

2016 Pulp and Paper Safety Association Annual Conference

OSHA DIRECTION & UPDATE

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What's Up at OSHA, Generally

- “Graying” of the agency => leadership crisis; field crisis
- The Obama Administration’s swansong
 - Aggressive rulemaking
 - Passive-aggressive “subregulatory” activity
- Centralization of authority
- Legacy rules/standards – Silica, Combustible Dust, Electronic Recordkeeping, “Volks”

Rulemaking – Final Rules “Planned”

- “Final Rule Stage”:
 - Walking Working Surfaces and Personal Fall Protection Systems (Slips, Trips, and Fall Prevention) (*withdrawn from OIRA in January*)
 - OSHA Access to Employee Medical Records
 - Retaliation claims processing

Rulemaking – Notable Proposed Rules in Pipeline

- Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness (*Volks*)
- Beryllium
- Revocation of Obsolete Permissible Exposure Limits (PELs)
- Amendment of Cranes and Derricks Standard
- Combustible Dust (pre-rule)
- Process Safety Management and Prevention of Major Chemical Accidents (pre-rule)

Rulemaking – Fatality/Hospitalization/Amputation Reporting

- Employers must notify OSHA of:
 - Work-related fatality within 8 hours
 - Work-related in-patient hospitalization, amputation or loss of an eye within 24 hours
- Huge increase in work for OSHA to do – 200-250 reports per month – so “triage” process necessary
- “RRI” system
 - Reports requiring inspection (fatalities, amputations, etc.)
 - Reports fit for “rapid response investigation” – RRI
 - Reports not covered by rule



Rulemaking – Fatality/Hospitalization/Amputation Reporting (cont'd)

- Problems/awareness points
 - Attorney-client/attorney work product privilege
 - Doing OSHA's job – 5-day requirement
 - “Non-Mandatory Investigative Tool”
 - Root cause analysis/detailed description
 - Witness identity/statement disclosure
 - Posting/certification
 - Use of form v. own form/document
 - Abatement “recommendations”/“corrective action” taken – ammunition for OSHA in future (willful)

Rulemaking – Electronic Injury/Illness Reporting

- “Improved Tracking of Workplace Injuries and Illnesses” – published May 12, 2016
- Will require annual reporting by “every establishment” of all illness and injury data to OSHA for publication on OSHA website.
- Will require establishments in certain (very inclusive) industries, including construction, manufacturing, utilities, agriculture, to submit 300As electronically.
- Effective dates phased in:
 - July 1, 2017 – 300As to be submitted
 - July 1, 2018 – 300 Logs, 301s, 300As to be submitted
 - 2019 – deadline changed from July 1 to March 2 of year

Rulemaking – Electronic Injury/Illness Reporting (cont'd)

- Will prohibit employers from “discouraging” reporting by employees (already covered by OSHA Act 11(c) and rules/standards).
- Will prohibit employers from discharging/discriminating based on injury/illness reporting.
- Will provide OSHA avenue to investigate retaliation without employee complaint and cite employers.
- Will require employers to inform employees:
 - That they have a right to report work-related injuries/illnesses;
 - How to report injuries/illnesses;
 - That employers may not discharge/discriminate based on reporting.
- Clear goal: shaming

Rulemaking – Electronic Injury/Illness Reporting (cont'd)

- Will prohibit employers from having “unreasonable” injury/illness reporting policies: “... [F]or a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness.”
- Will prohibit employers from having post-accident drug testing policies that are not limited to “situations in which drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use”.

Rulemaking – Electronic Injury/Illness Reporting (cont'd)

- Problems
 - Not authorized by 1910.1904 or OSHA Act
 - Would disclose confidential information on employers and employees and proprietary information (hours worked).
 - Could result in competitive injury.
 - Would not provide tools for understanding/use of data.
 - Would provide no mechanism for correction of data (work-relatedness; DAFWIs; DARTs; ...).

Rulemaking – Electronic Injury/Illness Reporting (cont'd)

- Problems
 - Corporate-wide injury/illness data available to OSHA => potentially more/more severe citations
 - Treasure trove for labor union organizers and plaintiffs' lawyers
 - COSHOs now acting like EEO investigators: what motivated employer to issue discipline; did employer treat injured employees, as a class, differently from employees not injured?
 - New mechanism for employees to litigate retaliation claims (in addition to 11(c) complaint)

Rulemaking – Silica

- Published March 25, 2016
- Applies to construction; glass products; pottery products; structural clay products; concrete products; foundries; dental laboratories; paintings and coatings; jewelry production; refractory products; refractory installation and repair; ready-mix concrete; cut stone and stone products; railroad track maintenance; hydraulic fracturing for gas and oil; and abrasive blasting.
- Reduces PEL to 50 (from 250) micrograms per cubic meter (50 $\mu\text{g}/\text{m}^3$) of air as an eight-hour time-weighted average.

Rulemaking – Silica (cont'd)

- Requires air monitoring for exposures of employees to action level (25 $\mu\text{g}/\text{m}^3$) or PEL; if > action level:
 - If > action level but < PEL, re-test in 6 months and submit exposed employees to medical surveillance;
 - If > PEL, retest in 3 months, submit exposed employees to medical surveillance, implement measures to reduce to below PEL, implement respiratory protection, establish regulated areas (general industry employers).
- Requires notification of employees of exposure assessment results.

Enforcement Activities – Increased Penalties

- Bipartisan Federal Budget Bill
- Directs OSHA to increase maximum penalties by up to 82%
 - Catch-up from 1990 (last increases) based on CPI.
 - Increases must be published by August 1, 2016.
 - In future years, increases by percentage increase in CPI from year before.
 - Maximum increases by citation classification:
 - Other-than-Serious/Serious: \$7,000.00 => \$12,744.00
 - Repeat/Willful: \$70,000.00 => \$127,438.00
 - Remember: per citation item.
 - Number of “significant cases” likely to skyrocket.

Enforcement Activities – Press Releases/Shaming

- Big push/tool for this OSHA.
- Generally issued where \$30K+ in proposed penalties, particularly severe cases, SVEP cases, egregious cases.
- Dr. Michaels: “They continue to be very effective.”
- State allegations as fact; often inaccurate/hyperbolic.
- New strategy: inclusion of employer’s worker’s compensation carrier by name.
 - Dr. Michaels: “They call and ask me why they’re included: ‘We had nothing to do with this.’ That’s the point.”

Enforcement Activities – Incentive Program Directive

- OSHA hates incentive/disincentive programs based on belief they discourage injury/illness reporting – “intentionally or unintentionally”.
- Culprit programs subject to scrutiny/citation are “blame the employee” programs.
- Focus should not be on fact/frequency of injury:
 - Underlying conduct leading to injury
 - Accounting for near misses
- Related *U.S. Steel* case:
 - Suit to enjoin employer’s immediate injury reporting rule
 - OSHA request: prohibition of rule requiring reporting within fewer than 7 days

Enforcement Activities – Whistleblower

- Investigators now must make “every” attempt to interview complainant; intake supervisor must insure coverage requirements met, *prima facie* case elements identified.
- New guidance to ensure consistency and quality of investigations.
- Rulemaking in works regarding procedures.
- April 20, 2015, Memorandum: “Reasonable cause” standard lower than “preponderance of the evidence” standard for proof in investigation – could “reasonable judge” find in favor of complainant?



Hot Issues

- “Fissured” workplaces
- Workplace violence
- Health hazards
- Heat campaign
- Fall protection campaign
- Customer service



Thank You!

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