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Legal experts predicting significant changes for worker safety under new administration

A new presidential administration almost certainly will mean a new direction for OSHA, legal experts agree. Regulations could be undone. Funding could decrease. Strategies for worker safety could shift 180 degrees.

Decisions ultimately lie with President Donald Trump and his team as they settle into the White House.

"Even if it wasn't Trump, just having a Republican in office would have been a substantial change by itself," said Mark Kittaka, a partner and administrator of the Labor and Employment Law Department at Barnes & Thornburg LLP in Fort Wayne, IN. "Because it's Trump, it's going to be even more."

On the campaign trail, Trump touted his belief in smaller government with fewer rules and more freedoms. He vowed to eliminate two regulations for every new one enacted. He also promised to ease the burdens on big businesses and blue-collar workers by stimulating the economy and creating jobs.

Trump's limited-regulation stance, coupled with his experience in construction and other industries, suggest to some that he will steer OSHA more toward compliance assistance and away from enforcement.

Trump offers the unprecedented case of an incoming commander-in-chief who has been fined multiple times by OSHA for safety violations at his worksites. His businesses also have relied on contractors and sub-contractors who have been hit with major penalties. One of his contractors was fined $104,000 after a construction worker fell 42 stories to his death in 2008 at the Trump SoHo hotel condominium in New York City. The penalty was later reduced to $44,000.

"This could be a unique new administration that does pay some amount of attention to OSHA in the early days because he's familiar with it," said Eric J. Conn, a founding partner of Washington-based Conn Maciel Carey LLP and chair of the firm's OSHA Workplace Safety Practice Group.

Regulations in jeopardy

Conn said he could see the administration curbing the injury and illness electronic recordkeeping rule requiring many employers to electronically submit injury and illness data, which then would be published on OSHA's website. The rule also prohibits employers from discouraging workers from reporting an injury or illness. Some employers claim the rule is burdensome and unnecessary.

A formal rulemaking process often requires years to enact change, but Trump could turn to faster existing methods. OSHA could issue new guidance documents or letters of interpretation that reopen the door for drug testing and safety incentive programs, for example. Or the administration could pursue a budget rider that says OSHA shall not spend funds implementing the electronic recordkeeping

– article continues on p. 4

OSHA releases final rule updating beryllium exposure limits

OSHA has issued a final rule lowering occupational exposure limits for beryllium. The standards apply to general industry, construction and shipyards.

Beryllium, a lightweight metal, is used in various industries, including electronics and energy. It is highly toxic when released into the air where workers can inhale it, and can result in lung damage, including a condition called chronic beryllium disease. Even low-level exposures can cause serious health problems, OSHA states.

Workers exposed to beryllium under OSHA's previous permissible exposure limits "face a significant risk of material impairment to their health," according to the rule, which will be effective 60 days after its publication in the Jan. 9 *Federal Register*.

Under the rule, the 8-hour PEL decreases to 0.2 micrograms of beryllium per cubic meter of air from the previous limit of 2.0. The rule also sets a short-term exposure limit of 2.0 micrograms per cubic meter of air over a 15-minute sampling period.

The previous PELs were "based on decades-old studies," OSHA stated in a Jan. 6 press release. In addition, the rule sets requirements for use of personal protective equipment, medical exams, training and other protections.

Employers will have one year to comply with most of the standard's provisions. The requirement for employers to provide change rooms and showers begins two years after the effective date, and the obligation for implementing engineering controls starts three years after the effective date.

OSHA claims the rule will annually save the lives of 94 workers from beryllium-related diseases and prevent 46 new cases.

"Outdated exposure limits do not adequately protect workers from beryllium exposure," then-OSHA administrator David Michaels said in the release. "OSHA's new standard is based on a strong foundation of science and consensus on the need for action, including peer-reviewed scientific evidence, a model standard developed by industry and labor, current consensus standards and extensive public outreach."

