



OSHA/ UPDATE 2020

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OVERVIEW

- Trump Administration is in final year of 1st (only?) term ...
- Reg Reform Legislation & Appropriations
 - What's happened on OSHA regulatory agenda
 - Which safety & health legislation will be considered
 - Which Executive Orders and agency policies affecting occupational safety and health affect enforcement
 - How have enforcement priorities shifted?

DOL POLITICS ...

- Secretary of Labor: Gene Scalia (son of SCOTUS) – notable for (unsuccessfully) fighting expansion of OSHA's GDC in *Secretary of Labor v. SeaWorld*
- OSHA – Scott Mugno withdrew as nominee (after Senate committee clearance)
 - Loren Sweatt - Acting Asst. Sec. of OSHA timed out
 - Amanda Edens – Now Acting Deputy (career OSHA staffer)
 - Many career OSHA personnel have retired – impact on institutional memory?
 - Lowest # of inspectors in 48 years – each employer would be inspected once in 165 years
- MSHA Asst. Sec. Dave Zatezalo: Under fire over silica and coal dust issues
 - Cancelled MSHA “Rules to Live By” program
 - Conducting electrical safety and powered haulage initiatives (due to # of fatalities)
 - “Blurring the lines” – combining Coal and MNM enforcement personnel, offices
 - Increased IH emphasis in MSHA inspections (preparatory to silica rule)
 - Trump’s “workplace exam” rule revision rejected by court – more stringent 2017 rule took effect 1/1/2020
 - Applies to all contractors at mine sites (including construction aggregates operations)

2020 OSHA FINAL RULE: MEDICAL RECORDS

- 7/31/2020 OSHA issued final rule to preserve worker medical privacy & streamline agency review of medical records during inspections
- Establishes new position of “medical records officer” who will decide when field staff CSHOs will have access to employee med records containing info identifying the worker (previously OSHA Asst Sec made decision)
- OSHA is also prohibited from releasing or sharing worker medical records except in limited circumstances (NIOSH research or enforcement cases where worker health is a concern)

OSHA COVID: HR 6559

- Every Worker Protection Act of 2020: would require OSHA to issue a ETS (within 7 days) based on CDC guidance to protect ALL workers from exposure to COVID-19 in the workplace (OSHA and courts rejected unions' call for ETS)
 - Would require all workplaces to implement infectious disease exposure control plans
 - OSHA would have to issue permanent infectious disease standard within 2 years
- Forbids employers from retaliating against workers for reporting infection control problems to employer, public authority, media, or on social media, or because workers use their own higher level PPE if employer does not provide it
- Protects public sector employees in the 24 federal OSHA states where they are not covered
- Gives OSHA citation discretion over PPE in health care and other covered employers if there is good-faith effort to purchase and alternative methods of protection are offered
- Requires CDC/NIOSH to track and investigate COVID-19 infections and make recommendations on needed actions to protect workers

S 3710: COVID-19 MINE WORKERS PROTECTION ACT

- BIPARTISAN legislation to require MSHA to promulgate ETS to protect miners of coal or other mines from occupational exposure to SARS–CoV–2 w/in 7 days (permanent rule in 2 yrs)
- Would require mine operators to provide necessary PPE, ancillary medical supplies, and other supplies determined necessary to reduce and limit exposure to SARS–CoV–2 in coal or other mines
- Requires incorporation of CDC, NIOSH and OSHA guidelines that are designed to prevent the transmission of infectious agents in occupational settings
- Requires recording and reporting of all work-related COVID–19 infections
- Prohibits retaliation against miners for complaints or for using more protective PPE

FEDERAL OSHA COVID ENFORCEMENT

- ❑ OSHA 5/19/2020 Update: OSHA is now increasing in-person inspections in all types of workplaces and “will utilize all enforcement tools as OSHA has historically done” – change made because “outbreaks among workers in industries other than healthcare, EMR, or corrections have been identified”
 - ❑ <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>
- ❑ CalOSHA & Virginia OSHA have enforceable standards on COVID
 - ❑ Or-OSHA has proposed ETS for COVID (comments close 9/7/2020) and plans permanent infectious disease rule to follow
 - ❑ Other state plan states may follow to fill the federal “gap” and knowledge of state plan compliance can be imputed to prove federal GDC citations
- ❑ If employer has a severe injury report, must still notify OSHA within 8 hr (fatal) or 24 hr (hospitalization, amputation, eye loss) but most will be handled through RRI – fatalities prioritized

