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OSHA NEWSLETTER

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Labor Secretary Alexander Acosta Appointed

Matthew Thomas Deffebach and Punam Kaji

Secretary of Labor Alexander Acosta was sworn in on April 28, 2017, after his Senate confirmation. Secretary Acosta has experience serving on the National Labor Relations Board and has held the positions of assistant attorney general for the Civil Rights Division of the U.S. Department of Justice, and U.S. Attorney for the Southern District of Florida.

It is yet to be seen how the appointment of Secretary Acosta will impact OSHA. Much remains unknown regarding OSHA's leadership and new direction. The Assistant Secretary for OSHA to replace Dr. Michaels has not yet been named.[1] The current Deputy Assistant Secretary Dorothy Dougherty is the acting Assistant Secretary for the time being.

Acosta did not commit himself to any particular policies regarding OSHA during his confirmation hearing, but did have the following key statements regarding worker safety:

- During his opening statement, Acosta said: "Congress has enacted workplace standards and safety laws. The Department of Labor enforces these. If confirmed, I will work to enforce the law under the Department's jurisdiction fully and fairly. As a former prosecutor, my enforcement efforts will always be on the side of the law. It's enacted by Congress. It should be enforced fully. It should be enforced fairly. And it should not be enforced in favor or against any particular constituency."
- In response to questions from Senators Tammy Baldwin (D-WI) and Maggie Hassan (D-NH) regarding budget cuts and resulting cuts in OSHA staff and inspectors, Acosta s aid: "I would be very concerned in a situation like you mentioned that there are only 7 inspectors because going from 7 to 6 has a substantial impact . . . I would have a lot of concern if the number of inspectors in any one area fell to the point where they could not do their job."
- Regarding enforcing the new Silica Rule, Acosta said he would enforce the r construction industry has been delayed until September 23, 2017.[2]

1 See **OSHA organizational chart**, updated on May 2017.

2 **Memorandum Delay of Enforcement of the Crystalline Silica Standard for Construction** under 29 CFR 1926.1153, April 6, 2017.

OSHA's Electronic Record-Keeping Compliance Deadline Delayed Indefinitely

Matthew Thomas Deffebach, Punam Kaji, Modinat "Abby" Kotun, and David B. Rost

OSHA announced that it has delayed the much-anticipated July 1, 2017, compliance deadline for employers to electronically submit form 300A injury and illness data. OSHA has not provided a new compliance deadline, thus, leaving the delay open-ended.

In 2016, OSHA published a final rule to improve the electronic tracking of workplace injuries and illnesses. 81 Fed. Reg. 29624 (May 12, 2016). The rule contains three new employee involvement provisions addressing employer conduct that could discourage employees from reporting work-related injuries or illnesses. 29 C.F.R. § 1904.35. In section 1904.35(b)(1)(i), the new rule clarifies the existing implicit requirement that an employer's reporting procedure for work-related injuries and illnesses be reasonable; that is, that the employer's procedure not deter or discourage reasonable employees from reporting work-related injuries or illnesses. Additionally, the new rule incorporates the existing statutory prohibition, under section 11(c) of the OSH Act, 29 U.S.C. § 660(c), on retaliating against employees for reporting work-related injuries or illnesses. 29 C.F.R. § 1904.35(b)(1)(iv). Further, the rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation. 29 C.F.R. § 1904.35(B)(1)(ii)-(iii). Lastly, the rule required employers to upload injury and illness data from the 300A logs to a public website by July 1, 2017, which has not been delayed indefinitely.

Opponents of the rule brought an action in the Northern District of Texas challenging the legality of the rule. *TEXO ABC/AGC, Inc. v. Perez*, No. 3:16-cv-01998 (N.D. Tex. filed July 8, 2016). The suit seeks a declaratory judgment that the rule, which prevents and/or restricts certain incident-based employer safety initiatives and programs that require drug testing after a workplace accident, exceeds the scope of statutory authority granted to OSHA. Another case challenging the same regulation has been filed in Oklahoma federal court and asserts that the rule is an unconstitutional violation of the regulated employers' First and Fifth Amendment rights and beyond the scope of OSHA's statutory authority. *Nat'l Assoc. of Home Builders of the United States v. Perez*, No. 5:17-cv-00009 (W.D. Okla. Jan. 4, 2017). The Oklahoma case takes a broader position challenging the electronic uploading part of the rule. Unions and public interest groups are seeking to intervene in the lawsuits to advocate for the rule. The courts have entered briefing schedules for later this summer.

Occupational Safety and Health Review Commission Vacancies Could be Filled

Matthew Thomas Deffebach and Punam Kaji

The Occupational Safety and Health Review Commission ("OSHRC") is the highest administrative court deciding contested citations resulting from OSHA inspections. After a case is decided by an Administrative Law Judge, an employer may appeal the decision to be heard by the OSHRC's panel of judges. Further appeals go to a federal appeals court.

