

AUGUST 1, 2017 | OSHA RULEMAKINGS & STANDARDS

Trump Admin. Pumps the Brakes on New OSHA Rules in its First Regulatory Agenda

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President Trump was carried to the White House on promises (or threats) of rolling back government regulations. At the CPAC conference this year, Pres. Trump's Sr. Policy Advisor, Steve Bannon, framed Pres. Trump's agenda with the phrase: "[deconstruction of the administrative state](#)," meaning the system of regulations the President believes have stymied economic growth. OSHA regulations are apparently at the heart of this deconstruction. Now, only half a year into the Trump Administration, we have seen significant changes to the OSHA regulatory landscape, from the Congressional Review Act repeal of Obama-era midnight rules, to a [budget proposal](#) that could shrink OSHA's enforcement efforts and prioritize compliance assistance, to a [series of Executive Orders](#) that shift OSHA to a business friendly regulatory philosophy.

And now, the Trump Administration has issued its first "[Unified Agenda of Regulatory and Deregulatory Actions](#)," and the path to "deconstruction of the administrative state" is clearer. The spring Unified Regulatory Agenda explains what agencies like OSHA and EPA will undertake on the rulemaking front, and the shift in the [Dept. of Labor's regulatory agenda](#) for rules and standards affecting workplace safety is more pronounced than ever. The new Regulatory Agenda places a bevy of Obama-era regulatory priorities out in the cold. Among them, new standards to address infectious diseases in healthcare, various chemical exposures, and other broad-based

Agency	Agenda Stage of Rulemaking	Title	RIN
DOL/OSHA	Pre-rule Stage	Communication Tower Safety	1218-AC00
DOL/OSHA	Pre-rule Stage	Mechanical Power Presses Update	1218-AC08
DOL/OSHA	Pre-rule Stage	Powered Industrial Trucks	1218-AC09
DOL/OSHA	Pre-rule Stage	Lock-Out/Tag-Out Update	1218-AD00
DOL/OSHA	Pre-rule Stage	Blood Lead Level for Medical Removal	1218-AD10
DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Beryllium	1218-AR76
DOL/OSHA	Proposed Rule Stage	Quantitative Fit Testing Protocol: Amendment to the Final Rule on Respiratory Protection	1218-AC04
DOL/OSHA	Proposed Rule Stage	Crane Operator Qualification in Construction	1218-AC06
DOL/OSHA	Proposed Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	1218-AD07
DOL/OSHA	Proposed Rule Stage	Technical Corrections to 16 OSHA Standards	1218-AD12
DOL/OSHA	Proposed Rule Stage	Puerto Rico State Plan	1218-AD13
DOL/OSHA	Proposed Rule Stage	Improve Tracking of Workplace Injuries and Illnesses	1218-AD16
DOL/OSHA	Proposed Rule Stage	Tracking of Workplace Injuries and Illnesses	1218-AD17
DOL/OSHA	Final Rule Stage	Standards Improvement Project IV	1218-AD18

initiatives have been canceled or placed on the regulatory back burner.

Here's a breakdown of what Pres. Trump's first Regulatory Agenda reveals about OSHA's future plans:

Controversial Rules Off the Table

To the relief of industry advocates who spent years wringing their hands over OSHA's aggressive rulemaking agenda during the Obama Administration, the new Administration put many of the Agency's previous plans on ice. This set of rules will not see further action for years.

For example, a comprehensive rule addressing combustible dust, which has been in the works for nearly a decade, is off the table. This rulemaking was spurred by a recommendation from the U.S. Chemical Safety & Hazard Investigation Board, and was pursued by top officials in the Obama-era OSHA. The Trump Administration has removed it from the Regulatory Agenda.

Here are some of the higher profile OSHA rulemaking efforts that are now effectively dead in the water:

- Updates to a host of chemical exposure Permissible Exposure Limits;
- Hearing protection in Construction; and
- Vehicle backing hazards in general industry and construction.

