Are We Ever Going to Get OSHA Guidance from the Trump Administration?

Insights
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No one thought that on June 22, we would still not know the Trump administration's enforcement position on the recordkeeping anti-retaliation requirements, including about automatic post-accident drug testing, the Silica standard, or a host of other issues. Republicans cannot solely blame the Democrats and the *"Resistance"* movement for the delay in thousands of appointments. The administration seems to be distracted by legal claims and to have little interest in appointing crucial agency leaders.

We understand that the solid candidate for Assistant Secretary of Labor for OSHA is in the process of completing his paperwork. However, with the pending Congressional five-week break, we cannot imagine the Confirmation Hearings occurring before September. Therefore, we are left with Obama Administration positions still in effect until we are advised otherwise. There is some talk of cancelling or shortening the break, which would be good.

- Silica Standard Moving AheadAddressing the Silica standard would require rulemaking or other major activity. However, the Trump Administration OSHA could easily issue a new directive and interpretation of the Recordkeeping anti-retaliation provisions.

  "We have no indication that anything is going to change." Attendees at the June 20 session of the Safety 2017 American Society of Safety Engineers conference in Denver heard David O'Connor, Director of the OSHA Office of Chemical Hazards - Non-Metals, state, "*We anticipate the crystalline silica standards as they are currently written will remain and the construction standard will be enforced as it stands on September 23 of this year."*

- Electronic RecordkeepingWe also do not know the ultimate disposition of the Electronic Injury and Illness recordkeeping submission provisions. The administration has indefinitely delayed the July, 2017 trigger date, but there are ongoing legal actions and political efforts to force the Administration to follow through on this standard. The AFL-CIO and the Steelworkers are seeking to intervene in an action before the U.S. District Court for the Western District of Oklahoma, and attorneys for the US DOL are opposing their effort.

  Of course, there are various other legal challenges pending on a number of these initiatives, and Congress might decide to attach a rider to a budget bill which prohibits OSHA from using any budgeted monies to administer and enforce new efforts.

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So More Waiting for Employers ....

As frustrating as it seems, we continue to advise employers to treat the Obama era OSHA positions as legally enforceable in most cases. With regard to the per se attack on automatic post-accident drug testing, some employers have decided to maintain such programs and see if the Secretary can meet its burden to prove that such programs, in fact, discourage employees from reporting workplace injuries and illnesses. However, the majority of employers seem to have thrown up their hands and have changed their programs either to do away with automatic post-accident testing or to implement training for supervisors to determine when to test employees after an accident if there is some possibility that drugs may have contributed to the accident. Unfortunately, many employers have found that it is not practical to train third shift supervisors and others to recognize and document the circumstances wanting such a test.

Meanwhile, employers are attempting to improve their safety processes, and OSHA Regional Administrators and Area Directors are attempting to efficiently manage their OSHA programs. Many employers and attorneys have commented that they notice a generally more reasonable approach by OSHA and the US Department of Labor Solicitors, but those are anecdotal observations.

What about State-OSHA Plans?

State OSHA plans, on the other hand, continue to assert their independence from Federal OSHA, and some State-OSHA plans will not or have not yet adopted the new penalty increases or various other Federal OSHA directives.

Other Important New Developments.

- Multi-Employer Doctrine in the 5th Circuit

  Our Firm recently prevailed in a case where an OSHA ALJ and the OSHRC approved application of 5th Circuit precedent concluding that protections under the OSH Act only extend to an employer's own employees. Under this interpretation, an employer who does not expose its own employees to hazard may not be cited for the safety violation. This view is squarely at odds with the Secretary of Labor's ***"controlling employer"*** doctrine and OSHA's broader ***Multi-Employer Citation Policy*** (1999), which among other things, authorizes OSHA to cite *a controlling employer* regardless of who the exposed employees work for.

  This ruling reopens a debate concerning the reach of OSHA's *"controlling employer"* doctrine for employers in Texas, Louisiana, and Mississippi. Because this ruling may affect many construction projects in Texas, Louisiana, and Mississippi, the Secretary of Labor may decide to appeal the matter to the 5th Circuit Court of Appeals. Should the Secretary of Labor decide not to appeal this ruling, then non-exposing employers in those three states who are cited by OSHA for *"controlling employer"* safety violations may have a "new" defense to raise when contesting such citations under *OSHA's Multi-Employer Citation Policy*.

Regardless of the eventual resolution, general contractors and other employers on a site have numerous practical and legal reasons to take steps to monitor and maintain safety on their multi-

employer sites.

- New Fed-OSHA Penalties.Similarly, we have challenged OSHA's penalty increases in some cases based on the theory that the increases were not properly enacted.

- Mass ShootingsFinally, the three mass shootings in a week's time have again reminded employers that they must do more than prepare a nice written workplace policy and show the brief *"Run, Hide, Fight"*- type videos.

We will continue to provide updates and information as we learn of new developments.

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