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WORKPLACE SAFETY AND HEALTH

Data and Enforcement Challenges Limit OSHA's Ability to Protect Workers during a Crisis

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Accessible Version

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GAO Highlights

Highlights of GAO-22-105711, a testimony before the Subcommittee on Workforce Protections, Committee on Education and Labor, House of Representatives

May 2022

WORKPLACE SAFETY AND HEALTH

Data and Enforcement Challenges Limit OSHA's Ability to Protect Workers during a Crisis

Why GAO Did This Study

The COVID-19 pandemic raised concerns about OSHA's preparedness for a future crisis. OSHA, within the Department of Labor, helps ensure safe and healthful worker conditions by setting mandatory standards, conducting inspections, and investigating incoming complaints and referrals, among other efforts.

This testimony is based on work in GAO's October 2021 CARES Act report (GAO-22-105051) and January 2021 report on OSHA's injury and illness reporting requirement (GAO-21-122). It examines OSHA's efforts regarding (1) COVID-19-related enforcement actions, (2) developing and using standards related to COVID-19, and (3) obtaining injury and illness data to support its enforcement efforts.

For the prior reports, GAO reviewed OSHA policies and federal laws and regulations, analyzed OSHA enforcement and employer-reported injury and illness data, and interviewed OSHA officials. For this testimony, GAO obtained updated data covering OSHA enforcement activity from February 2020 through December 2021, reviewed documentation, and interviewed OSHA officials.

What GAO Recommends

GAO recommended in October 2021 that OSHA assess challenges the agency has faced in its response to the COVID-19 pandemic, and take related action. OSHA partially agreed with this recommendation. GAO recommended in January 2021 that OSHA evaluate procedures for ensuring reporting of summary data and develop a plan to remediate deficiencies. OSHA generally agreed with this recommendation. Both remain open.

View GAO-22-105711. For more information, contact Thomas M. Costa, (202) 512-4769 or costat@gao.gov

What GAO Found

From February 2020 through June 2021, the Occupational Safety and Health Administration (OSHA) relied primarily on existing workplace safety and health standards and voluntary employer guidance for its COVID-19-related enforcement. Before June 2021, without COVID-19-specific standards in place, OSHA enforced existing applicable standards, such as those related to respiratory protection, and occasionally cited violations of its "general duty clause," which can be used when no standard applies to a particular hazard and certain criteria are met. However, inspectors faced challenges in applying existing OSHA requirements to COVID-19 hazards, and in citing general duty clause violations, which require large amounts of documentation. OSHA officials experienced other enforcement challenges while operating during the pandemic, including those related to resources, and to communication and guidance, but the agency has not yet assessed related lessons learned or promising practices.

Workers Wearing a Face Shield and Face Masks

Source: stock.adobe.com.

In 2021, OSHA issued one COVID-19 emergency temporary standard (ETS), which it is generally no longer enforcing, and a second COVID-19 ETS, which it withdrew; OSHA is also developing a separate infectious disease standard. If OSHA determines that employees are being exposed to a "grave danger" in the workplace, it may forgo its typical rulemaking process and issue an ETS. In June 2021, OSHA issued a COVID-19 ETS for certain health-care employers that treat suspected or confirmed COVID-19 patients. However, in December 2021, OSHA announced that it planned to withdraw all but the COVID-19 log and reporting provisions in the COVID-19 health-care ETS. The agency issued another ETS in November 2021 related to COVID-19 vaccination and testing for large employers. In January 2022, OSHA withdrew that ETS after a U.S. Supreme Court decision to stay it. OSHA currently is engaged in a rulemaking process, which began in 2010, to develop and issue a broader infectious disease standard to protect workers in high-risk environments from long-standing and emerging infectious diseases. GAO has previously reported on multiple challenges OSHA faces in setting standards and found that it took OSHA more than 7 years, on average, to develop and issue a new standard.

GAO estimated that employers did not report injury and illness data on more than 50 percent of their establishments for which they were required to do so for calendar years 2016 through 2018. GAO found that OSHA cited employers for nearly 35,800 recordkeeping violations in fiscal years 2005 through 2019. Among these violations, 65 percent occurred in the 7½ years before a court decision effectively limited the time period for citing these violations. The remaining 35 percent occurred in the 7½ years after that court decision. GAO also found that OSHA had limited procedures for encouraging compliance with the injury and illness reporting requirement and for penalizing non-compliance.

Chairwoman Adams, Republican Leader Keller, and Members of the Subcommittee:

Thank you for the opportunity to discuss GAO work relevant to the Occupational Safety and Health Administration's (OSHA) preparedness to handle emergent risks. In particular, I will highlight our recent work concerning OSHA's efforts during the COVID-19 pandemic and its injury and illness reporting requirement.[1]

My statement will describe (1) enforcement actions OSHA has taken and enforcement challenges it has faced during the pandemic, (2) new standards OSHA developed or used to protect workers from COVID-19, and (3) OSHA's efforts to obtain employer injury and illness data to support its enforcement efforts. As the COVID-19 pandemic passes the 2-year mark, vaccines have become more accessible, but the disease has continued to mutate and pose new challenges. COVID-19 workplace exposure continues to be a concern, and OSHA's enforcement efforts play a critical role in protecting workers. In order to fulfill this role, it is essential that OSHA understand where workplace injuries and illnesses are occurring. OSHA's requirement that certain employers report injury and illness summaries assists OSHA in more effectively targeting one of its scarce enforcement resources—inspections.

For the enclosure to our October 2021 CARES Act report, we reviewed OSHA guidance and enforcement policy, relevant federal laws and regulations, and OSHA enforcement data covering activity through August 2021.[2] To assess the reliability of OSHA's data, we reviewed technical documentation and interviewed OSHA officials, and determined that OSHA's data were sufficiently reliable for the purposes of our reporting objectives. We also interviewed OSHA headquarters officials, and managers and inspectors from five of OSHA's area offices that were selected to represent areas with industries affected by COVID-19 and a higher than average number of COVID-19-related complaints, employer

[1]GAO, *COVID-19: Additional Actions Needed to Improve Accountability and Program Effectiveness of Federal Response*, GAO-22-105051 (Washington, D.C.: Oct. 27, 2021); *Workplace Safety and Health: Actions Needed to Improve Reporting of Summary Injury and Illness Data*, GAO-21-122 (Washington, D.C.: Jan. 27, 2021).

[2]GAO-22-105051.

reports, and referrals from February through September 2020, among other things.

For our January 2021 report, we reviewed relevant federal laws, regulations, and OSHA guidance and directives.[3] We also interviewed OSHA headquarters officials, and managers and compliance officers at seven area offices. Criteria used to select these offices included geographic dispersion and variation in the amount of recordkeeping violations these offices cited. We also analyzed nationwide data on the number and type of recordkeeping violations OSHA cited from fiscal year 2005 through 2019. Finally, we estimated the extent to which employers electronically reported summary injury and illness data to OSHA by: (1) estimating the number of establishments that met the criteria to report these summaries using U.S. Census Bureau County Business Patterns data, and (2) comparing these estimates to the number of employers who reported this information to OSHA on their establishments. To assess the reliability of all recordkeeping data used in this report, we reviewed technical documentation, interviewed officials, and conducted electronic data testing on specific data elements. We determined that the data were sufficiently reliable for our purposes.

For updates to our COVID-19-related work, in January 2022, we requested updated OSHA data through December 2021, interviewed OSHA officials, and reviewed publicly available information. For updates to our COVID-19-related work and recordkeeping work, in April and May 2022, we reviewed publicly available information and information provided by OSHA.

