

# Politics, Regulations and the Outlook for 2015-2016

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## What's New at the State Level

- **Maryland:**
  - **Gov. Larry Hogan (R) elected:**
    - Seeks to cut taxes and emphasize economic stimulus for small businesses and middle class.
    - April 28, 2015: Signed into law ten bills aimed at economic development.
    - Currently before Governor is Augustine Commission
      - Includes five bills designed to improve states business environment.
    - Also before Governor is bill to impose a 2.5yr ban on Hydraulic Fracturing in Western Maryland.

## What's New at the State Level

- **Virginia:**
  - **Gov. Terry McAuliffe (D):**
    - Currently backing a bill for transportation infrastructure funding reform.
      - Includes new tax package to fund transportation projects.
      - Would not be fully in effect until 2021.
    - Emphasis on job creation in Tech and Energy area.
  - **VOSH:**
    - Updated crane certification rule to match Federal OSHA.
      - Seeks to extend deadline to ensure operator competency to November 2017, like OSHA.

## Federal Overview

- **Heading into home stretch of Obama Administration ... Issues:**
  - Will ambitious regulatory agenda come to fruition in 2 year period?
  - Will S&H issues be on Congress' radar screen in 2015?
  - Will delays continue at OIRA/OMB in releasing rules for comment or finalization?
  - Will regulatory reform legislation impact ongoing rulemaking?

## What About 2016 OSHA/MSHA Funding?

- New ballgame with Republic control of Congress
  - Transportation Funding – New Gas Tax or “User Fee.”
  - WOTUS regulations threatened by Congress?
- Spending for OSHA/MSHA in president’s budget calls for small increase (and cuts for NIOSH)
- Riders on FY 2016 Labor-HHS appropriations could include:
  - Freeze on finalization of crystalline silica rule and electronic rulemaking
  - Provisions barring further work on I2P2
  - Protections for VPP program
  - Retention of funding for MSHA State Grants Program

## Emphasis Programs

OSHA continues its National Emphasis Programs (NEPs)

- Federal OSHA emphasis areas include:
  - Combustible dust
  - Hazardous machinery (LOTO)
  - Amputations
  - Hexavalent Chromium
  - Lead
  - Isocyanates (paint, auto body repair)
  - Nursing and Residential Care Facilities
  - Primary Metals
  - Shipbreaking
  - Process Safety Management

## OSHA Regulatory Agenda

- Pre-rule stage:
  - Permissible Exposure Limits (PELs) – RFI published 10/14 and comments due 4/15 on methods of updating chemical and air contaminant protections
  - PSM – RFI issued requesting input on changes to standard (small business review to start 6/15)
  - BBP review (findings due 5/15)
  - Infectious diseases (SBREFA panel underway)

## OSHA Regulatory Agenda

- Proposed Rule Stage:
  - Crystalline Silica – could be finalized in late 2015 or early 2016 ... expect litigation or congressional intervention
  - Beryllium – SBREFA review complete, ANRPM due 1/15. Relatively few employers affected

## OSHA Regulatory Agenda

- Final Rule Stage –
  - Confined Spaces in Construction – rulemaking is over a decade in the making – final rule due 2015
  - Tracking of I/I (Electronic Reporting) – final rule slated for 8/15
- Long-Term Actions –
  - Combustible Dust
  - MSD Recordkeeping
  - I2P2

## OSHA's Silica Proposed Rule

- Establishes new PEL of 50  $\mu\text{g}/\text{m}^3$  and an action level of 25  $\mu\text{g}/\text{m}^3$
- Possible incorporation by reference of ASTM E1132 (general industry) and E2625 (construction)
- Preference for engineering and administrative controls but BARS job rotation as method of control
- Includes provisions for:
  - Measuring worker exposures to silica;
  - Limiting access to areas where workers could be exposed above the PEL;
  - Use of dust controls;
  - Use of respirators when necessary;
  - Medical exams for highly exposed workers;
  - Worker training; and
  - Recordkeeping.

