

Regulatory Outlook: How the Administration's Agenda May Impact OSHA

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Mid-Atlantic Construction Safety Conference

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Agenda

- What's Happening in Administration
 - Administration's Approach
 - Congressional Methods of Change
 - Secretary of Labor Alex Acosta
 - What Does This Mean For Employers
- What Has Happened and May Happen in 2017?
 - Civil Penalty Increase, Volks Rule
 - Electronic Recordkeeping, Anti-Retaliation
 - Fair Pay and Safe Workplaces,
 - Silica,
 - Lock Out Tag Out, Walking Working Surfaces,
 - Beryllium, Severe Injury Reporting
 - Take Aways

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What's Happening in Administration

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Administration Approach

- Pause Regulations - Priebus Memo: Issued January 20, 2017
 - Common for New Administration to “manage” regulatory process until cabinet members and staff in place
 - **Required** 60 day delay for regulations not in effect
 - **Withdraw** regulations submitted but not published
 - **Halt** publication of regulations until approved by Trump-approved Administration official
 - Impact: allows industry to lobby against new regulations, withdraw of ones “in limbo” and modification to guidance document

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Administration's Approach

- Overhaul Agencies - Executive Order 13781
 - “Eliminate unnecessary agencies, components of agencies, and agency programs”
 - Must have plan for each agency within 6 months
 - Focus on costs of agency programs,
 - Should program be managed by state or local governments or the private sector
- Decrease Regulations - Executive Order 13771
 - 2 for 1 regulations “Reducing Regulations and Controlling Regulatory Costs”
 - Costs of new and repealed regs must have \$0 impact
 - New guidance issued April 5th. Costs can be reduced through non-regulation costs such creating electronic filing for otherwise paper forms

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Administration's Approach

- Reform Regulatory Process – Executive Order 13777 – “Enforcing the Regulatory Reform Agenda”
 - Creates regulatory task forces to evaluate regulations and identify ones for modification or repeal
 - Creates regulatory reform officers to oversee implementation of regulatory reform projects
 - By April 25, 2017 head of agency must appoint officer
- May issue new letters of interpretation that are “employer friendly”
- May limit funding for enforcement efforts of rules
- Possibly use pending litigation to “modify” position on rule

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Congressional Methods of Change

- Congressional Review Act
 - Enables Congress to repeal regulations by joint resolution
 - Requires only a simple majority
 - Impacts recently enacted rules by Obama administration
 - Eliminates agencies ability to promulgate a similar rule
- Budget Cuts
 - Trump Proposed: 2.5 billion dollar cut
 - Lowest levels since 1970s
- 2017 Continuing Resolution ends April 28, 2017

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Sec. of Labor Nominee – A. Acosta

- Dean of Florida International University College of Law (Since 2009)
- U.S. Century Bank Chairman
- March 22, 2017 Confirmation Hearing Senate HELP committee held
- Supports the executive orders and goals of the Trump administration
- Full Senate confirmation hearing expected soon
- Would not commit to preserving silica rule “as is”

“The secretary of labor should really be called the secretary of the workforce because the issue for the workers today is not whether they belong to a union, it is whether they have the skills to adapt to the changing marketplace and to create, find, or keep good paying jobs.”

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What Does This Mean for Employers?

- Pro-Employer Administration
- Open Forum to Discuss Change
- Focus on Job Creation and Not on Regulations
- Less or No New Regulations
- Less Enforcement
- Investment in Cooperative Programs
- More Time to Comply
- Acting Solicitor Nicholas Green stated “I think you’ll see in the new administration that we will do a lot more outreach and attempt to assist, particularly, small employers who may not have the ability to have the excellent counsel like the people in this room.”

