



OSHA/MSHA FORECAST: 2019

ADELE L. ABRAMS, ESQ., CMSP

LAW OFFICE OF ADELE L. ABRAMS PC

WWW.SAFETY-LAW.COM

SAFETYLAWYER@GMAIL.COM



OVERVIEW

- Trump Administration just passed the two-year mark ...
- Reg Reform Legislation & Appropriations
 - What's happened on OSHA's regulatory agenda?
 - Which safety & health legislation will be considered by the new Congress?
 - Which Executive Orders and agency policies affecting occupational safety and health affect enforcement?
 - Will Congress use the FY 20 appropriations to cut agencies, programs & EHS enforcement personnel?
 - How have OSHA enforcement priorities shifted in this Administration?

DOL POLITICS ...

- Secretary of Labor: Alexander Acosta – May soon be under pressure to resign ...
- MSHA Asst. Sec. Dave Zatezalo: Under fire over POV, silica issues
 - Has cancelled MSHA “Rules to Live By” program (unofficially)
 - “Blurring the lines” – combining Coal and MNM enforcement personnel, offices
 - Major initiative is powered haulage safety
 - Increased IH emphasis in MSHA inspections (preparatory to silica rule???)
 - FMSHRC now has full 5 members – can again grants petitions for review

OSHA POLITICS ...

- Assistant Secretary of OSHA: Scott Mugno (Fed Ex safety/attorney) Senate confirmation vote never occurred in 2017 and 2018 ... February hearing was postponed
 - Loren Sweatt named as political OSHA Deputy Asst. Sec. and is acting head of OSHA – construction lobbyist and Hill staffer background
 - Many key career staff have now retired ... federal down < 1000 inspectors (4%)
 - State plan scrutiny for effectiveness will continue
 - OSHA maximum penalties hiked to \$132,598 (willful/repeat) and \$13,260 (serious and OTS) – state plan OSHA agencies must match
- OSHRC has lost its chair but still has quorum for granting review

REGULATORY ACCOUNTABILITY ACT – HR 5

- Enacted by Congress, signed by President Trump in 2017
 - 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.

HR 3358: LABOR-HHS APPROPRIATIONS FY 2019

DOL is one of the agencies whose FY 2019 funding WAS enacted on 10/28/18 by President Trump as part of a “minibus” bill, and so was not affected by government shutdown

- OSHA: \$557.8 million, which is \$5 million more than FY 18
 - Maintained funding for training grants (Harwood Grants)
 - \$3.5 million earmarked for continuation of VPP program
- NIOSH: \$336.3 million, including \$116 million for National Occupational Research Agenda
 - NIOSH funding also supports surveillance, health hazard evaluations, intramural and extramural research, instrument and methods development, dissemination, and training
 - NIOSH has done pallet industry studies (with NWPCA partnership) on noise and hearing protection, and amputation prevention

PROPOSED FY 2020 BUDGET

- Narrative says proposed budget “maintains targeted investments in the Occupational Safety and Health Administration (OSHA) . . . aimed at preventing worker fatalities, injuries, and illnesses through enforcement, outreach, and compliance assistance. The Budget includes funding for additional OSHA inspectors to conduct more inspections in high-hazard industries and for protecting whistleblowers’ rights.
 - DOL Budget overall reduced by 9.7% (from \$12.1 billion to \$10.9 billion) – EPA budget reduced by 31%
- FY20 budget request seeks a total of \$557.5 million for OSHA, a \$300,000 increased from FY19.
 - \$1.12 million is earmarked for five full-time whistleblower investigators,
 - \$3.8 million is earmarked to hire 26 compliance safety and health officers and
 - \$433,000 to hire two Training Institute instructors
 - Budget would eliminate \$10.5 million earmarked annually for the Susan Harwood Training Grants “to maximize flexibility and use alternative methods to develop and distribute training materials to reach the broadest possible audience”
 - Budget would also eliminate \$143 million in job safety training for Native Americans and migrant and seasonal farmworkers.

