

OSHA Under the **Trump Administration**

September 27, 2017

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ERIC J. CONN is Chair of the OSHA • Workplace Safety Practice Group at **Conn Maciel Carey**, where he focuses his practice on all aspects of occupational safety & health law:

- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
- Responds to and manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and chemical releases
- Handles all aspects of OSHA litigation, from criminal prosecutions to appeals of citations
- Writes & speaks regularly on safety & health law issues
- Conducts safety training & compliance counseling

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Agenda

Pres. Trump's Deregulatory Agenda

Electronic Recordkeeping Rule

Pres. Trump's 1st Regulatory Agenda

Future of OSHA Enforcement under Trump



Pres. Trump's Efforts to Slash Government Regulations



"Deconstruction of the Administrative State"

Trump from Campaign Trail: Strive to keep fed government out of workplace, give more jurisdiction to States, and repeal rules recently promulgated by Obama Admin.

"Deconstruction of the administrative state.... If you look at these cabinet appointees, they were selected for a reason and that is the deconstruction. The way the progressive left runs, is if they can't get it passed, they're just going to put in some sort of regulation in an agency. That's all going to be deconstructed"





Exec. Order 13771 2-For-1 Regulations

E.O. 13771 (1/30/17): "Reducing Regulation and Controlling Regulatory Costs"

- Require agencies to eliminate 2 regs for each 1 promulgated
- Agencies must ensure total incremental costs of new & repealed regs not exceed \$0 unless required by law or by advice of OMB



January 30, 2017

Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs

EXECUTIVE ORDER

REDUCING REGULATION AND CONTROLLING REGULATORY COSTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 et seq.), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Purpose. It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures that for every one new regulation issued, at least two prior regulations be managed and controlled through a budgeting process.

Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall dentify at least two existing regulations to be repealed.

- 4/15/17 - OMB guidance how E.O. to be implemented



Congressional Review Act

- Congressional Review Act of 1996 expedited procedures for Congress to repeal federal Agency regulations by joint resolution

 Sec. 251. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING.
- Simple majority vote only
- CRA repeal prevents agency from ever promulgating a "substantially similar" reg
- Pres. signs w/in 60 "Legis.
 Days" of Final Rule

"Sec.

801. Congressional review.

802. Congressional disapproval procedure.

803. Special rule on statutory, regulatory, and judicial deadlines.

804. Definitions.

805. Judicial review.

806. Applicability; severability.

807. Exemption for monetary policy.

808. Effective date of certain rules.

"\$801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(ii) a copy of the rule;

(iii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(iii) the proposed effective date of the rule shall submit to the Comptroller General and make available to each House

diately after chapter 7 the following new chapter:

Title 5, United States Code, is amended by inserting imme-



Congressional Review Act

- Only useful when outgoing Pres. enacts "midnight" rule, and the Pres. is replaced by Pres. and Congress of opposing party
- Used only once before in transition from Clinton to Bush,
 Clinton's "midnight" OSHA Ergonomics Standard repealed
- Heavy use in Trump Admin. (some awaiting Trump's signature)
- OSHA-related regulations repealed by CRA
 - DOL rule re: "Clarification" of Continuing Obligation to Make
 Accurate Injury and Illness Records" (Volks Rule)
 - FAR/DOL "Fair Pay & Safe Workplaces" (Contractor Blacklisting)



Electronic Injury and Illness Recordkeeping Rule



Injury Data Electronic Submission

employee representatives, potential employees,

astomers, potential customers, and public

Final Rule for Injury & Illness Recordkeeping Data Submission

3 Major Components:

- 1. Establishments w/ 250+ workers must annually submit to OSHA 300 Logs, 301 Incident Reports, and 300A Annual Summaries
- 2. Establishments w/ 20+ workers in certain "High Hazard Industries" to annually submit 300As

