

# SBA OSHA/MSHA Roundtable

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## OSHA's Emergency Response Rulemaking

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- Former Attorney-Investigator at the US Chemical Safety and Hazard Investigation Board (CSB)
- Represents employers in the full range of matters regarding the OSH Act
- Handles the full range of litigation related to contesting citations issued by OSHA
- Manages inspections and investigations by OSHA, the CSB, EPA, MSHA, DOJ, and state and local regulators

# Emergency Response Proposed Rule - Outline

(a) Scope	(b) Definitions	(c) Organization of the WERT, Establishment of the ERP and Emergency Service Capability	(d) ESO Establishment of ERP and Emergency Service(s) Capability	(e) Team Member and Responder Participation
(f) WERT and ESO Risk Management Plan	(g) Medical and Physical Requirements	(h) Training	(i) WERE Facility Preparedness	(j) ESO Facility Preparedness
(k) Equipment and PPE	(l) Vehicle Preparedness and Operation	(m) WERE Pre-Incident Planning	(n) ESO Pre-Incident Planning	(o) Incident Management System
(p) Emergency Incident Operations	(q) Standard Operating Procedures	(r) Post-Incident Analysis	(s) Program Evaluation	(t) Severability

# Emergency Response Proposed Rule



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**December 2023** – OSHA released a pre-publication NPRM for “Emergency Response” Standard (to update protections for emergency responders)

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Replaces “Fire Brigades” Standard and makes updates to other standards impacting emergency responders

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90-day Comment Period from **Feb. 5, 2024**, publication in Fed. Reg. (due May 6)

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**March 23, 2024** – CMC Rulemaking Coalition files request to extend comment period and hold a hearing

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**March 28, 2024** – OSHA grants extension of comment period by 45 days (due June 21) and announces that it will hold a hearing after the comment period (details TBA)

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**May 28, 2024** – CMC Rulemaking Coalition files 2nd request to extend comment period and hold a hearing

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**June 4, 2024** – OSHA grants second extension of comment period by 30 days (due July 22)

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# Unclear & Overly Broad Scope

- **What is an “emergency”?**
  - Emergency is not defined.
  - “Incident” is defined but is circular – any situation where a WERT member or ESO responder responds to provide emergency services.
- When does an event transition from coverage under the HAZPOWER or confined spaces standards (29 C.F.R. § 1910.120 or 1910.146) to this rule?
- To what extent does the rule apply to offshore, office spaces, or incipient fires?

## What activities are covered?

- Does not explain exactly what types of activities are covered.
- Relies on examples: “such as” firefighting, emergency medical services, and technical search and rescue.

## Which employees are covered?

- Rule is expansive in how it defines which employees are covered; anyone who serves a “role” – regardless of how remote – is subject to its requirements.

# Unduly Burdensome

## Numerous and cumbersome written documentary requirements:

- Emergency Response Program (ERP)
- Vulnerability Assessments
- Risk Management Plan (RMP)
- Incident Action Plan (IAP)
- Pre-Incident Plan (PIP)
- Standard Operating Procedures (SOPs)
- Post-Incident Analysis (PIA)

## Confusing and cumbersome review frequencies:

- ERP: annually and upon discovery of deficiencies
- RMP: when required by PIP/ERP; at least annually
- Medical evaluation: generally, every two years
- Behavioral health and wellness: regularly and recurring and after potentially traumatic event
- Fitness for duty: annually
- Training: initial, ongoing, and refresher, plus annual skills checks
- PIP: annually and, for WEREs, when conditions/hazards change
- PIA: promptly after significant event

# Tangled Requirements

## Unclear Compliance Lines:

- Clarity needed on when existing OSHA standards v. proposed rule applies

## Lengthy & Confusing:

- Rule is too complex for any business to interpret easily, requires intensive study
- Small and medium-sized businesses lack sufficient personnel or funding to invest resources in interpreting the rule
- Many aspects are economically infeasible for large part of regulated community

“While employees are engaged solely in activities subject to 1+ of these other [existing] OSHA standards, OSHA intends that the protections of those standards apply instead of the protections of the proposed rule. ... OSHA notes, however, that *most employers engaged in activities covered by those other standards are likely to also engage in other emergency response activities and would therefore need to comply w/ the proposed standard in order to prepare for and respond to covered emergency incidents.*”



# Duplicative, Overlapping, and Conflicting Requirements

- Many of the requirements in the proposed rule are duplicative of each other and of other OSHA standards (e.g., PPE training requirements).
- Cross reference to 29 C.F.R. 1910 Subpart L – Fire Protection in proposed rule should be eliminated or reworded to avoid confusion.
- Significant number of requirements are duplicative of regulations promulgated by other agencies:
  - Substantial overlap with EPA’s RMP
  - Duplication of requirements applicable to ICPs by various other EPA, Coast Guard, and OSHA regulations
- Rule should not have overlapping rules regarding EMS since EMS activities are already covered by jurisdictional requirements.





