

OSHA UPDATE & ENFORCEMENT INITIATIVES

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OVERVIEW

- ▶ Trump Administration has commenced!
- ▶ OSHA penalties went up 1/13/17 to maximum \$126,749 per violation
- ▶ Reg Reform Legislation & Appropriations
 - ▶ What final "midnight rules" came from OSHA?
 - ▶ What prospects for leftover items on regulatory agenda from 12/16?
 - ▶ Which rules has Congress rescinded under CRA?
 - ▶ Which Executive Orders affecting occupational safety and health were rescinded?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 OSHA final rules currently in litigation?

WHO'S IN CHARGE?

- ▶ Secretary of Labor
 - ▶ Alexander Acosta – Confirmed!
- ▶ Assistant Secretary of OSHA???. What qualities will be sought?
 - ▶ Loren Sweatt named as political OSHA Deputy – comes from GOP staff of House Ed & Workforce Cmte., with construction background
- ▶ 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.

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]."

OTHER S&H LEGISLATION

- ▶ Appropriations Bills for FY 2017 and FY 2018
- ▶ Protecting America's Workers Act (Democratic bill)
- ▶ Legislation to bar union workarounds at non-union worksites
- ▶ Bipartisan legislation to codify Voluntary Protection Program (VPP)

EXECUTIVE ORDERS

- ▶ “1 in, 2 out” approach – Zero Net Cost of New Rules (agency-wide “bank”)
- ▶ 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 e-recordkeeping, silica and beryllium rules
- ✓ 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

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 until 12/1/17
 - ▶ Data submission platform launched 8/1/17
 - ▶ 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 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 \$126,749 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 12/1/17
 - ▶ 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)

OSHA 7/20/17 REGULATORY AGENDA

- ▶ Rules withdrawn (for now)
 - ▶ Combustible Dust
 - ▶ I2P2 Programs
 - ▶ Update of PELs for Toxic Chemicals
 - ▶ Proximity Detection (construction)
 - ▶ Noise (construction)
- ▶ Rules on "long term" agenda
 - ▶ Infectious Disease
 - ▶ Process Safety Management
 - ▶ Crane Standard Revisions

JOINT EMPLOYER LIABILITY

- ▶ Obama-era Department of Labor (DOL) policy, released in relation to a National Labor Relations Board (NLRB) ruling in Browning Ferris (8/2015) makes franchising corporations responsible for OSHA and other labor law violations by franchises and related businesses
 - ▶ This policy was withdrawn in June 2017, as it applies to wage/hour laws but may still be used by OSHA in the short term ...
- ▶ The policy is viewed as providing OSHA with new enforcement powers against companies found to be "joint employers"
- ▶ Ultimate determination will be reached based on factual information about the relationship between the franchisor and franchisee over the terms and conditions of employment
- ▶ "A joint employer standard may apply where the corporate entity exercises direct or indirect control over working conditions, has the unexercised potential to control working conditions or based on the economic realities."

JOINT EMPLOYER LIABILITY

- ▶ Two entities will be found to be joint employers "when they share or codetermine those matters governing the essential terms and conditions of employment and the putative joint employer meaningfully affects the matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction"
- ▶ Information that OSHA is directed to obtain:
 - ▶ Overall Relationship Between Corporate and subsidiary;
 - ▶ Written Documentation of Corporation Direction and Control;
 - ▶ Corporate Control Over the Essential Terms and Conditions of Employment of the Workers at subsidiary; and
 - ▶ Corporate Control Over Safety and Health Policies & Procedures

OSHA EMPHASIS PROGRAM: AMPUTATION PREVENTION & HAZARDOUS MACHINERY

- Special Emphasis Programs (NEPs, REPs, LEPs) allow OSHA to conduct additional inspections focused on identified hazards
- Citations issued for high hazard violations under NEPs can place employer in SVEP
- NEP on amputations and hazardous machinery is one of the longest-running national emphasis programs.
- Began in 1997 with focus on mechanical power presses.
- Expanded in 2002 to include additional equipment
- Expanded again in 2006, and reissued most recently in 2015
- The current Amputation NEP is scheduled to run through August 2018
 - Tie-in with 24-hour reporting requirements for amputation injuries
- ✓ Most frequent trigger for programmed inspections in pallet industry!

NEP INSPECTION FOCUS

- OSHA will review 300 and 301 logs/reports for current and previous 3 years to identify recorded amputations associated with machinery and equipment.
- OSHA inspectors will look for:
 - Regular operation of the machine;
 - Setup/threading/preparation for regular operation of the machine;
 - Clearing jams or upset conditions;
 - Making running adjustments while the machine is operating;
 - Cleaning the machine;
 - Oiling or greasing of the machine or machine pans;
 - Scheduled and unscheduled maintenance; *and*
 - Locking and tagging out.

USING GUARDS FOR WORKER PROTECTION

- **Point of Operation** – the area of the machine where it performs work on the material
- **Power-transmission apparatuses** – flywheels, pulleys, belts, chains, couplings, spindles, cams and gears, connecting rods and other mechanical components that transmit energy
- **Other moving parts:** reciprocating, rotating and transverse moving parts, and auxiliary machine parts. Also watch for feed mechanisms on equipment.
- Must watch for hazardous mechanical motions such as: cutting, punching, shearing and bending
- **REMEMBER:** Manufacturers do not certify “OSHA compliance” when it comes to guarding, and inspectors may require employers to retrofit equipment with appropriate guards as abatement of citations

SAFE GUARDING REQUIREMENTS

- Prevent contact – a good system will eliminate possibility of the operator or another worker placing parts of their bodies near hazardous moving parts
- Secure – Guards and safety devices must be made of durable materials that can withstand conditions of normal use. They must be firmly secured to the machine.
- Protect from falling objects – A small tool dropped into a moving machine can become a projectile that can strike and injure or kill workers - guard openings
- Create no new hazards – Watch out for a guard with a shear point, jagged edge, or unfinished surface. Edges should be rolled or bolted to eliminate sharp edge
 - Consider the weight of guards and avoid engineering in ergonomic hazards – consider hinged guards that open for service
 - In some circumstances, area guards may be a solution where entry into an area is prohibited, and individual guards are not needed because entry is only permitted after LOTO.

