

The World According To Trump: Trump's Potential Impact On OSHA

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Mark S. Kittaka
Partner

As we have noted in a number of different blog posts since the election, there are a variety of ways that the new Trump administration could affect many different areas related to labor and employment law. In this post, we are going to look into our crystal ball to give you our best prediction regarding some of the ways we anticipate President-Elect Trump will change the course of current and pending Occupational Health and Safety Administration (OSHA) regulations as well as the administration of OSHA as a whole. With regard to regulations overall, Trump [lists his "vision"](#) to include the following:

1. Ask all department heads to submit a list of every wasteful and unnecessary regulation which kills jobs, and which does not improve public safety and eliminate them
2. Issue a temporary moratorium on new agency regulations that are not compelled by Congress or public safety
3. Decrease the size of our already bloated government after a thorough agency review

Even without changing a single regulation, Trump could simply limit OSHA's enforcement ability by cutting their budget. This was a tactic used by President Ronald Reagan and with a Republican majority in both the House and Senate, this is a distinct possibility. As for specific regulations and/or interpretation letters that may be targeted by the new administration, these seem to be at the top of the list:

- Electronic Recordkeeping/Non-Discrimination Provisions – These new regulations require electronic submission of OSHA logs, incident reports and annual summaries for larger employers but they also implemented controversial bans on blanket, post-accident drug testing as well as financial safety incentives. This is currently being challenged in a lawsuit focusing on the illegality of the non-discrimination provisions of the new rule. On Nov. 28, 2016, the judge **denied** the business groups' Motion for Preliminary Injunction. However, the judge stated that while it denied the Motion for Preliminary Injunction based on the failure to establish irreparable harm, it was not an indication of who will prevail on the merits. Even without the injunction, this dispute will continue into the Trump administration. President-elect Trump could direct the Department of Justice to discontinue the fight, which could result in a victory for the challenging business groups.
- Recordkeeping as a Continuing Violation – The White House Office of Management and Budget is currently reviewing a new proposed change to OSHA recordkeeping regulations that says an employer has

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a continuing duty to create accurate records of employee work-related injuries and illnesses. This could effectively change the statute of limitations for recordkeeping violations from six months to **five years and six months** (five years is the length of time employers must maintain OSHA 300 logs). If issued during the remaining days of the Obama Administration, this could be subject to a Congressional Review Act challenge by the Republican-controlled Congress.

- Silica – OSHA's new silica rule issued in March 2016 has been challenged in a number of lawsuits which have been consolidated in the D.C. Circuit. The rule set the permissible exposure limit (PEL) for airborne crystalline silica of 50 micrograms per cubic meter of air (50 $\mu\text{g}/\text{m}^3$) for general industry, construction and maritime employers. This represented a 50 percent reduction for general industry and an 80 percent reduction for the construction and maritime industries. Industry groups have argued that this new rule is “a solution in search of a problem” since mortality rates from silicosis have declined more than 90 percent between 1968 and 2010. Industry groups also challenge the economic and technological feasibility of the rule as applied in the foundry, hydraulic fracturing and construction industries. Since the petition for review of the final rule will not be fully briefed until the end of March 2017, this is another case where the Trump administration could decide to discontinue the fight in court, which could result in the invalidation of the regulation.
- Interpretation Letters – When a new Secretary of Labor is appointed, he/she will have the authority to issue new informal interpretation letters, which have been given the force of law over the years. For example, in 2013, OSHA issued a “[Standard Interpretation Letter](#)” in which it stated that during an OSHA walkaround inspection of a **non-union facility**, a **union** representative could be designated as the employees’ “personal representative” even without representation election or voluntary recognition of the union as the exclusive representative of the employees. This interpretation letter is currently being challenged in court as a violation of the Administrative Procedure Act, as no formal “notice and comment” period was provided for the promulgation of this rule. Again, the Trump administration may simply choose not to fight this case in court which may lead to the invalidation of the interpretation letter. Alternatively, it could issue a new interpretation letter after the new secretary has been appointed to the Department of Labor reversing position on this issue.

During prior Republican administrations, there was more emphasis on employer education and the Voluntary Protection Program (VPP) as compared to the increased fines and “regulation by shaming” through press releases which have been the *modus operandi* of Assistant Secretary Michaels since his appointment in December 2009. Trump could focus the agency on substantive safety enforcement (i.e., machine guarding, lockout/tagout, etc.) and less on the regulations listed above which may be interpreted as burdensome or unnecessary regulations on businesses. We will have to wait and see who is appointed as the new Secretary of Labor to fully grasp the magnitude of the change of direction of the agency.