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# Can Federal OSHA Withstand the Injury?

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## The Trump Administration's Impact on Worker Protection Rules

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# Agenda

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- I. Changes to Existing Regulations and Policies**
- II. New Regulatory Agenda**
- III. What's Can we Expect over the Next 3 Years?**



# Campaign Promises and the American Worker

- Create at least 25 million jobs and “be the greatest jobs president that God ever created.”
- Bring back manufacturing jobs from China, Mexico, Japan and elsewhere.
- Encourage manufacturers to build or grow factories in the United States with tax incentives.
- Refuse to eat another Oreo until Nabisco fully moves production back to the United States from Mexico.
- Tell Ford’s president that unless he cancels plans to build a massive plant in Mexico, the auto company will face a 35 percent tax on cars imported into the United States.

# Campaign Promises and the American Worker

- “Get Apple to start building their damn computers and things in this country, instead of in other countries.”
- Call the executives at the parent company of Carrier, an air-conditioning manufacturer that is closing a plant in Indiana and moving to Mexico, and threaten to impose a 35 percent tariff on air conditioners imported into the United States.
- Bring back the steel industry in Pennsylvania and use American-made steel in all federal infrastructure projects.
- Make the auto industry in Michigan “bigger and better and stronger than ever before.”
- Bring the coal industry back to life in the Appalachian Mountain region.

# Campaign Promises and the American Worker

- Require employers to recruit “from the unemployment office — not the immigration office.”
- Leave the federal minimum wage at \$7.25 per hour, which is already too high.
- Raise the federal minimum wage to \$10 per hour, as \$7.25 is too low and “the minimum wage has to go up.”
- Allow states to set their own minimum wage.

# Campaign Promises and the American Worker

- “Under a Trump presidency, the American worker will finally have a president **who will protect them** and fight for them.”
- Issue a moratorium on new federal regulations that are not compelled by Congress or public safety. For every new regulation that is added, two existing regulations must be eliminated. And those new regulations must pass this test: **Is this regulation good for the American worker?**
- Order agency and department heads to identify all “**needless job-killing regulations**” and then remove them.



## I. Rolling Back Existing Regulations



# The Congressional Review Act

- Key tool being used to roll back Obama-era regulations
- The Congressional Review Act allows Congress to pass a joint resolution disapproving a regulation.
- If the joint resolution is signed by the President, the regulation is revoked, and the issuing agency is prohibited from issuing any “substantially similar” regulation in the future without subsequent statutory authority.
- Prior to 2017, the Act had only been successfully used once to overturn a rule.
- Under the Trump Administration, already 14 of these resolutions have been passed and signed into law.

# Congressional Review Act Rollbacks

## 1. Volks Rule

### Volks Decision - 2012

- In 2006, OSHA issued a citation alleging that Volks had failed as long ago as 2002 to record injuries on its Form 300 injury logs and to create Form 301 injury reports.
  - Volks claimed that the citations were untimely because the Occupational Safety and Health Act has a 6-month statute of limitations.
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- OSHA Form 300  
Log of Work-Related Injuries and Illnesses
- No citation may be issued ...  
after the expiration of six months  
following the occurrence of any  
violation."

# Congressional Review Act Rollbacks

- In April 2017, President Trump signed a joint resolution revoking an OSHA rule (the “Volks Rule”) that would have given OSHA additional authority to issue citations to employers for failing to maintain records of employee injuries and illnesses.
- The Volks Rule was issued in response to a 2012 D.C. Circuit decision in *AKM LLC d/b/a Volks Constr. v. Dep’t of Labor*, holding that OSHA could not issue citations for recordkeeping violations 6 months old or older.
- The Volks Rule would have allowed OSHA to issue citations to employers for failing to maintain records at any time during the required 5-year retention period for such records.
- A bill to codify the Volks Rule is currently pending in front of the Senate Committee on Health, Education, Labor, and Pensions.

# Congressional Review Act Rollbacks

## 2. “Blacklisting” Rule



# Congressional Review Act Rollbacks

- In March 2017, President Trump signed a joint disapproval resolution revoking a regulation that would have required prospective federal government contractors to disclose labor law violations (aka the “Blacklisting Rule”).
- The revoked regulation implemented an Executive Order signed by President Obama.
- The underlying executive order also required the federal government to consider egregious violations when awarding federal government contracts.
- The Eastern District of Texas enjoined the enforcement of the Blacklisting Rule in October 2016, and it had not gone into effect at the time of its revocation.