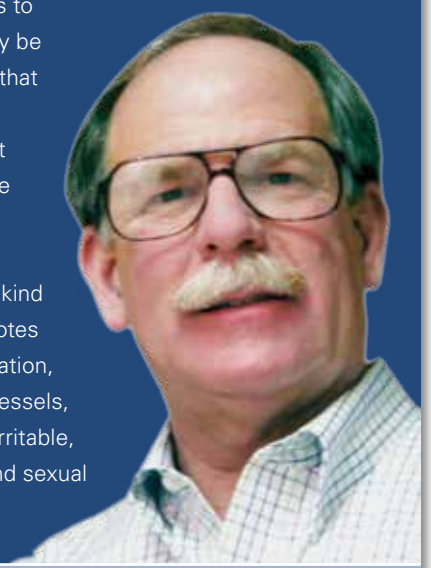
ASK THE EXPERT

with Rick Kaletsky

Q: *I've heard it's more important to change attitude than behavior. Why? Please clarify and give an example.*

A: It is much easier to modify behavior than attitude. A foreman can say, "I'm the boss. That's why. Do it this way or work somewhere else." The foreman can also blame OSHA. However, without an attitude adjustment, safe behavior may only be enacted when the employee is watched.

An employee can be told that hearing protection is required. The desired behavior will probably be achieved at first, as the employee wants to keep his/her job. Without constant monitoring, though, compliance may be sporadic or non-existent. The employee's attitude must be altered (and desire to comply upgraded), by explaining the adverse health effects of overexposure to noise. Explain that hearing loss may take several months or years to develop, but that the loss will probably be irreparable. Employees must not feel that just because they have no apparent hearing loss after a few months of not wearing the protection they'll never be affected. They might develop a false sense of security. Get specific: How would it be to not hear your spouse's kind words, your child's cry for help, the notes of your favorite song? For extra motivation, teach that noise can constrict blood vessels, cause heart problems, make victims irritable, and cause problems with digestion and sexual activity.



Former OSHA inspector turned consultant ***Rick Kaletsky*** *is a 45-year veteran of the safety industry. He is the author of "OSHA Inspections: Preparation and Response," published by the National Safety Council. Now in its 2nd edition, the book has been updated and expanded in 2016. Order a copy at* ***www.nsc.org****, and contact Kaletsky with safety questions at* ***safehealth@nsc.org****.*

In Other News…

OSHA issues final rule to clarify 'ongoing obligation' for recording illnesses, injuries

OSHA has released a final rule to help clarify for employers their "ongoing obligation" to make and maintain accurate records of work-related recordable injuries and illnesses.

The agency explains that the rule, published in the Dec. 19 *Federal Register*, does not add new requirements for compliance or recordkeeping of injuries or illnesses for which records are not already mandated.

Employers' responsibility to maintain accurate injury and illness records does not go away if they fail to record the incident when first required to do so, the rule states. The agency agreed that "the continuing nature" of its obligations for employer recordkeeping were unclear.

The rule's amendments, which include changes to the text of provisions and titles of sections and subparts, are in response to a 2012 case in which the U.S. Court of Appeals for the District of Columbia Circuit ruled that OSHA citations for recordkeeping violations must be issued within six months of an alleged failure to record the injury or illness.

The rule went into effect Jan. 18.

When is exercise recordable? OSHA letter aims to clarify

A recent letter of interpretation from OSHA offers clarification on when the recommendation or use of exercise should be recorded on the OSHA 300 log.

The letter is in response to an inquiry from Scott Ege of Rockton, IL-based Ege WorkSmart Solutions. Ege asked OSHA to elaborate on the differences between the use of preventive exercise as an intervention strategy and therapeutic

– "In Other News" continues on p. 4

OSHA STANDARD INTERPRETATIONS

OSHA requirements are set by statute, standards and regulations. Interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Enforcement guidance may be affected by changes to OSHA rules.