Rules Moved to "Long-Term Actions"

Some other long term and 11th-hour Obama initiatives were moved from the active agenda to the "Long-Term Actions" bucket, which is essentially an indefinite delay. For example, in the final days of Obama's second term, [OSHA granted a petition from a nurses union to initiate a rulemaking for workplace violence in healthcare](#). No sooner was that rulemaking put on OSHA's Agenda than it was effectively stopped by Pres. Trump's first regulatory agenda.

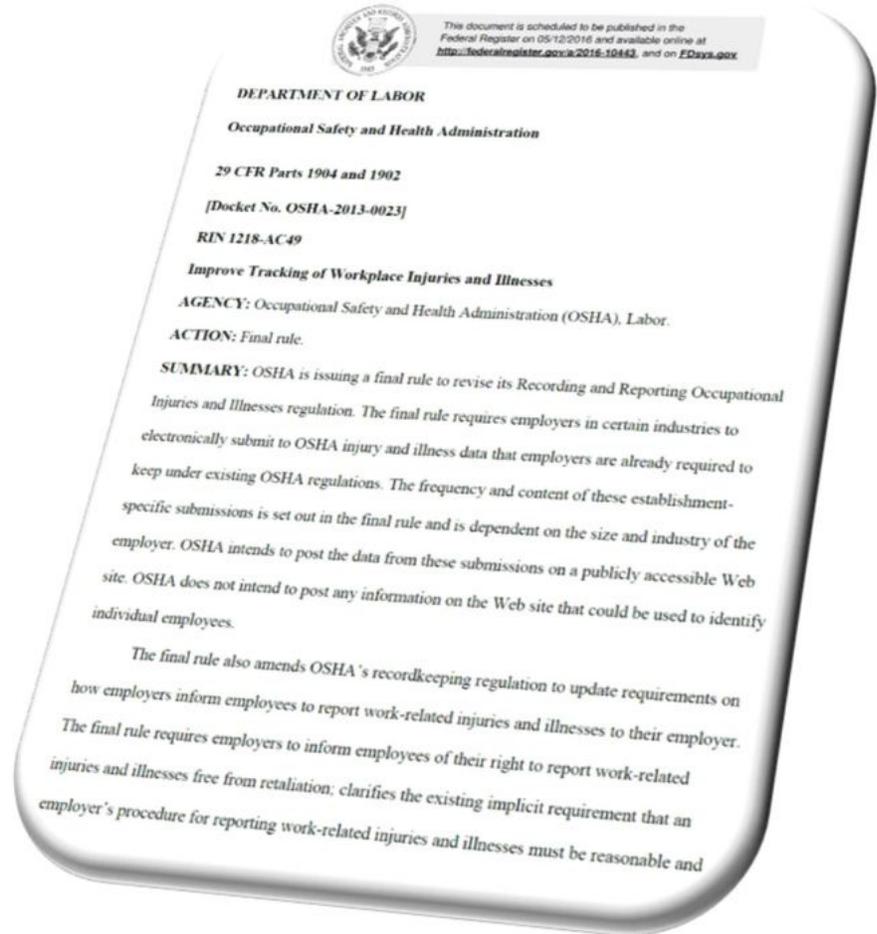
OSHA has indefinitely delayed other plans for some major rules, such as:

- Reforms to the Process Safety Management Standard that had been working in response to [Pres. Obama's Executive Order following the fertilizer plant explosion in West, TX](#) in 2013;
- A new regulation for Emergency Response and Preparedness; and
- A new standard to address Infectious Disease in Healthcare.

Electronic Recordkeeping Rule to be Revisited

There are some items on the agenda that are set for continued (or new) regulatory action, but still reflect Pres. Trump's de-regulatory focus. For example, an interesting issue to watch in the coming months is what Pres. Trump's OSHA does with the new [Electronic Recordkeeping Rule](#) finalized in the final year of the Obama

Administration.