PROPOSED FY 2020 LABOR – HHS APPROPRIATIONS

- Bill cleared House Labor-HHS Subcommittee and House Appropriations Committee on 5/8/19: ***“The Committee notes that under OSHA’s current staffing levels, it would take the agency an average of 165 years to inspect each employer within its jurisdiction just one time.”***
- \$661 million for the **Occupational Safety and Health Administration**, an increase of \$103 million above current levels and the President’s budget request
 - Current funding FY 2019 -- \$557,787,000
 - Budget request, FY 2020 -- 557,533,000
 - Cmte Recommendation -- 660,908,000
- Program area funding for FY 2020:
 - Safety and Health Standards \$23,100,000
 - Federal Enforcement 246,383,000
 - Whistleblower Programs --18,809,000
 - State Programs --123,233,000
 - Technical Support --30,597,000
 - Federal Compliance Assistance --86,623,000
 - State Consultation Grants -- 64,687,000
 - Training Grants -- 12,690,000

MSHA FUNDING FY 2020 (HOUSE APPROPRIATIONS)

- Appropriation, fiscal year 2019\$373,816,000
- Budget request, fiscal year 2020376,043,000
- Committee Recommendation417,290,000
- Change from enacted level+43,474,000
- Change from budget request+41,247,000
- ***Committee Report says: “Funding increase will support MSHA’s enforcement of the 2014 respirable dust rule and expanded monitoring of operator compliance with its existing silica rule. In addition, the Committee strongly encourages MSHA to develop a more protective silica monitoring standard.”***

DEMOCRATIC S&H LEGISLATION

- OSHA oversight hearings coming in House Ed & Labor Cmte.
- 34 members have called on DOL Sec. Acosta to rollback the changes to the E-Recordkeeping rule - H.J.Res.44 - Disapproving the final rule of the Occupational Safety and Health Administration titled "Tracking of Workplace Injuries and Illnesses"
- Reintroduction of Protecting America's Workers Act (HR 1074)
- Reintroduction of Workplace Violence Prevention legislation (HR 1309) – (approps language requires progress reports on standard)
- Bipartisan legislation to codify VPP (S. 904 & HR 1956)
- More to come? Possible measures include:
 - “Anti-Volks” bill to extend OSHA Statute of Limitations for Records Citations
 - “Giving Workers a Fair Shot Act” – legislation to increase OSHA criminal penalties for “knowing” violations resulting in death or serious injury/illness
 - Legislation to require OSHA to complete Combustible Dust rulemaking

EXECUTIVE ORDERS

- “1 in, 2 out” approach – Zero Net Cost of New Rules (agency-wide “bank”)
- 2/18 Exec. Order required each agency to form task force to review existing rules and recommend repeal or modification if the rule eliminates jobs – still in progress
- Regulatory Freeze –... delayed implementation of Obama era pending OSHA rules in some cases
 - Most are now in effect, but some have been reopened and/or modified – silica, e-recordkeeping, beryllium
- ✓ Congress also rescinded President Obama’s Executive Order on Fair Pay & Safe Workplaces, H. Res. 37

OSHA FY 2017 ENFORCEMENT DATA

Type	FY 2015	FY 2016	FY 2017
Total inspections	35,820	31,948	32,408
Programmed inspections	16,527	12,731	14,377
Unprogrammed inspections	19,293	19,217	18,031
Fatality/Catastrophic	912	890	837
Complaint based	9,037	8,870	8,249
Referrals	6,569	6,691	6,286
Other	3,686	2,766	2,659

ENFORCEMENT “WEIGHTING”

OSHA’s 2016 policy on “enforcement weighting” is still in effect and provides that these specific categories receive the following EU values:

- Federal Agency Inspections - 2 EUs
- Process Safety Management Inspections - 7 EUs
- Combustible Dust Inspections - 2 EUs
- Ergonomic Hazard Inspections - 5 EUs
- Heat Hazard Inspections - 4 EUs
- Non-PEL Exposure Hazard Inspections - 3 EUs
- Workplace Violence Hazard Inspections - 3 EUs
- Fatality / Catastrophe Inspections - 3 EUs
- Personal Sampling Inspections - 2 EUs
- Significant Cases - 8 EUs
- Non-formal Complaint Investigations - $\frac{1}{9}$ EU
- Rapid Response Investigations - $\frac{1}{9}$ EU

