



# The Administration's Approach to Safety: How Does It Impact Your Company?

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## Overview

- Trump Administration has passed the one-year mark ...
- Reg Reform Legislation & Appropriations
  - What was the impact on Obama Administration's "midnight rules"?
  - What is the status of nominations to lead safety agencies?
  - What's left of the OSHA/MSHA regulatory agenda?
  - Which Executive Orders and agency policies affecting occupational safety and health were rescinded ... and which new EOs were issued?
  - Status of safety agency funding under FY 18 CR
  - Trump's FY 2019 budget and impact on key safety and health agencies, programs & enforcement
  - Litigation update – Judges matter!



## WHO'S IN CHARGE?

- Secretary of Labor: Alexander Acosta – Not inclined to rescind some new OSHA rules but ...
- Assistant Secretary of OSHA: Scott Mugno (Fed Ex safety/attorney) has been nominated twice – has yet to be confirmed ... in jeopardy?
  - Loren Sweatt is political OSHA Deputy Asst. Sec. and acting asst. secy of OSHA – construction lobbyist and Hill staffer background
- Assistant Secretary of MSHA: David Zetazalo (former coal CEO) – Now in place at agency
  - MSHA oversight hearing focused on silica and coal dust issues, possible POV conflict
  - Zetazalo wants to focus on powered haulage safety due to fatality trends
  - Possible combining of coal and MNM inspectors and district offices?
  - Kevin Stricklin doing double duty as administrator for coal AND metal/nonmetal
- Head of NIOSH
  - Dr. John Howard serving six-year term that extends through Trump administration – but what fate for NIOSH?



## Regulatory Accountability Act – HR 5

- Enacted by Congress, signed by President – **IT'S THE LAW!!!**
  - Amends APA to revise requirements for federal agency rulemaking by requiring agencies to base factual determinations on evidence and to consider the legal authority under which the rule may be proposed, the specific nature and significance of the problem the agency may address with the rule, any reasonable alternatives for the rule, and the potential costs and benefits associated with such alternatives.
  - Requires agencies to publish *advance notice of proposed rulemaking* for major rules and for high-impact rules, for negative-impact on jobs and wages rules and those that involve a novel legal or policy issue arising out of statutory mandates.
    - Sets forth criteria for issuing *major guidance* (likely to lead to an annual cost on the economy of \$100 million or more, a major increase in cost or prices, or significant adverse effects on competition, employment, etc.) or guidance that involves a novel legal or policy issue arising out of statutory mandates; and
    - Expands the scope of judicial review of agency rulemaking by allowing *immediate review of rulemaking* not in compliance with notice requirements and establishing a *substantial evidence* standard for affirming agency rulemaking decisions.



## Regulatory Reform Legislation

- GOOD Act (HR 4809/S 2296): Codifies requirements for EPA and other agencies to post guidance docs on line in centralized location, and require comment under APA on guidance before it becomes final. Impacts OSHA CPLs, interpretative letters, MSHA PPM and PPLs etc.
- REINS Act (HR 26) – passed by House 237-187 –Rep. Scott tried (and failed) to exempt OSHA/MSHA rules from the legislation in floor amendment
  - Not yet considered in Senate (S. 21) but cleared for floor vote in 10/17
  - Curbs “unnecessary regulations” from agencies and requires them to submit “major regulations” (costing \$100 million+) to Congress for approval, and guarantees no major rule becomes effective until Congress approves it
  - Congress has 70 legislative days to vote up/down on major rules (allows “pocket veto”)
- Midnight Rules Relief Act (HR 21) – passed by House 238-184 – not yet considered in Senate (S.32) but cleared for floor action in 10/17
  - Would permit Congress to repeal, en masse, federal regulations issued during prior administration
  - Targets rules which were “poorly designed in the haste of the midnight rule period”



## H. Res. 83 & “Continuing Violation” Rule

- Congress enacted (and Trump signed) H. Res. 83, rescinding OSHA’s new rule on “continuing violations” for recordkeeping citations beyond the 6 mo. Statute of Limitations
  - OSHA has published *Fed Reg* notice withdrawing those sections of 29 CFR Part 1904
- OSHA rule had reversed USCA “*Volks*” decision and said that failure to keep injury/illness records for entire 5-year period could be cited as “continuing violation”
  - OSHA reviews I/I records for errors and omissions and to identify pattern/practice of hazards that result in injuries, as well as to identify emergent hazards
- Impact of rescission on other OSHA documentation requirements that extend beyond 6 months is now at issue – Training Docs, Inspections, Exposure Monitoring etc.