We performed the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[3]GAO-21-122.

Background

OSHA, within the Department of Labor (DOL), helps ensure safe and healthful conditions for workers by setting mandatory workplace safety and health standards; conducting inspections; investigating complaints and reports of injuries, illnesses, and fatalities at workplaces; and offering training, guidance, and outreach; among other efforts.[4] For example, OSHA requires employers to record work-related injuries and illnesses and promptly report certain severe injury and illness incidents to OSHA. OSHA has 10 regional offices and 89 area offices that implement and oversee enforcement in the field.[5] OSHA is responsible for setting and enforcing workplace safety and health standards for the private sector in 29 states, the District of Columbia, and four territories.[6] Twenty-one states and Puerto Rico set and enforce their own workplace safety and health standards for private sector and state and local government employers under state plans approved by OSHA.[7] OSHA has almost 1,900 employees, and its appropriation for fiscal year 2021 was approximately

[4]OSHA carries out these activities under the Occupational Safety and Health Act of 1970 (OSH Act), Pub. L. No. 91-596, 84 Stat.1590 (codified as amended at 29 U.S.C. §§ 553, 651-678).

[5]OSHA also has four district offices that are subordinate to an area office.

[6]In five of these states and the U.S. Virgin Islands, the state or territory is responsible for setting and enforcing standards for state and local government employers, under a state plan approved by OSHA.

[7]State standards and their enforcement must be at least as effective as the federal standards in protecting workers and in preventing work-related injuries, illnesses, and fatalities. Federal agencies are generally responsible for maintaining their own occupational safety and health programs, consistent with OSHA's regulations.

$592 million. OSHA received $105.8 million in additional funding under the CARES Act and the American Rescue Plan Act of 2021.[8]

OSHA Enforced COVID-19-Related Worker Safety and Health Using Existing OSHA Standards, the General Duty Clause, and a Health-Care ETS, but Faced Challenges

OSHA Relied Primarily on Existing Standards and Voluntary Employer Guidance to Conduct COVID-19-Related Enforcement during Much of the Pandemic

From February 2020 through June 2021, OSHA relied primarily on existing standards and voluntary employer guidance to conduct its

[8]The CARES Act appropriated $15 million to DOL for "Departmental Management," to remain available through September 30, 2022, to prevent, prepare for, and respond to the COVID-19 pandemic, including to enforce worker protection laws and regulations, among other things. Specifically, the CARES Act authorized the Secretary of Labor to transfer the amounts provided under this heading as necessary to OSHA and certain other DOL components, to prevent, prepare for, and respond to COVID-19, including for enforcement, oversight, and coordination activities in those accounts. Pub. L. No. 116-136, div. B, tit. VIII, 134 Stat. 281, 553-54 (2020). DOL officials said the department transferred $5.5 million of this amount to OSHA. As of September 30, 2021, $4.2 million had been obligated and, of that, $3.1 million had been expended, according to OSHA officials. The American Rescue Plan Act of 2021 (ARPA) appropriated $200 million to DOL to remain available until September 30, 2023. Pub. L. No. 117-2, tit. II, sub. B, 135 Stat. 4, 30 (2021). OSHA officials said the department provided $100.3 million of this amount to OSHA. As of September 30, 2021, according to OSHA officials, $35.5 million had been obligated for COVID-19-related activity (including $12.8 million for federal enforcement), of which $15.5 million had been expended (including $11.2 million for federal enforcement).

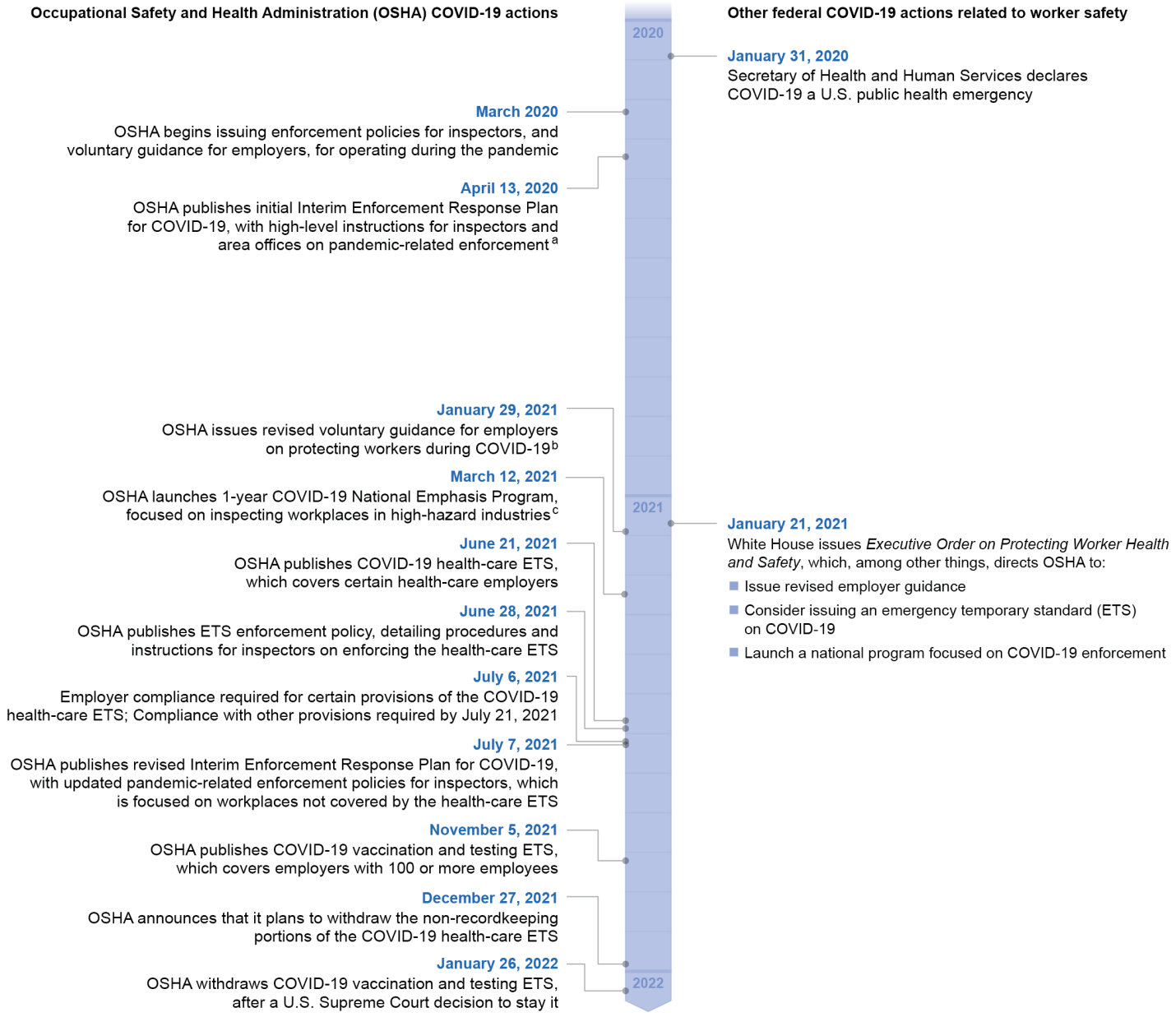
COVID-19-related enforcement activities.[9] In March 2021, OSHA initiated a COVID-19 National Emphasis Program to target its inspections on both health-care and non-health-care industries with a high risk of worker exposure to COVID-19.[10] In June 2021, OSHA issued an emergency temporary standard (ETS) related to COVID-19 exposure for the health-care industry, and in November 2021, the agency issued another ETS related to COVID-19 vaccination and testing for large employers. However, in December 2021, OSHA announced that it planned to withdraw the COVID-19 health-care ETS, with the exception of the COVID-19 log and reporting provisions. In addition, on January 13, 2022, the U.S. Supreme Court stayed (i.e., halted) the vaccination and testing ETS, and on January 26, 2022, OSHA withdrew it as an enforceable emergency temporary standard.[11] See figure 1 for a summary of key OSHA actions during the COVID-19 pandemic.