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What Has Happened and May Happen in 2017

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Civil Penalty Increase

- Civil penalty increase
- “Civil Monetary Penalties Inflation Adjustment Act”
- \$12,675 Max for OTS and Serious
- \$126,749 Max for Willful and Repeat
- “Egregious” enforcement policy allows OSHA to impose maximum penalty PER EXPOSED EMPLOYEE for a single violation
- OSHA did not have authority to increase penalties because OSH Act sets limit at 1990 penalties
- Legislation has been proposed to amend the OSH Act
- Administration may attempt to “roll back” the increases

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“Volks” Rule

- March 22, 2017 - Senate voted to repeal rule that allowed OSHA to cite employers for recordkeeping violations outside 6 month statute of limitations (awaiting President’s signature)
- Rule took effect January 2017, finalized December 2016
- OSHA responded to an unfavorable court decision – *Volks Constructors v. Sec’y of Labor*, 675 F.3d 752 (D.C. Cir. 2012), that said OSHA could not issue citations for failing to record an injury or illness beyond the six-month statute of limitations set out in the Act
- The rule - “Clarification of Employer’s Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness” said employers had a continuing obligation to maintain and record as long as records are required to be kept (FIVE YEARS)

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Electronic Recordkeeping

- Requires Employers With
 - 250+ workers to file electronic reports of all injuries and illnesses annually – Form 300A only in 2017, and adds Form 300 and Form 301 thereafter
 - Smaller employers (20-249) in high-hazard industries need to submit Form 300A only annually
 - Clarifies an employee’s right to report injury and illnesses to their employer without fear of retaliation, and makes it citable to violate any of the worker’s rights under Section 11(c) of OSH Act
- “Tracking of Workplace Injuries and Illnesses”
 - December 1, 2016 anti-discrimination provisions took effect
 - July 1, 2017 employer information to be published online

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Electronic Recordkeeping

- Litigation
 - Texas case challenging “safety incentive” prohibitions of rule requesting court to find rule is unlawful concerning limitations on incident-based employer safety incentive programs and routine mandatory post-accident drug testing programs (TEXO ABC/AGC v. Perez, N.D. Tex., No. 16-1998)
 - Oklahoma federal court case challenging implementation of rule because it 1) online database violates employers’ First and Fifth Amendment rights, 2) is arbitrary, capricious, and otherwise contrary to law. National Association of Home Builders of the United States et al. v. Perez et al., No. 5:17-cv-00009 (W.D. Okla. Jan. 4, 2017)

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Anti-Retaliation - Sec. 11(c)

- Protects workers from retaliation for engaging in protected activity if complaint filed within 30 days with OSHA (federal or state agency)
 - Speaking privately to OSHA
 - Testifying against employer in OSHA case
 - Making internal safety complaints
 - Making formal complaint to OSHA
- Growing OSHA enforcement area
- Remedies include: reinstatement, back pay, awarding of retroactive seniority, benefits
- Currently, no private right of action (some states allow wrongful discharge suits because of this under “public policy” exception)

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Silica

Area	Date For Compliance	Codified
General Industry / Maritime	6/23/18 Comply with most requirements	29 CFR 1910.1053
Construction / Shipyard	9/23/17 Achieve most requirements (can adopt “Table 1” controls in lieu of exposure monitoring)	29 CFR 1926.1153

Entity	Current Limit	New PEL Limit
General Industry	100 ug/m ³ (Permissible Exposure Limit)	50 ug/m ³
Construction / Shipyard	250 ug/m ³ (Permissible Exposure Limit)	50 ug/m ³
NIOSH	50 ug/m ³ Recommended Exposure Limit (1970s)	
ACGIH	25 ug/m ³ (Threshold Limit Value)	

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Crystalline Silica Final Rule

- Includes health findings of causal relationship between occupational respirable crystalline silica exposure and silicosis, pneumoconiosis, lung cancer, renal disease & autoimmune disorders (impact on Worker's Comp and Tort litigation)
- Requires: written exposure control plan, worker training, exposure monitoring, medical surveillance for workers exposed above action level, recordkeeping, regulated areas (GI only), competent person (construction only)
- OSHA sued by industry and unions – case in US Ct. of Appeals DC Circuit - effective dates were not stayed