# Regulatory Rollbacks

## 3. Beryllium



# Regulatory Rollbacks

- In January 2017, under the Obama Administration, OSHA published a final rule amending its standards for occupational exposure to beryllium in general industry, construction, and shipyards.
- Among other things, the rule sets the PEL ten times lower than the prior PEL.
- Members of the beryllium manufacturing industry and the steelworker union were both heavily involved in developing the proposed rule.
- Industry presented OSHA with a standard for beryllium that was substantially similar with OSHA's final rule.

# Regulatory Rollbacks

- In March 2017, OSHA delayed implementation of the rule by sixty days in response to President Trump's order for agencies to review regulations awaiting implementation.
- In June 2017, OSHA announced a proposed rule to modify the regulation of beryllium exposure for workers in the construction and shipyard industries.
- The proposed rule seeks to keep the exposure limit issued in January 2017, but to revoke so called “ancillary provisions” of the January 2017 rule (as they apply to the construction and shipyard industries), including exposure monitoring, protective equipment, and worker training requirement.



# Regulatory Rollbacks

- In announcing the proposed change, the Department of Labor noted that it was driven in part by concerns from the shipyards and construction industries that they were not given a “meaningful opportunity” to comment on the previous rule.
- OSHA first proposed the rule first in 2015, held a months-long public comment period and several days of public hearings, and received input from industry and labor stakeholders, small business representatives, subject matter experts and partner agencies.
- With respect to general industry, the beryllium standard is not proposed to be changed. Most of the provisions for general industry are scheduled to take effect in March of 2018, with other provisions (changing rooms, engineering controls) to be phased in in 2018 and 2019.

# Regulatory Delays

## 4. Silica



# Regulatory Delays

- Over four years ago, OSHA first proposed a rule to address risks from workplace exposure to crystalline silica, including a new PEL.
- The rule was finalized in March 2016, and enforcement for the construction industry was initially set to begin in June 2017. Most provisions for silica in general industry and maritime are set to go into effect in June of 2018.
- In April 2017, OSHA announced that it was delaying the enforcement of its final rule establishing a standard for exposure to crystalline silica in the construction industry.
- The OSHA announcement delayed the enforcement to September 2017, with an additional 30-day non-enforcement period for employers making a good faith effort to comply with the requirements of the rule. The rule went into full effect for the construction industry in October 2017, and OSHA has issued interim enforcement guidelines.

# Regulatory Delays

- Industry groups have challenged the rule in court, arguing that the costs of the complying with the new PEL are overly burdensome and that OSHA overestimated health risks from silica exposure.
- The challenge is pending before the D.C. Circuit; challengers may have difficulty establishing that OSHA failed to provide an appropriate basis for the rule.
- Labor Secretary Alexander Acosta recently stated that the lawsuit is “close to a resolution.”

# Regulatory Delays

## 5. Tracking Workplace Injuries and Illnesses



# Regulatory Delays

- In March 2016, OSHA issued its final electronic recordkeeping rule entitled “Improve Tracking of Workplace Injuries and Illnesses” which, among other things, requires certain employers to report injury and illness data to OSHA electronically.
- In June 2017, OSHA announced that it would delay the effective date of this regulation from July 1, 2017 to December 1, 2017.
- At the same time, OSHA announced that it intended to issue a proposal to “reconsider, revise, or remove” parts of the final rule.
- In October 2017, OSHA informed the Western District of Oklahoma, which is hearing a challenge to the rule by industry groups, that it had drafted “substantial portions” of the proposal.
- In November 2017, OSHA pushed the deadline for electronic reporting back to December 15.

# Regulatory Delays

- It is yet to be seen which portions OSHA will seek to rollback entirely or revise. At the moment, electronic reporting is the only sure thing to stand.
- A recent OSHA press release states that the agency is “currently reviewing the other provisions of its final rule to Improve Tracking of Workplace Injuries and Illnesses, and intends to publish a notice of proposed rulemaking to reconsider, revise, or remove portions of that rule in 2018.”
- A likely target for revision or rollback is the anti-retaliation portion of the rule, which allows OSHA to assert a retaliation claim against an employer even without an employee complaint. There are concerns that this change could have far-reaching impacts, including for example, possibly precluding mandatory post-incident drug testing as a form of retaliation.