COVID-19 & REPORTING

- OSHA revised its guidance on recording COVID-19 cases in May 2020 – now COVID is a recordable by all industry sectors
- Employers **must** record COVID illnesses if there is “objective evidence that a COVID-19 case **may** be work-related, and the evidence was reasonably available to the employer” – **due diligence investigation required**
- CalOSHA Reporting: A COVID case will be “presumed work-related” if **ANY** workplace exposure is identified, even if the cause of the illness is more likely attributable to a **non-workplace** exposure: look at (1) interactions with people known to be infected; (2) working in same area where people known to carry the virus have been; or (3) sharing tools, materials or vehicles with known carriers
 - Also consider type/extent/duration of contact with other people; physical distancing or other controls impacting likelihood of work-related transmission, and whether there was work-related contact with anyone who had COVID symptoms
- *A positive COVID test is NOT required to trigger CalOSHA recording*

WHAT ABOUT MSHA ?

- MSHA advises mine operators to adhere to CDC guidelines
- MSHA will continue its essential functions, including mandatory inspections, accident investigations, and hazard complaints
- MSHA has suspended EFS and small mine services, and “walk & talks”
 - If mines are limiting production or closing operations – let MSHA know so they can adjust inspector assignments
- MSHA will permit extensions on certain certifications but company must work with its district office to ensure certifications are conducted in a timely manner once the Emergency Declaration is lifted:
 - Annual refresher training (Part 46 and Part 48)
 - Certified person sampling (coal 70/71/90.202)
 - Certified person, maintenance & calibration (coal 70/71/90.203)
 - Likely to extend deadline on annual audiometric testing (get permission)
 - NO extension on new miner training – must still be complete before work at mines
 - Make sure to DOCUMENT any discussions of extensions with District Office to make sure there is concurrence on new “due date”

MSHA & COVID-19

- MSHA has protocols for:
 - inspections,
 - use of separate vehicles to travel within mines,
 - minimizing group meetings, and
 - postponement of health sampling (distancing considerations)
- Inspectors will remain a safe “distance from miners while performing inspections”
- Due to 103A, cannot refuse entry to mine
 - COVID-19 can raise difficult questions about where the inspector has traveled recently, any symptoms observed while on site – get District Office involved ASAP!
- Remember to document Task Training under Part 46/48 if workers are assigned to new jobs as a result of workforce shrinkage due to illness!

OSHA & MSHA REPORTING

- If worker reports COVID-19 to employer as “work-related” illness, worker is covered by OSHA and MSHA anti-retaliation laws (Sec. 11C and 1904.36 for OSHA; Sec. 105C of Mine Act for MSHA worksites)
 - Employer can determine work-relatedness for OSHA recording purposes (exercising due diligence to investigate reports)
 - If worker is hospitalized, and claims work-related, must notify OSHA within 24 hours (8 hours of work-related death) & for MSHA, must notify agency within 15 minutes of any death or injury/illness with potential to result in death (even those that may not be work related)
 - Can use online report or call local office
- MSHA says “illness or disease of miner” is reportable if it “**may** have resulted from work at a mine or for which an award of compensation is made” (30 CFR 50.2(f))