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Lock Out Tag Out

- October 2016 OSHA proposed change to LOTO 1910.147 under OSHA's Standards Improvement Project
 - 18 changes proposed that have little impact except LOTO
 - Phase 4 of Project
- Rule hasn't changed since 1989
- Purpose is to prevent release of hazardous energy when employees perform service or maintenance
 - "service and maintenance of machine and equipment in which unexpected energization or start up of machine or equipment or release of stored energy could harm employees"
- Proposal is to modify lock out tag out standard to remove term "unexpected energization"

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Lock Out Tag Out

- Term “unexpected” not defined by standard, but by Court (Reich v. General Motors Corp., Delco Chassis Div.)
 - Court held that system used had audio and visual cues to warn employees of startup and thereby notified worker of “unexpected” movement
- OSHA wants to clarify that rule covers OSHA startup operations and other potential sources of stored energy that could injure a worker and audio or visual cues are not a replacement for LOTO policies
- Take away: lock out of all energy sources would be required

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Beryllium



- Reduces PEL to 0.2 micrograms per cubic meter of air, averaged over 8 hours
- Establishes short-term exposure limit for beryllium of 2.0 micrograms per cubic meter of air, over a 15-minute sampling period
- Requires
 - Engineering and work practice controls (such as ventilation or enclosure) to limit exposure
 - Respirators use when overexposure
 - Control worker access to high-exposure areas
 - Written exposure control plan
 - Training on hazards
 - Medical exams

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Beryllium



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- Effective May 20, 2017, original Jan. 9, 2017
- Prevent chronic beryllium disease (CBD) and lung cancer
- Final rule included construction and shipyards
- Litigation
 - 8th Circuit case challenging rule pending

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Walking Working Surfaces

- Walking-Working Surfaces Rule released 11/18/16 – effective 1/17/17
- Mostly industry-friendly (allows more flexibility to use PFA systems in lieu of guardrails and barrier in general industry) –
- \$300 mil/yr cost projection
- May be rescinded under Congressional Review Act
- Litigation: DC Circuit

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Walking Working Surfaces

- Slips, trips, and falls constitute the majority of general industry accidents
 - About 20% of all disabling occupational injuries result from falls (202,066 serious accidents/year)
 - Data attribute 15% of all accidental deaths to slip/trip/fall incidents, second only to motor vehicles as a cause of fatalities (falls results in 345 fatalities/yr)
- Falls from ladders account for 20% of all fatal and LWD injuries in general industry
- Hazards to GI industry employees often arise from level surfaces such as floors (usually less serious injuries), but GI also covers worker falls from ladders, scaffolds, towers, aerial lifts, outdoor signs, roof hatches and similar heights

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Walking Working Surface Timeline

- Most provisions took effect January 17, 2017 (60 days from publication) except:
 - Ensuring exposed workers are trained on fall hazards (May 17, 2017)
 - Ensuring workers who use equipment covered by the final rule are trained (May 17, 2017)
 - Inspecting/certifying permanent anchorages for rope descent systems (November 20, 2017)
 - Installing PFA or ladder safety systems on new fixed ladders over 24 feet and on replacement ladders and sections (November 19, 2018)
 - Ensuring existing fixed ladders over 24 feet (including on outdoor advertising structures) are equipped with a cage, well, PFA system, or ladder safety system (November 19, 2018), and
 - Replacing cages and wells (used as fall protection) with ladder safety systems or PFA systems on all fixed ladders over 24 feet high (November 18, 2036)

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Severe Injury Reporting

- Effective January 1, 2015 – report to local office during normal hours or call 1-800-321-OSHA (6742) (or file on line)
- 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 (from time of incident).

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Prioritization of Reports

- Fatalities or at least 2 persons hospitalized;
- Injury to worker under age 18;
- Employers with known history of multiple injuries (same/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, and those involving temporary workers or health issues

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Reporting May Trigger Inspection

- 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?

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Take Aways

- Safety is still a priority to protect workers, decrease worker's comp claims, maintain consistent production
- Employers should maintain "internal" safety goals whether the Administration is focused on them or not
- Lobby for or against the regulations / executive orders
- Inspections and fines may decrease but workers can always file hazard complaints that trigger inspection
- Continue internal audits to reduce injuries & accidents
- Evaluate your policies and procedure
- Don't get comfortable

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Questions?

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