

OSHA LEGAL AND REGULATORY UPDATE

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Presented By

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She is a member of the MD, DC, and PA Bars; the U.S. District Courts of MD, DC, and TN; the U.S. Court of Appeals, DC Circuit 3rd Circuit, and 4th Circuit; and the United States Supreme Court. She also serves on the adjunct faculties of the Catholic University of America in Washington, DC, and the University of Colorado-Boulder, where she teaches on employment, labor and occupational safety law.

Abrams is a professional member of ASSP and is an active member of the National Safety Council, where she was awarded the Distinguished Service to Safety Award (DSSA) in 2017. She is also an Avetta Fellow. Abrams has coauthored several textbooks on employment law, occupational and mine safety and health, and is a regular columnist on safety law issues for multiple magazines.

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Who's on First?

- Dept. of Labor: Secretary Lori Chavez DeRemer confirmed (former GOP Rep. from OR)
- OSHA Nominee: David Keeling (consultant, former OHS specialist for UPS and Amazon — transportation safety background)
 - Amanda Wood Laihow is the Acting Assistant Secretary for OSHA, and she was a past Deputy Assistant Secretary for OSHA. Prior to this appointment, she was nominated by President Trump in 2019 and confirmed by the U.S. Senate in 2020 to serve as a Commissioner to the U.S. Occupational Safety and Health Review Commission from 2020 until 2023. She also was a policy chief for National Assn. of Manufacturers.
- MSHA Nominee: Wayne Palmer (Executive VP, Essential Minerals Assn. — and MSHA Deputy in Trump 1.0)
- NIOSH funding slashed almost completely and 2/3 of employees fired!
- OSHRC & FMSHRC: Both lack some Commissioners (FMSHRC in full Democratic control with two empty seats) — Trump has asserted control over independent agencies and claims right to fire ALJs — likely to face legal battle!

Pending Legal Challenges: OSHA “Walkaround Rights” & MSHA Crystalline Silica Rules



OSH Act of 1970 gives employers and employees the right to authorize a representative to accompany OSHA during a workplace inspection

Final rule published on April 1, 2024, Fed. Reg.
<https://www.govinfo.gov/content/pkg/FR-2024-04-01/pdf/2024-06572.pdf> - took effect 5/31/24 and in litigation (NO HOLD)



Final Rule grants “walkaround rights” during OSHA inspections to non-employees, such as a third-party or a union representative, when those individuals are “reasonably necessary” to “aid in OSHA inspections as the employees’ representative – took effect May 31, 2024!



MSHA Crystalline Silica Rule – In litigation in 8th Cir. (no stay) and Coal provisions were to take effect 4/14/25 while Metal/Nonmetal provisions were to take effect 4/8/26 – but MSHA has **STAYED** the rule’s implementation for four months and 8th circuit also issued an indefinite stay



QUESTION: WHAT IMPACT OF SCOTUS *Loper Bright* decision?

Project 2025 & Environmental Regulations

- Trump rolled back more than 100 environmental regulations during his first term in office
- Former NY Rep. Lee Zeldin heads EPA (voted against climate change legislation) – rescinded 31 regulations on 3/12/25- said he was “driving a dagger straight into the heart of climate change religion to drive down the cost of living for American families, unleash American energy, bring back auto jobs and more”
- Latest actions involve reconsideration of regulations on power plants, regulations on the oil and gas industry, mercury & air toxics standards targeting coal-fired power plants, Greenhouse Gas reporting program, Steam Electric ELGs, wastewater regs for coal power plants, and the Risk Management Program rule, the tech transfer rule, endangerment findings, NESHAPs, and PM 2.5 NAAQS rules
- Targeted rules: ambient [air quality] standards, regulations on greenhouse gas emissions from cars and power plants, TSCA regulations impacting both public and occupational health — all among Project 2025 recommendations
- SEC final rule for ESG - requiring large publicly traded companies to disclose climate action, GHG emissions, and the financial impacts of severe weather events – was set to go into effect in 2026 but implementation delayed due to lawsuits – unlikely to survive SCOTUS

