

# It's Been One Month: What Do We Know about OSHA Under the Trump Administration

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Presented by:

**Howard A. Mavity**

Email: [hmavity@fisherphillips.com](mailto:hmavity@fisherphillips.com)



# We're All Guessing about the New Administration



- President Trump has spoken little about Employment law, Labor and OSHA issues.
- He talks about slashing regulations, but he also ran on a populist platform, so may have to support minimum wage hikes, and expansion of overtime and leave.
- Unions love his anti-Free Trade positions – Will he listen to them?
  - ✓ Don't know if that will soften his Right-to-Work orientation.
- He is responding to groups who supported him.
  - ✓ Due to religious right support, may not back LGBT rights despite earlier comments.
- Likes small business, franchisees, etc.
- Gradual initial change as EEOC, NLRB change hands.
- States and Municipalities are passing their own employment laws; less on Safety.

# Why Don't We Know More?



- Continuous “*Crisis Mode*:” Immigration, Flynn, “*Resist*” efforts, coordination with DOJ, Previous Administration holdovers, leaks, amateur errors;
- Supreme Court nominee is solid and good nominee, but nomination battle will further distract from an orderly transition.
- Delay in getting Cabinet positions filled.
  - ✓ Especially Secretary of Labor.
- Secretary of Labor nominee Pudzer withdrew February 15 and **R. Alexander Acosta**, a Law School Dean and former U.S. Attorney/NLRB member/head of DOJ Civil Rights Division nominated on February 16.
  - ✓ NLRB Decisions: deliberate, not anti-worker, sometimes joined Democrat members;
  - ✓ Solid guy- well liked by both parties. Approved three times before.

# Realities facing Administration ....

- **Preibus Memo** effects (or lack there-of)?
  - ✓ Regulations that have already been sent to the *Federal Register* but not yet published, should immediately be withdrawn for review and approval, the memo says.
  - ✓ *Where appropriate and as permitted by applicable law, you should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period. In cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking,*
- Not that easy to change implemented regulations – requires Rulemaking, which takes time, and is not really this Administration’s style.
- President Obama only rolled back about 39 of over 4500 Bush era regulations in his first months in office.
- **Congressional Review Act** has only been successfully used once because of political realities and timing issues – most obvious targets are “*Blacklist*” Executive Order and Federal Contractor Paid Sick Leave Requirements. Congress may change CRA.
- May be options to push back implementation date of some rules not yet in effect, including Silica.
- Administration can do Budget Riders to deny money to specific efforts such as Electronic Recordkeeping or the Anti-Retaliation provisions.

# Congress Stepping In?

- Some vocal House members have a harsh and often uninformed view of OSHA – Federal and State-OSHA Plans need money – don't throw out good with bad.
- Obama Administration alienated many Congressional members, their staffs and constituents with its Retaliation and Recordkeeping preoccupation and overreaching Interpretations.
- Republican Congressional staffs say they will focus on “*modernizing and streamlining existing rules*” and “*de-politicizing*” OSHA.
- February 21 House Resolution to use CRA to cancel **Volks II** midnight rule increasing period to cite Recordkeeping violations from six months to five years (introduced by Chairman Bradley of House Education and the Workforce's Subcommittee on Workforce Protections);
- Speculation that CRA will be saved generally for more public issues than Beryllium.
- Everybody expects House push for more VPP/Conciliation efforts
  - ✓ Not much money available to expand consultation and cooperative efforts.
  - ✓ Consultation structure and personnel were disbanded.

## *For Now ...Business as Usual?*

- Unlikely to get an Assistant Secretary of Labor for OSHA before Second Quarter.
- OSHA Regional and Area Leadership need Directives, Memoranda, and training (and money).
  - ✓ Example: Anti-Retaliation provisions.
- Employer uncertainty ....
- Focus on the safety issues that matter: Fall Prevention, Lock Out/Amputation concerns, accurate JSAs, effective Safety Training, better Documentation ....

