



The Biden Administration

Enforcement Actions Affecting Labor & Employment

March 23, 2021

Seyfarth Shaw LLP

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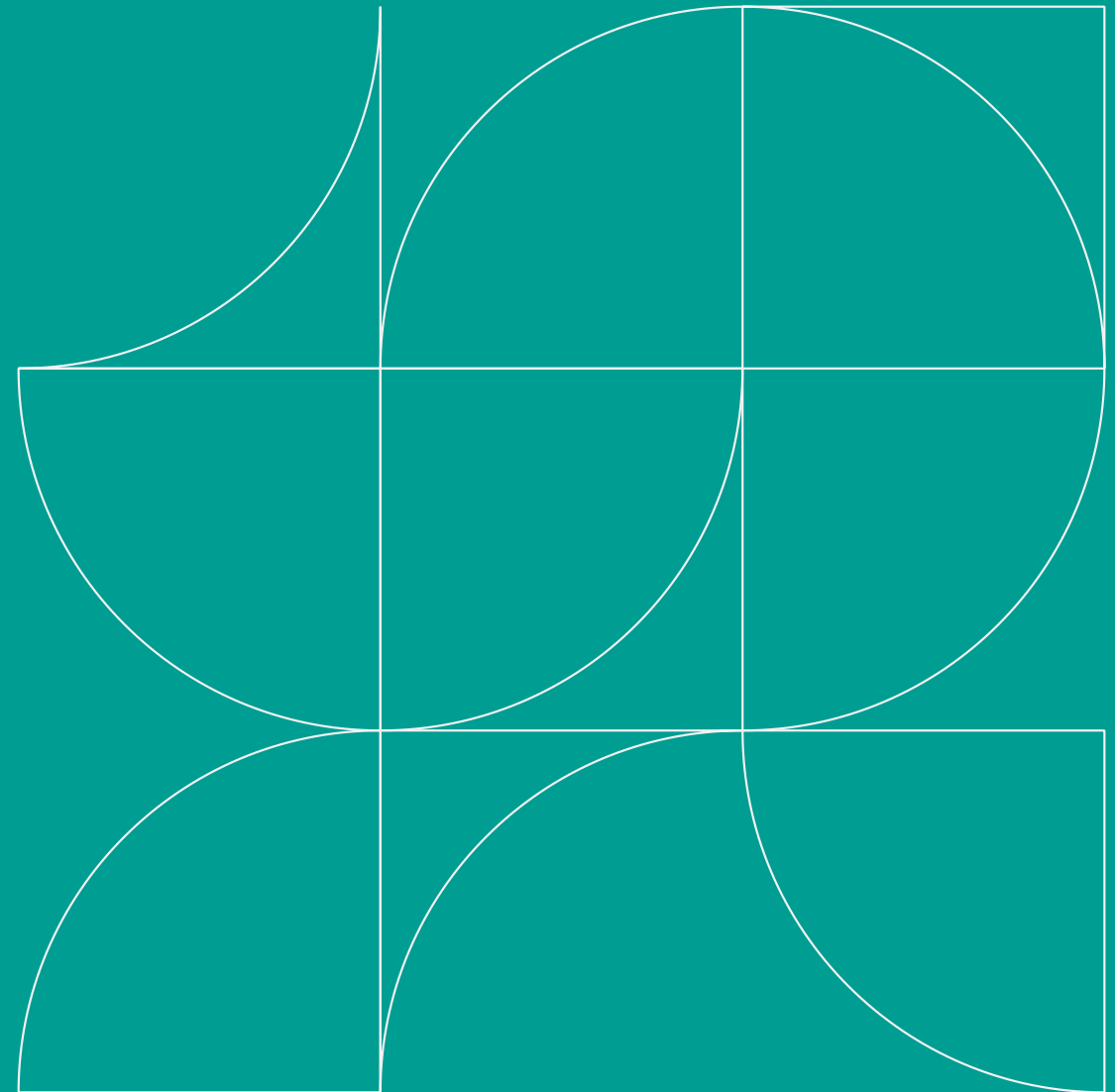


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Agenda

- EEOC Overview
- Key EEO Legislation
- OFCCP Overview
- Dept. of Labor: Wage & Hour Division
- Immigration Enforcement
- OSHA Emergency Temporary Standard (ETS)
- OSHA Enforcement
- OSHA and Vaccines

EEOC OVERVIEW





Composition of Equal Employment Opportunity Commission



Charlotte A. Burrows
Chair (D)

Term Expires
July 2023



Janet Dhillon
Commissioner
(R)

Term Expires
July 2022



Andrea R. Lucas
Commissioner
(R)

Term Expires
July 2025



Jocelyn Samuels
Vice Chair (D)

Term Expires
July 2021



Keith E. Sonderling
Commissioner
(R)

