



2



DINSMORE & SHOHL LLP • LEGAL COUNSEL



Daniel R. Flynn
Chicago, IL
(312) 837-4305
daniel.flynn@dinsmore.com



Anna Claire Skinner
Lexington, KY
(859) 425-1065
anna.skinner@dinsmore.com

3 

3

What We Will Be Covering

→OSHA legislative update.

→The Trump administration's effect on OSHA's agenda.

→How to manage OSHA compliance and enforcement issues to protect your employees and your business.

4

OSHA legislative update

5

Legislative Update: Electronic Reporting/Recordkeeping

→ **Electronic Recordkeeping Rule was issued in the final year of President Obama's administration.**

- Required establishments with 250 or more employees to electronically submit information from the OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and the OSHA Form 301 (Injury and Illness Incident Report).
- OSHA wanted to use the information to more effectively target its enforcement resources. It was anticipated that OSHA would use this information to initiate on-site inspections against certain employers.
- The information would also be available as part of OSHA's "regulation by shaming" initiative.
- Industry groups opposed the rule.
- When President Trump took office, OSHA postponed the rule's requirement to submit the 300 Log and 301 Report.



6

Legislative Update: Electronic Reporting/Recordkeeping

→ **In January 2019, OSHA rescinded the requirement to submit Form 300 and Form 301 data entirely.**

→ **OSHA justified this decision by stating that requiring the submittal of this data would increase the risk that sensitive worker information could be exposed under FOIA requests.**

→ **Employers are still required to submit OSHA Form 300A summary data as required by the 2016 rule.**

- 2018 Form 300A information must be submitted by March 2, 2019.

→ **OSHA will use this information to help identify potential enforcement and inspection actions.**

→ **OSHA announced its Site-Specific Targeting Program in October 2018.**



7

Legislative Update: Electronic Reporting/Recordkeeping

Site-Specific Targeting Program

- Announced in October 16, 2018.
- Provides OSHA with authority to conduct wall-to-wall inspections of target facilities.
- Lists of targeted facilities are generated using the 300A data and include:
 - ❑ “High-rate” establishments – those with elevated Days Away, Restricted or Transferred (DART) rates.
 - ❑ “Non-responders” – those that failed to provide the required Form 300A data.
- States have until April 16, 2019 to adopt the program or a similarly effective version.
- The Bureau of Labor Statistics provides several online resources, such as the Incidence Rate Calculator and Comparison Tool, one can use to evaluate one’s inspection risk.



Legislative Update: Electronic Reporting/Recordkeeping Litigation

- **Challenge to the Rescission**
- Public Citizen Health Research Group filed a complaint challenging the rule on the grounds it is “arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.”
- Previously, in January 2018, Public Citizen Foundation (Foundation) sought to compel OSHA to provide the all of the submitted 2016 Form 300A information in response to a Freedom of Information Act (FOIA) request.
- The matter remains in litigation, but if the court grants the Foundation’s request, it is likely the Foundation would ultimately make the information available to the public.



Legislative Update:
Silica: Relatively New Standards in General Industry and Construction

- OSHA's somewhat recent silica standards apply much more broadly than the previous permissible exposure limits.
- Action level for both standards is $25 \mu\text{g}/\text{m}^3$.
- This amount of silica, suspended in one cubic meter, triggers the action level.



Legislative Update:
Silica: OSHA Guidance

- Since the requirements of the Silica Rule have gone into effect, OSHA has issued several guidance documents to help employers comply with the rule.
 - OSHA has issued two lengthy FAQ documents, one for the construction industry and one for general industry.
 - OSHA has also issued numerous fact sheets to assist employers in complying with the silica rule.
 - Employers should take advantage of the guidance that OSHA has provided to ensure compliance with the new silica standard.

Legislative Update: Beryllium – Enforcement Guidance

→ OSHA estimates that, around 62,000 workers are exposed to beryllium at approximately 7,300 establishments across the country.

→ Worker exposures to beryllium can occur in:

- Beryllium Production
- Beryllium Oxide Ceramics and Composites
- Nonferrous Foundries
- Secondary Smelting, Refining, and Alloying
- Precision Turned Products
- Copper Rolling, Drawing, and Extruding
- Fabrication of Beryllium Alloy Products
- Welding
- Dental Laboratories
- Construction and Shipyards (Abrasive blasting with slags)
- Fossil Fuel-fired Electric Power Generation

12

Legislative Update: Beryllium – General Industry Regulations

→ Establishments covered by the standard must ensure that employees are not exposed to levels above the permissible exposure limit of 0.2 $\mu\text{g}/\text{m}^3$.

→ The standard also requires:

- Exposure assessments
- Regulated work areas
- Written exposure control plans
- Engineering and work practice controls
- Respiratory protection
- Personal protective clothing
- Hygiene areas
- Housekeeping practices
- Medical Surveillance and removal
- Hazard communication and training

13

Legislative Update: Air Contaminants

- OSHA can (and will) use the General Duty Clause to cite employers for exposing employees to air contaminants not listed under OSHA's air contaminant standard.
- All four required elements of a General Duty Clause must be present:
 - The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
 - The hazard was recognized;
 - The hazard was causing or was likely to cause death or serious physical harm; and
 - There was a feasible and useful method to correct the hazard.

Caution: OSHA may not simply use the General Duty Clause to circumvent permissible exposure limits.