# Likely OSHA Trends ....

- Much can be changed by Interpretations, but Interpretation process takes time.
- Could receive Guidance on Enforcement more swiftly, e.g. Anti-Retaliation provisions.
- Less Fed push on OSHA State Plans – who were already resisting.
- TOSHA, KY-OSHA, NC and SC-OSHA – business as usual/proud of their plans – not sure about VA OSHA.
- Michigan and Oregon OSHA will follow their own often leading edge path.
- WA DOSH and Cal-OSHA will continue being more aggressive.
- States and Municipalities are less likely to implement safety laws than other employment law areas – except for Boston, New York and Philadelphia and ... other cities?
  - Example: January 2017 Sacramento Crane Operator – Involuntary manslaughter and *Harco* NYC Criminal prosecution.
- Administrative Law Judges (ALJs) appointed by Obama Administration.
  - Resistance to Affirmative Defense of Unpreventable Employee Misconduct.”
  - Strict scrutiny of employer safety programs and site efforts.

# Likely OSHA Trends ....

- Once leadership settles - less emphasis on Retaliation concerns and less preoccupation with Recordkeeping and alleged failure to report workplace injuries. Third parties still push Retaliation claims.
- Continued interest in IH issues.
  - ✓ Silica Rule enforcement muddled – DC Court not waiting for Trump.
- **Temporary employees will remain important.**
- Maybe “some” easing on Recordkeeping definitions.
- More autonomy for OSHA Region Administrators and Area Directors.
- Commonsense focus by Area Offices and Regions, **such as on Fall Protection.**
- More effort to resolve cases at OSHA Informal Conference stage.
- Less focus on Severe Violators Enforcement Program (SVEP) - but not less attention to bad agents.
- Less Union clout – Union ***Walkaround Policy*** delayed.



# Not sure if or when Fed-OSHA changes ....

- Electronic Recordkeeping – at risk of delay/stop.
- Challenges to Post-Accident Drug Testing – easy target.
  - ✓ Concern about first quarter 2017 compliance until changed.
- Safety Incentives – possibly OSHA will reinterpret, not fund, or more legal challenge and no defense.
- Reporting Policy and Rules – already good law.
- Repeat Violations – Five years period change? Probably not.
- Volks Rule on Recordkeeping “*Midnight Rule*” – *targeted*.
- Fed-OSHA penalties? Probably not change. States’ Penalties? Less push.
- Walking and Working Surfaces?
- Role of OSHA’s “*Voluntary*” Safety Guidelines?

# OSHA Recordkeeping Anti-Retaliation Rule

- What must I do to make sure that employees report work-related injuries and illnesses to me?
  - (i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;

# OSHA'S INTERPRETATION OF THE RULE

- maintain incentive programs which reward employees for experiencing no recordable workplace injuries and illnesses;
- maintain rules requiring disciplining employees who do not immediately report workplace injuries; and
- automatically conduct post-accident drug testing of injured employees.
- Also Emphasized in OCT 19 MEMO: Disproportionate discipline against injured employees.

# OSHA'S POSITION ON AUTOMATIC POST-ACCIDENT DRUG TESTING

- *To strike the appropriate balance here, drug testing policies should limit post-incident testing to **situations in which employee drug use is likely to have contributed to the incident**, and for which the drug test can accurately identify impairment caused by drug use.*
- *Employers need not specifically suspect drug use before testing, but **there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing**. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.*

# PRACTICAL PROBLEMS WITH OSHA'S INTERPRETATION – IMPAIRMENT MAY NOT BE OBVIOUS.

- Remember this Landmark Study?
  - Marijuana carry-over effects on aircraft pilot performance.
  - Study found evidence for 24 and 48 -hour carry-over effects of a moderate social dose of marijuana on piloting tasks.
  - While seven of the nine pilots showed some degree of impairment at 24 h after smoking, only one reported any awareness of the drug's effects.

More subtle impairment may last and not be readily obvious.