Term Expires
July 2024



**General
Counsel**

Vacant

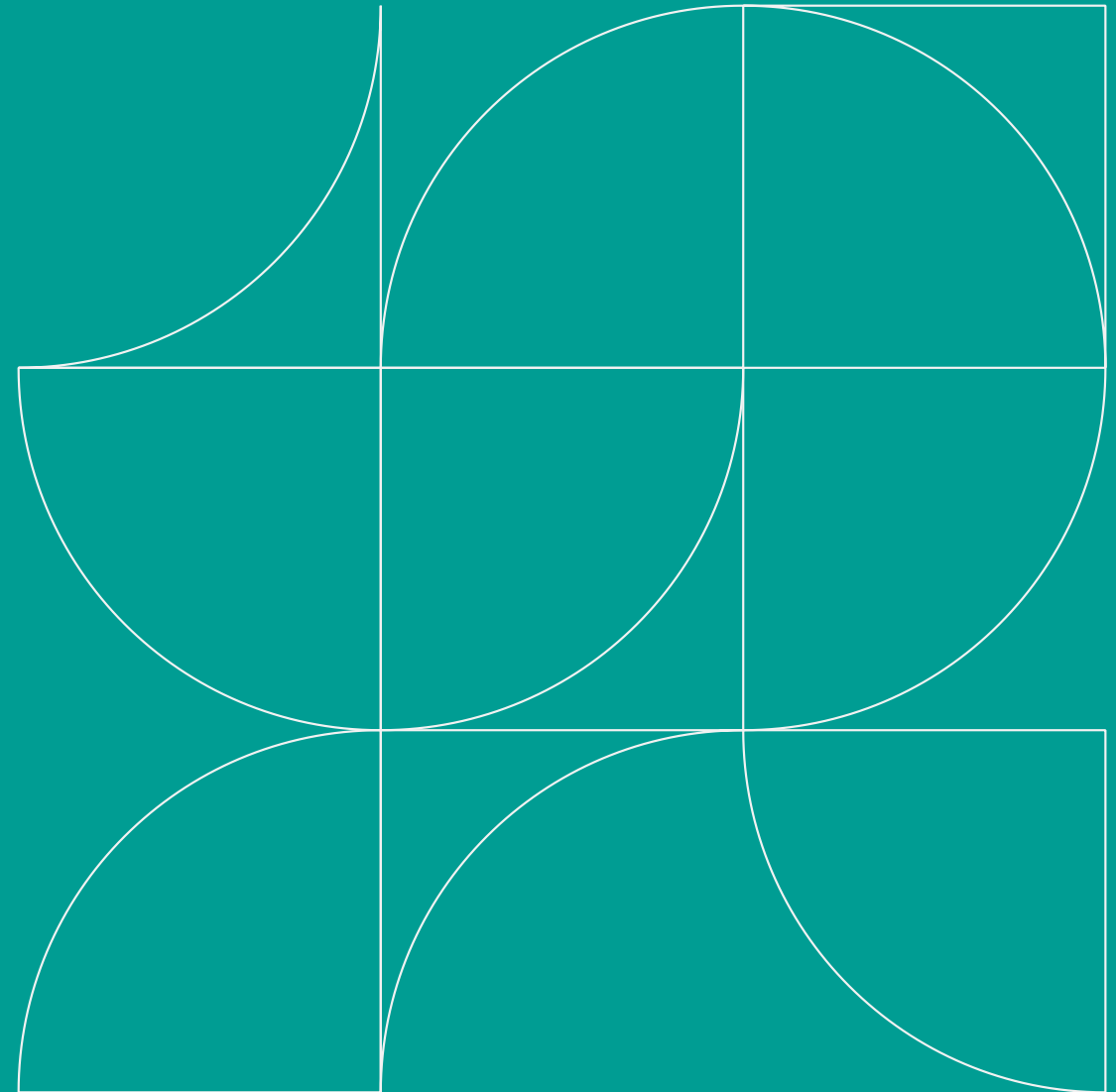
EEO-1 Component 2 Pay Data

- **State Access to Component 2 Information**
 - State of California et al vs. EEOC: filed in October 2020 to seek EEO-1 Component 2 data
 - February 25 – requested a 45 day state to allow additional review
 - Chair Burrows has indicated a willingness to reverse the prior administration’s policy on data sharing that sparked the lawsuit

Upcoming EEO-1 Submissions

- EEOC open collection for the 2019 and 2020 EEO-1 Reports in April with the new user guide made available in Mid-April
- Companies will receive login and registration information in April
 - Create their accounts for the new EEO-1 Online Filing System
 - A system for new filers to register will be available starting in April and will close in July.
- EEOC: online filing system has been updated to improve usability and system functionality
 - Data elements will be consistent with past collections
- The new EEO-1 landing page is available at:
<https://eeocdata.org/>

Key EEO Legislation



Paycheck Fairness Act (H.R. 7)



Introduced in House 1/30/19; Passed House 3/27/19

- Rewrites existing legal standards, remedies, and class action procedures contained in the EPA.
- Effectively eliminates the “factor other than sex” defense.
- Prohibits an employer from seeking or relying on an applicant's pay when extending a job offer.
- Imposes unlimited compensatory and punitive damages while inserting a more attorney-friendly class action device.
- Requires data collection by EEOC

Pregnant Workers Fairness Act (H.R. 1065)

