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Trump 2.0, OSHA: Expect Shifts in Federal Enforcement and Rulemaking Priorities As Well As More Aggressive State Plan Enforcement

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As the dust settles on the 2024 Election Cycle and the pundits continue analyzing and dissecting the results, the OSHA/MSHA Team at Conn Maciel Carey draws from decades of experience representing employers during Republican and Democratic administrations to forecast how the workplace safety and health landscape may change with respect to enforcement, compliance assistance, and rulemaking under a second Trump Administration.

Enforcement Resources and Priorities

At the federal level, history can provide insight into the likely priorities of a second Trump term. As loyal readers of this blog know, OSHA operated without a confirmed Assistant Secretary for the entirety of the first Trump Administration. While agencies lacking Senate-confirmed leaders can feel adrift and directionless, with confusion about roles, responsibilities, and priorities, it was essentially business as usual at OSHA under Trump—at least until COVID-19 hit—with other agencies facing more focused efforts to deregulate. While it is not yet clear how quickly the second Trump Administration will turn its sights to OSHA, we're unlikely to see a push to increase OSHA's budget or even to backfill enforcement personnel who leave the agency. OSHA had the fewest compliance officers in its history during the Trump Administration, and despite efforts by President Biden to increase staffing levels, the number of enforcement personnel is sure to ebb again. Fewer compliance officers will lead to decreased enforcement activity, as well as overwhelming workloads for remaining employees, and such a combination often results in reduced morale.

OSHA under Trump 2.0 is likely to adopt more employer-friendly policies than President Biden's current administration and could:



- Prioritize compliance assistance efforts, including increasing the avenues to foster cooperation between OSHA and employers by expanding its Alliance, Strategic Partnership, Voluntary Protection, Challenge, and On-Site Consultation Programs.
- Scale back or even stop using press releases and safety and health data to publicly shame employers, e.g., through the agency's severe injury dashboard. Even if OSHA continues issuing press releases, history teaches that employers can expect far fewer of them and that those which are issued will have a decidedly different, less sensational tone.
- Roll back enforcement policies and practices adopted by the Biden Administration, such as OSHA's expanded application of its instance-by-instance citation policy; lowered thresholds for inclusion in the Severe Violator Enforcement Program; and more aggressive use of, e.g., egregious, willful, and repeat citations. In other words, we can assume that OSHA will no longer be exploring creative ways to use all of the tools in its toolbox—some tools will be dulled and others will simply be put back on the shelf.
- Reduce the number of emphasis programs by declining to renew, or even withdrawing, certain NEPs, REPs, and/or LEPs—changes that tend to occur during Republican administrations, resulting in a shift from proactive enforcement to more reactive responses addressing major incidents and credible complaints.

However, the "law-and-order" approach touted by Conservatives could lead to additional citations targeting bad actors, specific companies, or emphasis industries that draw the new administration's attention. Consequently, these entities may continue to experience aggressive enforcement under the Trump regime.

Regulatory Impact

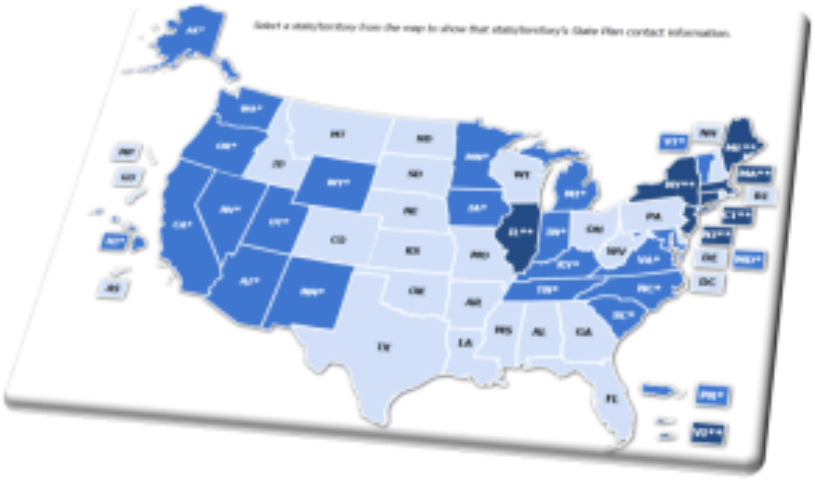
During his first administration, President Trump implemented a policy that for every new rule promulgated, two existing regulations should be withdrawn. He also required a review of agency guidance, directing departments to pull public materials that arguably expanded obligations, rather than simply restating existing legal obligations. With Congress likely on his side and the judiciary demonstrating an eagerness to limit agencies' rulemaking powers, we could see similar – or more stringent – practices reanimated. The Congressional Review Act and recent Supreme Court decisions *Loper Bright*, *Jarkesy*, and *Corner Post* will bolster efforts to rein in agency action, and the Trump Administration will push continued deregulation.

