OSHA Under the Trump Administration

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- 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
Agenda

1. Pres. Trump’s Deregulatory Agenda
2. Electronic Recordkeeping Rule
3. Pres. Trump’s 1st Regulatory Agenda
4. 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 . . . .”
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- Agencies must ensure total incremental costs of new & repealed regs not exceed $0 unless required by law or by advice of OMB
- 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

- 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
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• Used only once before – in transition from Clinton to Bush, Clinton’s “midnight” OSHA Ergonomics Standard repealed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• OSHA-related regulations repealed by CRA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

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

3. OSHA’s original intent was to publish the injury data
Delayed Reporting Deadlines

<table>
<thead>
<tr>
<th>Recordkeeping Forms for Year</th>
<th>Establishments w/ 250+ Employees</th>
<th>Establishments w/ 20-249 Employees</th>
<th>Deadline to Submit Forms</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016</td>
<td>300As</td>
<td>300As</td>
<td>Dec. 1, 2017</td>
</tr>
<tr>
<td>2017</td>
<td>300 Logs, 300As &amp; 301s</td>
<td>300As</td>
<td>July 1, 2018</td>
</tr>
<tr>
<td>2018 and thereafter</td>
<td>300 Logs, 300As &amp; 301s</td>
<td>300As</td>
<td>March 1, 2019 (March 1st each subsequent year)</td>
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</table>
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
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?

Repeat Violations

An employer’s violation may be characterized as Repeat if:

- The Same Employer
- Received a prior citation for the same or substantially similar condition or hazard
- The prior citation became a Final Order of the federal OSH Review Commission
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

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<tbody>
<tr>
<td>Serious</td>
<td>58,845</td>
<td>61,018</td>
<td>67,052</td>
<td>62,115</td>
<td>57,112</td>
<td>56,661</td>
<td>49,616</td>
<td>47,934</td>
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<td>Repeat</td>
<td>1,867</td>
<td>2,350</td>
<td>2,817</td>
<td>3,229</td>
<td>3,034</td>
<td>3,193</td>
<td>2,968</td>
<td>3,088</td>
<td>3,146</td>
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<td>Willful</td>
<td>331</td>
<td>747</td>
<td>517</td>
<td>594</td>
<td>423</td>
<td>319</td>
<td>439</td>
<td>527</td>
<td>524</td>
</tr>
</tbody>
</table>

Repeat Violations Percentage:

- 2002: 2.4%
- 2005: 2.7%
- 2008: 3.2%
- 2011: 3.7%
- 2012: 3.8%
- 2013: 4.0%
- 2014: 4.4%
- 2015: 4.7%
- 2016: 5.3%
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?
“In some cases, ‘regulation by shaming’ may be the most effective means for OSHA to encourage elimination of life-threatening 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)
2017 OSHA WEBINAR series

Top 5 OSHA Issues in 2017
Wednesday, January 25th

Slips, Trips and Falls Rule
Thursday, February 8th

Standards Improvement Project: Changes to LOTO
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:

www.OSHADefenseReport.com
QUESTIONS?
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