Introduced in House 5/14/19; Passed House 9/17/20



- Reasonable Accommodations for Pregnancy
- Follows ADA
- Bi-Partisan Support

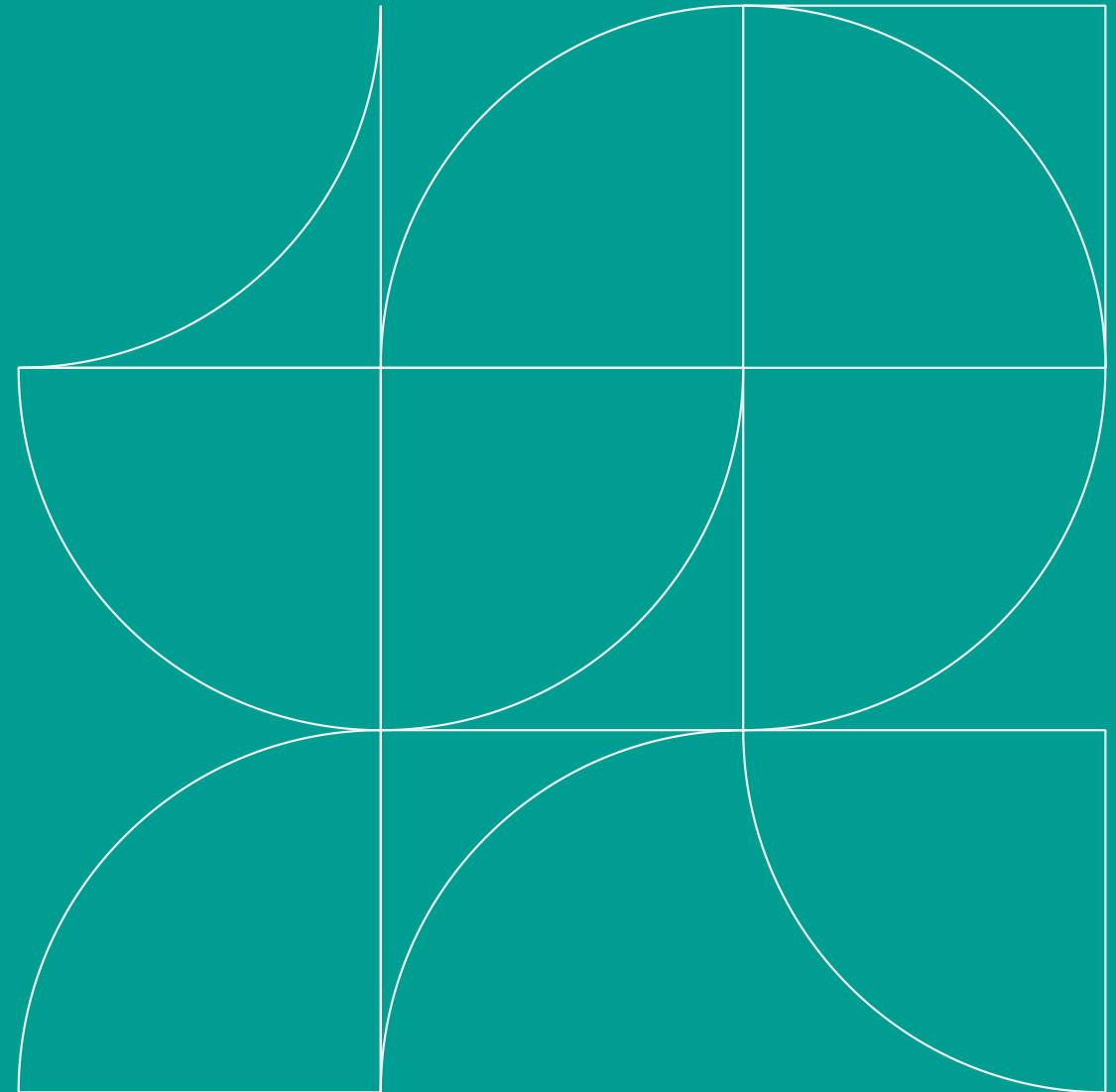
Protecting Older Workers Against Discrimination Act (H.R. 1230)



Introduced in House 2/14/19; Passed House 1/15/20

- “POWADA”
- Re-introduced 3/18/21
- Mixed Motive Theory Imported into Four Laws:
 - ADA
 - ADEA
 - Rehabilitation Act
 - Title VII Retaliation Provisions
- No Individual Remedies are available
 - Attorneys Fees; Affirmative Declaratory Relief.

