

WORKPLACE SAFETY AND HEALTH: An Overview of Where We Have Been, Where We May Be Heading, and Executive Orders of Interest

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Where Have We Been?

- **Since 2008, MSHA and OSHA have pursued regulatory agendas aimed at more rigorous health standards and enforcement potential.**
- **Regulating by policy without notice and comment rulemaking.**
- **Commission and Court Decisions have in some cases expanded theories of enforcement.**

MSHA Adjudicatory Examples

- **Mine Plan Review Process**
- **Expansion of Whistleblower causes of action regarding interference claims and claims against individuals**
- **Repeated Flagrant violation definition**
- **Significant and Substantial definition**
- **Access to documents during inspection and investigation expanded**
- **Limited review and potential for abuse of accident control orders**



MSHA Regulatory and Policy Examples

- **Respirable Coal Dust Rule**
- **POV Rule and implementation**
- **A run at revising the civil penalty rules**
- **The advent of the “impact inspection”**
- **Rules to Live By initiative resulting in special assessments**
- **Advanced Notice of Inspection Enforcement**
- **Workplace Examination Policy and Rule for M/NM mines**



Federal OSHA Adjudicatory Examples

- **Clarification of the meaning of “Willfulness” with regard to OSHA citations**
- **Upholding OSHA’s application of its multi-employer worksite doctrine on a case-by-case basis without the need for formal rulemaking**
- **Proof of knowledge of the employer requires more than supervisory misconduct**
- **Rejection of OSHA’s attempt to circumvent the 6 month statute of limitations in citing inaccurate injury and illness recordkeeping**



Federal OSHA Regulatory/Policy Examples

- **OSHA’s “clarification” Rule to permit it to circumvent the 6 month statute of limitations in issuing enforcement action on injury and illness reporting inaccuracies for the entire 5 year retention period.**
- **Injury and Illness Reporting Rules**
 - **Explicit anti-retaliation provisions**
 - **Expansion of 8 hour and 24 hour reporting requirements to OSHA.**
- **Protections for Temporary Workers**
 - **Personal Protective Equipment**
 - **Whistleblower Protection Rights**
- **Significant Maximum Civil Penalty Increases effective January 13, 2017.**



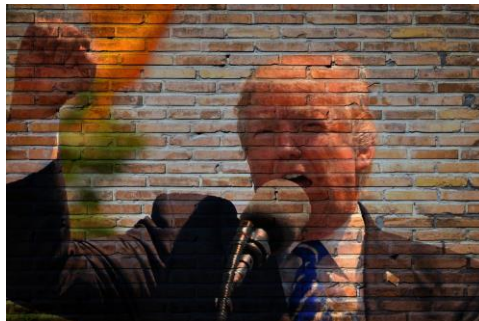
The Epic Saga of the Silica Rule

- **OSHA's Silica Rule became enforceable on September 23, 2017**
 - **Reduces the permissible exposure limit to 50 micrograms per cubic meter of air averaged during an 8 hour shift**
- **MSHA lists the Silica Rule as a long-term action in its most recently published regulatory agenda**



Current Landscape

- **Executive Orders signed by President Trump**
- **Proposed legislation**
- **Potential for collaborative environment to shape regulatory landscape?**



Regulatory Reform Executive Orders

- **January 20, 2017 - Regulatory freeze**
- **January 24, 2017 - Plan for streamlining permitting and reducing regulatory burdens for domestic manufacturing**
- **January 30, 2017 – Requires two regulations to be removed for each regulation proposed**
- **February 24, 2017 - Requires head of each agency to review existing regulations and make recommendations re: repeal, replacement, modification of regulations that eliminate jobs, inhibit job creation, impose costs, etc. within 60 days**



Continued

- **MSHA Regulatory Improvement – Executive Order 13777**
 - **MSHA has requested stakeholders' assistance in identifying those regulations that could be repealed, replaced, or modified without reducing miners' safety or health.**



Fair Pay and Safe Workplaces Executive Order

- **Signed by Pres. Obama on July 31, 2014**
 - **Published on August 25, 2016**
- **March 27, 2017 - President Trump signed Executive Order reversing the Fair Pay and Safe Workplaces Executive Order**