Determining work-related injuries for accidents that occur on a public road or highway

Standard: 1904.5
Date of response: Aug. 23, 2016

Specifically, you request an interpretation regarding a motor vehicle accident instigated by a drunk driver which led to the death of two of your employees. You ask for clarification on what constitutes a workplace event or exposure for accidents that occur on a public road or highway.

Work relatedness is defined under Section 1904.5 of OSHA's recordkeeping rule. Section 1904.5(a) states, "[The employer] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment ...." Under this language, a case is presumed work-related if, and only if, an event or exposure in the work environment is a discernible cause of the injury or illness or of a significant aggravation to a pre-existing condition.

Under Section 1904.5(b)(1), "work environment" means the establishment and other locations where employees are working or are present as a condition of their employment.

Section 1904.5(b)(6) states injuries and illnesses that occur while an employee is on travel status are work-related if, at the time of the injury or illness, the employee was engaged in work activities "in the interest of the employer." Examples of such activities include travel to and from customer contacts, conducting job tasks, and entertaining or being entertained to transact, discuss, or promote business (work-related entertainment includes only entertainment activities being engaged in at the direction of the employer).

You indicated in the description of the accident that your employees were traveling from your client's location in New Mexico back to their base location in Texas. Travel to and from a customer contact is specifically cited as an example of a work activity in the interest of the employer. Because the accident resulted in the death of your employees during the work activity, the two cases must be recorded on your OSHA Log.

There are many circumstances that lead to a recordable injury or illness that are beyond the employer's control. Nevertheless, because such an injury or illness was caused, contributed to, or significantly aggravated by an event or exposure in the work environment, it must be recorded on the OSHA 300 Log. This approach is consistent with the no-fault recordkeeping system OSHA has adopted, which includes work-related injuries and illnesses, regardless of the level of employer control or non-control involved. See FR 66 5934.

Sincerely,
Amanda Edens, Director
Directorate of Technical Support and Emergency Management

Excerpted from: *https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=31064*

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In This Issue

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– continued from p. 1

database or collecting or reviewing employers' injury and illness data submitted pursuant to the rule – effectively invalidating its existence.

Depending on the timing, some rules could be changed under the Congressional Review Act.

The silica rule published in March could be on the chopping block, Conn said. At press time, it was set to go into effect in the construction industry in June and for general industry in 2018.

Also in jeopardy is the so-called "blacklisting rule" published in August, which requires firms seeking to do business with the federal government to report previous labor-law violations. Meanwhile, ongoing but incomplete efforts, such as the combustible dust rule, are unlikely to advance.

"Worker safety regulations as a general matter are not likely to disappear – OSHA and its regulations have been around for a long time and have survived administration changes," said Aimee Delaney, a partner specializing in labor and employment at Hinshaw & Culbertson LLP in Chicago. "Additionally, Trump's victory was in no small part due to his appeal to the Rust Belt, blue-collar workers, so taking too aggressive an approach may conflict with the pro-employee message that helped win the election.

"However, less regulation is certainly something Trump campaigned on, and OSHA presents an area with a great deal of regulation."

– continued from p. 3

exercise used to treat a work-related injury or illness.

"Therapeutic exercise is bodily movement prescribed to correct impairment, improve musculoskeletal function, or maintain a state of well-being," Amanda Edens, director of OSHA's Directorate of Technical Support and Emergency Management, wrote in the Sept. 9 letter. "Therapeutic exercise is considered medical treatment when it is designed and administered to combat a particular injury, illness, or disorder as part of a treatment plan that includes termination of the therapeutic exercise once the objectives of its implementation have been met. Please be aware that if a treatment is administered as a purely precautionary measure to an employee who does not exhibit any signs or symptoms of an injury or illness, the case is not recordable. For a case to be recordable, an injury or illness must exist."

Go to *http://sh-m.ag/2iJqmFv* to read the letter.