

# SBA OSHA/MSHA Roundtable

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## OSHA's Emergency Response Rulemaking

SEPTEMBER 20, 2024

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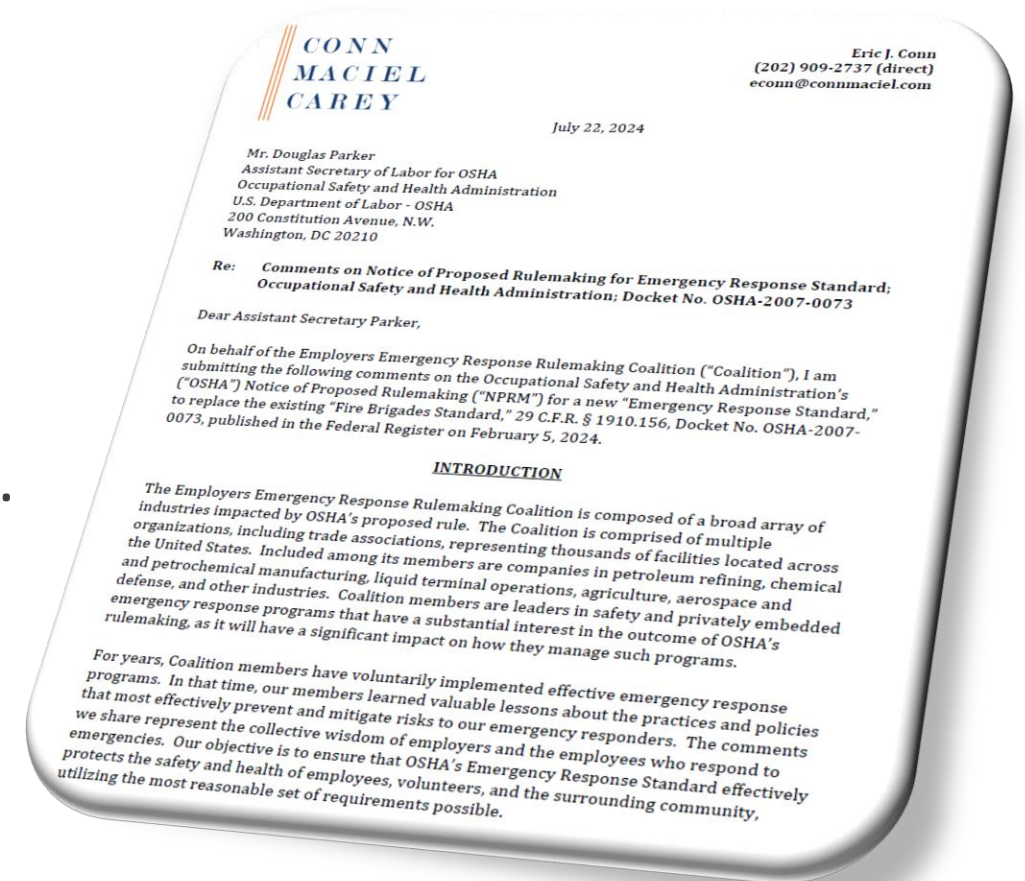
**Beeta Lashkari** is an Associate in the OSHA • Workplace Safety Practice Group at Conn Maciel Carey LLP, where she focuses her practice on OSH law.

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

# CMC Employers ER Rulemaking Coalition

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- Individual and trade groups of private employers
- Small, medium, and large-sized employers
- Industries represented include oil and gas, agriculture, grain, aerospace and defense, etc.
- Facilities across the U.S.
- Advocating for most reasonable, workable standard possible



# Emergency Response Proposed Rule - Outline

(a) Scope	(b) Definitions	(c) Org. of the WERT, Est. 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

## DECEMBER 2023

OSHA releases pre-publication NPRM for “Emergency Response” Standard (to replace Fire Brigades Standard)

## FEBRUARY 5, 2024

NPRM published in Federal Register, triggering 90-day comment period (due May 6)

## MARCH/MAY 2024

CMC Rulemaking Coalition submits requests for extensions; extensions granted (due July 22)

## JULY 22, 2024

CMC Rulemaking Coalition submits comments on NPRM

## JULY 23, 2024

Notice of Informal Hearing published in Federal Register (hearing scheduled for Nov. 12)

## SEPTEMBER 27, 2024

NOITA due for those who would like to speak at the hearing

## OCTOBER 18, 2024

Submit full hearing testimony and documents (if you request more than 10 min. to speak and/or intend to submit documents)

## NOVEMBER 12, 2024

Informal Public Hearing (to be extended to subsequent days if necessary)