Volks Rule Invalidated

- **April 4, 2017 - President Trump signed H.J. Res 83 invalidating Volks Rule**



Anti-Volks Rule Resurrected? (H.R. 2428 and S. 1122)

- **Would clarify when the time prior for issuance of citations under act begins**
- **Would require clarification of employer's duty to make and maintain records of work-related injuries and illnesses is an on-going obligation**
- **Introduced to House on May 16, 2017**



Regulatory Accountability Act (H.R. 5)

- **Revises procedures under Administrative Procedure Act**
- **Would Repeal the *Chevron* and *Auer* doctrines to end deference to agency interpretations of statutes and regulations.**
- **Passed the House on January 11, 2017**



More on Deference

- **Requires courts to defer to agency's interpretations of its own regulation "unless that interpretation is plainly erroneous or inconsistent with the regulation."**
- **Per the late Justice Scalia, *Auer* decision is "contrary to fundamental principles of separation of powers" and "permits the person who promulgates a law to interpret it as well."**



Future of Deference

- **H.R. 5 – Regulatory Accountability Act was introduced to the House on January 11, 2017, which would repeal *Chevron* and *Auer*.**
- **Judge Gorsuch has expressed skepticism of granting federal agencies deference.**



Midnight Rules Relief Act (H.R. 21)

- **Allows Congress to disapprove multiple regulations within last 60 legislative days of session during final year of President's term**
 - **Currently must consider only one regulation at a time**
- **Passed the House on January 4, 2017**



REINS Act (H.R. 26)

- **Requires agencies to submit major regulations to Congress for approval**
 - **Major = Costing over \$100 Million**
- **Passed the House on January 11, 2017**



Protecting America's Workers Act (H.R. 914)

- Increases protections for whistleblowers
- Increases penalties for high gravity violations
- Adjusts penalties for inflation
- Provides rights for victims and their families
- Introduced to the House by Democrats on February 7, 2017



BYRD Mine Safety Act (H.R. 1903 and S. 854) (Dem. Co-sponsors only)

- Requires independent investigation of a mine accident under certain circumstances
- Expands DOL's enforcement authority
- Revises civil and criminal penalties
 - Mine operator subject to felony punishable by 5 years in prison and \$1 million fine
- Expands whistleblower rights and protections
- Introduced to the House on April 5, 2017



Regulatory Agendas

□ OSHA

- **Removed 16 actions, including:**
 - **Injury and Illness Prevention Program**
 - **Combustible Dust**
 - **Noise in Construction**
- **Beryllium Rule is in proposed rulemaking stage**



□ MSHA

- **Still includes Diesel Exhaust Rule**
- **Silica Rule listed as a long-term action**
- **Withdrew 3 actions including Criteria and Procedures for Proposed Assessment of Civil Penalty Reform**



MSHA Wish List Items

- **Confirm the position of Assistant Secretary**
- **Fill vacancy on Commission**
 - **There have been several recent 2-2 split decisions**
- **Follow established formal rulemaking process**
- **Establish a conference process prior to issuance of penalties**
- **Return development of mine plans back to operator-specific approach**
- **Rescind respirable dust rule for review**
- **Re-define “interference” and “significant and substantial”**
- **Establish timelines for special investigations**



OSHA Wish List Items

- ❑ **Confirm Assistant Secretary Position**
- ❑ **Return to programs that recognize excellence in safety instead of focusing on enforcement**
- ❑ **Return to a 3 year look back for repeat violations**
- ❑ **Do not restrict an employer's ability to drug-test its workforce through reporting rules**
- ❑ **Overhaul the severe violator program to include only final orders**



Take Away Best Guesses

- ❑ **The more things change, the more they will stay the same (within a certain tolerance).**
- ❑ **Workplace safety and health is critical and should be protected.**
- ❑ **OSHA and MSHA will comply with executive orders with some relief for the regulated community.**
- ❑ **Deference to Agency interpretations of statutes and regulations will be under greater scrutiny.**



Other Exec Orders and Bills of Interest

- **Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects – January 24, 2017, Executive Order 13766**
- **Infrastructure/Highway Funding – Where is this heading?**
- **Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing**



Continued

- **Waters of the United States – EPA, Department of Army, and Army Corps of Engineers June 27, 2017, proposed rule to rescind the overly broad regulatory definition of WOTUS**

- **Clean Power Plan Rollback**



Questions and Discussion