# OSHA'S ATTACK ON DRUG TESTING IS ILL TIMED BECAUSE DRUG PROBLEMS ARE INCREASING

## **Latest Quest Diagnostics Drug Testing Index™ “Drug Positivity in U.S. Workforce Rises to Highest Level in a Decade”**

*Following years of declines, the percentage of employees in the combined U.S. workforce testing positive for drugs has steadily increased over the last three years to a 10-year high, according to an analysis of nearly 11 million workforce drug test results by Quest Diagnostics. Other insights include:*

- The rate of amphetamine, marijuana, and heroin detection has increased annually for the past five years.*
- Almost half (45%) of individuals in the general U.S. workforce with a positive drug test for any substance in 2015 showed evidence of marijuana.*
- Positivity rates for post-accident urine drug testing are rising in both the general U.S. and federally-mandated, safety-sensitive workforces.*

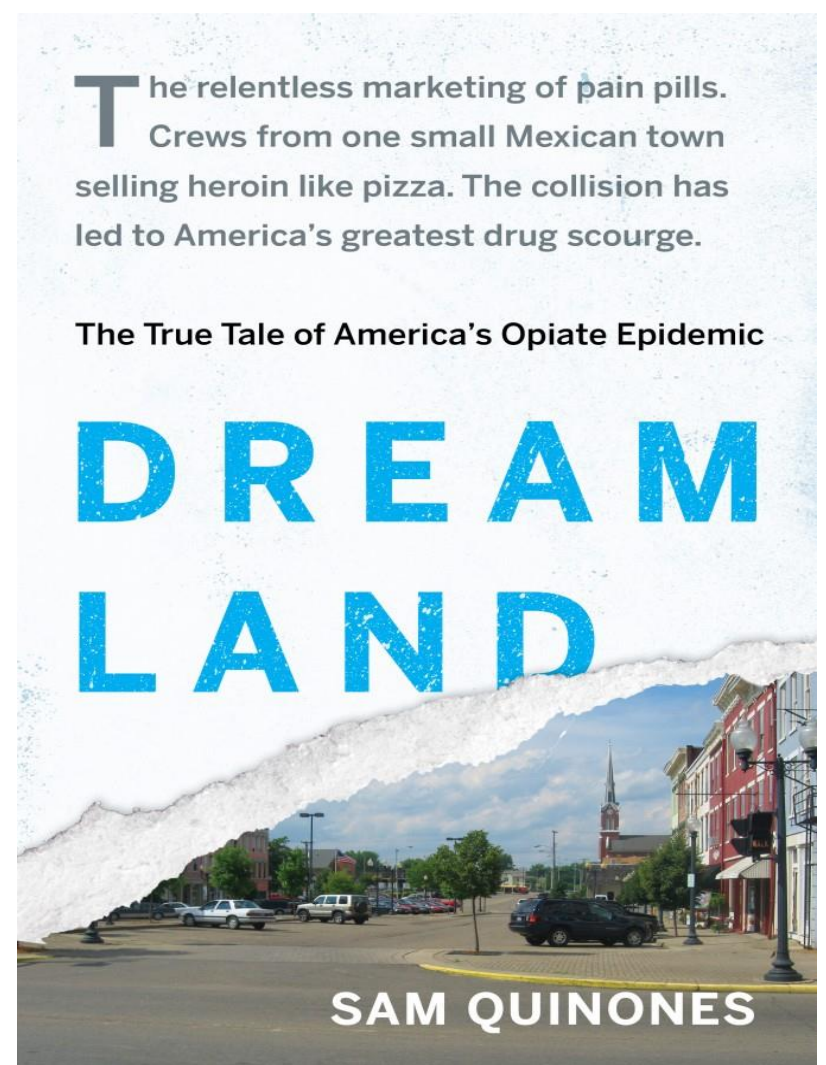
FROM: <http://www.employer-solutions-resources.com/index.php/whitepaper/2016-drug-testing-index>