The three-member OSHRC could soon have a full board for the first time since April 2015. Cynthia Atwood and Heather L. MacDougall were members of the OSHRC until April 27, 2017. On April 27, MacDougall's term expired, leaving Atwood and two open seats. One of the open spots could be filled by MacDougall, whom President Trump nominated to serve for a second term on April 21, 2017. MacDougall came to the OSHRC with 20 years of experience representing employers in matters regarding labor, employment and occupational safety and health.

On May 12, 2017, President Trump nominated James Sullivan to fill the remaining open seat. Sullivan is a Pennsylvania labor and employment lawyer with 37 years of experience representing employers and practicing occupational safety and health law.

President Trump's nominations must be confirmed by the Senate before Sullivan and MacDougall join the OSHRC.

Beryllium Rule Takes Effect Despite Trump Administration Beryllium Proposal Under Review

Modinat "Abby" Kotun, Punam Kaji, and Neil Issar

More than 40 years after the original beryllium standard, OSHA, under the Obama Administration, issued a final rule on January 9, 2017, reducing the occupational exposure limits for beryllium. The rule contains standards for general industry, construction, and shipyards. The three new standards reduce the permissible exposure limit for beryllium to 0.2 micrograms per cubic meter of air averaged over an eight-hour shift, 10 times lower than the previous limit.[1] The rule also includes provisions to protect employees, such as requirements for exposure assessments, methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping. On March 1, 2017, the U.S. Department of Labor proposed a delay in the effective date of the rule. It was otherwise scheduled to become effective on March 10, 2017, but was subsequently delayed until at least May 20, 2017, due to President Trump's Regulatory Freeze Memorandum issued on January 20, 2017.[2] As OSHA declined to further delay the final rule, it is now in effect.

In late April 2017, OSHA, under the Trump Administration, submitted a new proposed rule to the White House Office of Management and Budget ("OMB") for review. Although the contents of the proposed rule are unknown, the new proposed rule likely intends to roll back many of the January 2017 rule's requirements. If approved by the OMB, OSHA will then have to publish the new proposed rule in the Federal Register. Because Congress did not address the January 2017 rule under the Congressional Review Act, OSHA will have to go through the entire rulemaking process to change the standard; until then, the January 2017 beryllium rule is in effect. However, employers have no immediate action as the rule has staggered compliance dates: March 12, 2018 for most of the rule's obligations; March 11, 2019 to provide the required change rooms and showers; and March 10, 2020 to implement engineering controls.[3]

Beryllium is a lightweight metal that can induce adverse health effects if workers breathe in its dust, mist, or fumes or if a worker's skin comes into contact with beryllium particulate, fumes, or solutions.[4] According to OSHA, about 62,000 workers are exposed to beryllium in the workplace, including workers in general industry, construction, and shipyards. OSHA has long been of the opinion that the old beryllium standard inadequately protected workers.

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1 82 Fed. Reg. 2,470 (Jan. 9, 2017). Were the Obama beryllium standard to be implemented, three standards would exist: the general industry standard, 29 C.F.R. § 1910.1024; the construction standard, 29 C.F.R. § 1926.1124; and the shipyard standard, 29 C.F.R. § 1915.1024.

2 The Regulatory Freeze Memorandum stated that the "effective date of Obama [Administration] regulations that have been published but [have] not yet taken effect should be postponed for 60 days, to allow the new administration to review questions of fact, law and policy." See Cass R. Sunstein, ***The Fine Print in Trump's Regulation Memo***, BLOOMBERG (Jan. 25, 2017).

3 **OSHA Final Rule to Protect Workers from Beryllium Exposure**.

4 **OSHA Fact Sheet, Medical Surveillance for Beryllium-Exposed Workers** (Jan. 2017).

First Deadlines of New General Industry Walking-Working Surfaces and Fall Protection Standard

Matthew Thomas Deffebach and Punam Kaji

The final rule for General Industry Walking-Working Surfaces and Fall Protection ("Walking-Working Surfaces Rule") was published in November 2016, but some of the deadlines for compliance are in May 2017. The Walking-Working Surfaces Rule covers any horizontal, vertical or inclined working surface, adding new requirements for ladder safety and inspecting walking-working surfaces among other new requirements.

On some issues, the Walking-Working Surfaces Rule brings the regulations to the same level as the construction standards and adopts new requirements based on the current ANSI standards. The Walking-Working Surfaces Rule gives the employer more flexibility in determining which fall protection methods are best suited for the worksite's potential exposure. To assist employers with effectuating a proper fall protection plan, the Walking-Working Surfaces Rule includes two non-mandatory appendices (C&D) addressing: (1) planning for, selecting, using and inspecting personal fall arrest systems (Appendix C); and (2) test methods and procedures for personal fall arrest work positioning systems (Appendix D).

The Walking-Working Surfaces Rule includes requirements for training. By May 17, 2017, employers must have met the following two training requirements:

- Ensuring exposed workers are trained on fall hazards.
- Ensuring workers who use equipment covered by the final rule are trained

Other aspects of the Walking-Working Surfaces Rule are effective in November 2017. More information on the Walking-Working Surfaces Rule and its requirements can be found here.