Project 2025 & DOL

- Regulatory Freeze: 10 out/1 in approach will trim existing regulations.
- Project 2025 would enable corporations to cut overtime pay, relax worker safety rules, allow workplace discrimination, and more.
- Project 2025 endorses allowing young people to work in “inherently dangerous jobs,” in roles that are currently not permitted due to significant safety concerns that have long been established and enforced by the U.S. Department of Labor (DOL). Project 2025 would change DOL policies and allow America’s youth to work these jobs, meaning young people entering the labor force out of economic necessity could be subjected to more dangerous work.
- Project 2025 proposes lowering the threshold for the minimum wage and taking away overtime eligibility for millions of workers.
- It would consolidate the U.S. Bureau of Economic Analysis and Census Bureau with BLS into one agency, eliminating BLS’ independence – BLS currently measures employment, compensation, worker safety, productivity, and price movements.

Will OSHA Survive?

- HR 86 – “NOSHA Act” (Rep. Andy Biggs – R- AZ) – A BILL

To abolish the Occupational Safety and Health Administration, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, SECTION 1. SHORT TITLE.

This Act may be cited as the “Nullify Occupational Safety and Health Administration Act” or the “NOSHA Act”.
SEC. 2. IN GENERAL.

- The Occupational Safety and Health Act of 1970 is repealed. The Occupational Safety and Health Administration is abolished.
- **QUESTIONS: What impact if federal OSHA is abolished?**
 - State Plans: Kentucky bill already seeks to weaken KY-OSHA and set up legal challenge.
 - If federal OSHA abolished, multi-state employers will face crazy quilt of state rules (or states with no rules) undermining existing programs.
 - What about US participation in GHS without a federal OSHA?
 - Will Voluntary Consensus Standards (ANSI, NFPA, ASTM, ISO) become de facto requirements contractually or for tort purposes?

Demise of Chevron Deference to OSHA/EPA

- SCOTUS 6/28/24 decision in *Loper Bright Enterprises v. Raimondo* overturned its 40-year precedential test – “*Chevron* deference” when evaluating whether courts should defer to an agency’s “reasonable” interpretation of “ambiguous” statutory language
- *Chevron* is a foundational test in administrative law, and was long used in OSHA/MSHA/EPA cases to help agencies preserve new rules or enforcement actions against claims that the agency went beyond its authorizing statute
- Concerns arising that judges can now substitute their views on a topic for those of the agency SME who drafted it, including disregard of comments and hearings in the development of the rule
- This is major incentive for “forum shopping” to find federal courts in districts/circuits most likely to kill federal rules as they will no longer have to “defer” to the agency’s expertise, experience & judgment

OSHA in the Crosshairs

***Allstates Refractory Contractors LLC v. Su* (6th Cir. 2023) – Challenged constitutionality of Occupational Safety & Health Act of 1970 (OSH Act) – Former Trump White House counsel Don McGahn represents Allstates in this case!**

Coalition of industry and conservative groups sued to determine whether the congressional delegation to OSHA to set workplace safety standards violated the “Nondelegation Doctrine”

“Nondelegation doctrine” holds that under separation of powers and tripartite government, Congress generally cannot delegate its legislative power to another Branch ... but this does not prevent Congress from seeking assistance of its “coordinate branches”

- The Petitioners want **Congress**, not OSHA, to “set whatever specific safety standards lawmakers think are necessary”
- Challenges to the OSH Act in the past were struck down (in 1978 and 2011) by 7th Cir. and DC Cir.
- 6th Cir. “joined their sister circuits” in holding OSHA’s delegation to be constitutional (by a 2-1 vote)
- Appeal to SCOTUS failed to obtain certiorari ... but Justices Thomas and Gorsuch voted to grant review (4 votes are needed) and this is poised for another attempt

But Wait, There's More!