### Agency Rule List - Update 2017

Department of Labor

Agency	Agenda Stage of Rulemaking	Title	RIN
DOL/OSHA	Prerule Stage	Communication Tower Safety	
DOL/OSHA	Prerule Stage	Mechanical Power Presses Update	<a href="#">1218-AC90</a>
DOL/OSHA	Prerule Stage	Powered Industrial Trucks	<a href="#">1218-AC98</a>
DOL/OSHA	Prerule Stage	Lock-Out/Tag-Out Update	<a href="#">1218-AC99</a>
DOL/OSHA	Prerule Stage	Blood Lead Level for Medical Removal	<a href="#">1218-AD00</a>
DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Beryllium	<a href="#">1218-AD10</a>
DOL/OSHA	Proposed Rule Stage	Quantitative Fit Testing Protocol: Amendment to the Final Rule on Respiratory Protection	<a href="#">1218-AB76</a>
DOL/OSHA	Proposed Rule Stage	Crane Operator Qualification in Construction	<a href="#">1218-AC94</a>
DOL/OSHA	Proposed Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	<a href="#">1218-AC95</a>
DOL/OSHA	Proposed Rule Stage	Technical Corrections to 16 OSHA Standards	<a href="#">1218-AD07</a>
DOL/OSHA	Proposed Rule Stage	Puerto Rico State Plan	<a href="#">1218-AD12</a>
DOL/OSHA	Proposed Rule Stage	Improve Tracking of Workplace Injuries and Illnesses	<a href="#">1218-AD13</a>
DOL/OSHA	Proposed Rule Stage	Tracking of Workplace Injuries and Illnesses	<a href="#">1218-AD16</a>
DOL/OSHA	Final Rule Stage	Standards Improvement Project IV	<a href="#">1218-AD17</a>
DOL/OSHA			<a href="#">1218-AC99</a>

## II. New Regulatory Agenda



# Slimmed Down Regulatory Agenda

- The Trump Administration issued its first Regulatory Agenda in August 2017.
- The Regulatory Agenda omitted significant planned OSHA actions that were included in the final Obama Administration Regulatory Agenda, including:
  - A revision of the permissible exposure limit for occupational exposure to styrene.
  - The establishment of a permissible exposure limit for occupational exposure to 1-bromopropane.
  - A rule to address combustible dust hazards.

# Slimmed Down Regulatory Agenda

- **List of items removed from OSHA Regulatory Agenda:**
  - **Bloodborne Pathogens**
  - **Combustible Dust**
  - **Preventing Backover Injuries and Fatalities**
  - **Revocation of Obsolete Permissible Exposure Limits (PELs)**
  - **1-Bromopropane (1-BP) Standard**
  - **Noise in Construction**
  - **Occupational Exposure to Styrene**
  - **Updating Requirements for the Selection, Fit Testing and Use of Hearing Protection Devices**

# Slimmed Down Regulatory Agenda

- The Regulatory Agenda for the Department of Labor also reclassified potential regulatory actions as now “long-term” actions, including:
  - A rule to address workplace violence against employees in the healthcare and social assistance industries.
  - Modernization of the Process Safety Management standard, with the goal of preventing major chemical accidents.
  - Updates to OSHA’s shipyard safety standards, specifically relating to fall hazards.

# Slimmed Down Regulatory Agenda

- **List of items newly designated as long-term actions:**
  - Update to the Hazard Communication Standard
  - Amendments to the Cranes and Derricks in Construction Standard
  - Process Safety Management and Prevention of Major Chemical Accidents
  - Shipyard Fall Protection – Scaffolds, Ladders and Other Working Surfaces
  - Emergency Response and Preparedness
  - Infectious Disease
  - Tree Care Standard
  - Prevention of Workplace Violence in Health Care and Social Assistance
  - Occupational Injury and Illness Recording and Reporting Requirements – Musculoskeletal Disorders (MSD) Column
  - Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records

# Changes to Public Disclosure Practices

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- OSHA has also recently made changes to its own disclosure practices.
- These changes reduce the amount of information shared publicly regarding workplace incidents.

# Changes to Public Disclosure Practices

- Under the Obama Administration, worker fatalities were displayed prominently on the OSHA homepage

The screenshot shows the OSHA homepage with a red header containing the OSHA logo, "UNITED STATES DEPARTMENT OF LABOR", and social media icons. A search bar is located in the top right. Below the header, the text "Occupational Safety and Health Administration" is displayed, along with navigation buttons for "About OSHA", "A to Z Index", "Contact Us", "FAQs", and "What's New". A language selector for "English | Spanish" is also present. A main navigation bar includes categories like "For Workers", "For Employers", "Law & Regulations", "Data & Statistics", "Enforcement", "Training & Education", and "News & Publications".

The main content area features a "Labor Rights Week 2016" banner with three images of workers and text stating: "During Labor Rights Week, OSHA reminds ALL workers of their right to a safe and healthful workplace. Join us Aug. 29 - Sept. 4 for an event in your area." Below this banner is a "HOW TO..." section with links for "File a complaint", "Get a FREE OSHA poster", and "Get information on reporting severe work-related injuries, illnesses and fatalities to OSHA".