As any OSHA observer (and faithful reader of this blog) knows, this has in some ways been the most contentious regulatory action by the Agency in years. Numerous issues have swirled around the rule related to OSHA intrusion, employer shaming, worker privacy, bad policy about drug testing and safety incentives, etc. [Here is an article about the impact of the E-Recordkeeping Rule.](#)

Under the new Regulatory Agenda, OSHA has introduced two regulatory actions related to the E-Recordkeeping Rule. One regulatory action is to extend the deadline for employers to make their first electronic submissions of 300A data to OSHA (the new deadline already announced for December 1, 2017), and the other would re-open the rule for possible wholesale revisions. As OSHA put it when announcing the extension earlier this summer, a delay “will allow OSHA an opportunity to further review and consider” the rule, and officials added:

“The agency ... has determined that a further delay of the compliance date is appropriate for the purpose of additional review into questions of law and policy. The delay will also allow OSHA to provide employers the same four-month window for submitting data that the original rule would have provided.”

Possible revisions we may see to the Electronic Recordkeeping Rule include:

- Limit the scope of injury data employers must submit (e.g., even large employers to submit only 300A Annual Summaries, and not 300 Logs or 301 incident reports);
- Increase threshold trigger average industry DART rate to be considered a “High Hazard Industry,” and therefore reduce the number of smaller employers covered by the rule;
- Increase threshold number of employees for smaller employers to be covered by the rule; and
- Eliminate or cut down on the scope of the Anti-Retaliation provisions.

Lockout/Tagout Tug of War

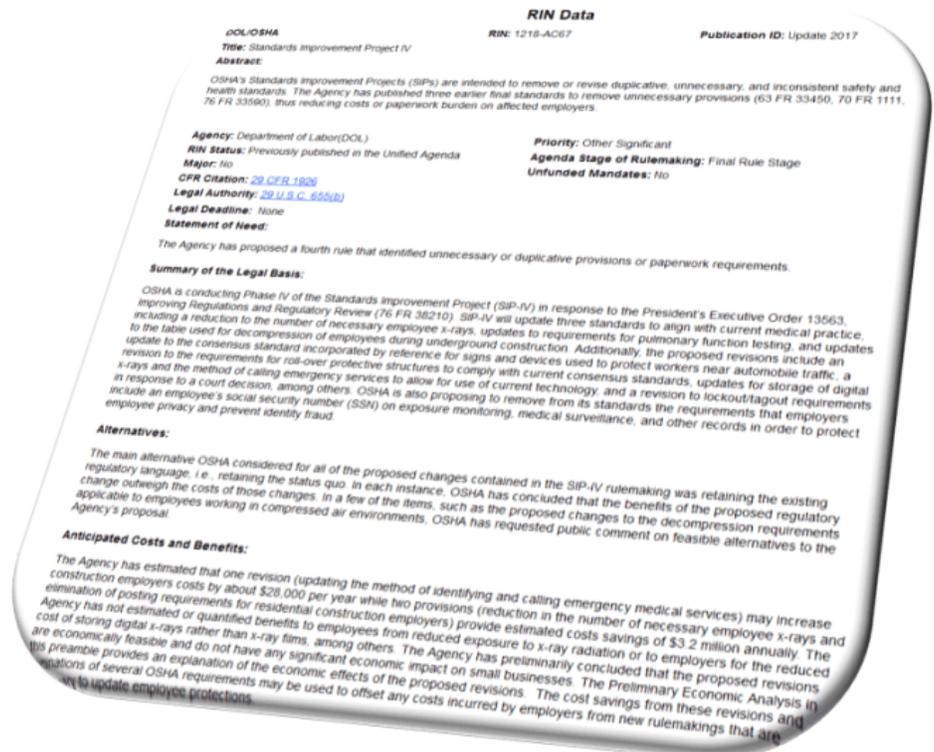
There is one surprising move in OSHA’s portion of the Regulatory Agenda, and it relates to OSHA’s Lockout/Tagout (LOTO) requirements. There are actually two rulemaking items on OSHA’s standard-setting plan related to LOTO, and they are somewhat contradictory.