[9]Beginning in March 2020, OSHA issued a variety of COVID-19 voluntary guidance and safety tips for employers, including *Protecting Workers: Guidance on Preparing Workplaces for COVID-19* in March 2020, supplemented with *Guidance on Returning to Work* in June 2020. During 2020, OSHA and the Centers for Disease Control and Prevention issued joint voluntary employer guidance on protecting workers in specific industries, such as farmworkers, manufacturing, meat and poultry processing, and seafood processing. OSHA published *Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplac*e on January 29, 2021, as directed by the President's *Executive Order on Protecting Worker Health and Safety*. According to OSHA officials, this guidance updated the earlier employer guidance, based on knowledge of the current state of the pandemic, and included input from multiple stakeholders on COVID-19 prevention measures and their feasibility. Although the new guidance did not provide new required standards for employers to follow, it reaffirmed that employers have an obligation to protect workers under the OSH Act and that a "general duty clause" violation could otherwise be cited. The new guidance also provided example abatement measures for fulfilling this obligation. OSHA updated this guidance on June 10, 2021, to focus on protecting unvaccinated or otherwise at-risk workers in the workplace. The updated guidance stated that most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at risk from COVID-19 exposure. The update also recommended steps to encourage workers to get vaccinated, including paid time off for employees to receive their COVID-19 vaccination. OSHA further updated the voluntary employer guidance on August 13, 2021, including to reflect the July 27, 2021 Centers for Disease Control and Prevention mask and testing recommendations for fully vaccinated individuals.

[10]OSHA targets establishments for these inspections, in part, based on Form 300A summary injury and illness data, the limitations of which are discussed later in this testimony.

[11]The two ETSs are discussed in more detail later in this testimony.

Figure 1: Timeline of OSHA's Key Actions to Respond to the COVID-19 Pandemic, from January 2020 through January 2022



Source: GAO summary of documentation from OSHA, the Department of Health and Human Services, and the White House. | GAO-22-105711

[a]OSHA published updated versions of its Interim Enforcement Response Plan for COVID-19 on May 19, 2020, March 12, 2021, and July 7, 2021.

[b]OSHA published updates to this employer guidance on June 10, 2021 and August 13, 2021.

[c]OSHA published an update to its COVID-19 National Emphasis Program on July 7, 2021.

OSHA Issued Violations and Penalties Using Existing Standards, the General Duty Clause, and the COVID-19 Health-Care ETS

From February 2020 through December 2021, OSHA received the following complaints, referrals, or reports related to COVID-19: 18,401 complaints and referrals, 1,928 employer reports of severe injuries or illnesses, 1,427 reports of fatalities, and three reports of catastrophes.[12] During the same time period, OSHA conducted 3,350 inspections related

[12]OSHA has recorded data related to COVID-19 in the workplace since February 2020. Complaints refer to reports notifying OSHA of alleged workplace safety or health hazards. Complaints can be made by employees, their representatives, or others. OSHA uses the term "referrals" to encompass two different report types: (1) reports of work-related severe injuries and illnesses, which employers are required to submit to OSHA (which OSHA calls employer-reported referrals); and (2) reports of potential workplace hazards from selected other entities, such as local government agencies or media outlets. In this testimony, we use "referrals" to describe reports from selected non-employer sources, and "employer reports" to describe reports from employers. Employers are required to report all work-related in-patient hospitalizations, amputations, and losses of an eye within 24 hours. 29 C.F.R. § 1904.39(a)(2). In addition, employers are required to report the work-related death of an employee to OSHA within 8 hours. 29 C.F.R. § 1904.39(a)(1). According to OSHA officials, most reports of fatalities come from employers. However, officials noted that they do receive reports of fatalities from other sources, such as the media or emergency medical personnel. In this testimony we refer to all reported fatalities as "reports of fatalities." OSHA's Field Operations Manual defines a catastrophe as the hospitalization of three or more employees resulting from a work-related incident or exposure. Data throughout this testimony include enforcement activity performed by OSHA only, and not by state agencies that operate under OSHA-approved state plans.

to COVID-19.[13] As a result of these inspections, OSHA cited 1,099 violations and issued about $7.1 million in penalties.[14] (See table 1.)

Table 1: COVID-19-Related Reports to OSHA and OSHA Enforcement Actions, February 2020 through December 2021

		Feb.-Mar. 2020[a]	Apr.-June 2020	July-Sept. 2020	Oct.-Dec. 2020	Jan.-Mar. 2021	Apr.-June 2021	July-Sept. 2021[b]	Oct.-Dec. 2021[b]	Total[b]
Reports to OSHA	Complaints	1,394	4,780	3,047	3,097	2,109	764	1,139	1,202	**17,532**
	Referrals	9	177	127	328	80	52	48	48	**869**
	Employer reports of severe injury or illness[c]	20	650	270	308	168	52	313	147	**1,928**
	Reports of fatalities[c]	8	483	269	177	180	57	155	98	**1,427**
	Reports of catastrophes[c]	0	2	0	1	0	0	0	0	**3**
OSHA enforcement actions	Inspections	8	668	464	397	433	541	510	329	**3,350**
	Violations cited[d]	1	299	228	144	165	93	111	58	**1,099**
	Penalties ($ thousands)[d]	0	2,121	1,345	900	1,429	426	622	244	**7,087**

Source: Occupational Safety and Health Administration (OSHA) Information System data. | GAO-22-105711

Notes: Complaints refer to reports notifying OSHA of alleged workplace safety or health hazards. Complaints can be made by employees, their representatives, or others.

[13]In addition to inspections, OSHA conducts informal inquiries to respond to complaints, referrals, or employer reports of severe injury or illness that do not meet OSHA's criteria for conducting inspections. According to OSHA's Field Operations Manual, if Area Directors consider employers' responses to these informal inquiries to be inadequate, they may decide to initiate a related inspection. See enclosures to our January 2021 and October 2021 CARES Act reports for information on OSHA's use of informal inquiries during the COVID-19 pandemic: GAO, *COVID-19: Critical Vaccine Distribution, Supply Chain, Program Integrity, and Other Challenges Require Focused Federal Attention*, GAO-21-265 (Washington, D.C.: Jan. 28, 2021) and GAO-22-105051.

[14]OSHA assesses financial penalties for violations based on various factors outlined in statute and OSHA policy. For example, after January 15, 2022, violations determined to be serious are subject to penalties of up to $14,502 per violation, and violations determined to be willful or repeated are subject to penalties of up to $145,027 per violation. See 87 Fed. Reg. 2,328, 2,336 (Jan. 14, 2022) (to be codified at 29 C.F.R. § 1903.15(d)). Some of these cases are still open and may have been contested or appealed by the employers, which could ultimately result in changes to the violations cited or penalties issued. In addition, under the OSH Act, OSHA has 6 months from the occurrence of a violation to issue a citation and any related penalties, so totals for the number of violations cited and penalties issued from July 2021 through December 2021 may not reflect the total that will eventually be cited or issued related to inspections initiated during those months. These data are current as of January 20, 2022.

