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OSHA/MSHA Update

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Overview

- ▶ Trump Administration has commenced!
- ▶ OSHA penalties went up 1/13/17 to maximum \$126,749 per violation
- ▶ MSHA penalties were also increased to \$256K max on 1/13/17
- ▶ Reg Reform Legislation & Appropriations
 - ▶ What final “midnight rules” came from OSHA/MSHA?
 - ▶ What prospects for leftover items on regulatory agenda from 12/16?
 - ▶ Which rules will Congress rescind under CRA or new “Reg Reform” legislation?
 - ▶ Which Executive Orders affecting occupational safety and health were rescinded?
 - ▶ Which S&H and Regulatory Reform issues are on Congress’ radar screen in 2017?
 - ▶ Will Congress use the OSHA FY 18 budget to cut agencies, programs & EHS enforcement personnel
 - ▶ Will Congress (or agencies) constrain enforcement of MSHA/OSHA final rules currently in litigation?



Who's in charge?

- Secretary of Labor
 - Alexander Acosta – Confirmed!
- Assistant Secretary of OSHA and MSHA??? What qualities will be sought?
- Head of NIOSH
 - Dr. John Howard serving six-year term that extends beyond 2017 ... will he continue to serve in administration?



Regulatory Reform Legislation

- REINS Act (HR 26) – passed by House 237-187 – not yet considered in Senate
 - 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
 - Would permit Congress to repeal, en masse, federal regulations issued since 6/16 by amending the Congressional Review Act
 - Targets rules “that defy message sent by the voters” or which were “poorly designed in the haste of the midnight rule period”



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.



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.
- **NOTE: MSHA has NO statute of limitations for citing violations or paperwork requirements**



Anti-Volks Legislation – Democratic Style

- HR 2428 & S. 1122 – Introduced May 16, 2017 with multiple (all Dem) cosponsors
- 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].”



Executive Orders

- “1 in, 2 out” approach – Zero Net Cost of New Rules
- 2/24 Exec. Order requires each agency to form task force to review existing rules and recommend repeal or modification if the rule eliminates jobs – will seek stakeholder input
- Expediting environmental reviews for construction and other projects
- Hiring Freeze Lifted ... but will RIFs occur in federal EHS based on budget cuts?
- Regulatory Freeze –... delays implementation of Obama era pending rules by 60 days (can be extended)
 - Delays already applied to OSHA silica and beryllium rules and MSHA workplace exam rule
- ✓ Meanwhile, Congress has rescinded President Obama’s Executive Order on Fair Pay & Safe Workplaces, H. Res. 37
 - ✓ The FPSW order had debarred federal contractors who had poor compliance records with OSHA, EEOC or other DOL employment and labor laws



Protecting America’s Workers Act

- HR 914 - Protecting Workers Act - OSHA “reform” bill reintroduced 2/7/17 with 24 sponsors (all Dem)
 - Would expand OSHA coverage to public sector workers
 - Would increase criminal penalties to 5 years (for serious injury) or 10 years (for fatality) arising from “knowing” violation (lower bar than current “willful”)
 - Would impose mandatory minimum penalties for fatality-related citations (\$50K)
 - Would expand whistleblower SOL to 180 days (current is 30 days) and expand rights of accident victims and their families to challenge OSHA settlement with employers
 - Would codify the anti-retaliation provisions of e-Recordkeeping rule
 - Would prohibit issuance of (or amendment to) “Unclassified” violations
 - Would require abatement of cited conditions even if contest filed, with procedures to move for stay
 - Would impose interest on penalties, running from date of contest, in the event the citation is upheld



BYRD Mine Safety Act - HR 1903 & S. 854

- Reintroduced in House and Senate (Dem co-sponsors only). Key provisions include:
 - Increased civil penalties
 - Codifies criteria for POV mines, with doubled penalties
 - Sets mandatory minimum fines of \$10,000 (max \$100,000) against company and/or supervisors for violating whistleblower rights, and expands statute of limitation for filing complaint from 60 days to 180 days
 - Increases criminal penalties (to 5 yrs and \$1 million penalty) and criminal referrals
 - Mandates NIOSH investigation of certain accidents
 - Expands MSHA Part 46/48 annual refresher training from 8-9 hrs, with the extra hour to address miners' rights and be taught BY MSHA or a third party approved trainer (not employer)
 - Prevents attorney from representing both company and its supervisors in investigations or litigation, at MSHA's discretion (can go to court to block representation if MSHA perceives "conflict of interest")
 - Provides Enhanced Subpoena Powers - To require attendance and testimony of witnesses and production of information and documents. Inspectors and DOL attorneys would be allowed to question individuals privately without the knowledge of the employer or its counsel