## Electronic Recordkeeping Proposal

- Grows out of Recordkeeping NEP – and “public shaming” approach
- All employers with 250+ workers would have to submit I/I reports electronically on quarterly basis
- Employers between 20-250 workers in high hazard industries would have to submit annually (2009 DART rate in the BLS Survey of Occupational Injuries and Illnesses of 2.0 or greater)
- Same info as on OSHA 300/301 – OSHA estimates \$40 cost to employers ...

## PELs RFI

- RFI issued 10/10/14 – comments due 4/8/15
- Issue: Many PELs outdated, many chemicals have no PELs at all, legal hurdles preclude “group rulemaking”
- OSHA is reviewing its approach to managing chemical exposures, and seeks input on new approaches (in light of legal requirements)
  - Role of exposure modeling in feasibility analysis
  - Potential role of REACH (EU approach), HazCom and control banding
  - Sources of info about chemical hazards
  - Non-OEL approaches to chemical management

## Other OSHA Directives

- Severe Violators Enforcement Program (SVEP)
  - Citations issued in conjunction with hazards covered by NEPs trigger SVEP status and company-wide OSHA inspections, federal and state
- Field Operations Manual (FOM) updates
- Residential Construction Fall Protection
- Site-Specific Targeting (SST)
  - Identifies high risk employers in high-hazard industries – federal and state
  - Less likely to be used in 2015

## New Reporting Requirements

- Final Rule took effect 1/1/2015 – report to local office during normal hours or call 1-800-321-OSHA (6742)
- Updates list of industries that are exempt, due to relatively low I/I rates, using North American Industry Classification System (NAICS) and injury and illness data from the Bureau of Labor Statistics (BLS)
- Rule retains the exemption for any employer with 10 or fewer employees, regardless of industry classification, from having to routinely keep records.
- Rule expands the list of severe work-related injuries that **all** employers **must report** to OSHA.
  - The revised rule retains the current requirement to report all work-related fatalities within 8 hours
  - Adds the requirement to report all work-related in-patient hospitalizations, amputations and loss of an eye within 24 hours to OSHA. Employers only have to report an inpatient hospitalization, amputation or loss of an eye that occurs within 24 hours of a work-related incident

## OSHA “TRIAGE” ON REPORTS

- In determining whether OSHA will send an inspection team, they ask:
  - What was the injured EE doing just before injury;
  - What tools, equipment or materials was he using;
  - What directly caused the harm;
  - Is the hazard that caused the harm still in the workplace;
  - Could other persons potentially be harmed;
  - What steps have been taken to remove the hazard;
  - Has there been a similar incident or near miss?

## OSHA TRIAGE ON REPORTS

- Priority inspections for I/I reports will be given to Category 1 reports:
  - Fatalities or at least 2 persons hospitalized;
  - Injury to worker under age 18;
  - Employers with known history of multiple injuries (sme/similar events in past 12 mo);
  - Repeat offenders (those with history of egregious violations, willful and repeat violations, and failure to abate situations)
  - Employers in SVEP
  - Those employers covered by National Emphasis Program
- OSHA will also give priority to those workplaces with whistleblower complaints pending, those in VPP or SHARP, and those involving temporary workers or health issues



## Temporary Worker Safety

- Staffing agencies and host employers are *jointly responsible* for maintaining a safe work environment for temporary workers - training, hazard communication, PPE and recordkeeping/reporting.
- OSHA could hold both the host and temporary employers responsible for the violative condition(s) - and that can include lack of adequate training regarding workplace hazards.
- OSHA recommends that temporary staffing agency and host employer set out their respective responsibilities in their contract.
- OSHA says:
  - The key is communication between the agency and host
  - Staffing agencies must inquire into conditions that their workers will face at assigned workplaces and ensure the work environment is safe
  - Ignorance of hazards is no excuse
  - Host employer must protect temps in same manner as regular employees
  - **ALSO watch out for “contingent worker” issues including misclassification!**

