Impact of the Trump’s OSHA on the Grain & Feed Industry

July 25, 2017

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ERIC J. CONN is Chair of the OSHA • Workplace Safety Practice Group at Conn Maciel Carey, where he focuses his practice on all aspects of occupational safety & health law:

- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
- Responds to and manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and chemical releases
- Handles all aspects of OSHA litigation, from criminal prosecutions to appeals of citations
- Writes & speaks regularly on safety & health law issues
- Conducts safety training & compliance counseling
Agenda

1. Leadership Changes at OSHA
2. OSHA Enforcement Under a Trump Admin.
3. Changes to OSHA’s Recordkeeping Rule
4. Public Shaming (Press Releases & SVEP)
OSHA Leadership Changes
OSHA Career Staff Leadership

Acting Dep. Assistant Sec. of Labor - OSHA
(highest rank at OSHA last week)

Tom Galassi
Ordinarily Director of Enforcement

Mandy Edens
Ordinarily Director of Tech. Support & Em. Management

Kim Locey
Ordinarily Director of Administrative Programs

Acting Director of Enforcement

Acting Advisor to the Acting Dep. Assistant Sec.
# Appointees at OSHA

<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Position</th>
<th>Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assistant Sec. of Labor for OSHA</td>
<td>TBD</td>
<td>Dep. Assistant Sec. of Labor for OSHA</td>
<td>TBD</td>
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<tr>
<td>OSHA Chief of Staff</td>
<td>TBD</td>
<td>Loren E. Sweatt</td>
<td>Sr. Policy Advisor to House Ed. &amp; Workforce Committee</td>
</tr>
</tbody>
</table>
OSHA Enforcement Under a Trump Administration
Obama’s OSHA: Enforcement First Philosophy

• 100+ new CSHOs
• Increased penalties and spike in significant / egregious cases
• Expand scope beyond individual workplace (+ Repeat violations)
• More criminal cases
• New enforcement initiatives and emphasis programs
• Active Rulemaking Agenda
Changing Enforcement Philosophy

• Expect OSHA under Trump / Acosta to scale back Enforcement-Heavy Philosophy

• Shift budget / personnel back to balance enforcement and compliance assistance

• Restore respect for / value of VPP

• Revise Field Operations Manual and Enforcement Policies that inflated civil penalties
OSHA Penalties Skyrocketed
OSHA Civil Penalties to Skyrocket

• Bipartisan Budget Act of 2015 (to avoid gov’t shutdown) included little known: “Civil Monetary Penalties Inflation Adjustment Act”

• **Required** OSHA to up max civil penalties to catch up w/ “cost of living” (CPI) since last time penalties raised

• **78% increase** since 1990

• Mandate **annual increases** based on CPI (1% in Jan. 2017)
# OSHA Citation Penalties

<table>
<thead>
<tr>
<th>Characterization</th>
<th>Old Max Penalty Per Violation</th>
<th>New Max Penalty Per Violation</th>
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</thead>
<tbody>
<tr>
<td>Other than Serious</td>
<td>$7,000</td>
<td>$12,675</td>
</tr>
<tr>
<td>Serious</td>
<td>$7,000</td>
<td>$12,675</td>
</tr>
<tr>
<td>Willful</td>
<td>$70,000</td>
<td>$126,750</td>
</tr>
<tr>
<td>Repeat</td>
<td>$70,000</td>
<td>$126,750</td>
</tr>
<tr>
<td>Failure to Abate</td>
<td>$7,000 per day</td>
<td>$12,675 per day</td>
</tr>
</tbody>
</table>
$250K Cases
Pre- / Post- Penalty Increase

Jan. - Jul. 2016: 8 cases
Aug. - Dec. 2016: 21 cases
Change to “Repeat” Violation Policies?

Repeat Violations

An employer’s violation may be characterized as Repeat if:

- The Same Employer
- Received a prior citation for the same or substantially similar condition or hazard
- The prior citation became a Final Order of the federal OSH Review Commission
OSHA’s Repeat Violation Policies

OSHA Historically:

• Treated workplaces as individual, independent establishments
• Limited its review of employers’ OSHA records to 3 years
• Reactive Philosophy (less likely to revisit workplaces within a few years)

OSHA Under Obama:

• Treats workplaces in a corporate family as 1 workplace
• Look back 5 yrs at employers’ record of enforcement
• Proactive Targeting (more follow-up inspections / hand select past violators for inspection)
Proactive Targeting Philosophy

Increased use of National & Local Emphasis Programs, 2009-2016

- OSHA: Heat Illness
- OSHA: Process Safety Management at Chemical Facilities
- OSHA: Amputations (LO/TO & Machine Guarding)
- OSHA: Combustible Dust
- OSHA: Falls In General Industry
- OSHA: Grain Handling
- OSHA: Noise
# Focus on Repeat Violations