Referrals and employer reports: OSHA uses the term "referrals" to encompass two different report types: (1) reports of work-related severe injuries and illnesses, which employers are required to submit to OSHA (which OSHA calls employer-reported referrals); and (2) reports of potential workplace hazards from selected other entities, such as local government agencies or media outlets. In this testimony, we use "referrals" to describe reports from selected non-employer sources, and "employer reports" to describe reports from employers. Employers are required to report all work-related in-patient hospitalizations, amputations, and losses of an eye within 24 hours. 29 C.F.R. § 1904.39(a)(2).

Fatalities: Employers are required to report the work-related death of an employee to OSHA within 8 hours. 29 C.F.R. § 1904.39(a)(1). According to OSHA officials, most reports of fatalities come from employers. However, officials noted that they do receive reports of fatalities from other sources, such as the media or emergency medical personnel. In this testimony we refer to all reported fatalities as "reports of fatalities."

Catastrophes: OSHA's Field Operations Manual defines a catastrophe as the hospitalization of three or more employees resulting from a work-related incident or exposure.

Data in this table include enforcement activity performed by OSHA only, and not by state agencies that operate under OSHA-approved state plans.

[a]OSHA began recording data related to COVID-19 in February 2020.

[b]Since OSHA has 6 months from the occurrence of a violation to issue a citation and any related penalties, totals for the number of violations cited and penalties issued from July 2021 through December 2021 may not reflect the total that will eventually be cited or issued related to inspections initiated during those months. These data are current as of January 20, 2022.

[c]Data reliability issues regarding COVID-19-related employer reports, specifically reports of hospitalizations, were discussed in an enclosure to our January 2021 CARES Act report. See GAO, *COVID-19: Critical Vaccine Distribution, Supply Chain, Program Integrity, and Other Challenges Require Focused Federal Attention*, GAO-21-265 (Washington, D.C.: Jan. 28, 2021).

[d]Some of these cases are still open and may have been contested or appealed by the employers, which could ultimately result in changes to the violations cited or penalties issued.

From February 2020 through May 2021, without COVID-19-specific standards in place, OSHA enforced existing applicable standards, such as those related to respiratory protection. OSHA also occasionally used the "general duty clause" for COVID-19-related enforcement, which can be used when no standard applies to a particular hazard and certain criteria are met.[15] In June 2021, OSHA issued the COVID-19 health-care ETS, and started enforcing its provisions in July 2021. Table 2 shows citation data for COVID-19-related violations and penalties related to each of these enforcement tools from February 2020 through December 2021, including those issued specifically to health-care employers.

[15]The general duty clause is discussed in more detail later in this testimony.

Table 2: COVID-19-Related Cited Violations and Penalties for OSHA's COVID-19 Health-Care ETS, General Duty Clause, and Most Frequently Cited Other Standards, from February 2020 through December 2021

	COVID-19 health-care emergency temporary standard (ETS)[a]	General duty clause[b]	Respiratory protection[c]	Internal employer recordkeeping for fatalities, injuries, and illnesses[d]	Reporting to OSHA fatalities and severe injuries and illnesses[e]	Personal protective equipment[f]
Violations cited[g] (all employers)	124	25	660	125	102	38
Violations cited[g] (health-care employers[h])	121	4	597	95	83	26
Penalties[g] ($ thousands for all employers)	607	493	4,982	209	624	120
Penalties[g] ($ thousands for health-care employers[h])	596	163	4,650	134	506	53

Source: Occupational Safety and Health Administration (OSHA) Information System data. | GAO-22-105711

[a]The COVID-19 health-care ETS generally requires certain covered health-care employers to comply with several provisions to protect workers from COVID-19 hazards. See 86 Fed. Reg. 32,376, 32,620-26 (June 21, 2021) (to be codified at 29 C.F.R. § 1910.502). The ETS also describes requirements for respirator use that can apply when respirators are used in place of face masks, under certain circumstances. See 86 Fed. Reg. 32,376, 32,626-28 (June 21, 2021) (to be codified at 29 C.F.R. § 1910.504). On December 27, 2021, OSHA announced that it planned to withdraw the COVID-19 health-care ETS, with the exception of the COVID-19 log and reporting provisions.

[b]The general duty clause requires employers to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees. The general duty clause is a part of the Occupational Safety and Health Act of 1970, as amended, and is distinct from standards, which OSHA promulgates under the OSH Act. The general duty clause is used when no standard applies to a particular hazard. See 29 U.S.C. § 654(a)(1).

[c]29 C.F.R. § 1910.134 generally requires employers to provide respiratory protection to employees when necessary to protect employee health.

[d]29 C.F.R. § 1904.4 generally requires employers to keep an internal record of all work-related fatalities, injuries, and illnesses.

[e]29 C.F.R. § 1904.39 generally requires employers to report to OSHA all work-related in-patient hospitalizations, amputations, and losses of an eye within 24 hours, and all work-related fatalities within 8 hours.

[f]29 C.F.R. § 1910.132 generally requires employers to provide personal protective equipment to employees when necessary, such as for eyes, face, and head.

[g]Some of these cases are still open and may have been contested or appealed by the employers, which could ultimately result in changes to the violations cited or penalties issued. Since OSHA has 6 months from the occurrence of a violation to issue a citation and any related penalties, totals for the number of violations cited and penalties issued may not reflect the total that will eventually be cited or issued. These data are current as of January 20, 2022.

[h]For this table, health-care employers include Subsectors 621 (ambulatory health-care services), 622 (hospitals), and 623 (nursing and residential care facilities) of the North American Industry Classification System. Since the group of employers represented in this table does not exactly match the group of employers covered by the health-care ETS, total health-care ETS violations and penalties, for all employers, vary slightly from those for health-care employers.

OSHA Inspectors Faced Challenges Applying Existing OSHA Standards and the General Duty Clause to COVID-19 Cases

OSHA standards existing prior to OSHA's June 2021 COVID-19 health-care ETS do not contain provisions specifically targeted at the COVID-19 hazard. According to the preamble to the health-care ETS, OSHA's efforts to enforce existing standards to address the COVID-19 hazard have been hindered by the absence of any specific requirements in these standards related to some of the most important COVID-19-mitigation measures. OSHA inspectors or managers from three of five area offices we spoke with said that it was difficult to apply existing OSHA standards to COVID-19 cases, for example, because existing standards did not cover certain COVID-19 hazard mitigations, such as wearing a face covering.