## Anti-Volks Legislation – Democratic Style

- HR 2428 & S. 1122 – Would amend the OSH Act to clarify when the time period for the issuance of citations under such Act begins
- Would require a rule to clarify that an employer’s duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation, which would provide:
  - (1) the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation;
  - (2) the duty to make and maintain such records continues for as long as the employer is required to keep records of the recordable injury or illness; and
  - (3) such duty does not expire solely because the employer fails to create the necessary records when first required to do so.
- Legislation states: “For purposes of this subsection, a violation continues to occur for as long as an employer has not satisfied the requirements, rules, standards, orders, and regulations referenced [In Sec. 9(a) of OSH Act].”



## Bipartisan VPP Legislation

- S. 1878 (Enzi & Bennet)/HR 1444 (59 cosponsors): Bipartisan legislation to codify Voluntary Protection Program (VPP) and encourage employers to adopt S&H management systems that include—
  - (1) requirements for systematic assessment of hazards;
  - (2) comprehensive hazard prevention, mitigation, and control programs;
  - (3) active and meaningful management and employee participation in the voluntary program; and
  - (4) employee safety and health training
- Specifies that onsite consultation visits for VPP evaluation shall not result in enforcement of citations
- Codifies that qualifying employers would be exempt from OSHA inspections and investigations except where triggered by: employee complaints, fatalities, catastrophes, or significant toxic releases
- Specifies that OSHA cannot charge employers for participating in VPP
- OSHA would have to codify regulations implementing VPP formally (rather than through policy)



## Other S&H Legislation

- S. 1000/HR 914 AND S. 2621: Protecting America's Workers Act (Democratic bill – largely the same as 2016 version – reintroduced again 3/22/18 by Sen. Baldwin & 5 cosponsors)
- S. 854/HR 1903: Byrd Mine Safety & Health Act (largely same as 2016)
- HR 2275: Giving Workers a Fair Shot Act – increases OSHA criminal penalties for “knowing” violations resulting in death or serious injury/illness (10 years imprisonment) and adds maximum \$50k fine for Sec. 11(c) violations
- HR 155: Worksite Reporting Act – would require site-controlling employers to keep a site log for all recordable I/I occurring among all employees on the particular site, regardless of whether they are employed directly by the site-controlling employer or by contractors, temp agencies or leasing services
- H.R.5223 - Health Care Workplace Violence Prevention Act (introduced 3/18) – would require a final OSHA standard to protect workers within 2 yrs of enactment (Bill has 15 cosponsors – all Dem)
- HR 5870: Amends OSH Act to require immediate notification to an employer of the issuance of a penalty, prohibit public notice of such citation for 24 hrs after issuance, and require public notice where an employer successfully contests any proposed penalty. (introduced 5/17/18)
- HR 3586: OSHA Inspection Integrity Act – Amends the OSH Act to bar non-employees from participating in OSHA inspections except if they are the authorized rep of workers under a CBA



## Environmental Health Workers Act

- S. 2616: Environmental Health Workforce Act of 2018: legislation to prioritize education and training for current and future members of the environmental health workforce (introduced 3/21/18)
- Env. Health Workers defined in legislation as those who investigate and assess hazardous environmental agents in various environmental settings; and develop, promote, and enforce guidelines, policies, and interventions to control such hazards.
- Would address gaps in existing programs and activities with regard to addressing future environmental health workforce needs, in collaboration with CDC (role for NIOSH/NIEHS)
- Would require model standards for credentialing by HHS of environmental public health workers (after consultation with stakeholder organizations)
- Model requirements would include understanding of:
  - basic public health principles and the interdisciplinary nature of environmental health
  - environmental protection and environmental health principles and practices
  - basic government functions
  - be sensitive to different cultures found in their institutions and communities