OFCCP OVERVIEW



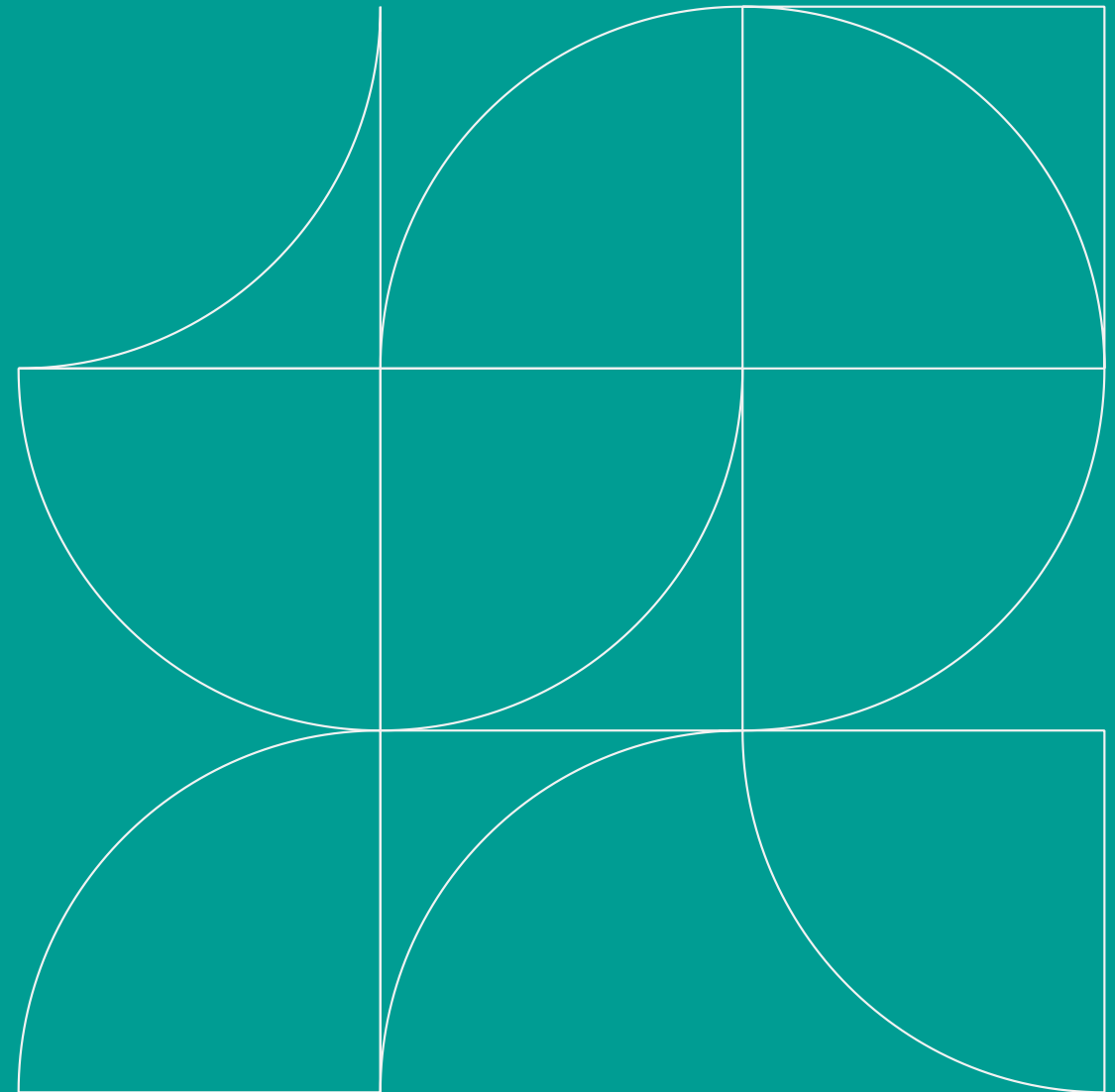
New OFCCP Director

- Former EEOC Commissioner Jenny Yang
 - Director Yang started on January 20, 2021
- Affirmative Action Plan Verification Interface Landing Page
- Removed Focused Reviews and Compliance Checks
- Discontinued Compliance Assistance Portal

How OFCCP Will Focus Its Efforts

- Emphasis on:
 - AI in Recruiting
 - Compensation Data Transparency
 - Focus on Systemic Pay Analyses
 - Shift in Audit Strategy from Education and Compliance to Enforcement
- Status of Trump Executive Orders and Related Actions
 - EO 13950 Combating Race and Sex Stereotyping – Withdrawn
 - FAQs – Withdrawn
 - Hotline Number – Disconnected
 - Filed Complaints – Dismissed
- Newly Issued Biden Executive Order
 - EO 13988 -- Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation

Dept. of Labor Wage & Hour Division



What's in Store at WHD:

People

DOL Secretary: Marty Walsh (confirmed yesterday)

- Elected Mayor of Boston in 2013
- Organized labor veteran with a reputation as a pragmatic dealmaker
- Longtime friend of President Biden

Deputy Secretary: Julie Su (in committee)

- Harvard Law School
- CA Labor & Workforce Development Agency Secretary since 2019; prior to that, DLSE Commissioner under Gov. Jerry Brown
- Spearheaded various initiatives in CA to help workers and employers plan for the future of work (and automation in particular)
- “California leads the way on labor standards and we’re not going to let employers do end runs around those standards.”

Senior Counsel: Patricia Smith

- Served in Obama administration as DOL Solicitor of Labor
- Former NYS Commissioner of Labor

WHD Principal Deputy Administrator: Jessica Looman

- Former E.D., Minnesota State Building and Construction Trades Council
- Former Commissioner, Minnesota Department of Commerce

What's in Store at WHD: *Enforcement Approach*

	Bet Your House	Bet Your Car	Bet Your Socks
<i>Regulations & Rulemaking</i>	<p>Tip pooling/credit rules did not take effect on Mar. 1</p> <p>IC regulations will be withdrawn</p> <p>JE regulations will be withdrawn</p>	<p>DOL will turn attention to IC and gig economy issues via rulemaking or AI</p> <p>CA-ABC + MA-ABC = US-ABC??</p>	<p>DOL will work with Biden on MW increase efforts and possibly paid family/medical leave</p> <p>Possibility of working with Biden to remove tipped MW</p>
<i>Opinion Letters</i>	<p>DOL will continue to assess and rescind Trump opinion letters</p>	<p>Possible to see return to of AI and/or move away from opinion letters</p>	
<i>Investigations & Enforcement Actions</i>	<p>DOL has already ended Trump relaxation on liquidated damages</p>	<p>Random/routine investigations will increase, likely driven by data</p>	
<i>Voluntary Compliance Initiatives</i>	<p>PAID program already terminated</p>	<p>Unlikely to see a voluntary compliance program return</p>	

Disclaimer: This is not actual betting advice or encouragement

What's in Store at WHD:

Substantive Issues

Independent contractor / gig economy issues

- Julie Su was keenly focused on future of work in California
- As noted before, IC and JE rules are already queued for rescission
- Gig economy opinion letter withdrawn
- WHD likely to focus on these issues, possibly also WFH?

Minimum wage issues

- Walsh has shown support for Biden and Democratic efforts to increase minimum wage to \$15
- It is also likely that the new administration will focus on tipped employees (80/20 rule? removal of tip credit?)