OSHA REGULATION OF BAND SAW GUARDING

- ▶ **OSHA** Standard 29 CFR 1910.212 applies to pallet disassembly horizontal bandsaws, because these most often are cutting the metal connectors, i.e., nails/staples, rather than the wood itself.
- ▶ Point of operation guarding may be infeasible and safe operation practices become of paramount importance in preventing worker injuries.
- ▶ Where feasible, guarding is the most effective method of preventing contact with mechanical motion hazards.
- ▶ Other hazards on the band saw-type equipment include being struck by flying material, and the noise that occurs when the machines are operated
 - ▶ These are addressed primarily through the use of personal protective equipment.
- ▶ Barriers or other “distance safeguarding” approaches (e.g., fences and railings) may be used to keep individuals other than the machine operators from accessing the equipment, and prevent inadvertent contact with moving parts

OSHA MAY ACCEPT THESE PRACTICES ...

- Require workers to use a "push stick" if the pallet becomes jammed, in order to push the remainder through the blade.
- A push stick should also be used whenever a worker would have to work within one-foot of the blade absent the use of a stick.
- Where the machine is the type requiring operation by two employees, one should push the pallet from one end and the other should pull it from the other end after it is sawed or disassembled.
 - In this situation, both workers must keep their hands at least one foot (12 inches) from the blade at all times.
- In some situations, it may be possible to safely lengthen the tables without increasing ergonomic hazards in order to further remove the worker from the point of contact.
 - However, the manufacturer should be consulted before modifying any equipment and an ergonomic evaluation should be performed to prevent "building in" new occupational health hazards for workers.

OSHA MAY ACCEPT THESE PRACTICES ...

- In some situations, it may be possible to install a cover above the blade at a height that will allow the pallet to pass beneath it.
 - The manufacturer should be consulted before modifying any equipment as installation of covers could create overheating hazards, interfere with the engineering design, and invalidate the manufacturer's warranty.
- Copies of these practices should be posted on each machine, in English and in any other languages spoken/read by the workers who use the equipment.
- Train workers not to place their hands or other body parts within one foot (12 inches) of the saw blade on the machines.
- Etch or mark a line on the saw table indicating the one-foot point, to give workers a visual benchmark for caution.

OTHER SAFE WORK PRACTICES

- ▶ Make sure any provided guards are in place before energizing the equipment.
- ▶ Keep the table and floor around the machine clean and free of scrap material, chips, oil, grease, coolant, tools or accessories to minimize the danger of slipping or tripping
- ▶ Do not use excessive force when pushing the wood past the blade.
- ▶ Do not back the stock away from the blade while the saw is in motion if the work piece binds or pinches on the blade.
- ▶ Do not stop a band saw by thrusting stock against the cutting edge or the side of a blade immediately after the power has been shut off.
- ▶ If the blade breaks, shut off the power and move away from the machine.
- ▶ Never try to free a blade while the wheels are turning.
- ▶ Do not remove sawdust or cuttings from the table by hand or with compressed air. Use a stick or brush.
- ▶ Do not leave a saw running unattended.
- ▶ Turn off the power and make sure the machine has stopped running before leaving the area.
- ▶ When changing the blade or servicing the saw, the power disconnect must be locked in the "off" position. For saws with a cord and plug, the saw must be unplugged.
- ▶ The saw must be tested after disconnecting power and before beginning service.

GENERAL LOTO REQUIREMENTS

- ▶ Energy control procedures: Procedures shall be **developed, documented and utilized** for the control of potentially hazardous energy when employees are engaged in covered activities
- ▶ Employee training: Employer must ensure employees **understand purpose and function** of energy control program, and have required skills for the use and removal of energy controls
- ▶ Periodic inspections: Must document review of procedures at least annually
- ▶ If an energy isolating device is capable of being locked out, the employer's energy control program **shall utilize lockout**, unless the employer can demonstrate that the utilization of a tagout system will provide **full employee protection**

LOTO: SPECIFIC PROCEDURES

▶ Documented Procedures must include:

- ▶ Specific intended use of the procedure;
- ▶ Specific steps for shutting down, isolating, blocking and securing equipment
- ▶ Specific steps for placement, removal, transfer of lockout/tagout devices and responsibility for them
- ▶ Specific requirements for testing equipment to verify effectiveness of lockout devices, tagout devices, and other energy control measures

TRAINING REQUIREMENTS

- ▶ Authorized employee:
 - ▶ Recognition of hazardous energy sources
 - ▶ Type and amount of energy in workplace
 - ▶ Methods and means for energy isolation
- ▶ Affected employee:
 - ▶ Purpose and use of procedure
- ▶ Retrain when procedures or equipment change, post-incident or near miss, or worker knowledge appears inadequate
- ▶ For other employees in area:
 - ▶ Procedure and prohibition on restarting
 - ▶ Training must be in language and vocabulary that worker can understand, and be documented
 - ▶ Should address limitations of tagout only systems

QUESTIONS???

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