DEMOCRATIC S&H LEGISLATION

- H.J.Res.44 - Disapproving the final rule of the Occupational Safety and Health Administration titled "Tracking of Workplace Injuries and Illnesses" (44 cosponsors)
- Protecting America's Workers Act (HR 1074) (41 Dem cosponsors)
- Workplace Violence Prevention legislation (HR 1309) – cleared House (bipartisan vote of 251-158)
 - Companion is S. 851 (no action – 31 cosponsors but no GOP)
- Bipartisan legislation to codify VPP (S. 904 & HR 1956) – specifies employers cannot be charged to participate
- HR 2872: Worksite Reporting Act – requires site-controlling employer to have a site log for all injuries/illnesses including those of temps and contractors
- HR 3668: Heat Illness & Fatality Prevention Act – introduced 7/10/19 (with hearing – currently 74 cosponsors – all D)
 - Would require OSHA to promulgate proposed rule within 2 years, and a final rule within 42 mo of enactment on prevention of occupational exposure to excessive heat (equivalent to most protected heat stress standard adopted by any state plan state)
 - If standard is not finalized in time, interim final standard would require employers to develop & implement comprehensive excessive heat prevention plan that considers NIOSH criteria (2016) and protect workers from discrimination or retaliation for exercising their rights under the rule

EXECUTIVE ORDERS

- “1 in, 2 out” approach – Zero Net Cost of New Rules (agency-wide “bank”) – review still ongoing but...
- 5/19/2020 “COVID” Executive Order (EO) requires OSHA, MSHA, EPA, etc. to “identify regulatory standards that may inhibit economic recovery and ... consider taking appropriate action ... to temporarily or permanently rescind, modify, waive or exempt persons or entities from those requirements.”
- EO authorizes agencies to exercise “enforcement discretion” or extensions of time for meeting regulatory requirements, “for the purpose of promoting job creation and economic growth.”
- EO further directs agencies to review any regulatory standards they temporarily altered during the COVID pandemic, and actions taken now in response to this order, and determine which would promote economic recovery “if made permanent.”
- ✓ Congress also rescinded President Obama’s Executive Order on Fair Pay & Safe Workplaces, H. Res. 37

10/19 EXECUTIVE ORDERS IMPACTING AGENCY POLICY

- 10/9/19: President Trump signed two Executive Orders aimed at limiting the ability of federal agencies to issue non-binding guidance documents, such as policy statements, memoranda, bulletins and letters of interpretation (LOI)
 - Agency policy is often use to expand exemptions in current rules, easing compliance obligations, but Policy issuances cannot add any binding requirements to new or existing rules
 - DOL final rule implementing this was published in August 2020 – will impact OSHA/MSHA ability to issue new policy, guidance and LOI (including on COVID!)
- New Executive Orders:
 - “Promoting the Rule of Law Through Improved Agency Guidance Documents,” requires all agencies to post all of their guidance documents on a searchable website with the understanding that anything not posted is considered rescinded.
 - “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,” is intended to safeguard against “Secret or unlawful interpretations of regulations, or from unfair or unexpected penalties.”
- **The Executive Orders took effect immediately**

ENFORCEMENT DATA UPDATE

- New OSHA/MSHA penalties as of 1/15/2020 – 1.8% increase mandated by statute
 - Maximum of \$134,937 for willful/repeat (up from \$132,598) with mandatory minimum of \$9,639
 - Maximum of \$13,494 for serious/OTS/FTA (up from \$13,260)
 - ***MSHA maximum penalties have increased to \$270,972 per violation (personal civil penalty max of \$73,901), with mandatory minimum of \$6,159 for failure to notify MSHA within 15 min. of fatality or serious injury!***
- Total Federal OSHA Inspections FY 2019 (all industries): 33,401
- There were 42,028 OSHA State inspections (up 2.3% from 2018) and 42% of state inspections focused on construction
- Federal construction inspections: 53%
- For construction inspections:
 - Total # of violations: 25,931
 - # Serious violations: 19,917
 - # Willful violations: 258
 - # Repeat violations: 1,753

ENFORCEMENT: OSHA TOP 10 (2019)

1. Fall Protection - General Requirements (1926.501)
2. Hazard Communication (1910.1200)
3. Scaffolding - General Requirements (1926.451)
4. Control of Hazardous Energy - Lockout/Tagout (1910.147)
5. Respiratory Protection (1910.134)
6. Ladders (1926.1053)
7. Powered Industrial Trucks (1910.178)
8. Fall Protection – Training Requirements (1926.503)
9. Machine Guarding– General Requirement (1910.212)
10. Personal Protective and Lifesaving Equipment – Eye and Face Protection (1926.102)