- SCOTUS Administrative Law decision, *Corner Post v. Board of Gov of Federal Reserve System* (6-3 decision) held that lawsuits over OSHA rules and other agencies “final agency action” do not have to begin within 6 years of the promulgation of the rule, but instead must be brought within 6 years of when the party was first injured by a particular policy (overturns 75 years of precedent)
- This opens floodgates for lawsuits against long-standing OSHA/MSHA/EPA agency rules and policies
- Decision (Justice Barrett) was under Administrative Procedure Act (APA) and held that the claim accrues “when plaintiff is injured by final agency action”
- Dissent (Justice Brown Jackson) warned that “The tsunami of lawsuits against agencies ... has the potential to devastate the functioning of the Federal Government” ... there are “no longer any limitations period for lawsuits that challenge agency regulations on their face” which is “destabilizing for both government and businesses”
- WV AG commented “Federal agencies should be held to account for their actions, even when years have passed from the time the rule was first issued”

Trump Executive Orders Impacting EHS

- EO 14219 (2/25 Fed Reg) – “Ensuring Lawful Governance & Implementing the President’s DOGE Deregulatory Initiative” –states that within 60 days, all agency heads must identify several types of regulations, including those that:
 - Are unconstitutional or raise serious constitutional issues - rules that exceed the fed govt power established in the Constitution
 - Are based on delegation of legislative power
 - Are based on anything other than a strict reading of authorizing statutes
 - Concern economic, political or social issues not clearly authorized by statute
 - Impose significant costs on private parties that are not outweighed by public benefits
 - Unjustifiably impede tech innovation, infrastructure development, disaster response, economic development, energy production, inflation reduction, R&D, land use, and foreign policy objectives
- Following 60-day review, each agency must immediately develop Unified Regulatory Agenda that seeks to rescind or modify regulations as appropriate (prioritizing those with “significant impact” – e.g., SBREFA rules) and repeal those considered “UNLAWFUL”
- NOTE: 4/9/25, Trump directed federal agencies to prioritize REPEALING regulations that do not comply with SCOTUS decisions on environment, admin courts and affirmative action
 - The issue is that the president told agencies NOT to engage in notice/comment rulemaking to do so – in clear violation of the Administrative Procedure Act
- EO 14192 (1/31) – “Unleashing Prosperity through Deregulation” -- Agencies must REMOVE 10 federal rules for every new one established

DOL Exec Orders!

- EO 11246 (1/21/25); “To Cease and Desist All Investigative and Enforcement Activity Under Rescinded Order 11246”
 - RESCINDS an Exec Order from 9/24/65 and regulations promulgated under it – includes enforcement by DOL under Office of Federal Contract Compliance, Office of ALJs and Administrative Review Board
- EO “Ending Illegal Discrimination and Restoring Merit-Based Opportunity “
 - This cancels ALL investigative and enforcement activity by DOL including all pending cases, conciliation agreements, investigations, complaints, and any other enforcement-related or investigative activity
 - All parties with open cases will be notified that the EO 11246 component of the review or investigation has been closed and any other review is held in abeyance
- EO 14151 – Ending all federal DEI programs
 - Another EO issued in April eliminates all “Disparate Impact” causes of action in federal discrimination cases (overturning decades of case law where facially neutral criteria eliminate classes of applicants while not being required for business necessity)

OSHA's IBI Enforcement Policy

- Under Biden, OSHA expanded its “egregious violation” policy to allow its use in high gravity serious violation cases, and recordkeeping cases, rather than limiting it to willful/repeated citations.
- “Instance-by-instance” (IBI) cases, revisions allow multiple citations/penalties for single violation
- Factors to be considered include:
 - The employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current
 - The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39
 - The proposed citations are related to a fatality/catastrophe
 - The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.
 - Instance-by-instance citations may be applied when the text of the relevant standard allows (such as, but not limited to, per machine, location, entry, or employee), and when the instances of violation cannot be abated by a single method of abatement.

Severe Violators Enforcement Program

- OSHA relaunched revised SVEP in 10/22, building on original 2010 program
- OSHA's updated SVEP criteria include the following:
 - Program placement for employers with citations for at least two willful or repeated violations or who receive failure-to-abate notices based on the presence of high-gravity serious violations.
 - Follow-up or referral inspections made one year – but not longer than two years – after the final order.
 - Potential removal from the Severe Violator Enforcement Program three years after the date of receiving verification that the employer has abated all program-related hazards.
 - Employers' ability to reduce time spent in the program to two years, if they consent to an enhanced settlement agreement that includes use of a safety and health management system with seven basic elements in OSHA's Recommended Practices for Safety and Health Programs (I2P2).