**TBD**  
Post-hearing  
comments  
due

# 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 a significant event

# Tangled Requirements

## UNCLEAR COMPLIANCE LINES:

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

## LENGTHY AND CONFUSING:

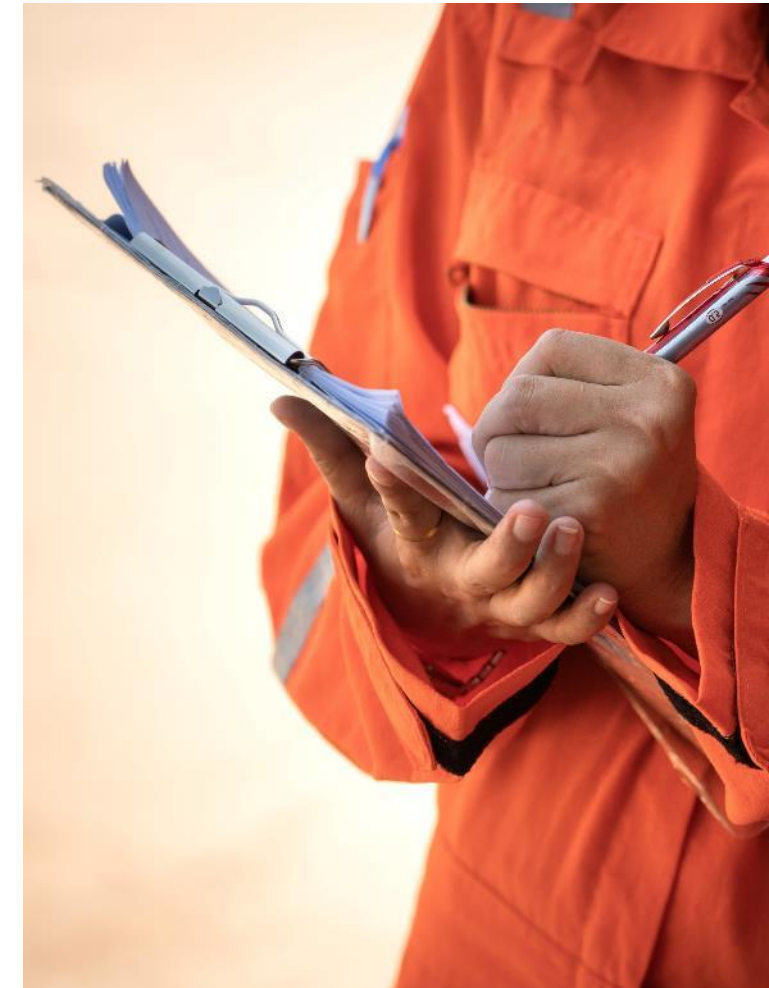
- Rule is too complex for any business to interpret easily, requires intensive study
- Small and medium-sized businesses lack sufficient personnel or funding to invest resources in interpreting the rule
- Many aspects are economically infeasible for large part of regulated community

“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 jurisdictional requirements already cover EMS activities.



# 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.

## UNCLEAR APPLICATION

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

## CONTRADICTORY REQUIREMENTS

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

## 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.

**Sept. 17, 2024 OSHA Announcement:** “OSHA is committed to taking steps in any final standard, consistent with the rulemaking record, to assess and minimize detrimental effects on volunteer fire departments. If supported by the record, this may include excluding voluntary emergency response organizations entirely based on these feasibility concerns.”

# 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 recommending.
- 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?





# 2024 OSHA Webinar series



## OSHA 2023 in Review and 2024 Forecast

Wednesday, January 17<sup>th</sup>

## Preventing and Responding to Workplace Violence

Wednesday, April 24<sup>th</sup>

## Mid-Year OSHA and MSHA Review

Tuesday, May 28<sup>th</sup>

## National and Local Enforcement Emphasis Programs

Thursday, July 18<sup>th</sup>

## Unique Aspects of State OSH Plans

Thursday, September 19<sup>th</sup>

## 2<sup>nd</sup> Annual Cal/OSHA and Employment Law Summit

Tues., October 8<sup>th</sup> and Thurs., October 10<sup>th</sup>

## Intersection of Artificial Intelligence and OSHA Law

Wednesday, November 13<sup>th</sup>

## OSHA Recordkeeping, E-Recordkeeping and Reporting

Thursday, February 8<sup>th</sup>

## Workplace Safety and Employment Law

## Compliance in ESG Programs

Tuesday, May 28<sup>th</sup>

## Impact of EPA's TSCA Regs on OSHA Chemical Safety

Wednesday, June 12<sup>th</sup>

## Process Safety Management and CalARP

Monday, August 5<sup>th</sup>

## Addressing Whistleblower and Retaliation Complaints

Wednesday, September 25<sup>th</sup>

## OSHA Hazard Communication Standard Update

Tuesday, October 15<sup>th</sup>

## 12 Ways to Improve Your OSHA Readiness

Wednesday, December 18<sup>th</sup>

Blogs



the **OSHA** Defense report



the **Employer** Defense report



the **Cal/OSHA** Defense report



the **MSHA** Defense report

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- Employers' and employees' rights
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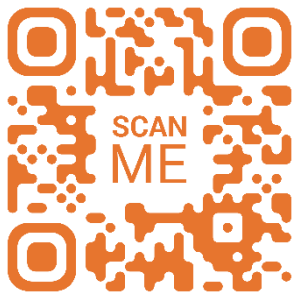
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October 8th in Berkeley, CA | October 10th in Pasadena, CA

*This program is currently under review for SHRM, HRCI, and California CLE credits.*

# Contact Us

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