## More Insights from Quest September 2016 Release

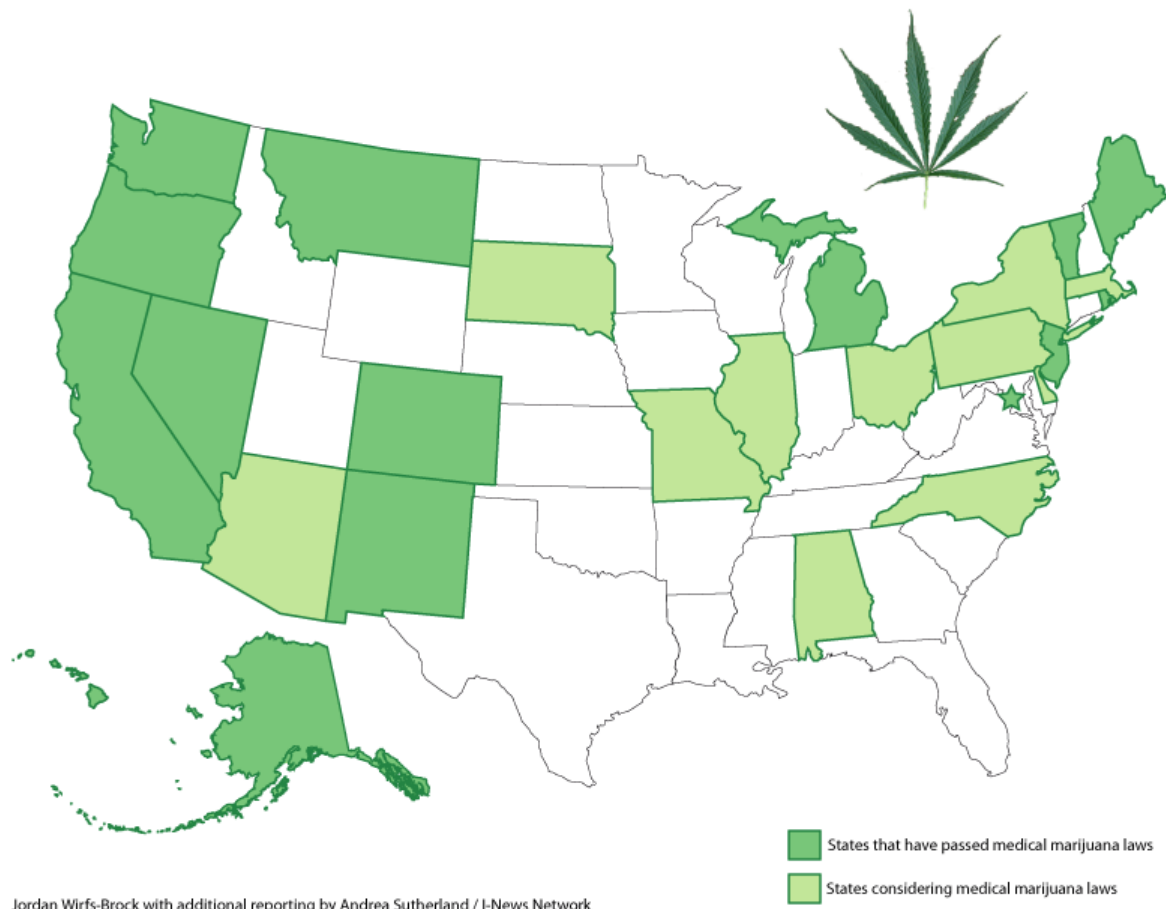
- 2015 positive rate for 9.5 million urine drug tests in combined U.S. workforce increased to 4%;
- 2015 positivity rate reflects 14% increase of 14 percent over the low from 2010 and 2011;
- Post-accident positivity increased 6.2 percent in 2015 when compared to 2014 and increased 30 percent since 2011;
- Post-accident positivity for the safety-sensitive workforce has risen 22 % from 2011 to 2016;
- In oral fluid drug testing, the overall positivity rate increased 47 percent over last 3 years in general U.S. workforce;
- The increase was largely driven by double-digit increases in marijuana positivity during this time period.