First, OSHA introduced in the Pre-Rule Stage a [substantive LOTO rulemaking](#), which is an effort to give employers more flexibility in how they control hazardous energy during service and maintenance activities. According to OSHA, recent advancements in technology and computer-based controls of hazardous energy can be more effective, but clash with OSHA’s existing LOTO standard, and the Agency has recently seen an increase in requests for variances for such devices. OSHA’s Standards division will work on a Request for Information due out next April:

“An RFI would be useful in understanding the strengths and limitations of this new technology, as well as potential hazards to workers.”

However, Pres. Trump’s first Regulatory Agenda was not 100% de-regulatory. Just as this new LOTO rulemaking would give employers flexibility, the Trump Administration appears to be pushing ahead on another action that would strip the LOTO rule of some longstanding flexibility. Specifically, OSHA’s latest Regulatory Agenda maintains the [current version of the Standards Improvement Project \(SIP IV\)](#), a kind of ongoing rulemaking the Agency has used for years to streamline, clarify, and update workplace safety standards to

remove duplicative, unnecessary, or inconsistent standards. OSHA initiated SIP in 1995 in response to Pres. Bill Clinton's Executive Order: "Improving Regulations and Regulatory Review." OSHA was specifically instructed to make non-controversial changes to requirements in confusing, outdated, duplicative, or inconsistent standards.



SIP IV, however, as initiated by Obama's OSHA, contained a provision about LOTO that does not meet the purpose or spirit of the Standards Improvement Project. Specifically, OSHA proposes to remove the term "unexpected energization" from the LOTO standard, and not for clarification or simplification. Rather, OSHA is attempting to use the SIP tool, which is intended for minor, non-controversial rule changes, to overrule the Sixth Circuit Federal Court of Appeals 1996 decision in [Reich v. GMC \("GM-Delco case"\)](#).

In the *GM-Delco* case, OSHA argued that LOTO applies when an "employee could be injured if equipment is energized ... during servicing." The Sixth Circuit disagreed, ruling that the plain language of the LOTO standard:

"unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate. . . ; where a service employee is endangered by a machine that can start up without the employee's foreknowledge."

The court further explained that energization is NOT unexpected if:

- An alarm gives employees clear, audible, timely warning of machine start-up;
- A machine so small or its controls located such that a servicing employee would know of attempts to restart it; or
- The equipment is unplugged and the plug is in the exclusive control of the servicing employee.

For twenty years now, employers have relied on this interpretation of "unexpected energization" in the *GM-Delco* case. It is well understood and its impact on operations is significant.

OSHA now asserts that a change by SIP is needed to return the scope of LOTO to OSHA's original intent, to ensure LOTO is used instead of less effective warning systems, and to reduce the burden on compliance officers who have needed to perform a case-by-case assessment of warning schemes.

Such a change, however, is far from non-controversial, is certainly not minor, and does not clarify any present confusion about application of the standard. If OSHA wishes to make such a fundamental change to the LOTO rule, it should do so through a full, separate rulemaking, which it is already initiating according to the current Regulatory Agenda, and solicit and consider comments from stakeholders.

Nonetheless, SIP IV remains on the agenda, and indeed, is the only OSHA rule noted in the "Final Rule Stage." Perhaps now that the Trump Administration is starting to get its political appointees in place at OSHA, this abuse of the SIP process will be remedied before the Final Rule is published in the Federal Register.

Other Rulemaking that Remains Active

Here are a few other regulatory actions that remained in an active status, purportedly with general industry buy-in, including:

- A new standard addressing Communication Tower Safety;
- An update to the Powered Industrial Truck Standard; and
- An amendment to the regulation for Mechanical Power Presses

Looking ahead

The Trump Administration is following through on the President's campaign pledges to roll back government regulations, and OSHA's are no exception. Given that workplace safety issues were not part of Trump's appeal to voters, the Agency's backpedaling on various rules should not come as a surprise, and future semi-annual agendas will undoubtedly reflect this as well.

For a more detailed discussion about the new Administration's approach to OSHA regulations, [join us for a webinar regarding *OSHA Status of Pres. Trump's Agenda for the "Deconstruction of the Administrative State"* on Aug. 15 at 1 PM Eastern.](#)