ELECTRONIC RECORDKEEPING

- Revised final rule took effect 2/25/19
- Original OSHA Final Rule (published 5/16) took effect 12/1/2016 for anti-retaliation provisions - those provisions unchanged in revised final rule but altered by policy
- Electronic data submission now limited to 300A forms for all affected employers (all worksites with 250+ workers, or high-hazard worksites with 20+ workers) – due date March 2nd each year now
 - Website Link is <https://www.osha.gov/injuryreporting/index.html>
- 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 possibly be retaliatory under Sec. 11(c) – modified by 10/11/18 policy
 - Rule also can be violated by certain types of incentive and disciplinary programs

OSHA 2018 POLICY ON DRUG TESTS

- OSHA issued “clarifying” policy on 10/11/2018: <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>
- Policy says permissible drug testing includes:
 - Random drug testing.
 - Drug testing unrelated to the reporting of a work-related injury or illness.
 - Drug testing under a state workers’ compensation law.
 - Drug testing under other federal law, such as DOT regs for CDL
 - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees
- ***If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.***

SITE SPECIFIC TARGETING INSPECTION PROGRAM

- SST is OSHA's main site-specific targeting inspection plan for non-construction workplaces that have 20 or more employees: different DART rates for manufacturing and non-manufacturing are set as selection criteria to achieve a 50/50 representation on the list
- Targeting is based on the data received from injury and illness information that employers submitted for CY 2016 under 29 CFR 1904.41
 - If an establishment is an approved participant in the Voluntary Protection Program (VPP) or in the Pre-Safety and Health Achievement Recognition Program (SHARP), it is granted a deferral from OSHA programmed inspections
 - ***States with OSHA approved State Plans are required to have their own inspection targeting systems (a “core inspection policy”), which must be documented in their State Plans and revised as necessary to reflect current practices***
 - These state plan inspection policies and procedures must be at least as effective as Federal OSHA's

PROGRAMMED INSPECTIONS: SITE SPECIFIC TARGETING

- OSHA relaunched the SST program in 10/18 (DIRECTIVE NUMBER:18-01 (CPL 02)) for a one-year period
 - Inspections are comprehensive in scope and can relate to safety or health (or both, based on prior history)
- OSHA will create inspection lists of establishments with elevated Days Away, Restricted or Transferred (DART) rate, together with a random sample of establishments that did not provide the required 2016 Form 300A data to OSHA
 - For most current programmed inspections, OSHA is using employer-submitted Calendar Year 2016 Form 300A data but this can be updated annually now that data is being submitted regularly
 - Non-responders will be subject to a record audit and cited for failure to electronically file data
 - If the worksite also falls under an NEP, then concurrent inspections will occur

NATIONAL EMPHASIS PROGRAMS (NEPs)

- OSHA currently has 8 National Emphasis Programs (NEPs) focusing on:
 - Lead: [OSHA Instruction CPL 03-00-009](#)
 - Ship-breaking: [OSHA Instruction CPL 03-00-020](#)
 - Trenching/excavations: [OSHA Instruction CPL 02-00-069](#)
 - OSHA has launched a [trenching and excavation webpage](#) with information on trenching hazards and solutions
 - Process safety management: [OSHA Instruction CPL 03-00-021](#)
 - Hazardous machinery/amputations: [OSHA Instruction CPL 03-00-019](#) (recently extended until 9/30/19)
 - Hexavalent chromium: [OSHA Instruction CPL 02-02-076](#)
 - Primary metal industries: [OSHA Instruction CPL 03-00-018](#)
 - Combustible dust: [OSHA Instruction CPL 03-00-008](#)
- OSHA also has approximately 100 Regional/Local Emphasis Programs (REPs/LEPs).

