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OSHA Compliance Under the Trump Administration

President Trump was carried to the White House on promises of rolling back government regulations. Less than a year into his presidency, the Trump Administration is delivering on those promises, with OSHA regulations apparently at the forefront. We have seen significant changes to the OSHA regulatory landscape, and this program will review actions taken by the Administration and Congress to roll-back OSHA rules or otherwise ease the impact of OSHA on construction employers, from a budget that reprioritizes compliance assistance over enforcement, to a series of business friendly Executive Orders, to repeal of several Obama-era midnight rules. This session will address the rulemaking and executive actions at OSHA that affect the construction industry, and how OSHA enforcement is changing.

I. Trump Administration's Agenda to "Deconstruct" OSHA

- A. Executive Orders to Slash Regulations - In his first days in office, Pres. Trump signed the "2-for-1" order requiring federal agencies to cut two existing regulations for every new regulation implemented. Another Executive Order directed federal agencies, including OSHA, to create "regulatory reform" task forces to evaluate federal rules and recommend whether to keep, repeal or change them, so as to reduce expensive or unnecessary rules.
- C. Congressional Review Act Repeal of Obama Midnight OSHA Rules – The Congressional Review Act allows Congress to overturn agency regulations with a joint resolution of disapproval by simple majority, signed by the President. The CRA is only effective in transitions to a president of a different party when the new president's party has a majority in Congress. The Trump Administration made heavy use of the CRA, including repealing these Obama-era OSHA rules:
 1. "Clarification of Continuing Obligation to Make Accurate Injury & Illness Records" – The DC Circuit's decision in the *Volks Constructors* case confirmed that injury recordkeeping violations are subject to the OSH Act's six-month statute of limitations. Without a petition for rehearing *en banc* to the D.C. Circuit or for a writ of certiorari to the Supreme Court following the *Volks* decision, Obama's OSHA amended the Injury and Illness recordkeeping rule to "clarify" the recordkeeping statute of limitations was five years, not six months.
 2. FAR/DOL "Fair Pay & Safe Workplaces" (Contractor Blacklisting Rule) – The Federal Acquisition Regulatory Council and Department of Labor issued a rule that requires government contractors to disclose OSHA citations (including just allegations) from three years prior to bid submission and bi-annually through the contract. The rule intended to prevent "irresponsible" companies from obtaining federal contracts, but because it cast such a broad net, the rule would intensify scrutiny of contractors and costs to participate in government contracts, without ferreting out irresponsible contractors. Aside from

increasing risks of debarment and loss of contracts, the Rule also created “Labor Compliance Agreements” between OSHA and contractors as a condition to win contracts.

II. Electronic Injury & Illness Recordkeeping Data Submission and Anti-Retaliation Rule

- A. Electronic Injury & Illness Data Submission – Historically, employers’ OSHA 300 Logs and related forms have largely been for internal use. An Obama-era OSHA regulation – the Electronic Recordkeeping Rule – requires hundreds of thousands of employers to submit these historically private records to OSHA, which in turn plans to will publish the data online.
- B. Recordkeeping Anti-Retaliation Provisions – OSHA included in the electronic recordkeeping rule an obligation for “reasonable reporting procedures” for employees to report work injuries. OSHA provided little guidance on what “reasonable reporting procedures” are, but past policy statements and regulatory history indicate a focus on reporting deadlines, injury-based safety incentive programs, post-injury drug testing, and compensation tied to injury rates.
- C. Future of the Electronic Recordkeeping Rule: Since the Trump Administration has taken the reins at OSHA, the agency announced a delay until December of the implementation of the injury and illness electronic data submission rule, and may use that delay to repeal or amend the rule.

III. The Future of Enforcement under Trump’s OSHA

- A. Looking forward, there will likely be a dramatic shift in enforcement philosophy at OSHA manifested by budget allocation away from an enforcement-heavy agenda to a balanced approach of enforcement and compliance assistance.
 - 1. Under Pres. Obama, OSHA hired more than 100 new compliance officers, increased civil monetary penalties, tripled the use of Repeat violations and the egregious policy, launched dozens of new enforcement initiatives and emphasis programs, and began prosecuting more criminal OSHA cases.
 - 2. Under President Trump, industry can expect a scaling back of enforcement efforts and a shift towards focusing OSHA’s budget and personnel resources on compliance assistance and cooperative programs, like the Voluntary Protection Program. OSHA will also likely revise its Field Operations Manual and enforcement policies that inflated penalties, promoted more Repeat violations, and permitted Union participation in inspections at non-union workplaces. Finally, we expect a reduction in OSHA’s policy of “public shaming,” from fewer and less inflammatory enforcement press releases, and scaling back or eliminating the Severe Violator Enforcement Program.