OSHA's "Union Walk Around Rule" Challenged in Court

Matthew Thomas Deffebach and Punam Kaji

On September 8, 2016, a lawsuit was filed by the National Federation of Independent Business ("NFIB") seeking to enjoin and strike down the Occupational Safety and Health Administration's ("OSHA") Union Walk Around Rule.[1] This rule was created by an OSHA letter of interpretation issued in February of 2013, which states that non-union employees may elect anyone to accompany OSHA compliance officers as they inspect the employer's worksite.[2] In the past, a union has used the Union Walk Around Rule to accompany OSHA inspectors in non-union settings and have been accused of using the procedure as a means to intimidate employers into unionizing.

OSHA does have a rule allowing "a representative authorized by [the employer's] employees." 29 U.S.C. § 657(e). However, NFIB argues that there is nothing within the Occupational Safety and Health Act allowing a non-employee to accompany the compliance officer. NFIB argues that the letter of interpretation violates the Administrative Procedures Act ("APA") because it is in fact a standard that should have been subject to notice and comment rather than an interpretation of an existing rule. This litigation should be closely watched as the outcome will impact both the Union Walk Around Rule and the long debate over whether OSHA's "interpretations" are sometimes standards subject to notice and comment rulemaking under the APA.

1 *National Federation of Independent Business v. Dougherty, et al.*, 3:16-cv-025688 (September 8, 2016) filed in the United States District Court for the Northern District of Texas.

2 See **OSHA Standard Interpretation Letter**, February 21, 2013.

OSHA's Changes to Lockout/Tagout Rule Facing Major Delay

Modinat "Abby" Kotun and Punam Kaji

OSHA's proposed revision to the lockout/tagout rule is facing major delays. As previously reported, OSHA made its proposed revisions to the rule, and many others, under OSHA's Standards Improvement Project-Phase IV ("SIP IV").[1] The current lockout/tagout standard applies to servicing and maintenance operations "in which the unexpected energization or startup of the machine or equipment, or release of stored energy could harm employees." OSHA intends to revise the lockout/tagout rule by removing the word "unexpected," such that the standard would apply to any energization, not just "unexpected" ones.

However, on his first day in office, President Donald Trump issued a Regulatory Freeze Memorandum (the "Freeze Memo"), where, among other things, he stated that the "effective date of Obama [Administration] regulations that have been published but [have] not yet taken effect should be postponed for 60 days, to allow the new administration to review questions of fact, law and policy."[2] As a result of the Freeze Memo, the proposed lockout/tagout rule cannot be adopted as a final rule until it is reviewed and approved. Thus, issuance of the final rule will likely be delayed, although it is unclear whether the effective date of the rule will also be delayed.

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1 **OSHA's Proposed Changes to Lockout/Tagout Rule Issued**, 12/14/2016. SIP IV is a collection of 18 OSHA rule revisions changed to "remove or revise outdated, duplicative, unnecessary, and inconsistent requirements" in OSHA's standards.

2 Cass R. Sunstein, ***The Fine Print in Trump's Regulation Memo***, BLOOMBERG (Jan. 25, 2017).

Penalties for State OSHA Programs May Increase

Punam Kaji, Modinat "Abby" Kotun, and David B. Rost

In August 2016, OSHA promulgated rules that significantly increased the maximum penalties for violations of safety regulations by 78 percent. This constituted the *first* penalty increase since 1990 and was explained as a one-time inflation catch-up.

Several states questioned the legitimacy of the rule change and asserted that they were not required to match the new fines. However, OSHA gave guidance to the states just days before President Trump took office, explaining that "OSHA-approved State Plans must have maximum and minimum penalty levels that are at least as effective as federal OSHA's." Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373-5377 (Jan. 18, 2017). The agency went on to say that "at least effective" requires that State Plans have penalty levels "at least as high as OSHA's." States resistant to the regulation have considered whether the Trump administration will reverse course and allow states to set penalty levels independently from their federal counterpart. However, until OSHA explicitly changes its rules, states must comply with the current regulations.

To date, the new head of OSHA has not been appointed, and it is unclear whether Secretary of Labor Acosta will appoint someone who would eliminate the increased fines. In the meantime, regulated employers should anticipate penalties in line with the increased requirements until a change is made, if at all.

OSHA published the following table to help determine which penalty applies:

Violations Occurring	Penalty Assessed	Which Penalty Level Applies
On or before November 2, 2015	On or before August 1, 2016	Pre-August 1, 2016 levels
On or before November 2, 2015	After August 1, 2016	Pre-August 1, 2016 levels
After November 2, 2015	After August 1, 2016 but on or before January 13, 2017	August 1, 2016 levels
After November 2, 2015	After January 13, 2017	January 13, 2017 levels

If you have any questions, please visit the Haynes and Boone Occupational Safety and Health Act (OSHA) and Workplace Disasters page of our website or contact one of the lawyers listed in this newsletter.