



SAFETY FORECAST: 2019

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OVERVIEW

- Trump Administration just passed the two-year mark ...
- Reg Reform Legislation & Appropriations
 - What's happened on MSHA/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 MSHA/OSHA enforcement priorities shifted in this Administration?

MSHA POLITICS ...

- Assistant Secretary of MSHA: David Zetazalo (former coal CEO) – At agency since 2017 – key issues:
 - “One MSHA” initiative will move more coal enforcement personnel to MNM mines
 - Powered haulage initiative (coal and MNM) – RFI concluded 12/18
 - Workplace Examinations – Obama rule modified, took effect 6/18
 - Crystalline silica – practical impact of OSHA rule on mining operations
 - MSHA had “back burnered” the rule but then explosion of CWP cases ...
 - MSHA maximum penalties hiked 1/23/19 to \$266,275 (\$72,620 for regular assessments & 110C cases)

OSHA POLITICS ...

- Secretary of Labor: Alexander Acosta – May soon be under pressure to resign ...
- Assistant Secretary of OSHA: Scott Mugno (Fed Ex safety/attorney) Senate confirmation vote never occurred in 2017 and 2018 ... hearing this month just 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
 - State plan scrutiny for effectiveness will continue
 - OSHA maximum penalties hiked to \$132,598 (willful/repeat) and \$13,260 (serious and OTS) – MI-OSHA must match

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

- 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
- MSHA: \$373.8 million, with \$10.5 million reserved for State Grants 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

DEMOCRATIC S&H LEGISLATION EXPECTED

- OSHA/MSHA oversight hearings coming in House Ed & Labor Cmte.
- Expect to see reintroduction of:
 - Protecting America's Workers Act
 - “Anti-Volks” bill to extend OSHA Statute of Limitations for Records Citations
 - Mine Safety & Health Act revisions
 - “Giving Workers a Fair Shot Act” – legislation to increase OSHA criminal penalties for “knowing” violations resulting in death or serious injury/illness
 - Another Bipartisan effort to codify Voluntary Protection Program (VPP)

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, and MSHA workplace exam rule
- ✓ Congress also rescinded President Obama’s Executive Order on Fair Pay & Safe Workplaces, H. Res. 37

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

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

OSHA 11/18 REGULATORY AGENDA

OSHA RFI/ANPRMs include:

- Crystalline Silica (an RFI to gather information on the effectiveness of control measures not currently included in Table I of the March 2016 final rule for construction),
- Mechanical Power Presses (an RFI on how to update the current rule to address hydraulic or pneumatic power press technological advances),
- Powered Industrial Trucks (an RFI on how to update its standards on powered industrial trucks),
- Lockout/Tagout (an RFI on technological advances employing computer-based controls of hazardous energy that conflict with existing LOTO standards)

OSHA also plans to:

- Strip some ancillary provisions from the Beryllium rule for Construction and Shipyards (which was finalized in January 2017 – target date for an amended final rule is June 2019),
- Delay the update to the Hazard Communication Standard until March 2019 (the next step is a proposed rule to maintain alignment with the Global Harmonization Systems of other countries), and
- Delay the due date to finalize amendments to its 2010 crane standard until June 2019
 - Final rule on type and capacity requirements for crane operator training was released on 11/9/2018

ELECTRONIC RECORDKEEPING

- Revised final rule released by OSHA (pre-publication) on 1/25/19 –legal challenge due to OIRA clearance during govt shutdown ... could delay implementation past next filing deadline (3/2/19)
- Original 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 delayed until 12/31/17.
 - 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 e-reporting provisions require all employers with 250+ workers (on worksite) to e-file 300A log of all injuries and illnesses annually
 - Smaller employers (20-249) in high-hazard industries will need to submit 300A log annually

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)*

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 will become effective on February 7, 2019.***

QUESTIONS???

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