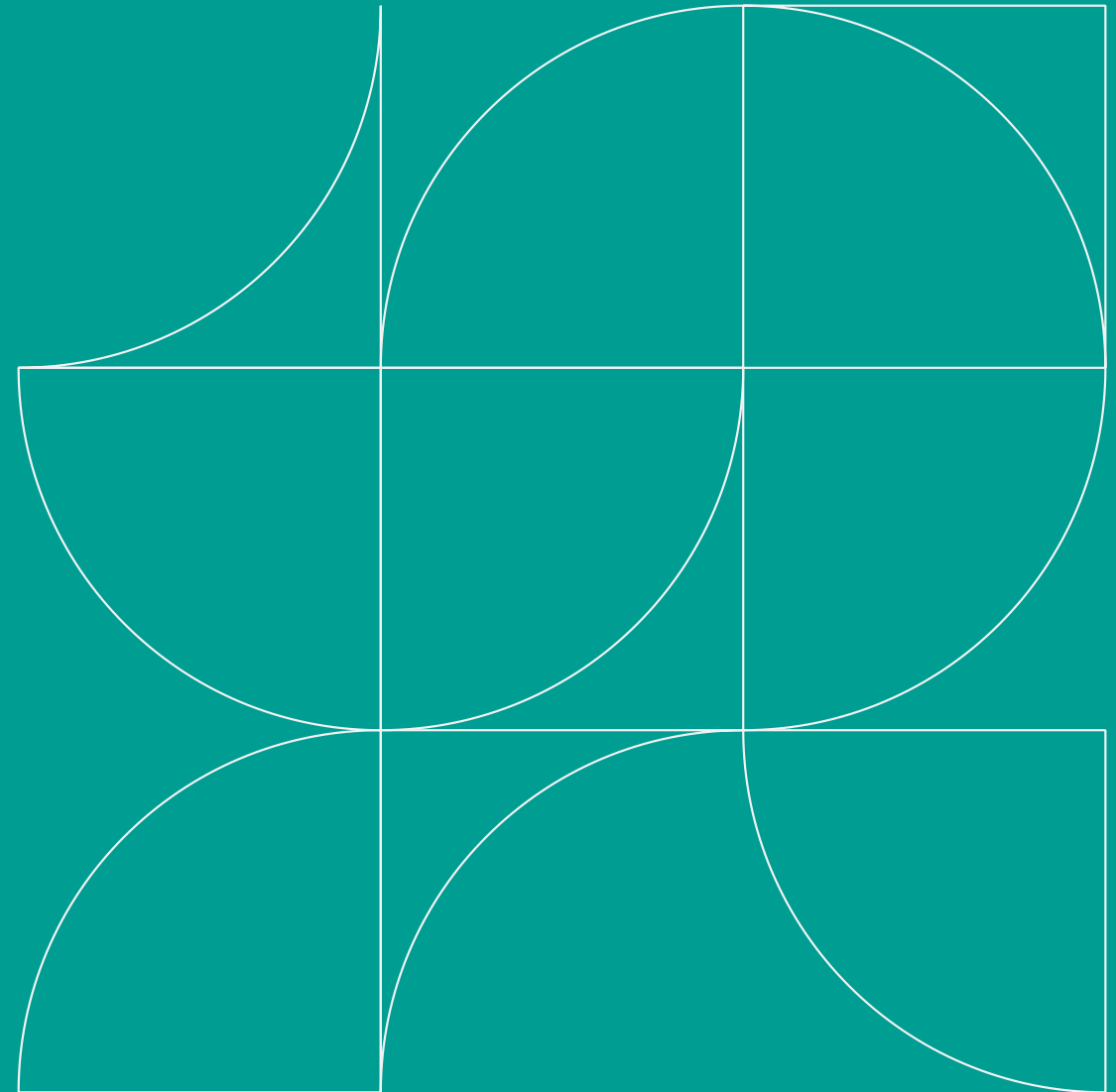
Likely advocate for paid family/medical leave

- Walsh strongly advocated for paid family leave for Boston city employees

Likely advocate for enhanced pay equity measures

- Mass. was the first state to overhaul equal pay law
- Walsh partnered with Boston Women's Workforce Council to implement the 100% Talent Compact, an initiative to close gender/race wage gap

Immigration Enforcement



Where Do Things Stand?

Expectations were not aligned in the business community on post election immigration

- President Trump's April and June 2020 Travel Ban proclamations effectively stopped almost all immigration to the United States
- On February 24, 2021, President Biden rescinded the ban on immigrant visas
- **Left the nonimmigrant visa ban in place....some were surprised**

Should businesses be worried?

- What's the mindset of this Administration?
- Is it still a mix of enforcement and new increased immigration?
- Pathway to Citizenship?

On the Hill & In the Courts

March 18, 2021 the House passed-

- The American Dream and Promise Act (H.R. 6)
- Farm Workforce Modernization Act (FWMA) (H.R. 1603)

Litigation was critical and remains critical

- U.S. Chamber is still litigating, AILA is still litigating
- All still litigating and talking policy
- Rest is for the weary

Immigration and BAHA

- BAHA's stated goal was protecting U.S. workers, promoting job growth, and protecting the integrity of the U.S. immigration system
- January 25, 2021 President Biden signed "Ensuring the Future Is Made in All of America by All of America's Workers,"
 - directs federal government agencies to "maximize the use of goods, products, and materials produced in, and services offered in, the United States."
 - directs Agencies to follow this policy via the federal procurement & budgetary process
 - revoked the "Buy American and Hire American" executive order

The BAHA Bandwagon stopped in its tracks?