Workload concerns also made citing COVID-19-related violations more difficult, given the substantial time commitment needed for inspectors to collect the documentation necessary to support a citation. Inspectors or managers from three of five area offices we spoke with described challenges during the COVID-19 pandemic with meeting the requirement that citations must be issued within 6 months of a violation. Particular challenges included both the large amount of paperwork required for a COVID-19 citation and the fact that inspectors sometimes learned of a COVID-19-related fatality several months after it occurred—when much of the 6-month window had already expired.[16]

In addition, although not unique to COVID-19 inspections, violations of the general duty clause were challenging to cite, since a large amount of documentation is necessary to demonstrate that all elements required to use the clause are present. The general duty clause requires employers to provide a workplace free from recognized hazards that are causing, or

[16]Under the OSH Act's statute of limitations, OSHA may not issue a citation to an employer for violating the act or any OSHA regulations after the expiration of 6 months following the occurrence of the violation. 29 U.S.C. § 658(c). For more information on this 6-month statute of limitations, see our January 2021 report on reporting of summary injury and illness data. In this report, GAO recommended that OSHA evaluate its procedures for ensuring reporting of summary injury and illness data and develop a plan to remediate deficiencies. OSHA generally concurred with our recommendation, and it remains open. GAO-21-122.

are likely to cause, death or serious physical harm to their employees.[17] OSHA's Field Operations Manual states that if hazards not covered by an OSHA standard are discovered during an inspection, a general duty clause violation may be cited. Such a citation requires that all four of the following elements are identified: (1) the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; (2) the hazard was recognized; (3) the hazard was causing or was likely to cause death or serious physical harm; and, (4) there was a feasible and useful method to correct the hazard.[18] We reported in April 2012 that using the general duty clause requires significant agency resources, and that agency officials say it is not always a viable option, for example, when a hazard is just emerging or OSHA cannot prove that an employer knows a certain hazard exists.[19] As shown in table 2 above, OSHA cited 25 COVID-19-related general duty clause violations through December 2021, a relatively small number compared to violations of other requirements.

Moreover, according to the preamble to OSHA's health-care ETS, the general duty clause does not provide employers with specific requirements to follow or a road map for implementing appropriate COVID-19 abatement measures. Inspectors or managers from four of the five area offices we spoke with also said it was difficult to apply the general duty clause to COVID-19-related hazards, for example, because it would likely only be cited if an employer was not making any effort to use any COVID-19 mitigation strategies. According to the preamble to OSHA's health-care ETS, many times during the pandemic inspectors found that employers were following some minimal COVID-19 mitigation strategy while ignoring other crucial components of employee protection. The preamble further notes that in such instances, because the employer

[17]29 U.S.C. § 654(a)(1).

[18]See OSHA Field Operations Manual, CPL 02-00-164, Ch. 4, Sec. III, A.

[19]See GAO, *Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting*, GAO-12-330 (Washington, D.C.: Apr. 2, 2012). In addition, our prior work on workplace violence discussed the challenges of citing employers for violating the general duty clause in the absence of a specific standard to address workplace violence. One of our recommendations in this report remains open. We recommended that OSHA assess the results of the agency's efforts to address workplace violence to help determine whether current efforts are effective or if additional action may be needed, such as development of a workplace violence prevention standard for health-care employers. See GAO, *Workplace Safety and Health: Additional Efforts Needed to Help Protect Health Care Workers from Workplace Violence,* GAO-16-11 (Washington, D.C.: Mar. 17, 2016).

had taken some steps to protect workers, successfully proving a general duty clause citation would have required OSHA to show that additional missing measures would have further materially reduced the COVID-19 hazard.

In October 2021, in response to these and other challenges, we recommended that OSHA assess various challenges related to resources, and to communication and guidance that the agency faced in response to the COVID-19 pandemic and take related actions as warranted.[20] In its response, DOL agreed that it was important to assess lessons learned and best practices regarding OSHA's operational response to COVID-19, but that during the pandemic, it was better to devote its resources to helping employers and workers mitigate exposures to COVID-19. In December 2021, OSHA officials said they planned to conduct an assessment as soon as feasible, with a team of national office and field office staff, and would incorporate lessons learned, if applicable, into future emergency response efforts. In the meantime, OSHA officials said the agency was taking steps to address issues we identified related to communication and guidance. In May 2022, OSHA officials said that the agency had taken a number of actions as a result of its ongoing assessment of successes and challenges during the pandemic, such as hiring new inspectors and implementing OSHA headquarters and field communication check-ins during periods of high COVID-19 transmission. OSHA officials also said that the agency will continue to conduct additional review of how to implement longer-term solutions for shortcomings we identified in our report. We will close this recommendation when OSHA has conducted an assessment of the various challenges the agency has faced in its response to the COVID-19 pandemic and has taken any related warranted actions.

OSHA Issued One COVID-19 ETS, for Which It Is No Longer Enforcing Most Provisions, and a

[20]Specifically, we recommended that the Assistant Secretary of Labor for Occupational Safety and Health assess—as soon as feasible and, as appropriate, periodically thereafter—various challenges related to resources and to communication and guidance that the Occupational Safety and Health Administration has faced in its response to the COVID-19 pandemic, and take related actions as warranted. See GAO-22-105051.

Second, Which It Withdrew; a Separate Infectious Disease Standard Is in Process

OSHA Is No Longer Enforcing Most Provisions of the Health-Care ETS and OSHA Withdrew the Vaccination and Testing ETS

In June 2021, OSHA issued a COVID-19 ETS for certain health-care employers that treat suspected or confirmed COVID-19 patients, such as hospitals and long-term care facilities.[21] To issue an ETS, OSHA must determine that employees are being exposed to a "grave danger."[22] In the preamble to the health-care ETS, OSHA cited "severe health consequences of COVID-19, the high risk to employees of developing the disease as a result of transmission of [COVID-19] in the workplace, and that [health-care] workplace settings provide direct care to known or suspected COVID-19 cases" as the basis for the determination.[23] The health-care ETS requires covered employers to comply with several provisions to protect workers from COVID-19 hazards, including:

[21]Under 29 U.S.C. § 655(c), OSHA has the authority to issue an "emergency temporary standard" (ETS) without going through the normal rulemaking process if it determines that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and that an ETS "is necessary to protect employees from such danger." In an enclosure to our September 2020 CARES Act report, we reported that the agency had determined that an ETS was not necessary. See GAO, *COVID-19: Federal Efforts Could Be Strengthened by Timely and Concerted Actions*, GAO-20-701 (Washington, D.C.: Sept. 21, 2020). However, in January 2021, President Biden signed Executive Order 13999 on Protecting Worker Health and Safety, which, among other things, directed the Secretary of Labor to consider whether a COVID-19 ETS was necessary. The COVID-19 health-care ETS went into effect on June 21, 2021, with employer compliance with certain provisions required by July 6, 2021, and others by July 21, 2021. The health-care ETS applies to workplaces where employees provide health-care services or health-care support services, and exempts some health-care facilities, such as non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter, and well-defined hospital ambulatory care settings where all employees are fully vaccinated, all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not permitted to enter.

[22]Further information about the federal standard-setting process, including the ETS process, can be found in our prior work. See GAO-12-330.

[23]See 86 Fed. Reg. 32,376, 32,381-84 (June 21, 2021). According to OSHA officials, the agency focused the scope of the health-care ETS on the areas of greatest COVID-19 exposure and did not make any legal findings about workers outside health-care settings because those were not necessary to justify the requirements in the health-care ETS.

- developing and implementing a COVID-19 plan and related policies and procedures, and providing related training;
- screening and managing patients and visitors, including contractors, for COVID-19;
- implementing various COVID-19 mitigation measures, such as use of personal protective equipment for employees, physical distancing, physical barriers, cleaning and disinfection, and ventilation;
- providing time and paid leave for COVID-19 vaccination;
- ensuring anti-retaliation principles are upheld related to employee rights under the ETS;
- screening and managing employees for COVID-19, including, for example, daily screening and requiring employees to notify the employer of COVID-19 positive tests and symptoms;
- keeping a log of all employee COVID-19 cases, regardless of whether they are work-related; and,
- reporting work-related COVID-19 fatalities and hospitalizations to OSHA, regardless of the amount of time between the exposure to COVID-19 and the fatality or hospitalization.

