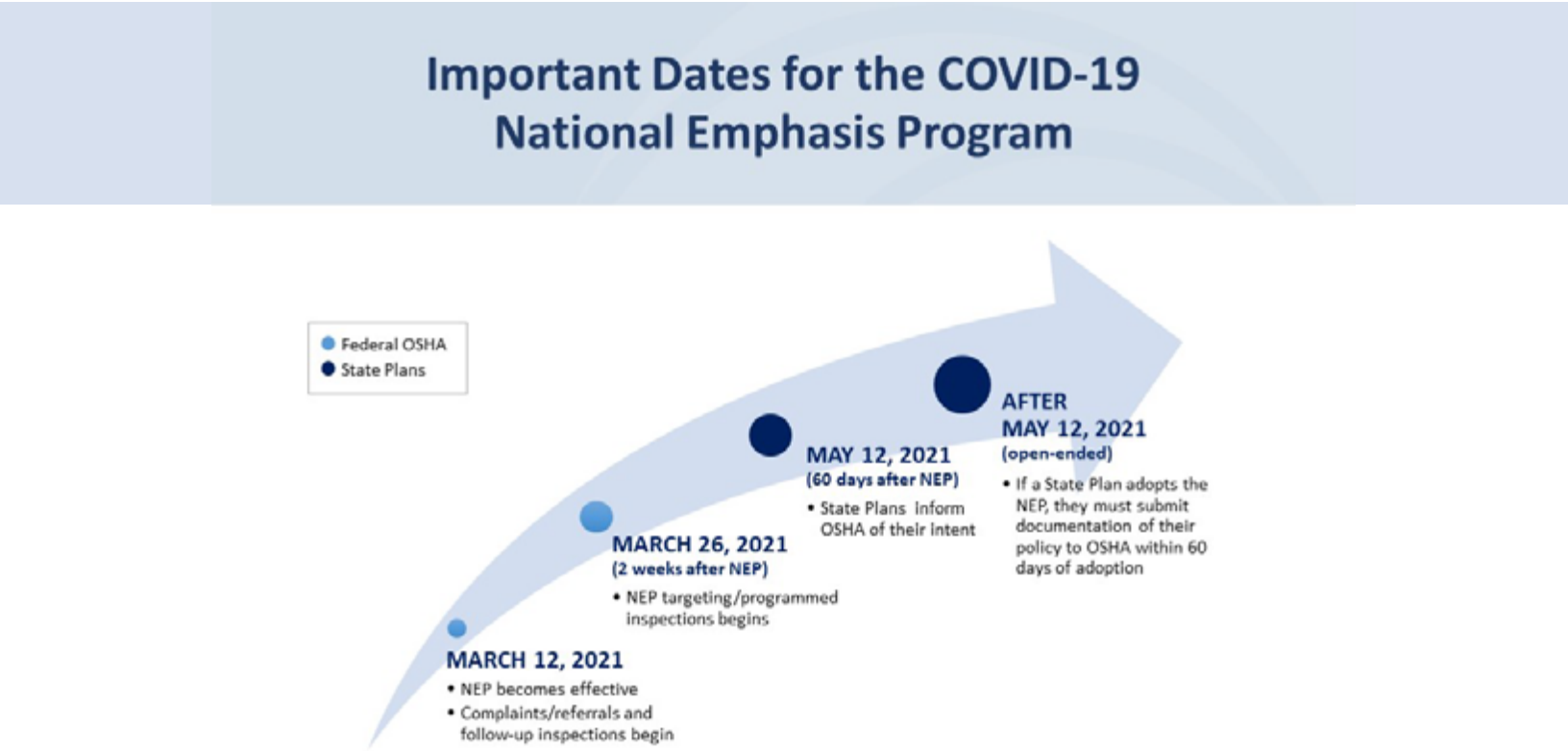

COVID-19 DECLARED A NATIONAL EMPHASIS PROGRAM BY OSHA

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Quite a bit has been happening since my last safety update article so, let me bring you up to date with what has been happening with OSHA. As I sit down to write this article, I want to consider some changes that have been occurring in OSHA.

First, about six weeks ago, OSHA declared COVID-19 a National Emphasis Program (NEP). This action will focus increased attention on employers and their COVID-19 Pandemic Protection Programs. Not only will this increase the importance of having a Pandemic Protection Program, it also draws attention to the actions that may be taken by employers in retaliation to employees who file complaints against them. This could also be what employees perceive as a lack of attention by the employer to protect them, the employees, from COVID-19. I am sure you are thinking, "but I would never retaliate against one of my employees because I determined that they directed OSHA to me by making such a complaint." However, you must remember that retaliation can take many forms and that it is more than employee termination or demotion. It can be any action that you take against an employee that the employee perceives is connected to a complaint that they made to OSHA.