In the "IN FOCUS" section, a red box highlights a "Fatality Reports" widget. The widget title is "4,821 workers died on the job in 2014". The content of the widget is as follows:

LA: Arturo Acosta died from heat stress 1 construction job site.	5/14/2016 pulling win
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Below the table are navigation controls for the Fatality Reports, including a "Fatality Reports" label and a set of media control icons (back, play, forward).

# Changes to Public Disclosure Practices

- In August 2017, OSHA removed information about worker fatalities from its homepage.

The screenshot shows the OSHA homepage with a red header containing the United States Department of Labor logo, social media icons, and a search bar. Below the header is the text 'Occupational Safety and Health Administration' and language options for English and Spanish. A navigation bar includes categories like 'ABOUT OSHA', 'WORKERS', 'EMPLOYERS', 'REGULATIONS', 'ENFORCEMENT', 'TOPICS', 'NEWS & PUBLICATIONS', 'DATA', and 'TRAINING'. The 'DATA' menu is open, showing options such as 'Data and Statistics', 'Commonly Used Statistics', 'High Penalties by State', and 'Fatality Reports', which is highlighted with a red box. Other options include 'Inspection Search by Establishment', 'Inspection Search by Number', and 'BLS Injury/Illness Statistics'. Below the menu is a large image of workers in a hazardous environment. The main content area is divided into three sections: 'TAKE ACTION' with links for 'Contact OSHA', 'File a safety and health complaint', 'Report a death or severe injury', and 'Get whistleblower information'; 'NEWS' with three recent articles dated November 7, 2017, and October 27, 2017; and 'OSHA WORKING WITH EMPLOYERS' with buttons for 'Training', 'Compliance Assistance', and 'Cooperative and Recognition Programs', along with a text box describing cooperative programs.

# Changes to Public Disclosure Practices

- Worker fatalities that do not result in a company citation are no longer included in OSHA's fatality list.
- Going forward, OSHA's fatality list will only include fatalities recorded in the states and territories that OSHA regulates directly.
  - Fatalities reported in the 26 states that administer their own OSHA programs will not be included in the fatality list.





### III. What Can we Expect Next?

# Regulatory Developments

## 1. Voluntary Protection Program (VPP)

- OSHA is moving forward with potential regulatory changes aimed at making it easier for businesses to comply, including through the VPP.
- Through the VPP, companies may conduct self-evaluations and submit compliance information and safety practices to OSHA and, in exchange, are exempted from regular OSHA inspections.
- From August-October 2017, OSHA sought public comment on changes to its VPP.
- OSHA sought public comment specifically relating the burden of the VPP's information collection requirements and how to reduce the burden of these requirements.

# Regulatory Developments

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- OSHA has also requested additional funding for VPP.
- Speaking to the need for expanding VPP, Secretary Acosta recently explained:
  - “Where you have employers that are trying to do to right thing, you want to help them do the right thing.”

# DOL Strategic Plan

- In November 2017, the Department of Labor published a draft of its 2018-2022 strategic plan.
- The Strategic Plan:
  - Emphasizes compliance, explaining OSHA’s resources for compliance assistance, but notes that “[s]trong, deterrent strategies” will be used for repeat offenders;
  - Confirms that OSHA will be exploring an expansion of its VPP program; and
  - Suggests that OSHA will participate in an initiative relating to federal government safety and helping federal government employees return to work following an injury.

# Mugno Nomination

- President Trump has nominated Scott Mugno to lead OSHA.
  - Mugno is the vice president of safety, sustainability and vehicle maintenance at FedEx Ground.
  - Indications that Mugno shares Trumps anti-regulation stance: “We’ve got to free OSHA from its own statutory and regulatory handcuffs.”
- Senate nomination hearing set for tomorrow – December 5, 2017.
- If confirmed, Mugno is expected to shift focus from tough enforcement to cooperative compliance, including through the Voluntary Protection Plan.

# A Few Conclusions...

# Takeaways

- **Rollbacks**
  - Previously issued or planned rules are being rolled back, either entirely or indefinitely.
- **Delay**
  - Proposals that have been in the works for years or decades are being delayed.
- **Streamlining**
  - Some regulatory streamlining is occurring, with the apparent goal of easing compliance.
- **The next three years...**
  - Depends on confirmation of Mugno, but expect further limitations on new rulemaking, and an expanded focus on cooperative compliance.