# Overreliance on Voluntary Consensus Standards



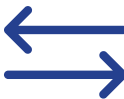
**Vetting:** not apparent that each provision of the +22 NFPA standards OSHA intends to incorporate by reference are all needed.



**Cost:** difficult and costly to access copies of all the consensus standards to be IBR'ed and expensive to implement requirements (e.g., high cost of stress tests with ultrasounds).



**Non-Delegation Doctrine:** arguable that this involves a delegation of rulemaking authority to NFPA and other private organizations.



**Contradictory Requirements:** conflicts between consensus standards and OSHA requirements (e.g., training frequencies) and confusion as to enforceability of other cross-referenced consensus standards.



**Unclear Application:** unclear application sections in consensus standards mean it is not clear when mandatory requirements of consensus standards will apply.



**PPE Requirements:** should permit fit for risk approach

# Mischaracterization of ESOs

- Many private employers have 1+ employees with emergency response duties that are essentially, but not 100%, their primary duty.
- In the proposed rule, it appears that such employers are characterized as ESOs rather than WEREs, subjecting them to heightened ESO compliance requirements.
- There are countless differences between traditional ESOs (e.g., local fire dept.) and private employers that might qualify as ESOs under the rule.
- OSHA should explicitly recognize that such employers are WEREs, regardless of the number of employees with primary emergency response duties.
- OSHA must clearly define percentage of emergency response duties that would differentiate between those categorized as collateral and primary.

# Infeasibility for Volunteers



Costly, burdensome requirements will have far-reaching implications on volunteer units, which are often small and work under tight budgets:

- Significant upfront costs for PPE, training, etc. totaling thousands of dollars per responder.
- Private employers less likely to subsidize costs of their own employees joining volunteer units in the community.

Unintended consequence of forcing volunteer operations to shut down entirely.

# Special Considerations for Health Standards

- Burdensome “medical” and “physical” fitness for duty requirements should be narrowly tailored.
- Medical evaluations to include stress tests with ultrasounds, which is not economically feasible for many employers.
- Unclear and unsupported action level triggers for ESO employees who may be exposed to combustion products 15 or more times per year. Related problems:
  - Ambiguous definition of “exposure”
  - Reliance on self-reporting
  - Tracking burden
  - Nature of the exposure (i.e., one significant exposure could be worse than 15 minimal exposures)



# Excessive Emergency Incident Operations Requirements

- Emergency incident operations requirements are unduly burdensome and do not consider the unique operational conditions that employers face during emergencies:
  - Control zones
  - Staffing levels
  - Skilled support workers
- Clear enforcement guidance will be needed for CSHOs related to keeping minimum staffing levels, which the agency states it is not specifying nor recommended.
- Generally, emergency incident operations rules should be guidelines rather than requirements.



# Workplace Violence

- OSHA requested comment on whether SOPs for protections against workplace violence should be included within rule.
- Recommend against this approach as workplace violence matters already typically handled by law enforcement, which is excluded by the rule.



# Questions?





# Contact Information



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# Check Out Our Blogs



# OSHA Recordkeeping and Reporting Masterclass

01

## OSHA Recordkeeping

- Scope of OSHA's Recordkeeping Authority
- OSHA Recordkeeping Forms
- Steps to Recordkeeping
- Recordkeeping Hypotheticals
- Summarize, Certify, Post and Maintain
- 5 Common Recordkeeping Mistakes

02

## Significant Injury and Fatality Reporting

- Hospitalization, Amputation, Fatality Reqs
- Reporting Timing Issues
- Common Reporting Mistakes
- What Happens After You Report?

03

## E-Recordkeeping

- Recordkeeping Data Submission Reqs
- How to Use OSHA's Injury Tracking App
- E-Recordkeeping Enforcement and Site-Specific Targeting Inspection

04

## COVID-19 Recordkeeping and Reporting

- COVID-19 Recordkeeping and Reporting Requirements
- Determining Work-Relatedness of COVID-19 cases

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# OSHA Inspection Masterclass

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**How to Achieve Successful Outcomes from OSHA Inspections**

**Strategies to Prepare in Advance for an OSHA Inspection**

**Employers', Employees', and OSHA's Rights During an OSHA Inspection**

**Tips for Managing Each Stage of an OSHA Inspection**

**What to Do If OSHA Brings a Third Party to Participate in the Inspection**

**How to Build and Prepare Your Inspection Team**

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# California Workplace Violence Prevention Compliance Solutions

## Workplace Violence Prevention Plan

We will develop a customized, compliant written Workplace Violence Prevention Plan along w/ all ancillary documents and sub-policies.

## Workplace Violence Prevention Training

We will develop customized training materials and conduct initial interactive training for all affected employees and "train the trainer."

## Turnkey and Ad Hoc Services

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## Gap Assessment of Related Policies

To ensure alignment, we will perform a Gap Assessment of existing, related policies that intersect with your new Workplace Violence Prevention Plan.

## Attorney Consultation Hours

A block of Attorney Consultation Hours to use within a year to help you roll out your new program.