## Focus on Agency Policy Development

- In 11/17, DOJ issued memos barring DOJ from issuing “binding” mandates by guidance, and barring DOJ attorneys from using OSHA and other agencies' guidance documents as the sole basis for civil enforcement actions.
- H.R. 4809/S, 2296: codifies requirements for EPA and other agencies to post their guidance documents online in a centralized location (narrower than proponents wanted) – has cleared House/Senate cmtes in 2018
- Industry groups have called on Congress (and Exec Branch) to amend the APA to require agencies to take comment on draft guidance before finalizing it
  - APA currently exempts 'interpretive rules' from notice-and-comment procedures
  - Argument is that “agencies frequently pronounce changes in regulatory policy in a manner that imposes new burdens on the public without giving any opportunity for citizens to voice concerns”
  - GAO Report cited by Congress found that agencies generally fail to comply with Congressional Review Act (CRA) and OMB requirements that increase public access to such documents
  - If enacted, could impact OSHA interpretative letters, new CPLs, FAQ guidance, handbooks (e.g., FOM), and MSHA's PPM, PPL, PIB and PILs



## OMNIBUS APPROPRIATIONS: FY 2018 & Proposed FY 2019 Budget

- OSHA: Omnibus: \$552.787 mil.
  - Original CR: \$551.74 mil.
  - FY 19 Budget: \$549.033 mil.
- MSHA: Omnibus: \$373.816 mil.
  - Original CR: \$375.172 mil.
  - FY 19 Budget: \$376 mil
- NIOSH: Omnibus: \$335.2 mil.
  - Original CR: \$325.2 mil.
  - FY 19 Budget: \$255 mil.
- CSB: Omnibus: \$11 mil.
  - Original CR: \$11 mil.
  - FY 19 Budget: \$11 mil.
- NTSB: Omnibus: \$110.4 mil.
  - Original CR: \$105 mil.
  - FY 19 Budget: \$108 mil



## Executive Orders

- “1 in, 2 out” approach – Zero Net Cost of New Rules (agency-wide “bank”)
  - OSHA and MSHA have formed task forces to review existing rules and recommend repeal or modification if the rule eliminates jobs – seeking stakeholder input (ongoing)
- Regulatory Freeze –... delayed implementation of Obama era pending rules
  - Delays initially applied to OSHA e-recordkeeping, silica and beryllium rules, and MSHA workplace examination rule
- ✓ Congress rescinded President Obama’s Executive Order on Fair Pay & Safe Workplaces, H. Res. 37



## Electronic Recordkeeping

- OSHA Final Rule (published 5/16) took effect 12/1/2016 for anti-retaliation provisions
- Electronic data submission was delayed until 12/31/17.
  - Data not yet publicly available – *Public Citizen* lawsuit pending over FOIA denial!
  - **FEDERAL WEBSITE NOW CLOSED FOR 2016 DATA SUBMISSION!**
- 29 CFR 1904.35 requires employers to clarify employee’s right to report injury and illnesses without fear of retaliation, worker training and new policies
  - OSHA views drug testing of injured workers, absent reasonable suspicion that impairment was a causal factor in incident, to be retaliatory under Sec. 11(c), and also targeted incentive & discipline programs
- 29 CFR 1904.36 incorporates Section 11(c) as citable (fine up to \$129,336 for any whistleblower retaliation even if worker does not file a complaint)
- OSHA e-reporting provisions require employers with 250+ workers to file electronic reports of all injuries and illnesses annually (300A log in 2017 – all logs thereafter) but OSHA has now said **only file 300A form in 2018** (due 7/1/18)





## OSHA's Crystalline Silica Rule

- Reduces PEL from 100 ug/m<sup>3</sup> (GI) & 250 ug/m<sup>3</sup> (Maritime/construction) to 50 ug/m<sup>3</sup>
  - Construction rule took effect 9/23/17; GI and Maritime take effect 6/23/18
- In December 2017, US Ct. of Appeals (DC Cir) affirmed rule (industry lost on all 5 grounds) and remanded to agency to consider adding "paid medical removal" provision sought by unions
- Employers must:
  - Measure worker exposures to silica periodically if at or above 25 ug/ m<sup>3</sup> action level (workers get notification of results within 15 working days) – construction employers can comply with "Table 1"
  - Use engineering controls (e.g., water, ventilation) and work practices to limit exposures from exceeding 50 ug/ m<sup>3</sup> over 8 hr time-weighted average workday;
  - Limit access to areas where workers could be exposed above the PEL;
  - Use respirators when necessary only after implementing engineering/admin controls;
  - Restrict housekeeping practices that expose workers to silica if feasible alternatives are available;
  - Provide free periodic medical exams for highly exposed workers;
  - Train workers on tasks and equipment that result in silica exposure and ways to limit exposure; and
  - Maintain records of workers' silica exposure and medical exams.
- All employers must have site-specific written exposure control plans!
  - Construction sites must also have "competent person" to oversee WECP