In the first 6 months of the health-care ETS's enforcement, OSHA issued violations and penalties related to several of its provisions, including requirements for personal protective equipment (PPE) and employer COVID-19 plans (see table 3).

Table 3: Cited Violations and Penalties under OSHA's COVID-19 Health-Care Emergency Temporary Standard (ETS),[a] by Requirement, from July 2021[b] through December 2021

COVID-19 health-care ETS requirements	Cited violations of requirement[c]	Penalties ($ thousands)[c]
Personal protective equipment (PPE)	49	296
COVID-19 plan	33	112
Physical barriers	11	33
Physical distancing	10	21
Health screening and medical management	10	60
Training	9	21
Patient screening and management	6	43
Recordkeeping (e.g., a COVID-19 log)	6	1
Reporting COVID-19 fatalities and hospitalizations to OSHA	4	1
Ventilation	3	19
Respirator use, in place of face mask	2	0
Cleaning and disinfection	1	0
Anti-retaliation	1	0

Source: Occupational Safety and Health Administration (OSHA) Information System data. | GAO-22-105711

[a]The COVID-19 health-care ETS generally requires certain covered health-care employers to comply with several provisions to protect workers from COVID-19 hazards. See 86 Fed. Reg. 32,376, 32,620-26 (June 21, 2021) (to be codified at 29 C.F.R. § 1910.502). The ETS also describes requirements for respirator use that can apply when respirators are used in place of face masks, under certain circumstances. See 86 Fed. Reg. 32,376, 32,626-28 (June 21, 2021) (to be codified at 29 C.F.R. § 1910.504). On December 27, 2021, OSHA announced that it planned to withdraw the COVID-19 health-care ETS, with the exception of the COVID-19 log and reporting provisions.

[b]Employers were required to comply with the health-care ETS starting in July 2021.

[c]Some of these cases are still open and may have been contested or appealed by the employers, which could ultimately result in changes to the violations cited or penalties issued. Since OSHA has 6 months from the occurrence of a violation to issue a citation and any related penalties, totals for the number of violations cited and penalties issued may not reflect the total that will eventually be cited or issued. "Cited violations of requirement" reflects the number of times that OSHA included the relevant requirement in "violations cited" for the health-care ETS shown in table 2. According to officials, OSHA may group multiple violated requirements into a single cited violation, when those requirements are based on a single hazardous condition. These data are current as of January 20, 2022.

An ETS may serve as a proposal for a permanent standard, and OSHA must generally take final action on the proposal within 6 months of publication, which in the case of the health-care ETS, was by December

2021.[24] OSHA received comments on the health-care ETS through August 20, 2021. On December 27, 2021, OSHA announced that it planned to withdraw the health-care ETS, with the exception of the COVID-19 log and reporting provisions, since officials anticipated that a final rule could not be completed "in a timeframe approaching the one contemplated by the OSH Act."[25]

In January 2022, OSHA officials said they were not currently enforcing most provisions of the health-care ETS, though requirements related to COVID-19 logs and reporting remained in effect. The agency would continue to evaluate violations of other health-care ETS provisions that occurred prior to its December 27, 2021 announcement, according to OSHA officials. The health-care ETS is also the subject of litigation.[26] In May 2022, OSHA officials said they were continuing to work toward a permanent COVID-19 health-care standard. In March 2022, OSHA re-opened the health-care ETS for an additional 30-day comment period and announced an informal public hearing as part of the development of a final standard.

On December 27, 2021, OSHA officials also announced that as the agency works toward a permanent regulatory solution, OSHA will

[24]29 U.S.C. § 655(c)(3).

[25]According to OSHA's announcement, the COVID-19 log and reporting provisions at 29 C.F.R. § 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r), will remain in effect, since they were adopted under section 8 of the OSH Act, and OSHA found good cause to forgo notice and comment in light of the grave danger presented by the pandemic.

[26]On June 24, 2021, the AFL-CIO and United Food and Commercial Workers unions petitioned the U.S. Court of Appeals for the D.C. Circuit to review OSHA's decision not to issue an ETS applicable to employees outside the health-care industry who face occupational exposure to COVID-19, including but not limited to employees in the meatpacking and food processing industries. The case is *United Food and Commercial Workers Int'l Union v. OSHA*, No. 21-1143 (D.C. Cir. filed June 24, 2021). On September 15, 2021, the court granted a joint request from the petitioners and OSHA that case proceedings be temporarily suspended because of the September 9, 2021 White House announcement that OSHA planned to issue a new COVID-19-related ETS, which had the potential to affect the claims at issue in the case. In the joint status report filed February 4, 2022, the parties noted that on December 27, 2021, OSHA announced that it was planning to withdraw the non-recordkeeping provisions of the ETS and that on January 5, 2022, National Nurses United and other unions petitioned the U.S. Court of Appeals for the D.C. Circuit to direct OSHA to keep the health-care ETS in effect until it is superseded by a permanent COVID-19 health-care standard. The case is *In re Nat'l Nurses United*, No. 22-1002 (D.C. Cir. filed Jan. 5, 2022). As of May 17, 2022, *United Food and Commercial Workers Int'l Union v. OSHA*, No. 21-1143 (D.C. Cir. filed June 24, 2021) remains temporarily suspended at the request of the parties.

vigorously enforce the general duty clause and its other standards, such as those related to respiratory protection and personal protective equipment, to protect health-care employees from COVID-19.[27] OSHA officials also said that continued adherence to the terms of the health-care ETS is the simplest way for employers in health-care settings to protect their employees' health and ensure compliance with their OSH Act obligations.

On November 5, 2021, OSHA issued a second COVID-19-related ETS, which required all employers with 100 or more employees to implement COVID-19 vaccination and testing requirements and to provide vaccine-related paid time off. On January 13, 2022, the U.S. Supreme Court stayed (i.e., halted) the vaccination and testing ETS, and on January 26, 2022, OSHA withdrew the ETS as an enforceable emergency temporary standard.[28]

OSHA is Engaged in Rulemaking for a Separate Infectious Disease Standard

On December 27, 2021, OSHA officials also announced that the agency would "continue to work expeditiously to issue a final standard that will protect health-care workers from COVID-19 hazards," as OSHA engages in ongoing separate rulemaking for a broader infectious disease standard to protect workers in high-risk environments from long-standing and emerging infectious diseases. According to the White House Office of Information and Regulatory Affairs' Fall 2021 regulatory agenda, the rulemaking considers targeting health-care workers and others who are exposed in high-risk environments, potentially covering workplaces such

[27]On March 7, 2022, OSHA announced a 3-month focused enforcement period from March 9, 2022 to June 9, 2022, directed at hospitals and skilled nursing care facilities that treat or handle COVID-19 patients. Characterized by OSHA as a supplement to the National Emphasis Program, this initiative includes follow-up and monitoring inspections at sites that were previously inspected or investigated where OSHA issued citations or Hazard Alert Letters, including those where remote inspections were conducted. See enclosures to our January 2021 and October 2021 CARES Act reports for information on OSHA's use of remote inspections during the COVID-19 pandemic: GAO-21-265 and GAO-22-105051.

[28]87 Fed. Reg. 3,928, 3,928-29 (Jan. 26, 2022), noting the Supreme Court's January 13, 2022 decision in *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022). In another opinion issued on January 13, 2022, the Supreme Court stayed lower court injunctions, allowing a rule requiring vaccines for covered staff at Medicare- and Medicaid-certified providers and suppliers regulated by the Centers for Medicare & Medicaid Services to go into effect. *Biden v. Missouri*, 142 S. Ct. 647, 654-55 (2022).

as hospitals, correctional facilities, some laboratories, and other occupational settings where workers can be at increased risk of exposure to infectious people.

