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# ANALYSIS: OSHA Emergency Covid Rule Imminent, but Vulnerable

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The U.S. Labor Department is in the final stages of issuing an emergency rule designed to protect workers from Covid-19 but, if history is any guide, the rule faces long odds of ever going into effect.

The rule is being put forward as an “emergency temporary standard” by DOL’s Occupational Safety and Health Administration. Unlike traditional regulations, emergency standards bypass the long rulemaking process that requires public comment and allows the agency to implement urgent six-month safety standards.

Such emergency rules are rare—and they are intended to be rare. OSHA is authorized to issue them only if doing so is “necessary to protect workers from grave danger.” The agency has issued nine emergency temporary standards in its 30-year history. The most recent was in 1983.

Rarer still is an emergency temporary standard that survives a legal challenge. Courts have been reluctant to allow OSHA to bypass the rulemaking process, some likening the process to agency-created legislation. Six of the nine emergency standards that were issued also were challenged. Of those six, only one was allowed to go into effect.

While the previous emergency temporary standards dealt with risks very different from a pandemic, they do offer some insight into how courts will evaluate OSHA’s authority to implement emergency standards.

## Outcomes of Challenges to OSHA Emergency Temporary Standards

Year	Emergency Temporary Standard	Outcome
1973	Organophosphorous Pesticides	Challenge successful
1973	14 Carcinogens	Challenge successful
1976	Diving Operations	Challenge successful
1977	Benzene	Challenge successful
<b>1978</b>	<b>Acrylonitrile</b>	<b>Challenge unsuccessful</b>
1983	Asbestos	Challenge successful

Source: Bloomberg Law

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### 1973: Organophosphorous Pesticides

OSHA, under pressure from worker groups, issued an emergency rule regulating worker exposure to organophosphorous pesticides in an attempt to limit their use as a substitute for the then-recently banned pesticide DDT. The ETS relied heavily on a Senate report addressing misuse of pesticides generally, but the the court blocked the rule, finding that OSHA failed to provide enough scientific evidence that the specific pesticides in question presented a grave danger to workers.

### 1973: 14 Carcinogens

OSHA's emergency rule regulating worker exposure to potentially carcinogenic chemicals used in manufacturing dyes and pigments was challenged by both manufacturers seeking to eliminate the regulations and workers demanding stronger protections. The challenge from manufacturers focused on two chemicals that had been proven carcinogenic in lab tests involving rodents, but not in humans. Citing the lack of evidence that those chemicals presented a grave harm to workers, the court blocked the portions of the emergency rule relating to the two chemicals in question.

### 1976: Diving Operations

OSHA's emergency rule regulating diving safety standards was challenged by commercial diving companies that argued that it was prohibitively expensive or impossible for them to comply with many of the provisions. The court blocked the emergency rule, holding that, if the ETS were permitted to go into effect, commercial diving companies would likely be successful in challenging the substance of the regulation.

### 1977: Benzene

OSHA's emergency rule requiring a reduction in worker exposure to benzene, a chemical commonly used in petroleum manufacturing, was issued after the chemical was linked to higher instances of cancer. Manufacturers won their argument, with the court holding that OSHA failed to show the rule was *reasonably necessary* to protect workers from grave harm.

#### **1978: Acrylonitrile**

OSHA issued its emergency rule on Acrylonitrile, a chemical used in rubber manufacturing, after several studies linked exposure to the chemical with higher instances of cancer. Despite a challenge from a manufacturer, the court allowed the rule to go into effect.

#### **1983: Asbestos**

OSHA's second emergency rule regulating worker exposure to asbestos was issued well after the risks of lung cancer, mesothelioma, and gastrointestinal cancer associated with asbestos were widely known and accepted. This ETS was intended to further limit worker exposure while OSHA engaged in notice and comment rulemaking to establish a permanent standard. The court acknowledged that asbestos may present a grave danger to workers, but blocked the rule, stating that OSHA failed to show that it was necessary to alleviate a grave risk of worker deaths during its six-month applicability.

#### **2021: Covid-19?**

It has been nearly 40 years since a court has had to consider the validity of an ETS. Even if Covid-19 seems very different from the risks addressed in the past, the legal standard has not changed. It's very likely that courts will view the coming ETS with the same skepticism with which they viewed benzene, asbestos, and other risks in the past.

It won't be enough for OSHA to show that Covid-19 is harmful to workers or that hundreds of thousands of Americans have died from the virus. Instead, the agency will have to show that, more than a year into the pandemic, with vaccine rates rising and other precautions already in place, workers are still at risk of grave harm from the disease and the specific ETS issued is necessary to keep workers safe.

For its part, OSHA seems to be gearing up for this challenge. The agency put an earlier version of the ETS on hold because it didn't reflect the latest scientific analysis of the state of the disease, potentially signaling that OSHA is prepared for and ready to answer these questions.

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