The NEP also gives OSHA probable cause to visit your worksite and at least demand to see your COVID-19 Protection Program. Remember that the COVID-19 NEP covers all industries so OSHA may use it to gain entry to your construction site, your shop, warehouse, or your office area. If you are confronted with such a visit under the NEP, which you do not feel is justified, be sure to contact your counsel before giving OSHA access to you work area. Remember, while such an inspection begins under the NEP, it can be expanded if the compliance officer conducting the inspection sees anything else that he/she believes is an OSHA violation or an unsafe condition.

At about the same time OSHA was declaring

COVID-19 to be an NEP, President Biden appointed Doug Parker, to head OSHA. Mr. Parker was, at the time of his appointment, the head of Cal OSHA. I have read several short commentaries on Mr. Parker's appointment, a few of which have been titled "There is a New Sheriff in Town." I think some of these sentiments have arisen because of Cal OSHA's safety enforcement reputation. Cal OSHA also has a very broad standard on heat illness prevention and an Emergency Temporary Standard on COVID-19. I believe there is a belief that with Mr. Parker becoming the Administrator of OSHA that we are going to see some new standard development (especially for COVID-19 and heat illness prevention); as well as an increase in enforcement inspections.

Interestingly, shortly after the announcement of Mr. Parker's appointment, which at the time of writing this article was still awaiting Senate confirmation, an Emergency Temporary Standard (ETS) was drafted, which has already been sent to the Office of Management and the Budget for approval. An ETS does not proceed through the same rule making process as does a non-emergency standard. There are more stringent criteria for such a standard, and I question whether COVID-19 can meet that test? An ETS takes effect immediately until it is superseded by a permanent standard. To promulgate an ETS OSHA must determine that workers are in grave danger due to exposure to toxic substances or agents determined to be toxic or physically harmful. The concept is that an ETS is needed to adequately protect the workers. I think that an ETS would have met these requirements a year ago, but now, with effective vaccines available to just about everyone, I am not sure that an ETS can be justified. Still, I think that after having not done much of anything definite for over a year, OSHA will move forward on the ETS. Usually, the ETS is used as a model for a permanent standard, which should be adopted within six months after the effective date of the ETS. An ETS is subject to challenge in an appropriate Federal Court of Appeals.

Recently OSHA has been addressing recordkeeping requirements for any employees who receive adverse side effects from receiving the COVID-19 vaccine. I feel that the simplest way to look at recordability is to distinguish between a vaccination mandated by the employer and one that was only encouraged by the employer. Clearly, if you "require" your employees to be vaccinated you will have to record any side effects that qualify for inclusion on your OSHA 300 log under the OSHA recordkeeping requirements found in 29 CFR 1904. The same is not true if you only encourage employees to get the vaccine, as long as employees who chose not to get it suffer no adverse consequences because of their refusal to be vaccinated. I believe this will be true, even if you take steps to "make it easy" for employees to get the vaccine.

> **"DO NOT forget that YOU are always responsible for the safety and health of your employees while they are working for you."**

With everything that is going on with regards to COVID-19, we may lose sight of the fact that there are many other obligations employers have to protect the safety and health of their employees. DO NOT forget that YOU are always responsible for the safety and health of your employees while they are working for you. While you cannot ignore your responsibility for all applicable safety compliance such as fall protection and PPE, as we head into summer and warmer weather, you need to be "dusting off" your heat illness prevention program. Retrain your supervisors and your crews on what they need to do to protect themselves from the dangers of working in a high heat index environment. As I have reviewed the heat illness protection programs of several construction industry employers, I have frequently felt that more than half of them do not understand what they need to do to protect their employees from heat illnesses. Employers need to comply with what OSHA believes are their obligations under the General Duty Clause. OSHA has identified five feasible steps to protect employees by adopting a NIOSH (National Institute for Occupational Safety and Health) Criteria Document of several years ago. Those five steps are:

1. Provide for acclimatization of employees new to working in a high heat index environment (or to your company) or who are returning to such an environment after a period of time away from such an environment.

2. Establish a work/rest regimen (based to the heat

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index) to provide employees with adequate rest breaks based on the heat index.

3. Establish a hydration schedule for employees and encourage them to adequately hydrate on the established schedule, again based on the heat index.

4. Establish cooling off areas in close proximity to the worksite and make them available ot employees during rest breaks or whenever an employee needs to take advantage of them because of the effects of the high heat index.

5. Train employees on the illnesses which can occur when working in a high heat index environment, the symptoms of those illnesses, how to identify the symptoms in themselves and others and the first aid steps to take whenever they are aware that they or another employee is exhibiting those symptoms.

Remember, protecting your employees is your responsibility. In addition, you need to confirm that your site supervisors are aware that it is their responsibility to ensure compliance with the five steps above. I suggest that you require your supervisors to download the OSHA Heat App on their Smart phones and use it to assist them in complying with your heat illness prevention program.

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ATTORNEYS