Legislative Update: Lockout/Tagout

- Trump's most recent regulatory agenda, released in the fall of 2018, calls for OSHA to issue a formal Request for Information to revise the lockout/tagout standard to address new technologies that conflict with the current standard's requirements.
- This rule is still in the "Prerule Stage."
- This is a significant departure from the revision proposed in the fall of 2016 that would have fundamentally altered the standard's applicability.

Legislative Update: Penalty Increases?

- On January 23, 2019 federal OSHA increased the maximum penalties.
 - Other-than-Serious, Serious, and Failure to Abate Citations -- \$13,260 per citation item.
 - Repeat and Willful Citations -- \$132,598 per citation item.

- IOSHA continues to utilize federal OSHA's 2006 penalty amounts.
 - Other-than-Serious, Serious, and Failure to Abate Citations -- \$7,000 per citation item.
 - Repeat and Willful Citations -- \$7,000 per citation item.

But wait!!! Mandatory Fines for Fatalities

- On January 14, 2018, Martin Carbaugh (R-Fort Wayne) introduced H.B. 1341 to amend the Indiana code on workplace safety.
- The proposed legislation would create an automatic \$100,000 fine for employee deaths:
 - "If an employer willfully violates any standard, rule, order, or this chapter and the violation results in the death of an employee, the commissioner shall assess a civil penalty of one hundred thousand dollars (\$100,000) for each employee whose death results from the violation."
- As of February 5, 2019, the bill was in the committee-stage.
- Indiana Chamber of Commerce supports the bill.

What's Hot With OSHA?



What's Hot with OSHA: Significant Inertia

→ Continued Enforcement

- 31 citations issued with penalties in excess of \$40,000 so far in January 2019.
- Over 762 citations issued with penalties in excess of \$40,000 during 2018.
- According to a Bloomberg Law analysis, Severe Violator Enforcement Program inspections are down 51% since fiscal year 2016. In fiscal year 2018, OSHA conducted 48 SVEP inspections. In 2017, there were 82 inspections, and in 2016, there were 97 inspections, under this program.
- OSHA and state agencies have resumed issuing press releases following very significant citations.
- Employers should continue to strengthen and enforce their safety and health programs as well as their culture to protect business and employees.

What's Hot with OSHA: An Unbalanced Force

→ **Scott Mugno Vice president, safety, sustainability & vehicle maintenance for FedEx Ground.**

- Nomination approved by the Senate committee and is awaiting a vote in the Senate.
- Strong reputation as a dedicated and practical safety professional.
- Expected to continue Secretary Acosta's efforts to steer OSHA in a direction focusing more effort on cooperative programs like the Voluntary Protection Program (VPP) and the Safety and Health Achievement Recognition Program (SHARP).

→ **No more shame?**

- Press releases have decreased.
- OSHA recently removed data on workplace fatalities from its website.
- Indiana OSHA, however, has not historically issued press releases over the past seven years.

What's Hot with OSHA: Drone Use?

- **Some news publications have recently reported that OSHA has started to use drones to assist compliance officers during certain inspections.**
- **Drone use brings up the concern that OSHA may use drones to try and broaden the scope of an inspection or conduct inspections without first obtaining the employer's consent.**
- **OSHA issued a memorandum in May 2018 that states it "will obtain express consent from the employer prior to using" drones on any inspection.**

What's Hot with OSHA: Workplace Violence

- OSHA is considering issuing a workplace violence rule.
- Scheduled to meet with small business representatives in March 2019 to discuss a potential rule.
- Prior history on workplace violence:
 - RFI in December 2016 to solicit information on a potential standard to prevent workplace violence in healthcare and social assistance settings.
 - OSHA was petitioned for a standard governing workplace violence by a broad coalition of labor unions and OSHA granted the petitions on January 10, 2017.

OSHA Compliance and Enforcement Management

Compliance Management

- Protects employees by creating a safer workplace.
- Protects the business by
 - Reducing potential OSHA liability
 - Reducing workplace injuries.
 - Creating a safer, happier, and more productive workforce.
- Consider developing programs and other tactics to engage all employees.
- Incentive programs?
- Drug testing?



24

Enforcement Management: The Plan

- **Employer rights:**
 - Right to limit inspection to complaint or accident;
 - Right to accompany inspector;
 - Right to attend non-private employee interview;
 - No duty to produce documents not required by law;
 - Right to end inspection if disruptive;
 - Right to require search warrant (should confer with senior management and legal counsel on decision).



25

Enforcement Management: The Plan

→ Employee rights:

- Right to private one-on-one interview with inspector;
- Right to refuse interview;
- Right to have another person present;
- Right to end interview at any time;
- No obligation to sign statement or be tape recorded or photographed;
- Cannot lie to inspector.



Enforcement Management: Evaluating Citations

→ What Constitutes a Violation?

- OSHA must prove:
 - The cited standard applies;
 - The employer violated the terms of the standard;
 - An employee had access to the violative conditions; and
 - The employer had actual or constructive knowledge of the violation (i.e., the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).
- Affirmative Defenses?



Enforcement Management: Evaluating Citations

→ The Informal Conference

- Opportunity for employers to achieve an early settlement.
- Employers need to be aware that accepted citations can then be used against them.

→ Filing a Notice of Contest

- Does not mean that the case will automatically go to trial.
- Gives employers an opportunity to access OSHA's inspection file and resolve the case at a later date.



Questions?



Daniel R. Flynn
Chicago, IL
(312) 837-4305
daniel.flynn@dinsmore.com



Anna Claire Skinner
Lexington, KY
(859) 425-1065
anna.skinner@dinsmore.com



