



Managing OHS in a Post-OSHA World

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Presented By

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Abrams is a professional member of ASSP and is an active member of the National Safety Council, where she was awarded the Distinguished Service to Safety Award (DSSA) in 2017. She is also an Avetta Fellow. Abrams has coauthored several textbooks on employment law, occupational and mine safety and health, and is a regular columnist on safety law issues for multiple magazines.

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Overview

- In the deregulatory environment, OSHA (and OSHRC) may be on the endangered species list – legislation to abolish OSHA/OSHRC is pending now before House Ed & Workforce Cmte.
- Turmoil at the DOL may hamper OSHA's ability to adequately fund its programs in FY 2027 and beyond
- Rulemaking activity is focused on DE-regulation
- Remaining action items – such as Heat Illness Prevention rule – are unlikely to come to completion
- Any NEW rules will face legal challenges due to recent SCOTUS decisions
- Any NEW rules that are adopted will require elimination of 10 EXISTING rules
- Rules from Biden Admin have already been overturned (Joint Employer) or indefinitely stayed (MSHA silica rule) while they await replacement by new regulatory requirements favored by industry

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Who's on First?

- **US Dept of Labor: Secretary Lori Chavez DeRemer – GONE!**
- **OSHA Assistant Secretary CONFIRMED 10/7/25**
 - David Keeling (consultant, former OHS specialist for UPS and Amazon – transportation safety background)
- **MSHA Assistant Secretary CONFIRMED 10/7/25**
 - Wayne Palmer (Executive VP, Essential Minerals Assn. – and MSHA Deputy in Trump 1.0)
- **OSHRC & FMSHRC: OSHRC lacks quorum to conduct business; FMSHRC had one commissioner abruptly removed (term ends 2028) in May 2026 and dissolved Pittsburgh office (firing one ALJ)**
- **Trump has asserted control over independent agencies and claims right to fire ALJs – likely to face legal battle!**



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Good News: OSHA Penalty Policy for Small Businesses

- OSHA has announced broadening of penalty reductions for which small employers are qualified, if they have no history of repeated violations and/or act to immediately abate a hazardous condition
- OSHA now offers a 70% penalty reduction for business up to 25 employees (previously was limited to businesses with 10 or fewer employees)
- A 30 % size reduction in penalty is now available to employers with 26 to 100 workers
- Employers with 101 to 250 workers may be eligible for a 10 percent size reduction
- A 15 % penalty reduction is now available to employers that immediately take action to address a hazard
- Employers who have never been inspected by OSHA or an OSHA state plan, as well as employers that have been inspected in the previous five years with no repeat, serious, willful, or failure-to-abate violations, can qualify for a 20 percent penalty reduction

VPP Program Update Coming

Key updates planned for the VPP include:

- **Modernization Efforts (2025):** The program is expanding to include a "self-audit" initiative to help firms improve safety programs and reduce injury rates
- **Program Structure & Elements:** Expanded from four to seven elements, with the inclusion of corporate participation and enhanced guidance for Process Safety Management (PSM)
- **Evaluation Changes:** Onsite teams will no longer immediately share approval recommendations with applicants, requiring Regional Administrator approval first, reports
- **Safety Requirements:** Increased focus on leading indicators, which are proactive, preventative, and predictive measures.
- **Withdrawal Process:** Procedures for voluntary withdrawal of applications are formalized

More info on VPP? [How the VPP Application Process Works](#)

Loper Bright: Demise of *Chevron* Deference

- SCOTUS 6/28/24 decision in *Loper Bright Enterprises v. Raimondo* overturned its 40-year precedential test – "*Chevron* deference" when evaluating whether courts should defer to an agency's "reasonable" interpretation of "ambiguous" statutory language
 - [22-451 Loper Bright Enterprises v. Raimondo \(06/28/2024\)](#)
- *Chevron* is a foundational test in administrative law, and was long used in OSHA/MSHA/EPA cases to help agencies preserve new rules or enforcement actions against claims that the agency went beyond its authorizing statute
- Concerns arising that judges can now substitute their views on a topic for those of the agency SME who drafted it, including disregard of comments and hearings in the development of the rule
- This is major incentive for "forum shopping" to find federal courts in districts/circuits most likely to kill federal rules as they will no longer have to "defer" to the agency's expertise, experience & judgment

