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Trump's Actual Impact on OSHA

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In November, we attempted to look into the crystal ball to see what potential impact the new Trump administration could have on the Occupational Health and Safety Administration (OSHA). Here are some of results so far, which on the whole, are favorable to employers who suffered under the "regulation by shaming" mantra of past Assistant Secretary of Labor David Michaels.

- **Budget Cuts** – As predicted, on May 5, President Trump signed a spending bill that cuts the labor department's discretionary spending budget by $83 million. This could limit some of OSHA's enforcement efforts.

- **Recordkeeping as a Continuing Violation** – The Volks rule, which was enacted by OSHA last December as a last minute rule in response to a loss, suffered through an adverse decision in the federal courts. The new rule established that an employer has a ***continuing duty*** to create accurate records of work-related employee injuries and illnesses. This effectively changed the statute of limitations for recordkeeping violations from six months to ***five years and six months.*** On April 3, President Trump signed a joint congressional resolution under the Congressional Review Act that overturned this rule. The law is now back to the original intent of Congress that the statute of limitations for all OSHA citations is six months. This is a significant win for employers who can focus their time on current substantive safety issues instead of reviewing documents for accuracy from up to five years ago.

- **Union Representatives in OSHA Inspections of Non-union Facilities** – As mentioned in the prior post, I predicted that interpretation letters could change with the new appointment of the secretary of labor. One of the most controversial of these letters was the 2013 Fairfax memo regarding walkaround rights during an OSHA inspection. The memo stated that during an OSHA 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 This was being challenged in court and then OSHA rescinded the Fairfax memo and agreed to revise the Field Operations Manual (FOM) for its inspectors to reflect the same change on April 25, 2017. The lawsuit was then dismissed as moot since OSHA rescinded the controversial

memo. The letter was viewed as an overstep by OSHA into the area of labor relations covered by the NLRB, since it appeared to be motivated by giving unions more access to non-union employers for organization efforts rather than to assist in a safety inspection. This is another win for employers.

So far, the progress has been good for employers. We will just have to wait and see how other issues develop, including the electronic recordkeeping rule and non-discrimination standard (which limits blanket post-accident drug tests), which is being challenged in two separate lawsuits, as well as the silica standard, which is being challenged in court. The DOL has to decide how strongly it will defend these rules in court which will have a significant impact on how the courts may rule. Stay tuned for updates.

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