OSHA SEVERE INJURY REPORTING

- Final Rule took effect 1/1/2015 – report to local office during normal hours or call 1-800-321-OSHA (6742) – or file on-line report
- 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.
 - Employers only have to report an inpatient hospitalization, amputation or loss of an eye that occurs within 24 hours of a work-related incident
 - Mandatory minimum penalty of \$5,000+ per violation

OSHA CRYSTALLINE SILICA UPDATE

- OSHA has issued extensive guidance on how it will enforce the rule – latest guidance issued 1/23/19 (64 FAQ), supplementing 53 FAQ guidance from 8/18
- 640 citations issued in first year, most involving exposure monitoring, written exposure control plans, and training requirements
 - One construction company in state-plan state (VA) has been fined \$304K under the new silica rule
- OSHA intends to reopen the rule, to reconsider medical removal provisions, and also to reexamine expansion of Table I (Construction) and a similar approach for high-exposure tasks in general industry and maritime
- All construction, general industry and maritime employers are now covered by this rule, but OSHA allowed additional time:
 - *for all fracking employers to install dust controls to meet new PEL (due 6/23/21)*
 - *for all GI employers to offer medical surveillance to employees exposed between PEL & AL for 30+ days/yr (due 6/23/20)*

2019 GI GUIDANCE: KEY POINTS

- ER does not have to sample every employee; can sample representative # in each task who are expected to have highest exposure, and those results are assigned to others performing that task
- Gauging what tasks are $< 25 \text{ ug/m}^3$ TWA under “foreseeable circumstances” includes failure/absence of controls, but not substitution of materials, or fixed walls
- Standard does not specifically exempt tasks with short-term exposure (15 minutes or less) but will not apply if employer has objective data showing EE exposure will be $< 25 \text{ ug/m}^3$ under all foreseeable circumstances
- ER needs to document its determination of such excluded tasks through objective data, and maintain EE exposure records under 1910.1020
- ER can mix scheduled monitoring and performance options, depending on which is optimal approach for task
- ER can start with scheduled monitoring, then switch to objective data once have sufficient info

2019 GI GUIDANCE: KEY POINTS

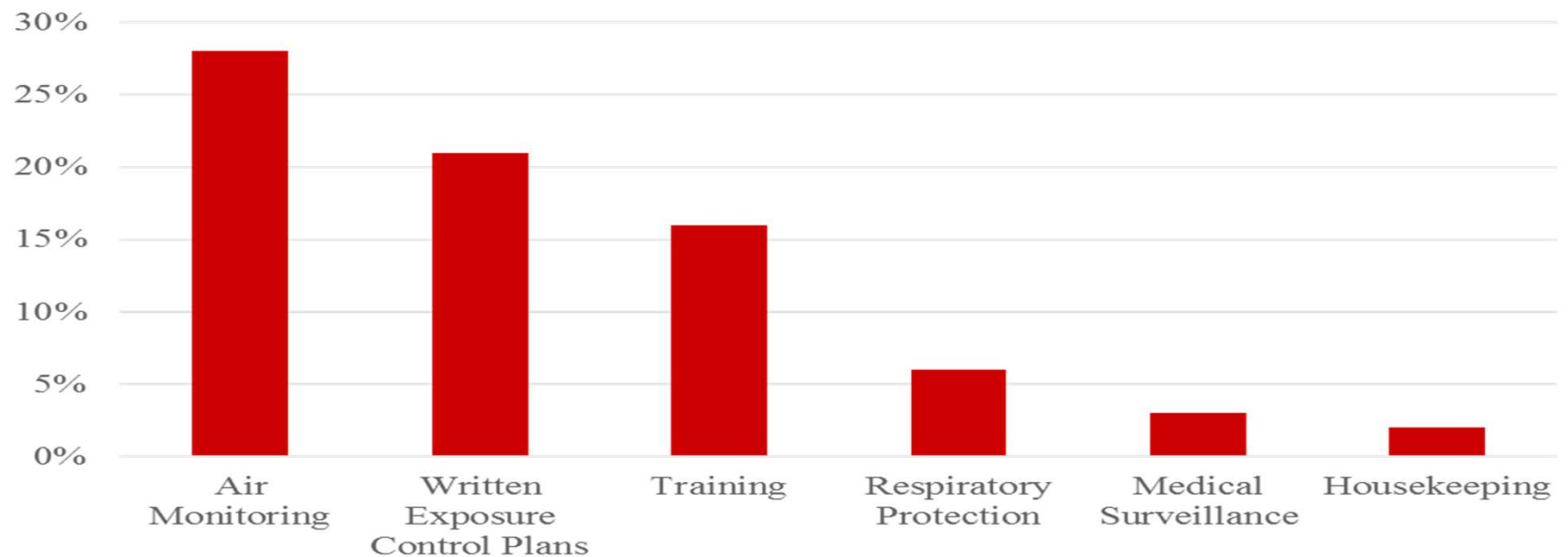
- Standard doesn't prohibit ER from requiring workers to wear personal samplers, but other laws or CBA might
- Sampling results need not be reported to OSHA, but must be made available to EEs under records access rule -period of employment + 30 yrs
- To protect workers from identity theft, it is now a *de minimis* violation to omit SS# from health records
- Employees must receive notice of their sampling results within 15 working days (GI) or 5 working days (construction) but the notification period only starts when the employer receives monitoring results
- If one or more EE will be exposed above 50 ug/m³, area must be “regulated” and all entering must wear respirators, even if they would not be in the area long enough to be overexposed
- Regulated areas can be temporary, using moveable stanchions, caution tape, cones ... but must have mandatory posted signage