## Residential Fall Protection

- If an employer is engaged in residential construction, but does not provide guardrail systems, safety net systems, personal fall arrest systems, or other fall protection allowed under 1926.501(b), a citation for violating 1926.501(b)(13) will be issued unless the employer can demonstrate the infeasibility or greater hazard.
- If the employer demonstrates infeasibility or a greater hazard, the CSHO must determine if the employer has implemented a fall protection plan meeting the requirements of 1926.502(k) (alternative measures to reduce or eliminate fall hazards).
- Fall protection plans under 1926.502(k) must be written and site-specific.

## Crystalline Silica NEP

- Latest version commenced 1/24/08 to identify and reduce/eliminate health hazards associated with occupational exposure
- Started as Special Emphasis Program in 1996 – ongoing (tie-in with rulemaking)
- Addresses workplaces including: manufacturing, construction, maritime and agriculture (esp. sandblasting, foundries, tunnelling, cement cutting, demolition, masonry, and granite cutting)
- At least 2% of annual OSHA inspections must be silica-related!
- Inspections include: employee exposure monitoring, evaluation of engineering and work practice controls, respiratory protection, hazard communication, housekeeping and hygiene practices, employee exposure and medical records, abrasive blasting (noise and exposure to metals as well as silica, and evaluation of ventilation)

## EO 13650 - Chemical Security

- OSHA has significant role in the multi-agency Chemical Facility Safety & Security Working Group aimed at improving chemical facility safety and security and reducing risks to workers and surrounding communities posed by hazardous chemicals at these facilities.
- Agencies include: DOL, DOJ, EPA, DHS, DOA
- In 12/14, Dr. Michaels told Senate OSHA is considering changes to emergency response standards, modernizing and updating the PSM standard and policies, regulatory changes to improve ammonium nitrate safety, and developing targeted outreach and guidance products

## SVEP

- Once under SVEP – remain there for at least 3 years!
- Will trigger inspections at all worksites based on certain types of violations found during initial inspections
- Repeat citations or failure to abate notices based on a serious violation related to the death of an employee or three or more hospitalizations.
  - Violations under this section do not need to be classified as “High Emphasis Hazards.”
- A “High Emphasis Hazard” is one based on a fall or a specific National Emphasis Program (NEP)
- Non-Fatality/Non-Catastrophic High Emphasis Hazards. An inspection which finds two or more Willful or Repeat violations or failure to abate notices based on high gravity, serious violations due to a High Emphasis Hazard.
- All “egregious” enforcement actions (cases where OSHA has alleged instance-by-instance violation of a particular standard) will be considered SVEP cases.

## Field Operations Manual Changes

- State plan citation history **may** be used to document employer knowledge to support a willful violation, and to determine eligibility for the history penalty reduction factor.
  - It **may not** be used to support a repeat violation.
- The CSHO is required to review any written hazard assessment that the employer has made in compliance with § 1910.132(d) to determine appropriate personal protective equipment.
- Extensive guidance is provided on interviews of non-managerial employees.

## General Duty Clause

- Section 5(a)(1) of OSH Act permits issuance of citations to exposing employer for recognized hazards that could cause death or serious bodily injury
- Necessary elements to prove a violation of the general duty clause:
  - ▶ The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
  - ▶ The hazard was recognized;
  - ▶ The hazard was causing or was likely to cause death or serious physical harm; and
  - ▶ There was a feasible and useful method to correct the hazard.
- Actual exposure(s) must have occurred within the six months immediately preceding the issuance of the citation to serve as a basis for a violation, except where the employer has concealed the violative condition or misled OSHA.

## General Duty Clause

- Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or “common-sense” recognition.
- Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the OSHA inspection.
- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data, may also show employer knowledge of a hazard.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
- An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard.