# Even Bigger Problem? Abuse of Opiates.

- Heroin and prescription opioids kill over 100 people/day.
- Must address in Injury Management.
- Abused prescription meds can lead to **Black Tar Heroin**.
- 7/2015 CDC – Abusing opioid pain relievers -  
*40 times more likely to abuse heroin.*
- Percentage of heroin users with opioid abuse -  
20.7% in 2002 to 45.2% in 2011-2013.
- Displacing Methamphetamines in many areas.
- Risk of Opiates overdose climbs at middle age.
- Suburbs and middle class market.
- *Serving All Your Heroin Needs,*  
NYT, April 17, 2015, Sam Quiones.







New Med Marijuana States: ND, AR, and FL.

New Recreational Marijuana States: NV, CA, MA and Maine.

Jordan Wirfs-Brock with additional reporting by Andrea Sutherland / I-News Network

# The Safety Policy May Look Good, but What Happens On the Floor?



- CONSTRUCTION EXAMPLE: Under 1926.20 and 21 - a construction employer must: (1) each day walk or check out the site and work to be done; (2) meet with employees; and (3) describe the potential hazards of the day's work and how to avoid them.
- **What does this mean in terms of your procedures and documentation?**
  - Contractors almost all use some sort of **pre-work, daily work or “*daily huddle*” form** to guide and document the meeting. **Revise or better use it.**
  - This document is generally not solely a safety document and may have places to note the day's tasks, weather, site conditions, subs, etc.
  - Some of these documents have checklists of common hazards associated with your work - the form should also have spaces to write in detail and not just check-off categories. OSHA looks for site- and day-specific notes, and not the appearance of being “*pencil whipped*.” **Do you actually use it for safety?**

# Problems with Employee Training

- Most job-specific training occurs on-the-job. **If OSHA challenged you, could you document where and when employees received the necessary training and whether it was site-specific?**
- Even with skilled hires, it is necessary to provide site-specific training in light of the work setting.
- And how do you document past experience and training? A checklist reviewing experience at hire?
- Refresher training is crucial. Many more experienced employees violate safety rules or take risks than the newbies. Employees become nonchalant about hazards, and think, “*I have done this a hundred times before . . . .*”
- Challenges with DVD and Online Training – still need OJT training.

# Safety Talks are Both Under Utilized and Misused.

Why limit to the Construction context?

Better use your “*Tool Box Talks.*”

- Ideally, you should cover topics relevant to that job, or you may follow an annual calendar to ensure that you cover all topics needed each year. **Try to cover process, production run or other job and site-specific issues as well as general LOTO, HazCom and other areas.**
- Tool Box talks are essential refreshers and reminders, but are not substitutes for training.
- An employee has to be trained to all job-specific hazards before performing that work. (So one cannot assign the employee and count on a Tool Box or Periodic Training Session coming up in a few weeks.)

# SURVEY OF EMPLOYEE ATTITUDES

93% of employees say that their Company is currently at risk of an injury or death caused by one of five avoidable workplace dangers:

- *“Get it Done”*
- *“Un-discussable Incompetence”*
- *“Just this Once”*
- *“This is overboard”*
- *“Are you a team player”*

And nearly one-half are aware of injury or deaths caused by these factors ...

# SURVEY – EMPLOYEE ATTITUDES

Despite being aware of these five threats and the past incidents, only one in four employees said that they speak up and try to correct unsafe conditions... even to a coworker not tied off ....

Culture must change.



# HOW WOULD YOUR EMPLOYEES RESPOND IF ASKED THESE SAFETY QUESTIONS?

(Agree/Disagree/Strongly Agree/Strongly Disagree)

- We practice at the jobsite what is in our Corporate Safety Policy.
- I always receive site/job-specific training.
- Supervisors hold us to safety rules.
- Our subs work safely.
- All of our people are trained.
- We cover the specific safety issues for the job that day.
- I hold coworkers accountable for safety.
- I am at risk of serious injury at my work?





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