OHS Regulations in the Crosshairs

- *Allstates Refractory Contractors, LLC v. Su* (6th Cir. 2023) – Challenged constitutionality of Occupational Safety & Health Act of 1970 (OSH Act) – Former Trump White House counsel Don McGahn represented Allstates in this case! [23-819 Allstates Refractory Contractors, LLC v. Su \(07/02/2024\)](#)
- Coalition of industry and conservative groups sued to determine whether the congressional delegation to OSHA to set workplace safety standards violated the “Nondelegation Doctrine”
- “Nondelegation doctrine” holds that under separation of powers and tri-partite government, Congress generally cannot delegate its legislative power to another Branch ... but this does not prevent Congress from seeking assistance of its “coordinate branches”
- The Petitioners wanted Congress, not OSHA, to “set whatever specific safety standards lawmakers think are necessary”
 - Challenges to the OSH Act in the past were struck down (in 1978 and 2011) by 7th Cir. and DC Cir.
 - 6th Cir “joined their sister circuits” in holding OSHA’s delegation to be constitutional (by a 2-1 vote)
- Appeal to SCOTUS failed to obtain certiorari ... but Justices Thomas and Gorsuch voted to grant review (4 votes are needed) and this is poised for another attempt

Nondelegation Doctrine (Redux)

- Nondelegation Doctrine: This doctrine, rooted in Article I of the Constitution, prevents Congress from delegating its legislative power to another branch or agency without **clear, guiding principles**.
 - SCOTUS first addressed the OSH Act’s delegation clauses in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), a plurality decision that held OSHA possessed the power “to promulgate health and safety standards only where a significant risk of harm exists.”
 - **Texas Produce Association Lawsuit (2025)**: Two Texas produce associations filed a lawsuit in the Northern District of Texas challenging the constitutionality of the OSH Act, arguing that 29 U.S.C. § 655(b) (the safety standards delegation) constitutes an “unlimited mandate” that violates the separation of powers. *Texas International Produce Association et al. v. Occupational Safety and Health Administration et al.*, 2:25-cv-00261
 - This 2025 lawsuit argues that if this broad delegation is permitted, the nondelegation doctrine is a “dead letter”

But Wait, There’s More!

- SCOTUS Administrative Law decision, *Comer Post v. Board of Gov of Federal Reserve System* (6-3 decision) held that lawsuits over OSHA rules and other agencies “final agency action” do not have to begin within 6 years of the promulgation of the rule, but instead must be brought within 6 years of when the party was first injured by a particular policy (overturns 75 years of precedent)
 - [22-1008 Comer Post, Inc. v. Board of Governors, FRS \(07/01/2024\)](#)
- This opens floodgates for lawsuits against long-standing federal agency rules and policies
- Decision (Justice Barrett) was under Administrative Procedure Act (APA) and held that the claim accrues “when plaintiff is injured by final agency action”
- Dissent (Justice Brown Jackson) warned that “The tsunami of lawsuits against agencies ... has the potential to devastate the functioning of the Federal Government” ... there are “no longer any limitations period for lawsuits that challenge agency regulations on their face” which is “destabilizing for both government and businesses”
 - WV AG commented “Federal agencies should be held to account for their actions, even when years have passed from the time the rule was first issued”

Trump E.O. Impacting OHS

- EO 14219 (2/25 Fed Reg) – “Ensuring Lawful Governance & Implementing the President’s DOGE Deregulatory Initiative” –stated that within 60 days, all agency heads must identify several types of regulations, including those that:
 - Are unconstitutional or **raise serious constitutional issues**
 - Are based on delegation of legislative power
 - Are based on anything **other than a strict reading of authorizing statutes**
 - Concern economic, political or social issues not clearly authorized by statute
 - Impose significant costs on private parties that are not outweighed by public benefits
 - Unjustifiably impede tech innovation, infrastructure development, disaster response, economic development, energy production, inflation reduction, R&D, land use and foreign policy objectives
- **Following review, each agency must develop Unified Regulatory Agenda that seeks to rescind or modify regulations as appropriate**

Repeal of Regs & ADA

EO 14192 (1/31) – “Unleashing Prosperity through Deregulation” -- Agencies must REMOVE 10 federal rules for every new one established

On 4/9/25, Trump directed federal agencies to prioritize REPEALING regulations that do not comply with SCOTUS decisions on environment, admin courts and affirmative action

The issue is that the president told agencies NOT to engage in notice/comment rulemaking to do so – in clear violation of the Administrative Procedure Act

After 60 day review period that ends shortly, agencies “must immediately” take steps to repeal regulations determined to be outside agency authority or that are otherwise “unlawful”

OHS Response to Deregulatory E.O.

