

OSHA's Proposed 'Emergency Response' Rule

March 12, 2024 Lauren Brogdon, Matthew Deffebach, Mini Kapoor

PRACTICES Labor and Employment, OSHA, Environmental, Chemical, Environmental Litigation, Crisis Management

A newly issued OSHA proposed rule, if approved, will expand the scope of employer obligations for protecting emergency responders and will further delineate certain categories of employees engaged in incident response.¹ The proposed rule would replace the existing “Fire Brigades” standard, promulgated in 1980.² OSHA is accepting public comments on the proposed Emergency Response rule until May 6, 2024.

The Current “Fire Brigades” Standard

Since 1980, OSHA has defined a “fire brigade” as “an organized group of employees who are knowledgeable, trained, and skilled in at least basic firefighting operations.”³ Generally speaking, fire brigades comprise private and industrial fire departments established by an employer, but the definition has been extended to include well-trained crews of volunteer employees and even other employees who are solely and expressly responsible for manning a post until trained relief arrives in the event of an emergency.⁴

The current Fire Brigades standard contains requirements for fire brigade organization, training, and personal protective equipment. As the recent notice of proposed rulemaking (“NPRM”) notes, however, “the [Fire Brigades] standards do not address the full range of hazards facing emergency responders, lag behind changes in protective equipment performance and industry practices, and conflict with current industry consensus standards.”⁶

The Proposed “Emergency Response” Rule

The Emergency Response rule will require employers across a wide range of occupations to establish risk management plans, develop medical and physical requirements for emergency responders, provide training and medical surveillance, and create standard operating procedures.⁷ The NPRM notes that the scope of the Emergency Response rule will expand outside the confines of the Fire Brigade standard and instead take an “all-hazards approach,” meaning that it will comprise “employers who provide other emergency services, such as pre-hospital EMS and technical search and rescue services.”⁸

The new rule will establish two subcategories of emergency response employers, on the basis that there should be less stringent requirements for an employer who is not in the business of providing emergency services but who requires workers to perform emergency response activities if necessary.⁹ The first category – Workplace Emergency Response Employer (“WERE”) – includes “employers engaged in industries such as manufacturing, processing, and warehousing that have, or establish a workplace emergency response team.”¹⁰ Whether an employer is a WERE will depend on whether the emergency response team’s duties are collateral to regular daily work assignments.¹¹ Specifically, the NPRM notes that the “proposed rule . . . would apply to . . .

employers that have an emergency response team where employees, as a collateral duty to their regular daily work assignments, respond to emergency incidents to provide services such as fire suppression, emergency medical care, and technical search and rescue.” This approach may substantially expand the scope of covered workplaces under the proposed standard as compared with the current (Fire Brigade) standard.¹²

The second category of emergency response employers – Emergency Service Organization (“ESO”) – includes employers who provide “emergency service(s) as a primary function of the organization, or [whose] employees perform emergency service(s) as a primary duty for the employer.”¹³ Because employees of ESOs are exposed to more hazards on a more frequent basis, there will be heightened compliance standards for these employers.

The proposed rule would also expand protection to some emergency response volunteers who receive “significant remuneration” in exchange for their services.¹⁴ This remuneration can be monetary or other compensation.¹⁵

Despite the advertised “all-hazards approach,” the new rule excludes employers who engage in disaster site clean-up or recovery duties following natural disasters (*after* emergency response activities cease).¹⁶ The proposed rule may also exempt employers regulated by OSHA’s construction, maritime, and agriculture standards.¹⁷

Requirements for States with OSHA-Approved State Plans

If promulgated federally, the Emergency Response rule may trigger a ripple effect across states with OSHA-approved State Plans.¹⁸ To illustrate the complexity that this may entail, the NPRM explains that “some states may provide benefits in the form of insurance and tax benefits to volunteers that might affect whether they are considered employees,” while other states “may extend OSHA protections to volunteer firefighters but not to volunteer EMS providers or other non-firefighting volunteers.”¹⁹

OSHA is accepting Public Comments on the proposed Emergency Response rule until May 6, 2024, after which the agency will decide whether to proceed with the rulemaking process, issue a new or modified proposal, or withdraw the proposal.

¹ See Emergency Response Standard, 89 Fed. Reg. 7774 (proposed Feb. 5, 2024).

² See 29 C.F.R. § 1910.156.

³ *Id.* § 1910.155(c)(18).

⁴ *Id.*; *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1043, 1046 (7th Cir. 1989).

⁵ 29 C.F.R. § 1910.156(a).

⁶ Emergency Response Standard, 89 Fed. Reg. 7774, 7980.

⁷ *Id.* at 7981.

⁸ *Id.* at 7802.

⁹ *Id.* at 7803.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 7851.

¹³ *Id.*

¹⁴ *Id.* at 7802.

¹⁵ *Id.*

¹⁶ *Id.* at 7805.

¹⁷ *Id.* at 7802, 7805.

¹⁸ See 29 C.F.R. § 1953.5.

¹⁹ 89 Fed. Reg. 7774, 7852.