OSHA Fall Prevention NEP



- Effective 5/1/23, OSHA launched a fall prevention NEP covering both construction & general industry
 - Program will be reviewed in six months to determine effectiveness by analyzing both citations and fall hazard data
 - State plans must notify of intent but adoption is not mandatory
- For non-construction, NEP targets the following activities:
 - Roof top mechanical work/maintenance
 - Utility line work/maintenance (Electrical & Cable)
 - Arborist/tree trimming
 - Holiday light installation
 - Road sign maintenance/billboards
 - Power washing buildings (not connected with painting)
 - Gutter cleaning
 - Window cleaning
 - Communication towers
 - For other non-construction work, when worker is observed working at height, inspection MAY be initiated upon approval of area office – if inspection not warranted, CSHO will conduct outreach on Fall Protection

Warehouse Safety NEP

CPL 03-00-026 - National Emphasis Program on Warehousing and Distribution Center Operations - launched 07/13/2023 and is OSHA-wide (state plan notice of intent and adoption is required)

- Covers inspections at warehousing and distribution center operations, mail/postal processing and distribution centers, parcel delivery/courier services, and certain high injury rate retail establishments
- NEP will focus on workplace hazards common to those industries, including:
 - powered industrial vehicle operations,
 - material handling/storage,
 - walking-working surfaces,
 - means of egress, and fire protection.
- ***Heat and ergonomic hazards must be considered during all inspections covered by this NEP and a health inspection shall be conducted if OSHA learns that heat and/or ergonomic hazards are present.***



OSHA Heat Illness Prevention NEP

OSHA NEP looks for employers to incorporate the following into a prevention program, and can enforce via GDC, recordkeeping/reporting, training rules:

- a) A training program informing employees about the effects of heat stress, and how to recognize heat-related illness symptoms and prevent heat-induced illnesses;
- b) A screening program to identify health conditions aggravated by elevated environmental temperatures;
- c) An acclimation program for new employees or employees returning to work from absences of three or more days;
- d) Specific procedures to be followed for heat-related emergency situations; and
- e) Provisions that first aid be administered immediately to employees displaying symptoms of heat-related illness.

Other OSHA National Emphasis Programs

- Combustible dust – CPL 03-00-008
- Hazardous machinery (LOTO & Amputations) – CPL 03-00-022
- Hexavalent Chromium - CPL 02-02-076
- Lead – CPL 03-00-009
- Primary Metals - CPL 03-00-018
- Process Safety Management – CPL 03-00-021
- Shipbreaking – CPL 03-00-020
- Crystalline Silica – CPL 03-00-023
- Trenching & Excavation – CPL 02-00-161

Heat Stress Prevention NPRM

- OSHA issued NPRM for a new rule on “Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings” - **public hearing set for 6/16/25 – must register to testify by 5/2/25.**
- Proposal covers both outdoor and indoor work settings, and background information can be found on OSHA’s Heat Injury and Illness SBREFA website at <https://lnkd.in/gmj2qBvU>.
- OSHA lost key heat stress case where OSHRC held it could not use the National Weather Services’ “Heat Index” for enforcement - *Secretary of Labor v. A.H. Sturgill Roofing, Inc.* This necessitated a rulemaking in order for OSHA to be able to regulate this hazard at the federal level because of difficulty using GDC.
- OSHA seeks public comment on the nature and extent of hazardous heat in the workplace and interventions and controls to prevent heat-related injury and illness, including measuring heat exposures, strategies to reduce it, personal protective equipment and other controls, and worker training and engagement.

OSHA E-Recordkeeping

- OSHA reopened e-Recordkeeping rule 3/30/22—***Final rule released July 2023 and took effect 1/1/2024, with data due electronically by 3/2/25***
 - *CY 2024 300A form must also be posted in workplace from 2/1/25 – 4/30/25*
- All records submitted electronically are publicly searchable on OSHA website but will redact personal identifiers of workers (company name WILL be identified as well as worksite name).
 - Revises NAICS codes that trigger submission of 300A logs by “small” employers (redefined as 20-99 employees at a worksite).
 - Adds new submission requirements for specified employers (using NAICS) with 100+ workers at a worksite—would have to submit 300 and 301 logs PLUS 300A summary

Thank you

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