CONSTRUCTION TOP 10 MOST-CITED VIOLATIONS – FY 2019

1. Fall Protection (1926.501) – 6,881 citations (1,192 were willful or repeat)
2. Scaffolding (1926.451) – 3,169 citations (172 were willful or repeat)
3. Ladders (1926.1053) – 2,708 (135 were willful or repeat)
4. Fall Protection Training (1926.503) – 2,015 (108 were willful or repeat)
5. Eye & Face Protection (1926.102) – 1,618 (131 were willful or repeat)
6. General S&H Provisions (1926.20) – 1,007 (48 were repeat)
7. Head Protection (1926.100) – 933 (36 were willful or repeat)
8. Specific Excavation Requirements (1926.651-652) – 1,500 (116 were willful or repeat)
9. Aerial Lifts (1926.453) – 783 (30 were willful or repeat)
10. Fall Protection Systems Criteria & Practices (1926.502) – 758 (28 were willful or repeat)

DRONES IN OSHA ENFORCEMENT

- OSHA issued (5/18) an internal memorandum to its regional administrators directing the procedures for the use of “Unmanned Aircraft Systems” (UAS) – commonly referred to as “drones” – during inspections
 - NEW policy expected in 2020 – to date, a dozen or more inspections conducted with drones
 - Drones that will be used for OSHA inspections must weigh less than 55 pounds and be registered with the FAA if the UAS weighs more than 8.8 ounces.
- OSHA says it will “obtain express consent from the employer prior to using UAS on any inspection” and Personnel on site will be notified of the aerial inspection prior to launching a UAS, and consent obtained from employer
- OSHA representative operating the drone must keep a visual line of sight, only operate it during the day, UAS cannot operate more than 400 feet above the ground, except when within 400 feet of a structure, then can hover
 - This allows for inspection of rooftops, for example, to see if skylights have proper covers when workers are exposed or to observe work performed by mechanical contractors in those areas.
- Drones are intended to be mainly used for inspection of areas that are deemed unsafe or difficult for inspectors to reach on foot
- OSHA drones will be shooting videotape, which can capture trade secrets and employees caught in the act of doing something that constitutes a legal violation of OSHA (or company) rules may implicate employer
 - OSHA’s memo fails to detail how the information gathered might be protected, and with whom it would be shared – including through FOIA requests.

KEY OSHRC DECISIONS

- **Hensel Phelps: Multi-Employer Worksite Policy Challenge**

- ALJ vacated citation on past 5th Cir precedent that “only employer’s own employees” were protected
- OSHRC – became final order and OSHA appealed to 5th Cir which reversed ALJ and affirmed OSHA’s historical multi-ER policy

- **Integra Health Management: Workplace Violence**

- Employer held liable under GDC by OSHRC in death of worker at hands of patient (three separate opinions!)
- Held: Workplace violence is recognized significant hazard in social services and health care sectors, likely to cause death or serious physical harm, and there were feasible methods of abatement
- Majority found direct nexus between work being performed and risk of violence, and that company training programs recognized the hazard – Integra had agreed that safety training, background checks, and a buddy system would be effective methods of risk reduction

KEY OSHRC DECISIONS

- **A.H. Sturgill: Heat Stress & GDC**
- Temporary employee suffered fatal heat stroke – Employer cited for not adequately implementing heat illness prevention program and failure to train workers on avoiding heat related illness, in violation of OSHA General Duty Clause (Sec. 5(a)(1) of OSH Act)
 - ALJ affirmed both citations
- Issues before OSHRC were whether employer's lack of knowledge of worker's underlying health problems were relevant to OSHA's burden of proof, and whether ALJ miscalculated heat index on day in question
- OSHRC vacated citations, finding OSHA failed to establish heat-related hazard on day in question and that it had no knowledge of temp worker's underlying health condition and that OSHA's guidance docs on heat failed to establish requisite employer knowledge
- **Kiewit Power Constructors Co.: Legitimacy of OSHA Use of WHA Standards**
- Issue is whether OSHA's eye/body wash "quick drenching" rule was legally promulgated (it originally applied only to govt contractors in manufacturing, under Walsh-Healey Act)
- OSHRC (and ALJ) vacated citation
- US Court of Appeals (DC Cir) just reversed and reinstated citation!