- BAHA directed federal agencies to protect U.S. workers' jobs from employers that abuse temporary work visa programs
- Targeted, investigated, & brought enforcement actions against employers that “intentionally discriminate against U.S. workers”, preferring for temporary visa workers
- **Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division** launched the Protecting U.S. Workers Initiative in 2017
- IER cases continue post election, doubt they will slow down, likely increase
 - February 4, 2021 *Justice Department Settles Retaliation Claim Against Florida Electrician Company*
 - January 6, 2021 *Justice Department Settles with New Jersey-Based IT Consulting Company to Resolve Immigration-Related Discrimination Claims*

Immigration and the Agencies

- USCIS

- undoing some of the immigration memos and policies created under BAHA including increased USCIS RFEs and case denials and the:
 - Rescission of the “deference memos” for extensions in H-1B and L-1
 - Rescission of H-1B Third-Party Worksite Memorandum
 - Enhancement of Fraud Detection & Prevention’s site visit program (H-1B & L-1 ERs)

- DOL

- Nothing is immediate and nothing is certain
- Proposed to extend the effective date of Prevailing Wage Rule for an 18+ months
- Would move its effective date from May 14, 2021 to November 14, 2022
- Wage and Hour Investigations

- Joint Task Forces

- Government interagency Cooperation

ICE/HSI Worksite Enforcement Investigations

- Protecting our nation's critical infrastructures
- Reducing illegal employment
- Protecting employment opportunities for the country's lawful workforce

The HSI Worksite Enforcement mission has three critical areas:

- **Enforcement**
- **Compliance**
- **Outreach**

OIG ICE Report

- OIG Report January 15, 2021
- Report contains four recommendations & ICE accepted all of them
 - This is important because it speaks to worksite enforcement improvements including:
 - I-9 inspections,
 - Increased difficulty in negotiating down fines,
 - Consistency and standardization, and
 - Public outreach

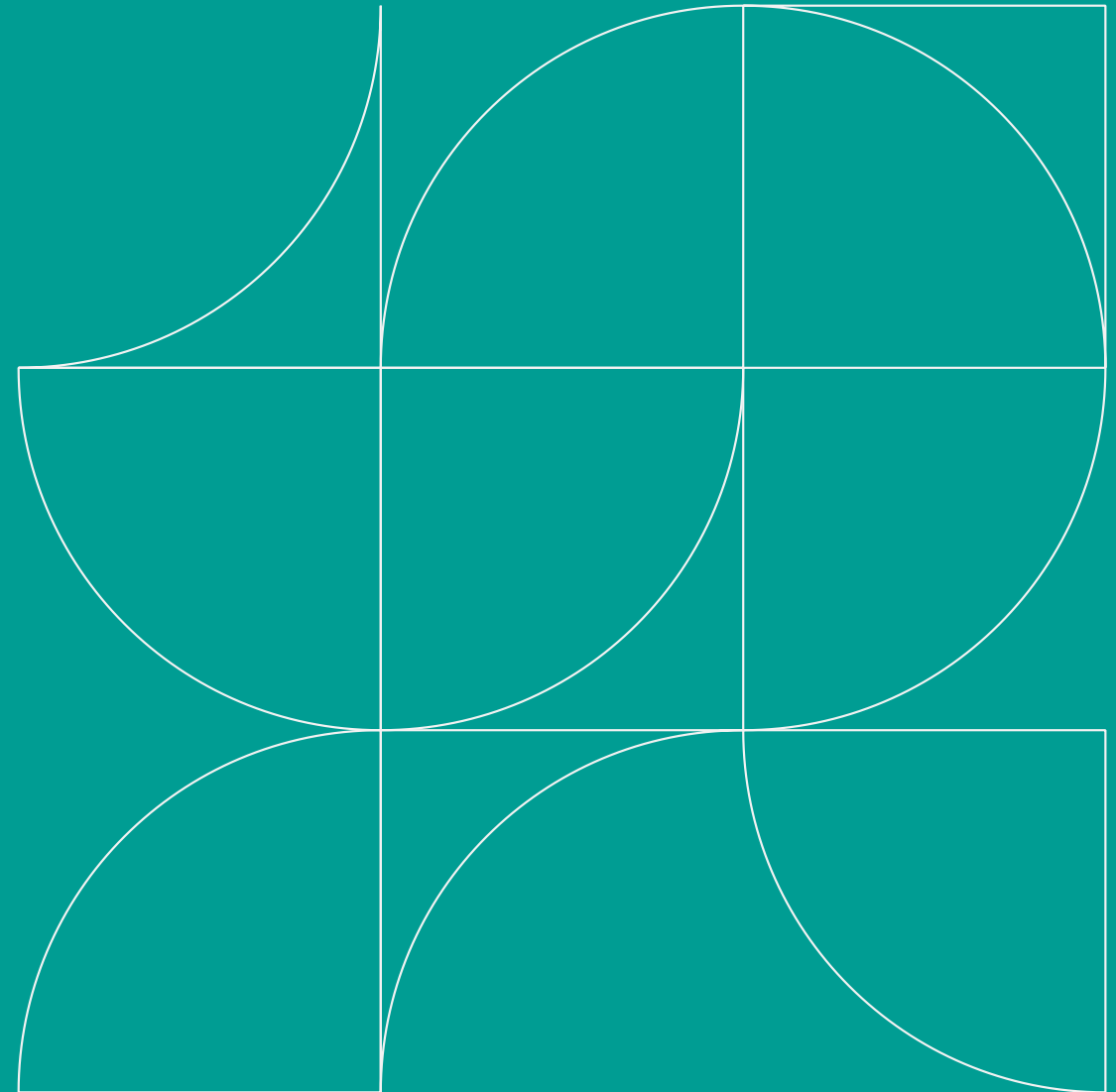
OIG Recommendations

Recommendation 1: Update the I-9 Guide to include minimum elements ICE officials must document in case files to justify fine reductions.