OSHA responded by posting over 30 items on its “regulatory agenda” for modification or deletion Only a few new rulemaking items remain – including heat illness prevention

MSHA published 18 Notices of Proposed Rulemaking aimed at eliminating, revising, or modernizing regulations to reduce the compliance burden on mine operators

Both agencies argue that existing rules are redundant, outdated, or already covered by other parts of the Code of Federal Regulations.

The agencies maintain that these revisions are designed to maintain the same level of protection for workers while increasing efficiency.

Advocates for workers and those in the OHS community have expressed concern that these actions could weaken safety protections.

Will OSHA Survive?

• HR 86 – “NOSHA Act” (Rep. Andy Biggs – R- AZ)
A BILL

To abolish the Occupational Safety and Health Administration, and for other purposes.

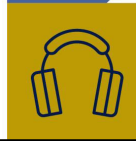
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Nullify Occupational Safety and Health Administration Act” or the “NOSHA Act”.

SEC. 2. IN GENERAL.

• *The Occupational Safety and Health Act of 1970 is repealed. The Occupational Safety and Health Administration is abolished.*



A World Without OSHA?

- What impact on State Plan Programs if federal OSHA is abolished?
- Will there be a “red state/blue state” safety division with disparate protections for workers within a single company?
 - Kentucky bill already seeks to weaken KY-OSHA and set up legal challenge -- measure would bar state regulators from enforcing “any occupational safety and health administrative regulation that the Occupational Safety and Health Administration or the United States Department of Labor has not promulgated, or that is more stringent than the corresponding federal OSHA provision (issue is Gov. veto override)
- If federal OSHA abolished, multi-state employers will face crazy quilt of state rules (or states with no rules) undermining existing programs
- What about US participation in GHS without a federal OSHA? Impact on use of Voluntary Consensus Standards (ANSI, ASTM, NFPA etc.)



What About VCS?

- OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards in Conformity Assessment Activities* (Feb. 10, 1998. rev'd 2017):
 - If an applicable voluntary consensus standard exists in an area where the agency seeks to regulate, the agency should use this as the basis for a proposed rule rather than starting from scratch or adopting a differing approach
- **"Voluntary consensus standards bodies"** are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures.
- A voluntary consensus standards body is defined by the following attributes:
 - (i) Openness.
 - (ii) Balance of interest.
 - (iii) Due process.
 - (vi) An appeals process.
- [circular-119-1.pdf](#)



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Consensus Standard Advantages

- National consensus standards have fewer procedural burdens that traditional governmental rulemaking model;
- The consensus method provides for a balance between competing interests;
- The voluntary nature of consensus standards enables users to adapt provisions to meet unusual circumstances; and
- Standards can be developed at a lower cost to the government and general public.



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Governmental Use of VCS

- Once adopted by agency through formal rulemaking (incorporation by reference), VCS have force of law.
- Many OSHA standards were derived from ANSI standards of 1960s
- The text of VCS does NOT appear in the Code of Federal Regulations.
 - Most consensus standards that are incorporated are outdated ... but only the "adopted" version is enforceable and this may offer defense to citations
 - Downside is difficulty in locating the actual adopted version ... may not be available at local OSHA offices or libraries



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OSHA's Current Use of VCS

- OSHA's "General Duty Clause" (Section 5(a)(1) of OSH Act) requires employers to protect against known hazards
- Agency already uses ANSI, ASTM, NFPA and other VCS to show industry knowledge in such enforcement actions
- OSHA also makes consensus standards part of formal rules through incorporation by reference
- Both agencies use "backdoor" methods to interpret subjective standards (or where consensus standards – ANSI, ASTM, NFPA etc. -- are referenced in manufacturer's manuals)



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OSHA's Use of VCS

- OSH Act defines "National consensus" standards as those emanating from a nationally recognized standard producing organization. 29 U.S.C. § 652(9).
- When adopting a consensus standard, both MSHA and OSHA must incorporate by reference a specific version (year and number) of a VCS through notice-and-comment rulemaking.
- Agency cannot simply adopt consensus standards, but must first examine whether they meet the statutory criteria for any binding rules under Mine Act or OSH Act – e.g., reduction of a "significant risk" – before incorporation.
- OSHA has engaged in updates through direct final rules – more on the way in the latest regulatory agenda (ANSI Z89.1 on PPE/head protection)
 - MSHA has not followed suit



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Which Standards Are Recognized?