## GDC and “Industry Recognition”

- Industry recognition of a hazard can be established in several ways:
  - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
  - Manufacturers’ warnings on equipment or in literature;
  - Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered;
  - Government and insurance industry studies, if the employer or the employer’s industry is familiar with the studies and recognizes their validity;
  - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred;
  - If the relevant industry participated in the committees drafting national consensus standards, this can constitute industry recognition.

## OSHA Revised Penalties

- OSHA has made changes in administrative procedures that could significantly increase the average penalty – impacts what OSHA area directors can offer in settlement.
- The issuance of “egregious” violations is increasing, and this allows a penalty to be assessed for each occurrence of a problem or each worker affected.
- Area directors can offer an employer with 250 or fewer employees a 20 percent penalty reduction if it agrees to retain an independent safety and health consultant.
- **Repeat Violations:** The time period for considering the classification of repeated violations will be increased from three to five years.

## Other Enforcement Initiatives

- Higher penalties and more stringent enforcement by state plan states because this is one of OSHA's benchmarking criteria to measure program effectiveness
- Granting union reps "walkaround rights" at non-union workplaces
- Inclusion of I2P2 requirements, bar on I/I incentives, and corporate wide conditions as conditions of settlement
- More emphasis on prosecuting whistleblower violations under Section 11(c) of OSH Act
  - OSHA has formed Whistleblower Advisory Committee to develop recommendations for improved enforcement under OSH Act and other environmental/transportation whistleblower provisions enforced by OSHA
- Suggested PELs table and "safer chemicals" substitution list posted by OSHA ... GDC implications???

## MSHA Update

- Regulatory agenda quiet – latest initiatives finalized involved coal dust, refuge chambers, and proximity detection systems for continuous mining machines
- Future rulemaking: silica standard (follow OSHA's lead), hazcom? (to codify GHS – for now informal adoption), strengthen diesel exhaust standards UG (possible spread to surface mines?)
- Civil penalty system changes – higher fines possible, impact on contractors
- New "Rule to Live By" calculator to target mine operators for enhanced enforcement based on rate of ISSUED RTLB citations – impact on contractors?
- Remember – At MSHA –regulated worksites, contractors are under MSHA jurisdiction and may require specialized training
- MSHA has: strict liability, warrantless search authority, mandatory inspections, mandatory (higher) penalties including penalties against "agents" of management, no statute of limitations!

## Key Cases of Interest

- *Fiberdome* – case settled but was example of using GDC to enforce more stringent PELs than those codified by OSHA, based on “industry recognition” that PELs were not sufficiently protective of workers
- *Aracoma Widows* – affirms that federal inspectors can be personally liable for “negligent” inspections that do not detect hazards that subsequently kill/injure workers (expansion of US Supreme Court decision in *United States v. Olsen*) – US Govt settled case in 2014!
- *Grinnell* – OSHA can use subpoenas to obtain copies of insurance company audits and worker’s compensation files to use against employer
- *Warrior Coal (US Ct of Appeals)* – Held MSHA investigators had right to home addresses and phone numbers of workers so interviews can be conducted off-site without employer’s knowledge.

## Additional Legislative Action

- Protecting America’s Workers Act could be reintroduced but probably DOA
- Possible cherry picking of items from PAW Act for individual consideration: public sector worker protections, whistleblower protection enhancement, heightened civil and/or criminal penalties
  - Republican initiatives could include codification of VPP, third party audit or audit privilege legislation
- Mine Safety legislation - Byrd Mine Act reintroduced – event driven
- Appropriations riders
- Oversight hearings on agency effectiveness, use of “guidelines” in lieu of rules, and OSHA’s expansive use of General Duty Clause
- Regulatory Accountability Act has passed House ... requires more scientific basis for rulemaking, may lead to “prior approval” by Congress of rules (possible Constitutionality issue ... )

# Questions????

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