OSHA has completed a number of steps toward issuing an infectious disease standard over the past 11 years. The Office of Information and Regulatory Affairs' Fall 2021 regulatory agenda projected that a notice of proposed rulemaking for the infectious disease standard would be published in April 2022. However, in January 2022, OSHA officials told us they no longer expected to publish the proposed rule in April. According to OSHA documentation, the agency generally plans for between 4 years 8 months and 12 years 6 months to complete the rulemaking process—from preliminary rulemaking activities such as conducting research to determine the scope of the problem through post-promulgation activities, such as developing outreach and training materials.[29] In 2012, we reported on multiple challenges OSHA faces in setting standards, and found that it took OSHA more than 7 years, on average, to develop and issue standards, and that these time frames could range widely, from 15 months to 19 years.[30]

[29]In May 2022, OSHA officials said that these are the approximate ranges of time for the rulemaking process, assuming a typical steady work pace and the procedures and review times under Executive Order No. 12866, *Regulatory Planning and Review*, which, among other things, provides for coordinated review of certain agency rules by the Office of Management and Budget. However, depending on administration priorities and restrictions from Congress, times can vary outside of these ranges, according to OSHA officials.

[30]Experts and agency officials cited increased procedural requirements, shifting priorities, and a rigorous standard of judicial review as contributing to lengthy time frames for developing and issuing standards. See GAO-12-330. For example, we reported that, in 2013, 15 stakeholder groups petitioned OSHA and the U.S. Department of Agriculture, asking OSHA to establish a "work-speed" workplace safety and health standard to protect workers in the meat and poultry industry. In 2015, OSHA denied the petition and cited limited resources as its reason for not conducting a comprehensive analysis and rulemaking. See GAO, *Workplace Safety and Health: Additional Data Needed to Address Continued Hazards in the Meat and Poultry Industry,* GAO-16-337 (Washington, D.C.: Apr. 25, 2016).

Improvements Are Needed in Employer Reporting of Summary Injury and Illness Data

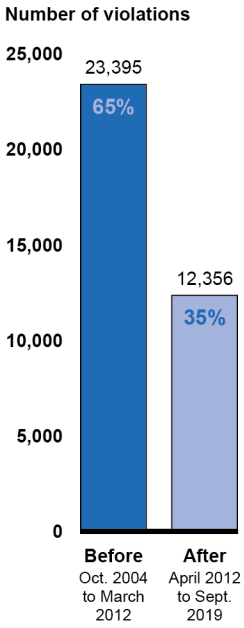
A 2012 Court Decision Coincided with Changes in the Number of Recordkeeping Violations OSHA Cited

Our 2021 report on OSHA recordkeeping requirements shows that a decrease in the number of times OSHA cited violations to any of its recordkeeping rules over a 15-year period (fiscal years 2005 through 2019) coincided with the April 2012 decision in *AKM LLC v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012), known as the *Volks* decision (see fig. 2).[31] The *Volks* decision required OSHA to change how it applied the OSH Act's 6-month statute of limitations when issuing recordkeeping citations.[32] Specifically, OSHA cited employers for a total of nearly 35,800 recordkeeping violations during fiscal years 2005 through 2019. Sixty-five percent of these violations occurred before the *Volks* decision and 35 percent occurred after this decision, despite a similar length of time before and after the decision. Managers and compliance officers in seven area offices told us that the decision limited their ability to cite employers for recordkeeping violations because, under OSHA's former interpretation of the statute of limitations, more recordkeeping violations fell within a period of time in which it was permissible to issue citations.

[31]See GAO-21-122. OSHA has a variety of recordkeeping regulations. These regulations require employers to record all work-related injuries and illnesses that result in death, loss of consciousness, days away from work, restricted work or job transfer, or medical treatment beyond first aid, among other criteria, and maintain these records for 5 years. Employers with 10 or fewer employees and employers in certain industries are exempt from these requirements. Employers are required to use OSHA forms (or equivalent forms) to record this information.

[32]Prior to the *Volks* decision, OSHA considered a recordkeeping violation—such as a failure to record a work-related injury on an OSHA or equivalent form—to constitute a "continuing violation" for every day the injury remained unrecorded. Since employers are required to maintain recordkeeping forms for 5 years, OSHA considered the 6-month statute of limitations to begin at the end of this 5-year period. As a result, prior to the *Volks* decision, OSHA issued citations to employers for recordkeeping violations for up to about 5 ½ years from the date that the initial violation occurred. The court in *Volks,* however, disagreed with this interpretation, holding that a recordkeeping violation occurs—and the statute of limitations is triggered—on the last day that an employer has to record an injury or illness (which, under OSHA regulations at 29 C.F.R. § 1904.29(b)(3), is 7 days after receiving information that a recordable injury or illness has occurred).

Figure 2: Number of Recordkeeping Violations Cited Before and After the April 2012 *Volks* Decision



Source: GAO analysis of Occupational Safety and Health Administration data. | GAO-22-105711

Note: Data include recordkeeping violations cited by federal OSHA area offices only and exclude any violations cited by state occupational safety and health agencies. In this figure, the "*Volks* decision" refers to AKM LLC d/b/a Volks Constructors v. Sec'y of Labor, 675 F.3d 752 (D.C. Cir. 2012). This figure includes violations cited between April 1 and April 5, 2012, in the "After" category; however, such violations would have been issued prior to the *Volks* decision, which was issued on April 6, 2012.

Employers Did Not Report Required Summary Injury and Illness Data on More Than 50 Percent of Establishments

Our 2021 report estimated that employers did not report any injury and illness data on more than 50 percent of their establishments for which

they were required to do so in calendar years 2016 through 2018.[33] For example, in 2018, an estimated 212,000 out of 459,000 required establishments reported injury and illness data. Since our report was issued, OSHA reported some progress as nearly 234,000 establishments submitted their summaries for calendar year 2021. However, OSHA is still not able to ensure that establishments with the highest injury and illness rates are reporting required data. Further, OSHA uses the reported summaries to identify establishments for its Site Specific Targeting inspections. Because OSHA uses summary data to target these inspections, this may be creating a disincentive for employers to report injuries and illnesses to OSHA—since not reporting these injury and illness summaries decreases the likelihood that their establishments will be selected for an inspection.[34]

[33]See GAO-21-122. Among other things, OSHA's recordkeeping regulations require certain employers to electronically report the number of workplace injuries, illnesses, and fatalities that occurred in their workplace establishments to OSHA. Only those incidents that meet OSHA's definition of a workplace injury, illness, or fatality are required to be reported. Employers are required to report these data annually on: (1) establishments with 20 to 249 employees at any point during the previous calendar year in certain industries (such as manufacturing and nursing care facilities) or (2) establishments with 250 or more employees at any point during the previous calendar year, whose employers are required to routinely maintain injury and illness records. 29 C.F.R. § 1904.41. These data are due to OSHA by March 2 of each year and employers transmit them via an OSHA portal called the Injury Tracking Application (ITA). An establishment is a single physical business location.