OSHA and MSHA have adopted standards by standards development organizations including:

- American National Standards Institute ("ANSI")
- American Society of Mechanical Engineers International ("ASME")
- American Society of Testing and Materials ("ASTM")
- National Bureau of Standards (National Electrical Code, or "NEC")
- National Fire Protection Association International ("NFPA")
- Society of Automotive Engineers ("SAE")



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Potential Problems of VCS

- Advisory provisions ("should") of voluntary consensus standards may be incorporated as mandatory provisions ("shall") of government regulations.
- Because standards incorporate specific versions, these eventually become outdated and require additional rulemaking by adopting agency to continue reflecting "best practices" in safety, health and environmental protection.
- Although process is open to public, many (esp. small businesses) are unaware of activities and are "unrepresented."
 - Secretariats for many standards under development include ASSE, AIHA, and specialized trade organizations
 - Potential for domination by those with special interests – public can comment but committee reviews comments and votes on adoption.



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Examples of Key ANSI OHS Standards

- **ANSI A10.40** – Ergonomics/Construction
- **ANSI A10.8**: Safety Requirements for Scaffolding
- **ANSI A10.12**: Safety Requirements for Excavation
- **ANSI A10.14**: Ladder Systems
- **ANSI A10.15**: Safety Requirements for Dredging
- **ANSI A10.16**: Safety Requirements for Tunnels, Shafts & Caissons
- **ANSI A10.17**: Safe Operating Practices for Hot Mix Asphalt Construction
- **ANSI A10.18**: Safety Requirements for Temporary Roof & Floor Holes, Wall Openings, Stairways & Other Unprotected Edges in Construction & Demolition Operations
- **ANSI A10.32**: Fall Protection Systems
- **ANSI A10.33**: Safety & Health Program Requirements for Multi-Employer Projects
- **ANSI A10.39**: Construction Safety & Health Audit Program
- **ANSI Z10** – Safety and Health Management Programs
- **ANSI Z15** – Motor Vehicle Fleet Safety
- **ANSI Z117** – Confined Spaces (2003 version)
- **ANSI Z244** Lockout/Tagout
- **ANSI Z359** Fall Protection
- **ANSI Z400.1** – MSDS preparation guidelines
- **ANSI Z490** Safety, Health and Environmental Training



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What About International Standards?

- International Labour Organisation (ILO): Since 1919, ILO has maintained a system of international labour standards aimed at “promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity.”
 - **ILO Conventions and Protocols**, which are legally binding international treaties that may be ratified by member States, or
 - **ILO Recommendations**, which serve as non-binding guidelines.
- International Organization of Standards (ISO)
 - **ISO 14001**: focuses on Environmental Management Systems, helping users to reduce environmental footprint and increase sustainability
 - **ISO 45001**: Specifies requirements for Occupational Health & Safety (OHS) management to prevent work-related injuries and illnesses



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ASTM International Standards

- [E1132-21 Standard Practice for Health Requirements Relating to Occupational Exposure to Respirable Crystalline Silica](#)
 - [E2350-24 Standard Guide for Integration of Ergonomics/Human Factors into New Occupational Systems](#)
 - [E2565-21\(2026\) Standard Guide for Consensus-Based Process for an Occupational Safety and Health Standard That Includes an Occupational Exposure Guideline](#)
 - [E2625-19 Standard Practice for Controlling Occupational Exposure to Respirable Crystalline Silica for Construction and Demolition Activities](#)
 - [E2920-26 Standard Guide for Recording Priority Occupational Injuries and Illnesses and Serious Injury or Fatality \(SIF\)-Related Serious Injuries/Illnesses and Fatalities](#)
 - [E3279-21\(2026\) Standard Guide for Managing Heat Stress and Heat Strain in Foundries](#)
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Conclusion

- Employers must be knowledgeable about VCS affecting their industry sector because of the potential legal ramifications of “willful ignorance” AND because these may be the de facto “rules” if OSHA is abolished
- Meanwhile, OSHA can and will use VCS for enforcement purposes under the General Duty Clause to impute knowledge to employer.
- Modern legal trend is toward greater admissibility of VCS in tort cases on the issue of negligence. 58 ALR3d at 154-155.
 - This reflects the view that consensus standards carry the approval of a significant segment of an industry, and are sufficiently trustworthy to justify an exemption to the hearsay rule.
- Because OSHA/MSHA standards may be outdated, use of VCS can help company safety programs move BEYOND compliance and better protect workers – whether there are OHS enforcement agencies or not!



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Thank you

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