



Congress has Voted to Kill OSHA's "Volks Rule – So What Does that Really Mean?

Insights

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If one listens to various Democrat and labor talking heads, you would think that Congress has rolled back 40 years of worker protections by passing a resolution killing the new OSHA rule, which permitted OSHA to cite employers for record-keeping violations up to five years old, rather than the six-month look back applicable to other violations.

The OSHA rule, colloquially known as "*Volks II*" was implemented in response to a 2012 US Court of Appeals decision holding that OSHA could not cite employers for failing to record on-the-job illnesses or injuries if the violation took place more than six months before the citation was issued.

OSHA's rule particularly incensed businesses because it was passed at the proverbial midnight hour, December 16, 2016, four years after the Court decision.

Volks was also one of the few new regulations that could be struck down by the much touted but seldom used *Congressional Review Act (CRA)*, which gives Congress 60 legislative days to vote down certain new rules.

Let's put the hyperbole aside. Generally, OSHA flyspecking employers' Form 300 and 300-As for five years is a gotcha situation. Yes, some employers have flagrantly avoided recording workplace injuries and illnesses, but the overwhelming majority of employers follow OSHA rules, and often over record. Worker safety was not improved by trying to force employers to shift safety resources to focus with monk like determination on these documents.

Rather, the *Volks Rule* was emblematic of two themes of the previous Administration. First, a contempt for proper rulemaking and legislation, and a preference to simply change things by Interpretation or Directive. Second, the previous Administration diverted OSHA's scarce resources in a quest to attack employers for unsubstantiated mass failures to record workplace injuries.

What does Congress' Action Not Do?

The *Volks* rule was an easy target for a Congress eager to use the CRA. Employers should not assume that wholesale changes will now occur with regard to controversial new requirements such as OSHA's Electronic Recordkeeping and the related Anti-Retaliation provisions. The reason is that the "*Resist Movement*" and the Administration's own missteps have drug out the approval of a Secretary of Labor. Therefore, there is no new political leadership at OSHA or the Office of the

Secretary of Labor. Therefore, there is no new political leadership at OSHA or the Office of the Solicitor, or a host of other vital DOL agencies. Regardless of what one thinks of President Trump, employees and employers suffer when agencies such as OSHA receive no political guidance. It is not fair to expect career DOL management to make policy decisions prior to the new political leadership taking the reins.

Can I Ignore the OSHA Electronic recordkeeping or Anti-retaliation Requirements Because Trump May Shut Them Down?

Nope. Employers are left in the lurch. While many commentators expect a Trump OSHA to change their interpretation of the Anti-retaliation provisions as regards automatic post-accident drug testing and safety incentive programs, no such action has yet occurred. Likewise, no one seems to know if OSHA is moving ahead with the necessary electronic architecture to begin electronically collecting individual employers' workplace injury and illness data later this year. As we have explained, there are a number of ways that the Administration might delay or block the Electronic Recordkeeping requirements. However, until told otherwise, employers have to assume that the Electronic Recordkeeping requirements will kick in as scheduled, and that OSHA's October 2016 pronouncements on Anti-retaliation provisions will be enforced.

In fact, we understand that there are approximately 40 current instances of OSHA investigating alleged anti-retaliatory policies, but we do not know if those policies involve automatic post-accident drug testing, safety incentive programs, injury and illness reporting procedures, or other aspects of an employer's procedures and discipline. We do not know the stage of such investigations and whether they are being seriously pursued.

Can I Do Anything?

As the *Volks* Resolution demonstrates, the AGC, ABC and other employer groups can persuade Congress to act and will presumably receive a respectful listen from the new DOL leadership. Pick the most serious issues and use your resources.

And if you have the ears of your elected representatives, encourage them to not throw out the baby with the bathwater. OSHA's budget, in my personal opinion, should not be cut. Allow me to explain Employers suffer when OSHA does not have adequate funding to fully staff and train its Compliance Officers and Industrial Hygienists. Inexperienced investigators make investigation errors which require employers to spend time and money to challenge. Likewise, most employers want to see OSHA devote more resources to Cooperative and Consultation efforts, especially for smaller businesses. OSHA needs more money to increase its consultation efforts, or otherwise, like the previous Administration, DOL will take needed money away from enforcement and other areas.

We are already seeing some welcome changes. You may have noticed that OSHA is no longer issuing the "Regulation by shaming" press releases on OSHA inspections resulting in huge dollars penalties. In fact, I almost miss those dramatic press releases because they were in fact motivational, but they were also often grossly unfair.

Stay tuned. 2017 will be as wild as 2016. and maybe more so.

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