[34]Research on employer underreporting of workplace injuries and illnesses indicates that one reason employers underreport injuries and illnesses is to avoid being selected for an OSHA inspection. We reported, for example, that without accurate records, employers engaged in hazardous activities can avoid inspections because OSHA based many of its safety inspections on work-related injury and illness rates. (See GAO, *Workplace Safety and Health: Enhancing OSHA"s Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data*, GAO-10-10 (Washington, D.C.: Oct. 15, 2009). According to OSHA officials, this procedure for inspections continues today. Also, the National Academy of Sciences identified multiple factors that contribute to employers underreporting injury and illness data, including concerns about OSHA penalties (which may be issued as a result of an OSHA inspection). See *A Smarter National Surveillance System for Occupational Safety and Health in the 21st Century,* (Washington, D.C.: The National Academies Press, 2018).

Table 4: Estimated Compliance with Summary Injury and Illness Reporting Requirement, Calendar Years 2016-2018

Calendar year	Estimated establishments that met summary injury and illness reporting requirements[a]	Establishments whose employers submitted summary injury and illness data[b]	
		Number	Percent
2016	451,000	159,000	35%
2017	454,000	189,000	42%
2018	459,000	212,000	46%

Source: GAO analysis of U.S. Census Business Patterns data and OSHA summary (300A) injury and illness data. Establishments in all 50 states and the District of Columbia reported these data. Data are rounded to the nearest thousand. | GAO-22-105711

[a]GAO used U.S. Census Bureau County Business Patterns data on employer size and industry to estimate the number of employers that met the criteria to electronically report required summary and illness data in OSHA's regulation 29 C.F.R. § 1904.41. Due in part to differences between the regulatory criteria and the information contained in the Census data, legal compliance cannot be determined from these estimates alone.

[b]To estimate the proportion of establishments with submitted summary injury and illness data, this analysis compared the estimated number of establishments for which OSHA received summary injury and illness data to the estimated number of establishments that met the reporting requirement. We analyzed roughly 73 percent of the 763,000 summary injury and illness records employers submitted electronically to OSHA. We excluded establishments from our analysis: (1) that reported these data to OSHA, but did not meet the reporting requirements in OSHA's regulation 29 C.F.R. § 1904.41 and (2) for other technical reasons, such as that the industry code that would indicate if the establishment met the reporting requirement was not included in either the Census database or in the data reported to OSHA.

OSHA Has Limited Procedures to Encourage Employers to Report Required Summary Injury and Illness Data and Cite Employers Who Do Not Report These Data

OSHA has limited procedures for encouraging employers to comply with its requirement to report summary injury and illness data and for penalizing non-compliance.

- Our 2021 report found that OSHA's outreach procedures to encourage electronic reporting were limited because they may not have fully explained which employers were required to comply with this rule nor successfully encouraged such employers to submit their data.[35] For example, OSHA officials told us that they identified through a data match nearly 220,000 employers who may not have reported their 2019 injury and illness data and mailed reminder postcards to about 27,000 of them. At that time, OSHA officials said that they did not send postcards to all potentially non-compliant employers because they did not have enough funding to do so. In a partial response to our recommendation to evaluate procedures for ensuring

[35]See GAO-21-122.

that employers report these data when required, OSHA examined the extent to which it obtained injury and illness data from the relatively small number of establishments that were mailed reminder postcards. They reported that between 2018 and 2020, the agency received these data on fewer than 20 percent of such establishments.

- OSHA issued fewer than 300 injury and illness reporting citations between December 15, 2017 (when certain employers were first required to submit their summary injury and illness data) and September 30, 2019. Moreover, according to a recent agency update, the number of citations has since decreased. Specifically, OSHA issued 110 citations over the nearly 2 ½-year time period of October 1, 2019 through April 15, 2022. All citations were issued as a result of inspections, and the agency inspects only a small percentage of all establishments it oversees each year—less than one-half of 1 percent in fiscal year 2019, for example.

OSHA may not issue citations for violations, including failure to report injury and illness data, after 6 months following the occurrence of the violation. This means that OSHA can issue citations during inspections for failure to report injury and illness data only if (1) the employer did not report the data in the same year in which the inspection occurred, and (2) the inspection is completed and any citations are issued by September 2, which is 6 months after the March 2 due date specified in the reporting requirement.

OSHA has used procedures for issuing citations that do not involve conducting on-site inspections, according to OSHA officials. For example, OSHA issued citations based on conducting remote inspections during the COVID-19 pandemic. OSHA officials also said that under an earlier program that collected the same injury and illness summary information as the agency is now collecting electronically—the OSHA Data Initiative—the agency opened inspections and issued citations without going on site.

We recommended in our 2021 report that OSHA evaluate its current procedures for ensuring that employers electronically report their summary injury and illness data when required and implement a plan to remediate any deficiencies.[36] OSHA generally agreed with this recommendation.

- As of mid-May 2022, OSHA officials described steps the agency has taken to evaluate efforts to encourage employers to comply with this

[36]See GAO-21-122.

reporting requirement and steps they will, or plan to, take to increase compliance. For example, according to OSHA officials, OSHA tracked the extent to which various online postings were viewed on specific days and the number of electronic injury and illness data submissions employers submitted on those days. Officials also told us that the agency plans to increase the number of reminder postcards it sends to potentially non-compliant employers. It is not clear to us, however, the extent to which either of these actions will improve the potentially widespread non-compliance with this reporting requirement. Officials did not indicate how many additional reminder postcards they intend to send each year and, as of mid-May 2022, the agency had not yet sent any in an effort to obtain the 2021 injury and illness data that was due on March 2, 2022. Given that the agency has a 6-month window in which to cite employers for non-compliance with this reporting requirement, the effectiveness of sending postcards is likely affected by how promptly they are sent.

- In April 2022, OSHA began a new program to cite employers that failed to report summary injury and illness data, by matching potentially non-compliant employers against weekly lists of establishments newly scheduled for inspection. If the area office conducting the inspection determines that the employer for the establishment under inspection did not submit the required injury and illness data, then the employer can be cited for a recordkeeping violation. Because this program is new, it is not possible to fully evaluate its impact on improving compliance with the reporting requirement. However, the program will only result in citations if a non-compliant employer's establishment is among the few establishments scheduled for an OSHA inspection in a given year during the 6-month period following March 2.

In conclusion, when faced with a new hazard, to enforce workplace safety and health, OSHA will need to rely on an ETS, a new permanent standard, existing standards, or the general duty clause. However, during the COVID-19 pandemic, OSHA faced challenges in implementing an ETS or a new permanent standard, as well as in enforcing existing standards and the general duty clause. Moreover, due to potential widespread non-compliance with the requirement to report summary injury and illness data to OSHA, the agency does not know if it is getting reports from employers with the highest injury and illness rates. Without these reports, OSHA will continue to lack the information necessary to most effectively target inspections of high-risk establishments. As we recommended, OSHA should assess the challenges it faces in protecting workers from COVID-19 and evaluate procedures for ensuring reporting of summary injury and illness data. Absent these evaluations and any

warranted actions to implement their findings, OSHA may not be positioned to more effectively ensure worker safety and health during a future crisis.

Chairwoman Adams, Republican Leader Keller, and Members of the Subcommittee, this concludes my prepared statement. I would be happy to respond to any questions you may have at this time.

GAO Contact and Staff Acknowledgements

If you or your staff have any questions about this testimony, please contact Thomas M. Costa; Director; Education, Workforce, and Income Security, at (202) 512-4769 or costat@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Blake Ainsworth (Assistant Director), Margaret Hettinger and Rebecca Kuhlmann Taylor (Analysts in Charge), Nancy Cosentino, and Aaron Olszewski. Also contributing to this testimony were James Bennett, Benjamin DeYoung, Randi Hall, Amrita Sen, Kathleen van Gelder, and Timothy Young.

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