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Serious</td>
<td>58,845</td>
<td>61,018</td>
<td>67,052</td>
<td>62,115</td>
<td>57,112</td>
<td>56,661</td>
<td>49,616</td>
<td>47,934</td>
<td>42,984</td>
</tr>
<tr>
<td>Repeat</td>
<td>1,867</td>
<td>2,350</td>
<td>2,817</td>
<td>3,229</td>
<td>3,034</td>
<td>3,193</td>
<td>2,968</td>
<td>3,088</td>
<td>3,146</td>
</tr>
<tr>
<td>Willful</td>
<td>331</td>
<td>747</td>
<td>517</td>
<td>594</td>
<td>423</td>
<td>319</td>
<td>439</td>
<td>527</td>
<td>524</td>
</tr>
<tr>
<td></td>
<td>2.4%</td>
<td>2.7%</td>
<td>3.2%</td>
<td>3.7%</td>
<td>3.8%</td>
<td>4.0%</td>
<td>4.4%</td>
<td>4.7%</td>
<td>5.3%</td>
</tr>
</tbody>
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OSHA’s Repeat Violation Policies

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**OSHA Under Trump:**
- Return to 3 year look back period?
- Extend exemptions due to recent inspections?
- Retire numerous emphasis programs and restore Reactive Inspection Focus?
- Change successorship analysis to return to alter ego model?
Electronic Injury and Illness Recordkeeping Rule
Injury Data Electronic Submission

May 12, 2016, OSHA published the Final Rule re: Injury and Illness Recordkeeping Electronic Data Submission

3 Major Components:

1. Establishments w/ 250+ workers must annually submit to OSHA 300 Logs, 301 Incident Reports, and 300A Annual Summaries

2. Establishments w/ 20+ workers in certain “High Hazard Industries” to annually submit 300As

3. OSHA’s original intent was to publish the injury data
# Current Reporting Deadlines

<table>
<thead>
<tr>
<th>Recordkeeping Forms for Year</th>
<th>Establishments w/ 250+ Employees</th>
<th>Establishments w/ 20-249 Employees</th>
<th>Deadline to Submit Forms</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016</td>
<td>300As</td>
<td>300As</td>
<td>Dec. 1, 2017</td>
</tr>
<tr>
<td>2017</td>
<td>300 Logs, 300As &amp; 301s</td>
<td>300As</td>
<td>July 1, 2018</td>
</tr>
<tr>
<td>2018 and thereafter</td>
<td>300 Logs, 300As &amp; 301s</td>
<td>300As</td>
<td>March 1, 2019 (March 1st each subsequent year)</td>
</tr>
</tbody>
</table>
Status and Future of E-Recordkeeping Submission

- May 17, 2017 – OSHA announced indefinite delay of July 1st deadline to submit injury data
- June 28, 2017 – OSHA published a Notice of Proposed Rulemaking to extend injury data submission deadline to December 1, 2017
- Delay intended to allow new Administration time to decide what it wants to do with the rule (e.g., repeal / amend)
- July 14, 2017 – OSHA announces online portal will go live August 1, 2017
Electronic Injury and Illness Recordkeeping Rule

Anti-Retaliation Elements
Final Rule on Injury Reporting Policies

As of December 1, 2016, Employers were required to:

• Inform employees of right to report workplace injuries

• Inform employees of right to report work related injuries free from discrimination or retaliation

• Update injury reporting policies to remove “unreasonable” elements that may discourage employees from reporting (e.g., discipline for late reporting or vague safety rules, blanket post-injury drug testing, safety incentive or compensation programs tied to the injury rates)

These elements are OSHA’s response to universal criticism that Rule would lead to under-reporting/under-recording
Drug Testing

• Drug testing may “dissuade a reasonable employee from reporting a work-related injury” b/c of “invasion of privacy”

• Prohibits “Blanket post-injury drug testing policies”

• Post-injury drug testing may not be a form of discipline, but it may be used as tool to evaluate root causes of workplace injury

• Permits the following drug testing:
  – Pre-employment & Random
  – To comply w/ state or fed law (e.g., DOT mandatory post-accident test)
  – When required by WC’ insurer (including premium reduction policies for post-accident drug testing)
  – Post-accident if reasonable basis to believe drugs/alcohol contributed
Safety Incentive and Compensation Programs

Concern about chilling/retaliatory effect of some safety incentives:

- Bonus (e.g., pizza party, safety bingo, gift cards, etc.) for employees or crew for having no injuries over a certain period of time

- Raffle in month that all employees comply w/ legitimate safety rule (e.g., using hard hats and fall protection)

- Reward or deny benefit or bonus based on injury rate (e.g., DART rate)

- Bonus employees observed working safely, reporting unsafe conditions, completing safety training, or joining safety committee

- Front line supervisor annual bonus tied to injury rate

- Senior manager or executive annual bonus tied to injury rate
Status of Anti-Retaliation Elements of the Rule

• Anti-Retaliation Elements (e.g., limits to post-incident drug tests and safety incentives) – currently in effect

• OSHA actively pursuing violations, but only where there is an aggrieved employee (first citations just issued)

• Obama’s DOL filed a motion to dismiss Industry challenge in final days of Admin.

