



# "MAKE OSHA GREAT AGAIN!" What the Occupational Safety & Health Administration Might Look Like Under a President Trump

Insights

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The general election is less than five weeks away. On November 8, 2016 - in conclusion of perhaps the most entertaining election cycle in U.S. history - American voters will finally determine if Hillary Clinton or Donald Trump will succeed Barack Obama as our nation's President.

One of these two candidates will be sworn into office on January 20, 2017. In the four years (or more) that follow, Ms. Clinton or Mr. Trump will be in charge of the executive branch, which includes determining in what manner and how aggressively federal government agencies, like the Occupational Safety & Health Administration ("Fed-OSHA"), will enforce their regulations during his or her tenure. While campaign promises are not always kept and each candidate reserves the right to change course once in office, we can offer some general ideas about what the next four years could look like for employers.

We plan to draft a series of articles predicting what employers can expect under the next President; we will cover Ms. Clinton's likely approach to Fed-OSHA in a later publication.

Although it is difficult to forecast what he might do if elected, here's a prediction as to some of the changes to Fed-OSHA President Trump might be expected to make if successful this November:

**1. Repeal or Streamline Several Fed-OSHA Regulations/Initiatives.** The Republican platform indicates that regulatory reform is key to its agenda: "[u]nelected bureaucrats in the executive branch now write countless rules with the force of law and arbitrarily punish [those] who disobey those rules."

Based on comments he has made throughout his campaign, Trump clearly intends to follow the GOP's stance and eliminate many regulations. During the September 26 presidential debate, he claimed his administration will first place a moratorium on all new regulations. He will then determine which existing regulations create the greatest burden for companies and repeal them.

Trump's website echoes this stance, claiming that he will put the "job-killing regulation industry out of business," and "[e]liminate burdensome regulations that are not necessary, do not improve public safety, needlessly kill jobs, and increase the size of our already bloated government after a thorough agency review"

Fed-OSHA regulations will likely not be immune from the ire of a President Trump. The Fed-OSHA regulations (or rules) Trump may find burdensome to employers or business growth and thus repeal include the following:

**a. Fed-OSHA's Increased Penalties.** Effective August 2, 2016, Fed-OSHA increased its maximum penalty amounts by over 80% (the top penalty for a serious citation is now \$12,471 and \$124,709 for willful/repeat citations). Trump may repeal this increase not only because of the additional financial burden he likely believes it places on employers, but also due to the lack of uniformity created by many state OSHA plans' inability to increase their penalties in a commensurate amount. While Fed-OSHA's penalty increases are already in place, many state plans' penalty amounts are codified in state statutes, require legislative action to amend, and to date haven't been changed. Convincing Republican-controlled legislatures to increase penalties may be nearly impossible in some conservative states. Trump may use the state plans' failure or refusal to increase maximum penalties as an excuse for repealing Fed-OSHA's recent increase.

If Trump decides to not repeal the penalty increase rule in its entirety, look for him to at least remove the rule's requirement that Fed-OSHA's maximum penalties increase each year to account for inflation.

**b. New Electronic Reporting Requirements.** Beginning July 1, 2017, Fed-OSHA will begin requiring certain employers (including those with more than 250 employees at a single establishment) to begin, among other things, reporting injury and illness information to Fed-OSHA, which will then post this information online for public viewing on its website.

In following the position stated on his website, Trump likely will view this new rule as an unnecessary burden on employees, as most employers must already track this information internally on their OSHA 300 logs. He may see the new electronic reporting rule as "unelected bureaucrats" shaming certain employers into compliance masked as an effort to collect data about injuries and illnesses. If Trump wins, this rule may disappear.

**c. Amputation Reporting Requirement.** Effective July 1, 2015, employers are now required to report to OSHA an amputation or a single in-patient hospitalization within 24 hours of learning of the incident, in addition to the previous requirement of reporting fatalities or catastrophic incidents (3 or more inpatient hospitalizations) within 8 hours.

This new rule and, in particular, the amputation reporting requirement, has led to a significant increase in the number of "referral-based" inspections conducted by OSHA. Our firm's workplace safety attorneys have noticed that the spike of amputation referrals has strained OSHA's resources. Compliance safety and health officers ("CSHO") now appear to be conducting fewer programmed or planned inspections (which are conducted at high hazard worksites appearing on an "emphasis plan" list) because they are responding to amputation referrals and lack the time. One measure CSHOs have taken into account for this increase is the (illegal?) expansion of complaint and referral-

based inspections to include other alleged hazards at an employer's facility, as noted in a previous [article](#) on this issue.

Trump will rely on his experience as businessman and attempt to streamline Fed-OSHA and maximize its productivity. He may view the new amputation reporting requirement as a hindrance to Fed-OSHA accomplishing its goals of working with employers to keep employees safe and focusing enforcement on high-hazard workplaces. Repealing the new reporting requirement will give the strained agency more time to accomplish these goals without expending more taxpayer dollars.

**2. Create More State Plans or Give Them More Jurisdiction.** Trump is no stranger to OSHA enforcement. Since 2008, his companies have been inspected by Fed-OSHA and state OSHA plans approximately 13 times, with around six of those inspections resulting in penalties. Given this history, he likely understands that Fed-OSHA enforces the OSH Act in some states, while state OSHA plans enforce the Act in the balance of states.

Relying again on his business background, he may find expansion of state OSHA plan jurisdiction as an opportunity to shrink the federal agency and save taxpayer dollars. He may find a way - such as eliminating any Fed-OSHA jurisdiction in current state plan states, or encouraging more states to develop state OSHA plans - to decrease the size of the federal agency and shift more responsibilities to the states.

Conservative states where Fed-OSHA currently enforces the OSH Act, such as Texas, Alabama, and Georgia, may be interested in developing a state OSHA plan and thereby controlling how the OSH Act is enforced there against private employers, if given incentives to do so.

**3. Scale Back Whistleblower Programs.** Fed-OSHA enforces the whistleblower provisions of approximately 22 statutes. Like the referenced amputation referral requirement, whistleblower claims demand a significant amount of Fed-OSHA's resources. Unfortunately, many of these complaints are unfounded and result in a significant waste of time and resources. According to one official, perhaps only 1 in every 30 (or more) whistleblower claims may have merit or result in a "cause" finding.

Trump may attempt to eliminate Fed-OSHA's jurisdiction over many of these statutes, heighten the threshold for a claimant to establish a *prima facie* whistleblower claim, or both. These changes would allow Fed-OSHA to focus on high-hazard industry enforcement, accident/fatality inspections, and safety outreach/consultations with employers.

It is impossible to know how a President Trump would manage the federal agencies. Based on his comments and the literature made available by his campaign, however, Trump likely will streamline Fed-OSHA, repeal some or all of its recent rules on increased penalties and reporting requirements, and refocus the agency on high-hazard enforcement.

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