OSHA Fact Sheet Final Rule to Improve Tracking of Workplace Injuries and Illnesses at Occupational Safety and Health Act, employers must provide their workers with worksites free of recognized serious hazards. In order to help prevent work-related injuries and illnesses, the Occupational Safety and Health Administration (OSHA) has for decades required employers to keep track of their workers' injuries and illnesses by recording them in what is often called an "OBHA log. The rule will also provide OSHA with data to assist January 1, 2012, OSHA will revise its requirements for recording and submitting the agency in improving allocation of compliance assistance — help OSHA provide to employers seconds of workplace injuries and illnessess to who want to improve their safety standards — and quire that some of this recorded information enforcement resources, expanding the Agency's he submitted to OSHA electronically for posting ability to identify, target and remove safety and health hazards, thereby preventing workplace We are taking information that employers are ryuries, illnesses and deaths. It will also enable already required to collect and using these data OSHA to conduct more riporous evaluations of the to help keep workers safer and make employers. impact of government injury prevention activities. the public, and the government better informed about workplace hazards. Releasing the data in In addition, behavioral science suggests that standard, open formats with public disclosure of the data will "nudge employers to reduce work-related injuries and Encourage employers to increase their efforts illnesses in order to demonstrate to investors, to prevent worker injuries and illnesses, and, job seekers, customers, and the broader public pelled by their competitive spirit, to race that their workplaces provide safe and healthy to the top in terms of worker safety; and work environments for their employees. Enable researchers to examine these data in Currently, employers cannot compare their innovative ways that may help employers make injury experience with other businesses in their their workplaces safer and healthier and may industry; they can only compare their experience also help to identify new workplace safety with their industry as a whole. Access to hazards before they become widespread. establishment-specific data will enable employers In addition, the final rule includes provisions to benchmark their safety and health performance that encourage workers to report work-related against industry leaders, encouraging them to injuries or illnesses to their employers and improve their safety programs, prohibit employers from retaliating against Finally, public access to very large sets of workers for making those reports. workplace injury and illness data will provide OSHA expects this new rule will help improve public health researchers with unprecedented workplace safety through expanded access to opportunities to advance the fields of injury and timely, establishment-specific injury and illness illness causation and prevention research. information for OSHA, employers, employees,

3. OSHA's original intent was to publish the injury data

Background

In 2013, OSHA issued a proposed rule to improve tracking of workplace injuries and

illnesses through the electronic collection of establishment-specific injury and illness data



Delayed Reporting Deadlines

Recordkeeping Forms for Year

Establishments w/ 250+ **Employees**

Establishments w/ 20-249 **Employees**

Deadline to **Submit Forms**

2016

300As

300As

Dec. 1, 2017

2017

300 Logs, 300As & 301s

300As

July 1, 2018

2018 and thereafter

300 Logs, 300As & 301s

300As

March 1, 2019 (March 1st each subsequent year)



Status and Future of E-**Recordkeeping Submission**

- May 17, 2017 OSHA announced indefinite delay of July 1st deadline to submit injury data
- June 28, 2017 OSHA published a Notice of Proposed Rulemaking to extend injury data submission deadline to December 1, 2017
- Delay intended to allow new Administration time to decide what it wants to do with the rule (e.g., repeal / amend)
- August 1, 2017 OSHA took the online portal live

Trade Release

U.S. Department of Labor Occupational Safety and Health Administration Office of Communications Washington, D.C. www.osha.gov

For Immediate Release July 14, 2017 Contact: Office of Communications Phone: 202-693-1999

OSHA launches application to electronically submit injury and illness data on August 1

WASHINGTON - The Occupational Safety and Health Administration will launch on Aug. 1, 2017, the Injury Tracking Application (ITA). The Web-based form allows employers to electronically submit required injury and illness data from their completed 2016 OSHA Form 300A. The application will be accessible from the ITA webpage.

Last month, OSHA published a notice of proposed rulemaking to extend the deadline for submitting 2016 Form 300A to Dec. 1, 2017, to allow affected entities sufficient time to familiarize themselves with the electronic reporting system, and to provide the new administration an opportunity to review the new electronic reporting requirements prior to their implementation.

The data submission process involves four steps: (1) Creating an establishment; (2) adding 300A summary data; (3) submitting data to OSHA; and (4) reviewing the confirmation email. The secure website offers three options for data submission. One option will enable users to manually enter data into a web form. Another option will give users the ability to upload a CSV file to process single or multiple establishments the same time. A third option will allow users of automated recordkeeping systems to transmit data



Electronic Injury and Illness Recordkeeping Rule

Anti-Retaliation Elements



Final Rule on Injury Reporting Policies

As of December 1, 2016, Employers were required to:

- Inform employees of right to report workplace injuries
- Inform employees of right to report work related injuries free from discrimination or retaliation
- Update injury reporting policies to remove "unreasonable" elements that may discourage employees from reporting (e.g., discipline for late reporting or violating vague safety rules, blanket post-injury drug testing, safety incentive or compensation programs tied to the injury rates)



Status of Anti-Retaliation Elements of the Rule

- Anti-Retaliation Elements (e.g., limits to post-incident drug tests and safety incentives) - currently in effect
- OSHA actively pursuing violations, but only where there is an aggrieved employee (first citations just issued)
- Obama's DOL filed a motion to dismiss Industry challenge in final days of Admin.
- Since Pres. Trump's inauguration, DOL withdrew motion to dismiss and moved to stay to allow time to reconsider Rule
- Legal challenge "stayed" (closed)



Trump Administration's First Regulatory Agenda



Unified Agenda of Regulatory & Deregulatory Actions

1st Regulatory Agenda issued by Trump Administration

Published on July 20, 2017

 IDs rulemaking priorities fed agencies will undertake

 Indicates prioritization of current rulemaking efforts and their status in the rulemaking process



