



8 For '18: 8 Things for Employers to Look For from OSHA and MSHA in 2018

Insights

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It's that time of year again: for employers to celebrate the successes of the prior year and make plans and resolutions for the new one. But OSHA and MSHA are making New Year's resolutions, too, and employers are well-advised to consider what actions these agencies may take in 2018 that could affect their businesses.

Here are eight things employers should expect from the Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA) in 2018:

1. Budget Cuts. It should be no surprise that OSHA and MSHA may face budget cuts due to Republicans' control of Congress and the White House. Indeed, the Trump Administration has proposed cuts to both OSHA's and MSHA's budgets. Congress has yet to pass a budget for the current fiscal year, and the deadline for passing a budget—even a continuing spending resolution—to prevent a government shutdown is looming. With Democrats focused on funding the Child Health Insurance Program, stabilizing the Affordable Care Act's insurance markets, and enacting protections for Dreamers in budget negotiations, Republicans are in a position to either cut OSHA and MSHA's budgets or keep them stable. With fewer resources, OSHA and MSHA may be less willing to enact many new regulations or limit their enforcement of existing regulations.
2. MSHA's Workplace Examination Rule Remains in Flux. MSHA published its final rule on Examinations of Working Places in Metal and Nonmetal Mines on January 23, 2017. The rule, which includes five specific requirements regarding the timing, notification, and manner of examinations, was originally set to take effect on May 23, 2017 but has been postponed repeatedly. Most recently, on September 12, 2017, MSHA sought to delay the effective date of the final until March 2, 2018. With David Zatezalo, a retired coal mining executive, being confirmed by the Senate on November 15, 2017 to head MSHA, employers should expect continued delay of the final rule as MSHA reorients and adjusts to new leadership.
3. The Silica Standard [Will it Be Enforced?]. OSHA issued its final rule on Occupational Exposure to Respirable Crystalline Silica on March 25, 2016. The final rule established a new eight-hour weighted average permissible exposure limit of $50 \mu\text{g}/\text{m}^3$ for all covered industries. As a result, OSHA revoked its National Emphasis Program on silica and is in the process of adopting new procedures for enforcement of the new standard. The Trump Administration, however, has since slow-walked enforcement. Enforcement on the construction industry began on September 22,

slow-walked enforcement. Enforcement on the construction industry began on September 25, 2017, but a one-month grace period was provided to employers to comply with the standard. OSHA is set to begin enforcement of the silica standard on general industry and the maritime industry on June 23, 2018, but the Trump administration may seek a delay depending on its experience with enforcement of the standard on the construction industry. Employers in those industries should stay in wait-and-see mode, but be prepared in case enforcement begins next year.

4. OSHA's Electronic Reporting Rule. OSHA has issued a final rule that revised its recordkeeping and submission requirements to include electronic reporting of injuries and illnesses to OSHA for posting on OSHA's website. The rule was initially set to take effect on January 1, 2017, but has been delayed repeatedly to the latest date of December 15, 2017. With the Trump Administration's more business-friendly stance on regulations generally, employers may expect to see the rule delayed further. We expect the next delay may be announced shortly after Scott Mugno's confirmation as the head of OSHA.
5. MSHA's Backdoor Inspections. MSHA has a new trick up its sleeve that employers should watch out for: attempting to conduct a second inspection of the workplace through the discovery process in FMSHRC proceedings. FMSHRC Rule 58(c) allows parties to request entry or inspection of premises as part of the discovery process. MSHA recently has attempted to use this rule to get a second look at the employer's workplace, and has been vague about why it is requesting the inspection. Employers should be wary of these requests, as they appear to be obvious attempts by MSHA to establish new citations.
6. Walking Working Surfaces. OSHA issued a new walking working surfaces rule that became effective on January 17, 2017. Although the rule went into effect last January, many provisions of the new standard have delayed effective dates, including provisions regarding training (May 17, 2017), testing and certifying anchorages (November 20, 2017), and installing fall arrest and ladder safety systems on existing and new fixed ladders (November 19, 2018). Employers should begin to make plans regarding how to comply with the new fall safety systems requirements by the November 19, 2018 effective date.
7. MSHA's Use of Section 110(c) Actions and Special Investigations. During the Obama Administration, MSHA made special use of its Special Investigations Department and enforcement of Section 110(c) of the Mine Act regarding knowing and willful violations. This aggressive process, which has included the threat of imposing civil penalties on individual miners, has led to heightened distrust of the mining industry toward MSHA. Employers can expect that Assistant Secretary Zatezalo will seek to rebuild MSHA's relationship with the industry, in part by curtailing the use of Section 110(c) actions.
8. Fewer Nickel and Dime Citations. MSHA has a well-known reputation for nickel and dime mining companies by citing every potential violation they see, no matter how small or technical. Assistant Secretary Zatezalo, with his background in the industry, is more likely to understand how this approach affects MSHA's relationship with the industry it regulates. Employers may hope to see a softening of MSHA's hard approach to issuing citations for smaller claimed violations.

It is impossible to know how the two federal safety agencies will act (or not act) during the second year of President Trump's Administration. Based on what we've seen so far, however, OSHA and MSHA likely will continue to refocus their efforts on consultation and high-hazard enforcement in 2018.

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