NATIONAL EMPHASIS PROGRAMS (NEPs)

- OSHA currently has 9 National Emphasis Programs (NEPs) focusing on:
 - Silica: https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-023.pdf (effective 2/4/2020)
 - Lead: [OSHA Instruction CPL 03-00-009](#)
 - Ship-breaking: [OSHA Instruction CPL 03-00-020](#)
 - Trenching/excavations: <https://www.osha.gov/enforcement/directives/cpl-02-00-161> (effective 10/1/18)
 - 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: <https://www.osha.gov/enforcement/directives/cpl-03-00-022> (effective 12/10/19)
 - 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) and 13 new regional REPs were announced 10/19

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))
 - 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 Form 300A data but this 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

OSHA CRYSTALLINE SILICA UPDATE

- OSHA has issued extensive guidance on how it will enforce the rule –64 FAQ for general industry and 53 FAQ guidance for construction plus 2 new LOI released in 10/19
- Majority of citations in 1st year involved violations of exposure monitoring, written exposure control plans, and training requirements
- OSHA RFI on reopening of silica rule to reexamine expansion of Table I (Construction) and a similar approach for high-exposure tasks in general industry and maritime – new agenda also calls on reopening to address “medical removal” provision!
 - MSHA also has RFI on its version of a silica standard – proposed rule due in 10/2020
 - NIOSH plans silica stakeholders meeting (Virtual) in October 2020
 - Current MSHA PEL is 100 ug/m³ (twice the new OSHA limit of 50 mg/m³ for 8-hr TWA)
- 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)*

OSHA RULEMAKING ON TREE CARE OPERATIONS

- OSHA just convened a SBREFA panel for a possible Tree Care Operations Standard
- OSHA has a formal webpage on the rulemaking:
<https://www.osha.gov/SLTC/treecare/index.html>
- Potential standard could cover employees exposed to hazards including pruning, maintaining, repairing or removing trees, as well as establish safe work practices for such operations.
- Affected employers include companies, municipalities and organizations that occasionally remove trees or perform tree care as part of their operations (residential/commercial construction, remodeling, landscaping, golf courses, power and pipeline clearance and agricultural operations)

OTHER OSHA INITIATIVES

- Focus Four emphasis using 2018 BLS data to target main causes of 59% of construction fatalities: Falls (33%), Struck by (11%), Electrocution (8.5%) and Caught in/between (5.5%)
- More health inspections will occur to address silica rule enforcement (OSHA trying to hire more with IH experience)
- Suicide and opioids prevention in construction (unintentional ODs at work increased by 12% and suicides at work were up by 11 percent in 2018)
- DOL's new Joint Employer rule: potential impact on OSHA enforcement (effective March 16, 2020)
 - Rule limits circumstances under which employers (e.g., franchises) can be considered to “jointly employ” workers, making them responsible for compliance with employment and labor laws and utilizes revised “four factor” test

OTHER OSHA INITIATIVES

- Crane certification issue – OSHA will also update FAQs and issue small entity compliance guide and directive (Spring 2020) on enforcing operator qualifications
 - 11/26/19 memo to field staff re: non-acceptance of CIC certifications starting 12/19 until further notice
- Communication towers: OSHA plans to issue NPRM in 2020 – SBREFA completed in 2018 (8 fatalities from towers in 2019)
- Welding in Confined Spaces: to clarify that this applies to all construction including welding activities
- Beryllium: informal hearing completed, on limited reopening of rule's applicability in construction (main exposure is abrasive blasting with slag)
- PPE Fit in Construction- Long-term action to ensure PPE fits the worker (to bring into conformity with General Industry rule)

MSHA WORKPLACE EXAMINATION RULE

- MSHA final rule took effect 6/1/18 for MNM mines (30 CFR 56/57.18002), but was rescinded by US Ct. of Appeals DC circuit for reducing miners' protections
- MSHA reverted to Obama-era 2016/17 final rule version (most stringent) effective 9/30/19
- 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 \$74K
- 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 \$270,972 plus criminal prosecution (5 years in federal prison)

QUESTIONS???

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