This environment leaves the fates of recent and pending OSHA rulemakings in question.

- Many expect President Trump to drop the government's defense of OSHA's "Worker Walkaround Representative Designation Process" rule, which allows certain third parties to participate in OSHA worksite inspections and is currently under contest in the Western District of Texas. We pause to consider Candidate Trump's courting of the union vote, as labor organizations favor the expanded participation allowed under the new walkaround rule, but despite promises from the campaign trail, the winds of change portend the rule's demise.
- OSHA's proposed "Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings" rule's comment period remains open until December 30, 2024, but how a new OSHA team considers comments and whether it decides to pursue further action after January 20, 2025 is open for debate. States with Republican leadership have not been keen to implement rules combatting heat illness and injury, see Florida, and that approach could trickle up to the federal level in President Trump's OSHA.
- OSHA scheduled a public hearing, set to begin November 12, 2024, on its proposed "Emergency Response Standard." We expect the current administration to keep this rulemaking process moving forward. But under Trump's OSHA, the rule could be deprioritized, with opponents having characterized OSHA's proposal as overburdensome and unclear.
- A rule that exemplifies the regulatory ping pong OSHA has experienced through recent administrative transitions is the agency's regulation to "Improve Tracking of Workplace Injuries and Illnesses." This rule, requiring designated employers to electronically submit injury and illness data, launched under the Obama Administration, was dialed back under President Trump's first term, and then found new life under President Biden. Its history describes but one example of how each new administration's reversals of preceding policy create confusion for employers, employees, and even government personnel trying to execute presidential directives.

State Activities

So, what does this all mean? Forget about compliance because OSHA is about to disappear? Absolutely, not. Enforcement will continue – albeit with shifted priorities – at the federal level. In addition, the importance of state plan enforcement will increase.



The Occupational Safety and Health Act, at section 18, allows states to operate their own federally-approved OSHA programs, and according to OSHA, "[t]here are currently 22 State Plans covering both private sector and state and local government workers, and seven State Plans covering only state and local government workers."

Private employers in state plan states are subject to state workplace safety and health requirements, which can be stricter than federal obligations. State plan programs may look to fill any enforcement gap under the second Trump Administration by ramping up their aggressiveness to ensure compliance with local rules.

For example, we can expect California's Division of Occupational Safety and Health – lovingly known as Cal/OSHA – to push the bounds of worker protection. California Governor Gavin Newsom appears set to establish himself as a foil to President Trump, as the governor has already called for a special December session of the California legislature designed to "Trump-proof" the State. But California won't be alone, as jurisdictions like Washington, Oregon, and Michigan also will seek to lead in workplace safety and health enforcement.

Legislatures in these states, and elsewhere, could increase their workplace safety and health activities as well. We've already seen such movement in California with its workplace violence prevention requirements, and even in jurisdictions where federal OSHA regulates private employers, such as New York or Illinois, like-minded legislatures could up their safety and health games.

We'll continue to update this space with thoughts on the upcoming presidential transition, so stay tuned. In the meantime, please connect with the authors or your friendly neighborhood Conn Maciel Carey attorney for further information on these and other workplace safety or labor & employment issues.