



# **OHS: Regulatory, Legislative & Legal Update**

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# Presented By

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She is a member of the Maryland, D.C., and PA Bars; the U.S. District Courts of Maryland, D.C., and TN; the U.S. Court of Appeals, D.C. 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, D.C., 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?



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- US Dept of Labor: Secretary Lori Chavez DeRemer confirmed (former GOP Rep. from OR)
- OSHA Assistant Secretary CONFIRMED 10/7/25: David Keeling (consultant, former OHS specialist for UPS and Amazon – transportation safety background)
- MSHA Assistant Secretary CONFIRMED 10/7/25: 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 – some now reinstated but for how long?
- OSHRC & FMSHRC: Both lack some Commissioners (FMSHRC in Democratic control with one empty seat) – 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 officials during a workplace inspection
  - Final rule published in 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 – takes effect May 31, 2024!”
  - Rule clarifies the relevant knowledge, skills and experience with hazards in the workplace, or language skills, for those authorized by employees to assist with the inspection as their representative – special knowledge can include IH experience, **language** or **communication** skills
- MSHA Crystalline Silica Rule – In litigation in 8<sup>th</sup> Cir. (no stay) and Coal provisions were to take effect 4/14/25 while Metal/Nonmetal provisions were to effect 4/8/26 – but MSHA has STAYED the rule’s implementation for four months and 8<sup>th</sup> circuit also issued an indefinite stay.
  - Rule is quite different from OSHA rule and legitimate feasibility issues
- QUESTION: How rigorously will the DOJ defend these rules against industry challenges?
- WHAT IMPACT OF SCOTUS *Loper Bright* decision?

# Project 2025 & DOL



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Regulatory Freeze: 10 Out/1 in approach will trim existing regs

NOTE: OSHA/MSHA DEREGULATORY AGENDA has over 40 items to be modified or deleted

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.*
- **QUESTION: What impact on State Plan Programs if federal OSHA is abolished?**
  - Kentucky bill already seeks to weaken KY-OSHA and set up legal challenge -- measure would bar state regulators from enforcing “any occupational safety and health administrative regulation that the Occupational Safety and Health Administration or the United States Department of Labor has not promulgated, or that is more stringent than the corresponding federal OSHA provision (issue is Gov. veto override)
  - 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? Impact on use of Voluntary Consensus Standards (ANSI, ASTM, NFPA etc.)

# Demise of *Chevron* Deference

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- 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

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- *Allstates Refractory Contractors LLC v. Su* (6<sup>th</sup> 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 7<sup>th</sup> Cir. and DC Cir.
- 6<sup>th</sup> 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!

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- 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

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- 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 review, each agency must develop Unified Regulatory Agenda that seeks to rescind or modify regulations as appropriate (prioritizing those with “significant impact” – e.g., SBREFA rules)

# Repeal of Regs & APA

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- EO 14192 (1/31) – “Unleashing Prosperity through Deregulation” -- Agencies must REMOVE 10 federal rules for every new one established
- On 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
- After 60 day review period that ends shortly, agencies “must immediately” take steps to repeal regulations determined to be outside agency authority or that are otherwise “unlawful”

# DOL Exec Orders!

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- **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**
  - NOTE: A different Ex Order also abolished “disparate impact” causes of action in discrimination cases

# Government Shutdown: Now What?

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- OSHA furloughed 75% of workers – only inspections are for imminent danger, fatalities/catastrophies and hazard complaints – no informal conferences will be held
- MSHA furloughed 45% of workers – ALL mandatory 2/4 inspections continue, as do investigations, but no settlement conferences or CLR activities
- OSHRC and FMSHRC are closed except for emergency hearings – portals still open for filings
  - Hearings are cancelled until further notice, and pleadings deadlines are extended but NOT filing of timely notices of contest
- Senate OHS funding for FY 2026 would be FLAT
- House OHS funding for FY 2026 would be significant cuts for OSHA, MSHA and NIOSH
- Stay tuned ...

# Thank you



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