MSHA Workplace Exam Final Rule – Effective 10/2/17 (new date)

- Rule is currently in litigation in US Ct. of Appeals – no stay from court but administrative stay by MSHA
- Main provisions:
 - “A competent person designated by the operator shall examine each working place at least once each shift, before miners begin work in that place, for conditions that adversely affect safety or health.” (NEW)
 - Definitions of “competent person” and “working place” remain same per 56/57.2 (current)
 - Examination of each working place at least once each shift (current) but before miners begin work in an area (NEW)
 - The examiner/competent person’s name, date and location of examination record must be included (NEW)
 - The examination record must include a description of any conditions that may adversely affect miners S&H (NEW)



MSHA Workplace Examination Rule

- The examination record must include the DATE of the corrective action (new)
- The Operator must promptly notify miners of any adverse conditions found (NEW) and promptly initiate corrective action
- The examination record must be made available to miners and their representatives (new)
- Withdrawal of miners if an imminent danger is found and notification of Operator (current)
- Examination record maintained for a period of 1 year (current) and made available to MSHA and to rep of miners (NEW)



DOL/DOJ MOU: Criminal Prosecution

- 12/17/15: DOL/DOJ entered an MOU to work cooperatively in bringing more criminal prosecutions under the OSH Act and Mine Act, and under other federal statutes with more stringent sentences
 - But DOJ division tasked with these prosecutions (Environmental Crimes Unit) is on Trump "hit list"
- US Attorneys are urged to use EPA laws (with felony provisions) and 18 USC (obstruction of justice, conspiracy, false statements, witness tampering) to impose sentences that could reach 20+ years
- More prosecutions could be brought under state laws (homicide, manslaughter, reckless endangerment, assault/battery) if feds refuse to act
- DOL/DOJ MOU suggests that workplace violations may be prosecuted creatively by using Clean Air Act, Resource Conservation & Recovery Act, and Toxic Substances Control Act
 - DOL will also seek criminal prosecution for violations of child labor laws that endanger workers.



OSHA's 2016 Crystalline Silica Rule

- Sets new PEL of 50 ug/m³ (8 hr TWA) and action level of 25 ug/m³
- Rule now takes effect (federally) on Sept. 23, 2017 for construction
- Effective on June 23, 2018 for GI/maritime
- In litigation in US Court of Appeals ... litigants also filed petition to reopen rulemaking with OSHA on 5/3/17.
- Court has not stayed implementation dates



Crystalline Silica – General Industry Rule

- Includes provisions for:
 - Measuring worker exposures to silica if at or above 25 ug/m³ action level and workers get notification of results within 15 working days;
 - Using engineering controls (e.g., water, ventilation) and work practices to limit exposures from exceeding 50 ug/m³ over 8 hr time-weighted average workday;
 - Limiting access to areas where workers could be exposed above the PEL (signage requirement);
 - Using respirators when necessary only after implementing all feasible engineering and administrative controls;
 - Restricting housekeeping practices that expose workers to silica if feasible alternatives are available;
 - Medical exams for highly exposed workers (25 ug/m³ exposure for more than 30 days in GI);
 - Worker training on work ops that result in exposure and ways to limit exposure; and
 - Recordkeeping of workers' silica exposure and medical exams.