Recommendation 2: Assess I-9 processes and update the I-9 Guide to ensure it addresses risks and challenges, including:

- a. When employers make corrections to address substantive violations and when employers claim they were unaware that they employed Unauthorized Alien Workers;
 - b. ICE's ability to conduct follow-up inspections with limited resources; and
 - c. When I-9 inspections identify individuals using fraudulent documents to obtain unlawful employment.
- **Recommendation 3:** Develop and implement a quality assurance process that allows ICE headquarters to sample cases on an objective, periodic basis, to determine whether field offices reduce fines, issue compliance letters, and conduct follow-up inspections of employers in accordance with ICE policies and procedures.
 - **Recommendation 4:** Conduct an assessment of the IMAGE program to determine whether implementation of other approaches would aid in achieving its outreach goal and be cost effective, or if funds should be put to better use.

OSHA Emergency Temporary Standard (ETS)?



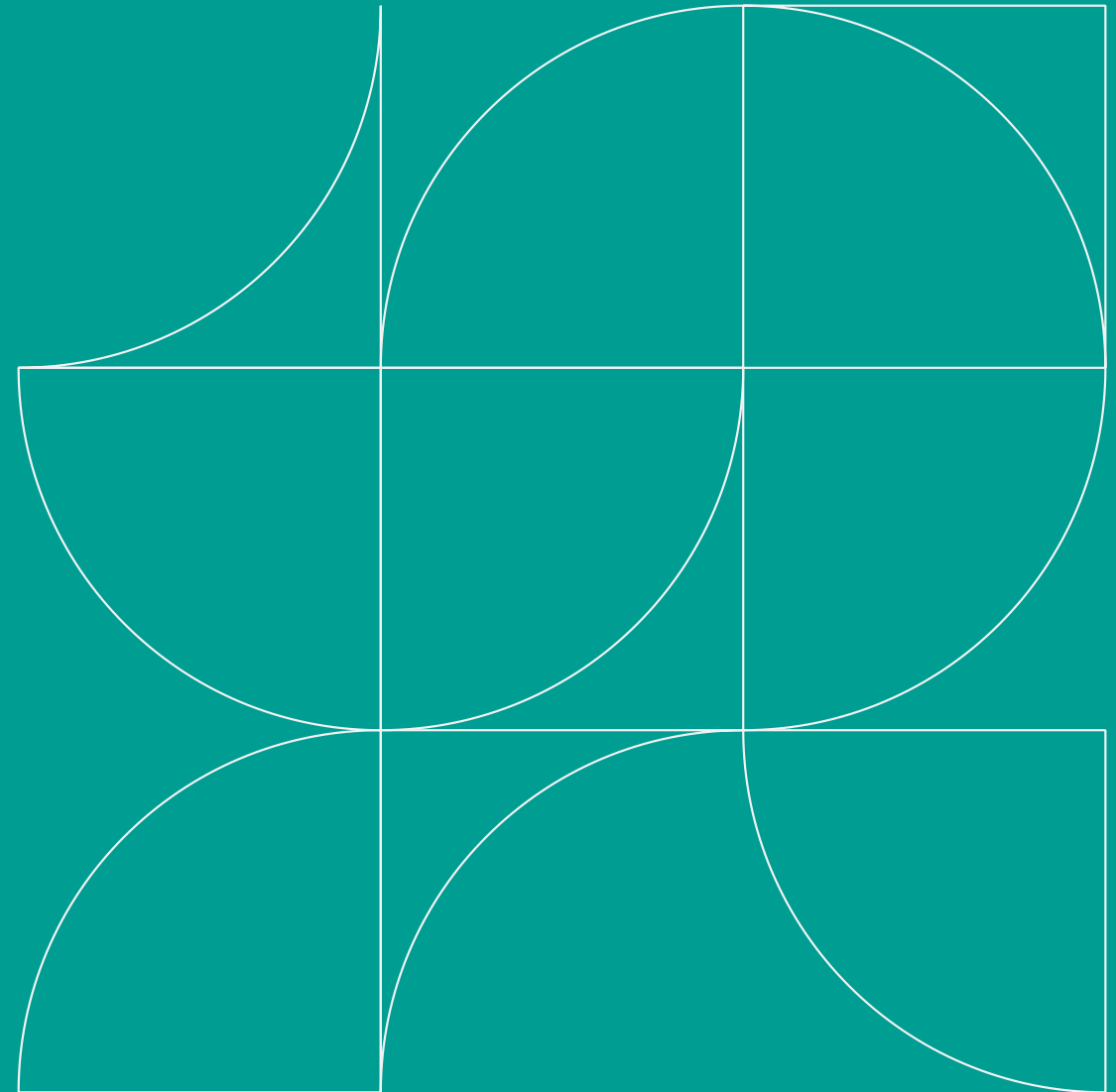
COVID-19 Emergency Temporary Standard

- President Biden’s March 15, 2021 deadline for OSHA to issue a **COVID-19 ETS** came and went, but many expect a **delayed issuance**.
- Expect OSHA to:
 - Require employers to follow CDC guidance;
 - Rely on its January 29, 2021 publication, “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace,” in developing ETS mandates.
 - Review and incorporate provisions from state ETSs and final standards into the federal ETS.

COVID-19 National Emphasis Program

- On March 12, OSHA announced a COVID-19 National Emphasis Program designed “to ensure that employees in high-hazard industries or work tasks are protected from the hazard of contracting SARS-CoV-2.”
- Targeted industries include **healthcare, meat processing, grocery stores, warehousing and storage, restaurants, and correctional institutions.**
- The NEP will also focus on **preventing and punishing retaliation** against workers who complain about unsafe or unhealthy conditions.

