



End of the Year Whirlwind for Labor and OSHA Matters! Part I of III

Insights

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Finally! An OSHA Head... Almost.

The long awaited nominee for Assistant Secretary of Labor for OSHA, Scott Mugno, finally received his Senate Labor Committee hearing on December 5, and passed through without controversy on a party line vote. Unfortunately, hopes are fading that he'll be in office before the Christmas Congressional break.

The panel also approved and sent to the Senate the nomination of Kate O'Scannlain to be the Department of Labor's top attorney, Solicitor, which is an important post.

I'm especially interested in how Scott's will approach his focus on 24-hour safety. Fed Ex has done a fine job of teaching employees, especially drivers that safety is a 24-hour mindset – one cannot expect safety to be reflexive if one thinks about safety during only work hours. When I trained as a fighter, we trained on situational awareness until the behavior was part of who we were. To this day, I find myself automatically scanning 10 cars ahead, anticipating car moves and evaluating every room I enter for threats. Fed Ex may not have literally beaten situational awareness into their drivers, but the company was innovative and consistent in training.

As I discussed in my previous post, transportation and vehicle worker fatalities remain around a staggering 40% of the annual employee deaths. OSHA has few tools to employ with regard to deaths on public roads. With Scott's excellent and successful experience with drivers at federal Express, I suspect that he'll roll up his sleeves and wade into this problem.

I fear that some employers will be disappointed in what Scott can and cannot do at OSHA.

Of course Scott will want to emphasize consultation and cooperative efforts, but the previous Administration decimated the consultation staff and OSHA is woefully underfunded and understaffed for even its core safety role.

Similarly, the Assistant Secretary Labor – OSHA cannot simply stop or eliminate the Silica or Electronic Reporting obligations with a signature. Rulemaking is required, or Court or Congressional action.

The Labor Department is still reviewing the delayed portions of the Recordkeeping and Reporting Rule. The rule also faces two court challenges (Nat'l Assoc. of Home Builders v. Perez, W.D. Okla.,

and TEXO ABC/AGC Inc et al v. Perez et al, N.D, which are both on hold “while OSHA reviews the rule.”

We will, however, likely ... finally see modification of OSHA’s indefensible position on post-injury drug testing.

As to the Silica Rule, A three-judge panel of the U.S. Appeals Court for the District of Columbia Circuit heard oral arguments on Sept. 26 but hasn’t yet issued a decision. According to Bloomberg BNA’s Sam Pearson, “*Labor Secretary Alexander Acosta also said at a House Committee on Education and the Workforce hearing Nov. 15 that settlement talks were “close to resolution.”*”

Do not expect a massive easing up by OSHA Area Offices on Enforcement after Scott takes the reins. I’ve had tougher battles with Area Offices in the last few months than in the previous year. The focus is less political but no less robust.

Another (short) Delay for OSHA Electronic Injury Submission.

OSHA again extended the date for the first submission to December 30, 2017.

Employers are required to submit Form 300A data for only 2016 by December 30. This requirement is for establishments of more than 249 employees or those employers with 20 to 249 employees who are included in the following

List: <https://www.osha.gov/recordkeeping/NAICScodesforelectronicsubmission.html>

In 2018, covered establishments with 250 or more employees must submit information from all completed 2017 forms (300A, 300, and 301) by July 1, 2018, and covered establishments with 20-249 employees must submit information from their completed 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, covered establishments must submit the information by March 2.

It remains to be seen if the Administration tinkers with the degree to which the submissions are publically accessible. Many employers fear that third parties will seize the information and mischaracterize it to attack employers’ image.

Frustratingly, Workplace Death Rates Increase the Most Since 2010.

2016 fatalities occurred under the Obama Administration and these numbers have nothing to do with the Trump Administration’s actions or lack thereof. However, it would also be unfair to blame the numbers solely on the Obama OSHA’s efforts. We need to parse the numbers and determine why worker deaths increased, and even more so, why so many workplace deaths still appear.

Let’s not call these deaths “the fatality Rate;” let’s call it what it is ... people dying. 3.6 workers died for every 100,000 full-time equivalent workers, up from 3.4 in 2015.

Across all occupations, 5,190 workers lost their lives in 2016, a 7 percent increase from 4,836 deaths in 2015 and the highest number since 2008, when 5,214 workers died. [LINK TO REPORT.](#)

[Look at the number of vehicle-related employee deaths – a whopping 40% of these deaths were transportation –related. We’re talking 2,083 fatalities in 2016.](#)

[Continue to Previous Post.](#)

An Underfunded OSHA.

The Obama Administration may have alienated employers by many of its OSHA policies, but these issues do not diminish the need for a strong and efficient Agency. Sure, the punitive approach, public shaming of employers and shift of resources to whistleblower efforts at the expense of core safety enforcement ticked off many employers. However, many employer-side people like me will tell you that a 30% or 40% budget increase would not be unreasonable to add Compliance Officers, improve training, and bring OSHA’s labs and technical capacity more into the modern era. Instead, A Senate committee is recommending OSHA receive \$552.8 million for fiscal year 2018, [the same inadequate sum as in 2017.](#) The House is proposing a dangerously low \$531.5 million for OSHA in 2018.

With the proposed budgets, I see no way that OSHA can restore the consultation efforts diminished by the past Administration.

Howard