OSHA's Construction SILICA Rule

- High risk tasks: masonry saws, grinders, drills, jackhammers, chipping tools, drilling rigs, milling crushing, heavy equipment used for demolition & other tasks
- Rule includes provisions for:
 - Use of control methods in Table 1 OR measure worker exposure and decide which controls work best to limit exposures to PEL in workplace
 - Written exposure control plan with implementation by designated competent person
 - Restriction on housekeeping practices that expose workers to silica
 - Medical exams (chest X-ray and lung function tests) every 3 years for workers who wear respirator 30+ days/yr.
 - Worker Training & Recordkeeping



Construction "Table 1" 81 Fed. Reg. 16877-16879

- **Employers who follow Table 1 correctly are NOT required to measure worker exposure to silica and are NOT subject to PEL! Otherwise 50 ug/m³ PEL and 25 ug/3 AL apply.**
- Table 1 lists:
 - Equipment/Task (18 tasks included),
 - Engineering & Work Practice Control Methods, and
 - Required Respiratory Protection and Minimum Assigned Protection Factor (APF) for shifts <4 hr and those > 4 hrs
- Chart lets employers know what they need to do, including use of water and ventilation, sometimes supplemented with respiratory protection.



Table 1: Work Tasks/Equipment

- Stationary masonry saws
- Handheld power saws
- Handheld power saws for cutting fiber-cement board (blade diameter of 8" or less)
- Walk-behind saws
- Drivable saws
- Rig-mounted core saws or drills
- Handheld and stand-mounted drills
- Dowel drilling rigs for concrete
- Vehicle-mounted drilling rigs for rock and concrete
- Jackhammers and handheld powered chipping tools
- Handheld grinders for mortar removal (i.e., tuck pointing)
- Handheld grinders for uses other than mortar removal
- Walk-behind milling machines and floor grinders
- Small drivable milling machines
- Large drivable milling machines
- Crushing machines
- Heavy equipment and utility vehicles used during demolition
- Heavy equipment and utility vehicles for grading & excavating

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 Triage On Reports

- ▶ Priority inspections for I/I reports will be given to Category 1 reports:
 - ▶ Fatalities or at least 2 persons hospitalized;
 - ▶ Injury to worker under age 18;
 - ▶ Employers with known history of multiple injuries (same/similar events in past 12 mo);
 - ▶ Repeat offenders (those with history of egregious violations, willful and repeat violations, and failure to abate situations)
 - ▶ Employers in SVEP
 - ▶ Those employers covered by National Emphasis Program

- ▶ OSHA will also give priority to those workplaces with whistleblower complaints pending, those in VPP or SHARP, and those involving temporary workers or health issues



Electronic Recordkeeping

- OSHA Final Rule (published 5/16) took effect 12/1/2016 for anti-retaliation provisions
- Electronic data submission was to start 7/1/2017 for reporting I/I data (but in litigation now) – OSHA just announced it will be delayed – new date TBA
- 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)
 - Rule also can be violated by certain types of incentive and disciplinary programs
- 29 CFR 1904.36 incorporates Section 11(c) as citable (fine up to \$124,709) 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) by 7/1/17
 - Smaller employers (20-249) in high-hazard industries will need to submit 300A log annually
- Electronic data will be publicly available and searchable by employer name



OSHA General Industry Walking/Working Surfaces Final Rule

- Walking-Working Surfaces Rule released 11/18/16 – effective 1/17/17 (in part)
 - Mostly industry-friendly (allows more flexibility to use PFA systems in lieu of guardrails and barrier in general industry) – but \$300 mil/yr cost projection could force Congress to rescind under Congressional Review Act
 - Requires workplace inspections of all surface areas “regularly” and training of all workers by 5/17/17 on fall hazards and use of PFA (documentation is critical)
 - Now in litigation over rope descent system provisions (possible challenges to application of rule to **combustible dust** hazards, discussed in preamble, were not brought – expect request for interpretation to OSHA)



Other Actions

- Trump budget targets Chemical Safety Board for total elimination
- “Every new rule requires two rules to be rescinded” (removal of many pending items from Regulatory Agenda) – probably rulemaking freeze at OSHA/MSHA for a while
- Increased OSHA/MSHA funding for Strategic Partnerships & Alliances and compliance assistance
 - Cut in funding expected for standards setting and enforcement programs
 - Resurgence of VPP/SHARP programs – possible expansion to MSHA?
 - OSHA SVEP may become toothless/rescinded
- Most OSHA inspections will be “event-driven” by injuries and employee complaints
- MSHA must continue “2s and 4s” unless Congress amends Mine Act





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QUESTIONS???

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