OSHA Enforcement



No Assistant Secretary . . . Yet

- Current Leadership:
 - James Frederick, Principal Deputy Assistant Secretary
 - Amanda Edens, Deputy Assistant Secretary
 - Joseph Hughes, Jr., Deputy Assistant Secretary for Pandemic and Emergency Response
 - Leah Ford, Chief of Staff
 - Ann Rosenthal, Senior Advisor

Top Ten OSHA Violations – FY2016 (31,948 Inspections)

1. Fall Protection (29 CFR 1926.501)
2. Hazard Communication (29 CFR 1910.1200)
3. Scaffolding (29 CFR 1926.451)
4. Respiratory Protection (1910.134)
5. Control of Hazardous Energy - Lockout/Tagout (1910.147)
6. Powered Industrial Trucks (29 CFR 1910.178)
7. Ladders (1926.1053)
8. Machine Guarding - General Requirement (29 CFR 1910.212)
9. Electrical - Wiring Methods (29 CFR 1910.305)
10. Electrical - General Requirement (29 CFR 1910.303)

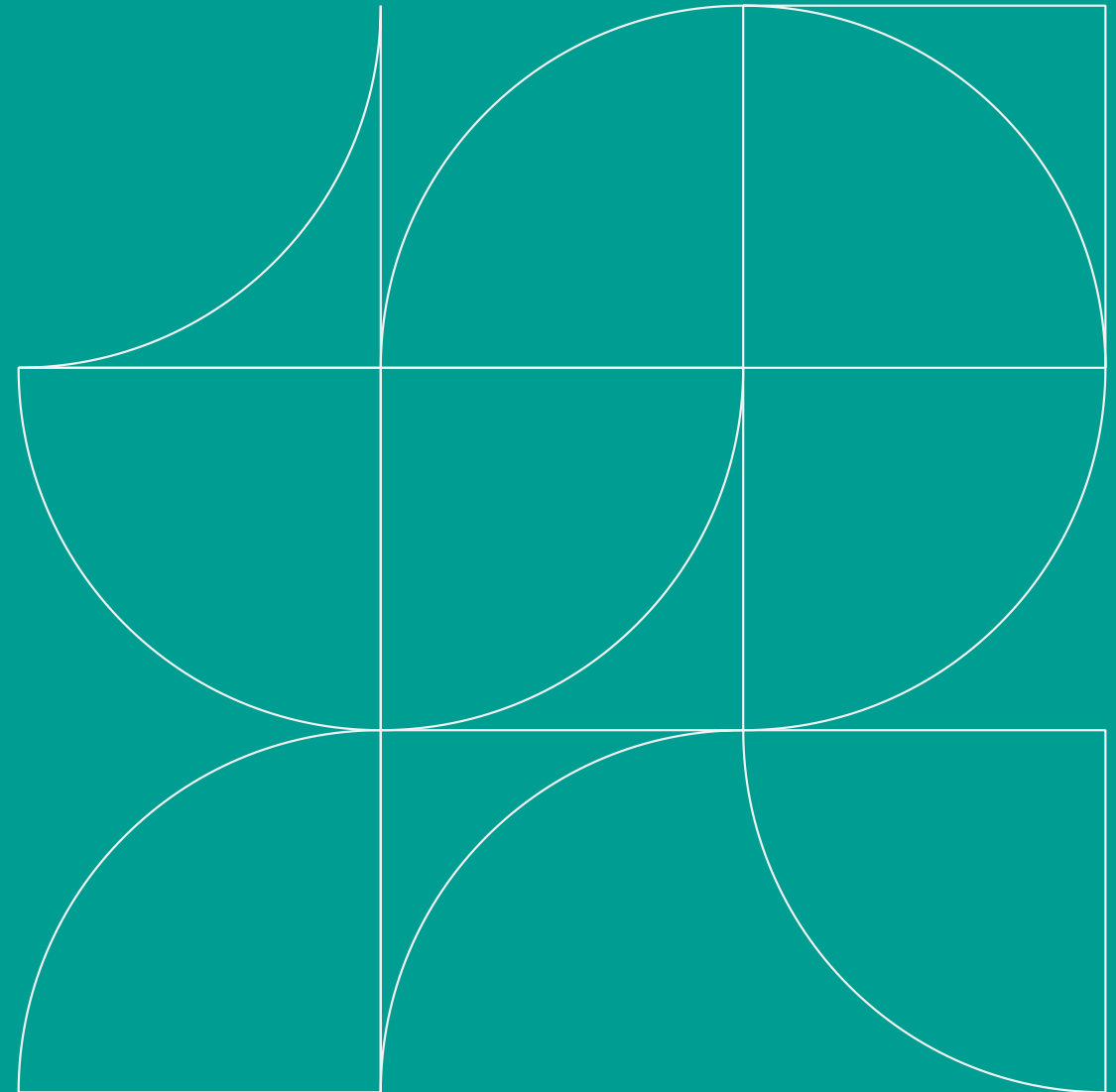
Publicity

- Already in February and March, we have seen OSHA return to a press release policy that announces issued violations and proposed penalties, rather than waiting until the citations and penalties become final orders.
- Employers should expect public shaming to continue under President Biden's OSHA.

“Every OSHA press release achieves as much compliance as 210 inspections.”

Dr. David Michaels, Former OSHA Assistant Secretary
October 23, 2020 Tweet

OSHA and Vaccines



OSHA and Vaccines

- OSHA has **not mandated** employee vaccinations, but has indicated that employers can do so.
- The **whistleblower** provision at section 11(c) of the OSH Act may afford protections to an employee who refuses to be vaccinated under an employer vaccination program because of the reasonable belief that a medical condition may cause a reaction to the vaccine resulting in serious injury or death.
- Employees may allege that employers without vaccination programs have failed to provide safe and healthy work environments, as required by the OSH Act's **general duty clause** at section 5(a)(1).

**Thank You for
Attending**