• Since Trump inauguration, DOL withdrew motion to dismiss and requested stay to allow time to reconsider the Rule

• Legal challenge “stayed” (closed)
Future of the E-Recordkeeping and Anti-Retaliation Rule

• OSHA to most likely initiate new rulemaking to rescind or amend the Rule

• Most likely changes to the Rule:
  – Injury data limited to only 300A Annual Summaries for all employers in all years
  – Increase threshold trigger for “High Hazard Industries”
  – Increase threshold for smaller employers to be covered
  – Eliminate the Anti-Retaliation provisions
Clarity about OSHA Injury & Illness Recordkeeping Statute of Limitations

The Fate of the “Volks” Rule
Volks Recordkeeping Statute of Limitations Rule

• Final Rule published 12/19/2016: “Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness”

• “Clarification” needed b/c of D.C. Cir. Decision in Volks case

• Attempts to “clarify” that keeping Recordkeeping logs accurate is a “continuing duty”

• Under this new Final Rule, the statute of limitations for RK violations becomes 6 mos. + 5 yrs. (i.e., 5 yr. duty to keep logs + 6 month statute of limitations)
D.C. Circuit’s Volks Decision

• Rule attempts to overturn Volks decision that held OSHA could only cite recordkeeping violations in 6 months from when injury 1st due to be recorded

• Opinion based on unambiguous text of the OSH Act:
  – RK violation occurs when employer fails to properly record injury w/in 7 days of injury
  – Failure to record is not a continuing violation for entire record retention period

• Proposed rule overturns Volks decision w/out petition to Supreme Court or for rehearing en banc
Volks Rule Repealed

- Both houses of Congress passed and Pres. Trump signed H.J. Res. 83 – the Congressional Review Act joint resolution “disapproving” the Volks Rule
- Returns to Volks decision - strict 6-mos. Limitations period for RK violations
- From D.C. Circuit’s Volks decision to promulgation of Volks Rule, Recordkeeping violations dropped 75%
End of Public Shaming?
Regulation By Shaming

“In some cases, ‘regulation by shaming’ may be the most effective means for OSHA to encourage elimination of life-threatening hazards, and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger. To do this, we will issue more hard-hitting press releases that explain more clearly why we cited a specific employer.”
Enforcement Press Releases

- 2003-2008: 889 (148 / year)
- 2011-2016: 2,780 (463 / year)
- Since Jan. 20, 2017: 9 (15 / year)
Severe Violator Enforcement Program

Employers “demonstrate indifference to their OSH Act obligations” by committing:

- **Any Egregious** enforcement action
- 1+ Willful, Repeat, or FTA citations related to a **Fatality or Catastrophe**
- 2+ Willful, Repeat, or FTA citations related to **High Emphasis Hazards**
- 3+ Willful, Repeat, or FTA citations under the **PSM Standard**

**High Emphasis Hazard**

- Falls
- Amputations
- Excavations
- Combustible Dust
- Oil & Gas
- Grain handling
- Lead
- Silica
- Primary Metals
SVEP Shaming

- Names of SVEP Employers Posted on the Web
- Embarrassing Electronic Press Release
Recordkeeping Data Submission

• In Dec. ‘17 OSHA to begin publishing employer-specific info online

• Data originally due to be published without context

• Adverse Impacts:
  – Discourage consumers from doing business
  – Kill contract opportunities
  – Provide ammunition to competitors and unions

• OSHA about to re-open rule and consider changes
Check out our OSHA Blog:

www.OSHADefenseReport.com
the OSHA DEFENSE report

2017 OSHA WEBINAR series

Top 5 OSHA Issues in 2017
Wednesday, January 25th

Slips, Trips and Falls Rule
Thursday, February 8th

Standards Improvement Project: Changes to LOTO
Tuesday, March 28th

New Cal/OSHA Enforcement Issues
Tuesday, April 11th

OSHA's New E-Recordkeeping & Anti-Retaliation Rule
Tuesday, May 16th

Interpretations and Variances: New Regulatory Strategy
Tuesday, June 6th

Multi-and Joint-Employers, Contractors and Temps
Tuesday, July 11th

OSHA Status of Pres. Trump’s De-Regulatory Agenda
Tuesday, August 15th

OSHA’s New Leadership Team
Tuesday, September 12th

Addressing Employee Complaints
Tuesday, October 17th

OSHA’s Fatality & Injury Reporting
Tuesday, November 14th

OSHA PSM and EPA RMP Update
Tuesday, December 12th
QUESTIONS?
Contact Information

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econn@connmaciel.com