2019 GI GUIDANCE: KEY POINTS

- Administrative controls are permitted to reduce worker exposure: worker rotation, or schedule high exposure tasks when other workers not near ... but worker rotation may subject additional workers to medical surv.
- If use of engineering and work practice controls reduce exposures below PEL, then additional controls are not required to reduce exposures even lower (even if feasible)
- If feasible engineering & work practice controls are not sufficient to reduce exposures below PEL, then ER must use all feasible controls and then provide appropriate PPE
- Only tasks with foreseeable exposures above 25 ug/m³ (AL) must be listed in WECP
- ER do not need separate ECP for different operations, processes or shifts at the same worksite (use single comprehensive plan) but terms must be sufficiently descriptive to enable EE to consistently identify and control silica-related hazards

OSHA SILICA ENFORCEMENT FY 2018

Percent of all construction silica citations since 9/23/17 – by category



2018 CHANGES TO OSHA CRANE RULE

- In 11/18, OSHA issued a revised final rule clarifying certification requirements for crane operators and maintaining the employer's duty to ensure that crane operators can safely operate the equipment.
- Employers are now required to train operators as needed to perform assigned crane activities, evaluate them, and document successful completion of the evaluations.
- Employers who have evaluated operators prior to December 9, 2018, will not have to conduct those evaluations again, but will only have to document when those evaluations were completed.
- The rule also requires crane operators to be certified or licensed, and receive ongoing training as necessary to operate new equipment.
 - Operators can be certified based on the crane's type and capacity, or type only, which ensures that more accredited testing organizations are eligible to meet OSHA's certification program requirements.
 - The final rule revises a 2010 requirement that crane operator certification must specify the rated lifting capacity of cranes for which the operator is certified. Compliant certifications that were already issued by type and capacity are still acceptable under this final rule.
- ***The final rule, with the exception of the evaluation and documentation requirements, became effective on Dec. 9, 2018.***
- ***The evaluation and documentation requirements took effect on February 7, 2019.***

MSHA WORKPLACE EXAMINATION RULE

- MSHA final rule took effect 6/1/18 for MNM mines (30 CFR 56/57.18002)
- 2016 *Sunbelt Rentals* FMSHRC decision held contractors and subcontractors at mine sites must also conduct and document their workplace examinations (each shift, by a competent person task trained in the task of workplace examination, in writing for all active work areas)
- Workplace exam must be “adequate” using the “reasonably prudent person” test
- Workplace examiner may be considered “agent of management” and personally fined up to \$72K
- Records must be maintained for a rolling 12 month window and made available to MSHA upon request
- Host mine operator can also be cited if its contractors do not perform & document examinations
- Falsified examination records can result in a fine of \$266K plus criminal prosecution (5 years in federal prison)

QUESTIONS???

- Adele L. Abrams, Esq., CMSP
- President
- Law Office of Adele L. Abrams PC
- 301-595-3520 Eastern office
- 303-228-2170 Western office
- safetylawyer@gmail.com



**LAW OFFICE OF
ADELE L. ABRAMS P.C.**