



Did These 10 OSHA Rules and Initiatives Die With the Election of Donald Trump?

Insights

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The election of Donald Trump surprised some Americans. In the days since his victory, our firm's lawyers have fielded numerous questions from employers regarding what changes to workplace law they can expect under the Trump Administration.

The morning after President-Elect Trump's win, we provided an [overview](#) of the changes employers can expect in several areas of the law. We predicted that President-Elect Trump will streamline the Occupational Safety and Health Administration ("OSHA"), focusing its attention primarily on high-hazard industry enforcement and safety consultation.

We also expect Trump to alter or repeal several of OSHA's recently adopted rules and initiatives. He can scale back the agency's rules through several avenues, including working with a Republican-led Congress to repeal or amend statutes governing the agency, by repealing executive orders, electing to simply have the agency not enforce existing regulations, or revisiting regulations through the agency's rule making process.

Although it is unclear how exactly President-Elect Trump will govern the agency, or how long it will take to make changes, here are ten OSHA rules and initiatives likely in the Trump Administration's crosshairs:

1. Drug Testing/Anti-Retaliation Rule. This rule was issued on May 11, 2016 and includes provisions that prohibit employers from, among other things, discouraging workers from reporting an injury and adopting a blanket post-accident drug testing policy (see OSHA's FAQ regarding the rule [here](#)). As a result of litigation, enforcement of the rule has been delayed until December 1, 2016. Due to what some may view as administrative burdens that accompany the rule, it likely will be revisited by the Trump Administration, which could reopen and revise this rule which has been loathed by most employers.

2. Name and Shame Initiative. In the last several years, OSHA has increased the number of press releases it issues concerning high-profile enforcement cases. The so-called "Name and Shame" initiative has drawn the ire of many employers, especially when the government official quoted in the release has never visited the worksite at issue. Expect this practice to be eliminated, or significantly diminished, under President Trump.

3. Electronic Reporting Requirements. Beginning July 1, 2017, 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 OSHA, which will then post this information online for public viewing on its website.

President-Elect 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. This rule may disappear.

4. Penalty Increases. 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). President-Elect Trump may work with the Republican-led Congress to 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. 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 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 OSHA’s maximum penalties increase each year to account for inflation.

5. Five Year Repeat Rule. OSHA recently increased the time period during which a prior citation may be used as the basis as a repeat violation from 3 to 5 years. The Trump Administration may view this change as failing to reward employers who rectify previous issues with their safety program. The President-Elect likely will change this rule back to the previous standard of 3 years.

6. Safe Workplaces Executive Order. On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order to, among other things, require prospective federal contractors to disclose labor law violations, including OSHA citations, when bidding on certain projects.

President-Elect Trump will likely immediately repeal this Order prior to its implementation in late 2017, as such repeal will not require Congressional action.

7. Directives to Expand Inspections. On October 28, 2015, OSHA instructed its inspectors to substantially expand every inspection of poultry processing facilities, regardless of what triggered the visit, as follows:

This memorandum establishes guidance for inspections conducted in poultry slaughtering and processing establishments, North American Industry Classification System (NAICS) 311615, Poultry

Processing. **All such inspections, programmed and unprogrammed**, shall cover the hazards listed below:

- *Ergonomics/Musculoskeletal Disorders*
- *Personal Protection Equipment (PPE)/Payment for PPE*
- *Lockout/Tagout – Electrical . . .*

These focus hazards shall be addressed in addition to other hazards that may be the subject of the inspection or brought to the attention of the compliance officer during the inspection. The goal of this policy is to significantly reduce injuries and illnesses resulting from these hazards through a combination of enforcement, compliance assistance, and outreach.

In other words, OSHA wants all complaint-based inspections of poultry facilities expanded into a comprehensive review, or a “wall-to-wall” inspection. Expect such directives, which many employers view as an additional undue burden and violation of their Fourth Amendment rights, to be eliminated under the Trump Administration.

8. Amputation Reporting Requirements. Effective January 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.

Trump may view the new amputation reporting requirement as a hindrance to 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.

9. Respirable Silica Standard. This standard has drawn criticism from a number of industry and business groups, which claim that key components of the standard, including monitoring of respirable silica levels by a competent person and medical examinations for workers, are burdensome and that compliance is nearly impossible. Additionally, the financial burden on employers – and the industry as a whole – is staggering.

The Trump Administration could re-open the rule-making process for this standard and revise it.

10. Changes to OSHA Whistleblower Jurisdiction. 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.

Trump may attempt to eliminate OSHA's jurisdiction over many of these statutes (which may occur when some statutes such as Dodd-Frank are repealed), 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 President-Elect Trump will manage OSHA. Based on his comments during his campaign and the decisions he has made during his transition to the White House, however, Trump likely will streamline OSHA, repeal some its recent rules including those relating to increased penalties and reporting requirements, and refocus the agency on high-hazard enforcement.

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