## MSHA Workplace Exam Final Rule

- 30 CFR 56/57.18002 – revisions to "Obama Rule" take effect 6/2/18
- New requirements that apply to mine operators AND contractors:
  - Examine each active working place at start of shift or before workers enter area
  - Exam must be by a competent person (salaried or hourly), and indicate name on form
    - Competent person must have part 46/48 task training on task of workplace exams
    - MSHA can "double dip" and find exam isn't "adequate" if hazards are found in the examined area without effort to barricade or correct promptly
  - Record all hazards found that are not promptly corrected, and notify affected miners
  - Withdraw affected workers if imminent danger situations arise
  - Record date that hazard is corrected
  - Workplace exam records must be kept for 12 mo., made available to MSHA, miners and miner's rep – can be kept in any format (paper, electronic etc.)





## OSHA 5/18 Regulatory Agenda

### Final Rule Stage:

- SIP IV: Completes action on the standards improvement project (IV) – due 7/18
- Respiratory Protection: Addresses fit-test protocol applications, to force rulemaking and consider new quantitative fit tests that reduce time to complete testing while maintaining acceptable test sensitivity – due 9/18
- Technical corrections to 36 OSHA standards (due 6/18)
- Amendments to procedures regarding OSHA access to medical records (due 12/18)



## OSHA 5/18 Regulatory Agenda

- Proposed Rule Stage:
  - Crane Operator Qualification (construction) – Proposed rule 5/18
  - Beryllium Exposure - proposal revising construction/maritime provisions 12/18
  - Update to Hazard Communication Standard (TBD)
  - Tracking of Workplace Injuries/Illnesses (e-recordkeeping rule changes)
- Prerule Stage:
  - Communication Tower Safety
  - Emergency Response and Preparedness
  - Mechanical Power Press Update
  - LOTO Updates
  - Tree Care Standard
  - Prevention of Workplace Violence in Healthcare and Social Services
  - Lowering blood lead level for medical removal
  - Revisions to Table 1 of Silica Standard (and reopening re: medical removal per court)



## OSHA/MSHA 5/18 Regulatory Agenda

- OSHA Long-Term Actions:
  - Injury/illness Recording and Reporting (Separate MSD column)
  - Infectious Disease Standard
  - Amendments to Process Safety Management Standard
  - Shipyard Fall Protection
- MSHA Regulatory Agenda:
  - Exposure of UG Miners to Diesel Exhaust
  - Regulatory Reform of Existing Standards
  - Retrospective study on Respirable Coal Dust Rule
  - Safeguards for Powered Haulage for Surface Mines
  - Respirable Crystalline Silica (TBD)
  - Proximity Detection Systems for Mobile Machines in UG Mines (TBD)



## Current OSHA Enforcement Initiatives

- OSHA Severe Injury Reporting inspections/enforcement – most inspections in 2018 will be “event driven”
- Contractor and Temporary Worker Safety – will emphasis on safety for workers in the “gig” economy and fissured workforce continue?
- OSHA and chemical PELs – enforcement through GDC ... will there be follow up to the RFI on chemical PELs?
- SVEP and W-SVEP
- Prosecution of more whistleblower claims under Sec. 11(c) and new anti-retaliation provisions of e-Recordkeeping rule
- Heightened criminal prosecutions – but what about DOJ budget cuts?
- Federal OSHA NEPs, hundreds of regional/local SEPs – what changes?



## Other OSHA Enforcement Issues

- Penalties increased (again) effective 1/2/2018:
  - Maximum OSHA penalty now \$129,336 (willful/repeat) and \$12,934 (serious/OTS)
  - Maximum MSHA penalty now \$259,725 for “flagrant” violations (\$70,834 for others)
  - Revised SHMP Guidelines – recent update of 1989 version replaced any I2P2 rulemaking for foreseeable future – separate versions for GI and Construction
    - Inclusion of SHMP requirements, bar on I/I incentives, warrant waiver, and corporate wide abatement of violative conditions as conditions of settlement
- Voluntary Protection Program: Retooling/relaunch with revised criteria?
- End of Press Releases and “Public Shaming” (Behavioral Economics)?
- More emphasis on Partnerships and Alliances?



## Questions???

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