Identifies new and cancelled rulemaking efforts



Rules Removed from OSHA's Reg Agenda

Comprehensive rule addressing combustible dust;

Updates to various chemical PELs;

Hearing protection in Construction; and

Vehicle backing hazards in general industry and construction



Rules Moved to "Long-Term Actions"

- Numerous rules moved from Active to "Long-Term Actions"
- Effectively indefinitely delays progress on these rules
- Major rulemakings moved from active agenda:
 - Workplace Violence
 - Reforms to PSM standard
 - Emergency Response and Preparedness
 - Infectious Disease in Healthcare



Revisiting Electronic Recordkeeping Rule

- Two actions related to OSHA's E-Recordkeeping rule
 - 1. Extends deadline to make first electronic submissions of 300A data to December 1, 2017; and
 - 2. Specifies intent "to issue proposal to reconsider, revise, or remove provisions" of E-Recordkeeping rule
- Predictions for Possible Revisions to Rule:
 - Limit scope of injury data required to be submitted
 - Increase in threshold DART rate for "High Hazard Industry"
 - Increase threshold of employees to be covered by standard
 - Eliminate or cut scope of anti-retaliation provisions



OSHA Enforcement Under a Trump Administration



Changing Enforcement Philosophy

Expect OSHA under Trump / Acosta to scale back

Enforcement-Heavy Philosophy

 Shift budget / personnel back to balance enforcement and compliance assistance

- Restore respect for / value of VPP
- Revise Field Operations Manual and Enforcement Policies that inflated civil penalties





Change to "Repeat" Violation Policies?





OSHA's Repeat Violation Policies

OSHA Historically:

- Treated workplaces as individual, independent establishments
- Limited its review of employers' OSHA records to 3 years
- Reactive Philosophy (less likely to revisit workplaces within a few years)

OSHA Under Obama:

- Treats workplaces in a corporate family as 1 workplace
- Look back 5 yrs at employers' record of enforcement
- Proactive Targeting (more follow-up inspections / hand select past violators for inspection)



Focus on Repeat Violations

	2002	2005	2008	2011	2012	2013	2014	2015	2016
Serious	58,845	61,018	67,052	62,115	57,112	56,661	49,616	47,934	42,984
Repeat	1,867 2.4%	2,350 2.7%	2,817 3.2%	3,229 3.7%	3,034 3.8%	3,193 4.0%	2,968 4.4%	3,088 4.7%	3,146 5.3%
Willful	331	747	517	594	423	319	439	527	524



OSHA's Repeat Violation Policies

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OSHA Under Trump:

- Return to 3 year look back period?
- Extend exemptions due to recent inspections?
- Retire numerous emphasis programs and restore Reactive Inspection Focus?
- Change successorship analysis to return to alter ego model?



End of Public Shaming?

Regulation By Shaming



"In some cases, 'regulation by **shaming'** may be the most effective means for OSHA to encourage elimination of lifethreatening hazards, and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger. To do this, we will issue more hard-hitting press releases that explain more clearly why we cited a specific employer."

Enforcement Press Releases

2003-2008 889 (148 / year)

2011-2016 2,780 (463 / year)

Since Jan. 20, 2017

15
(20 / year)

the **OSHA DEFENSE** report



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2017 **OSHA WEBINAR** series

Top 5 OSHA Issues in 2017 Wednesday, January 25th

Slips, Trips and Falls Rule Thursday, February 8th

<u>Standards Improvement Project: Changes to LOTO</u>
Tuesday, March 28th

New Cal/OSHA Enforcement Issues
Tuesday, April 11th

OSHA's New E-Recordkeeping & Anti-Retaliation Rule
Tuesday, May 16th

Interpretations and Variances: New Regulatory Strategy
Tuesday, June 6th

Multi-and Joint-Employers, Contractors and Temps
Tuesday, July 11th

OSHA Status of Pres. Trump's De-Regulatory Agenda
Tuesday, August 15th

OSHA's New Leadership Team Tuesday, September 12th

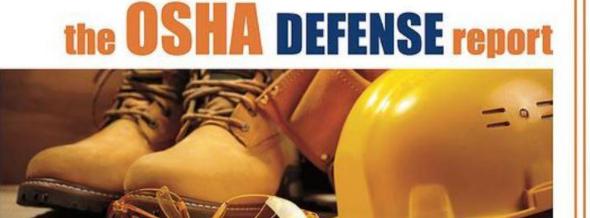
Addressing Employee Complaints
Tuesday, October 17th

OSHA's Fatality & Injury Reporting
Tuesday, November 14th

OSHA PSM and EPA RMP Update
Tuesday, December 12th



Check out our OSHA Blog:



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www.OSHADefenseReport.com

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QUESTIONS?





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