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Fall 2019 regulatory agenda: Few changes for OSHA

The Department of Labor's regulatory agenda for Fall 2019 – released Nov. 20 – shows only a handful of changes for OSHA.

The agenda, issued by the Office of Information and Regulatory Affairs twice a year, gives the status of and projected dates for all potential regulations listed in three stages: pre-rule, proposed rule and final rule.

OSHA has four regulations listed in the final rule stage, three of which are holdovers from the spring agenda:

- Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records
- Technical Corrections to 27 OSHA Standards and Regulations
- Exposure to Beryllium to Review General Industry Provisions

The lone OSHA regulation added to the final rule stage is Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work, which stems from a September 2014 settlement between OSHA and the Association of American Railroads.

“The settlement agreement requires OSHA to propose a rule to expand

Agency	Agency Stage of Rulemaking	Title	RIA
DOL/ETA	Proposed Rule Stage	Trade Adjustment Assistance for Workers	1205-0828
DOL/ETA	Proposed Rule Stage	Amendments to Foreign Labor Certification Regulations to Conform to Amendments to Immigration Control Act	1205-0809
DOL/ETA	Final Rule Stage	Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations	1205-0805
DOL/ETA	Final Rule Stage	Wagner-Peyser Act	1205-0801
DOL/ETA	Final Rule Stage	Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers)	1205-0800
DOL/ETA	Final Rule Stage	Modernizing Retirement Requirements Under the H-2B Program	1205-0797
DOL/ETA	Final Rule Stage	Northern Mariana Islands (U.S. Workforce Act of 2008)	1205-0802
DOL/ETA	Final Rule Stage	Requirements and Responsibilities for Job Corps Contracts	1205-0806
DOL/ETA	Final Rule Stage	Removal of Waivers to Work Regulations	1205-0808
DOL/ETA	Final Rule Stage	“Open MEP” and Other Issues Under Section 301 of ERISA	1205-0803
DOL/ETA	Proposed Rule Stage	Fiduciary Rule and Prohibited Transaction Exemptions	1215-0802
DOL/ETA	Proposed Rule Stage	Grandfathered Group Health Plans and Grandfathered Group Health Insurance Coverage	1215-0809
DOL/ETA	Proposed Rule Stage	Default Election Procedures by Employee Pension Benefit Plans Under ERISA	1215-0801
DOL/ETA	Proposed Rule Stage	Privacy Notice Update	1215-0804
DOL/ETA	Proposed Rule Stage	Transparency in Coverage	1215-0805
DOL/ETA	Proposed Rule Stage	Adoption of Amended and Revised Voluntary Fiduciary Correction Program	1215-0803
DOL/ETA	Pre-rule Stage	Emergency Response	1218-AC01
DOL/ETA	Pre-rule Stage	Mechanical Power Presses Update	1218-AC08
DOL/ETA	Pre-rule Stage	Powered Industrial Trucks	1218-AC09
DOL/ETA	Pre-rule Stage	Lock-Out/Tag-Out Update	1218-AC02
DOL/ETA	Pre-rule Stage	Tree Care Standard	1218-AC04
DOL/ETA	Pre-rule Stage	Prevention of Workplace Violence in Health Care and Social Assistance	1218-AC06
DOL/ETA	Pre-rule Stage	Blood Lead Levels for Medical Removal	1218-AC05
DOL/ETA	Pre-rule Stage	Occupational Exposure to Crystalline Silica, Revisions to Table 1 in the Standard for Construction	1218-AC03
DOL/ETA	Proposed Rule Stage	Amendments to the Cranes and Derricks in Construction Standard	1218-AC01
DOL/ETA	Proposed Rule Stage	Communication Tower Safety	1218-AC05

exemptions affecting railroad roadway work by providing an additional exemption from the crane standard for a particular class of track maintenance hoisting equipment and partial exemptions from, or alternate work practices in lieu of, particular

requirements of the cranes standard,” the abstract of the regulatory agenda entry states.

The agency is expected to issue this final rule in May.

— article continues on p. 4

DOL OIG publishes list of planned audits for OSHA

OSHA’s complaint inspections, Severe Violator Enforcement Program activities, Whistleblower Protection Programs and administration of rules are all intended to undergo evaluation this year by the Department of Labor Office of Inspector General.

DOL OIG outlines its fiscal year 2020 audit plans for OSHA, the Mine Safety and Health Administration and other agencies in a work plan released Oct. 30.

Discretionary audits are conducted with funds left over after mandatory audits – those required by law or regulation – have been completed. “We decide which discretionary audits to conduct based on risk

and potential impact on DOL’s mission and goals,” the work plan states.

Regarding complaint inspections, the audit “will focus on the extent OSHA has used complainant and witness testimony” during the process. The work plan notes that the agency conducts around 9,000 annual inspections stemming from complaints and issues citations about 24% of the time. OSHA compliance safety and health officers are not required to interview complainants during those inspections.

The SVEP-focused audit is a follow-up to a 2009 DOL OIG report and will determine whether OSHA “has made changes to improve enforcement activities related to

employers who demonstrated indifference to their workplace safety responsibilities.” The report showed that in 97% of sampled cases, OSHA “did not identify all egregious employers and did not perform sufficient inspections and related enforcement.”

The current whistleblower audit is a sampling from approximately 900 retaliation complaints made from FY 2011 to FY 2018 in the San Francisco region, and whether those complaints were investigated appropriately. Additionally, the ongoing rulemaking audit stems from “concerns about recently finalized rules that appear to violate” the Administrative Procedure Act and other executive orders.

OSHA ALLIANCES

The OSHA Alliance Program fosters collaborative relationships with groups committed to worker safety and health. Alliance partners help OSHA reach targeted audiences and give them better access to workplace safety and health tools and information. For more on OSHA alliances, go to osha.gov/dcsp/alliances/index.html.

Western Colorado Contractors Association

Date of alliance: Sept. 19, 2019

Through the alliance, the organizations will use relevant injury, illness and hazard exposure data when appropriate to help identify areas of emphasis for alliance awareness, outreach and communication activities. The alliance will also explore and implement selected options to evaluate the effectiveness of the alliance and measure the impact of its overall effort on improving workplace safety for employers and workers. In developing this alliance, OSHA and WCCA recognize that OSHA’s On-site Consultation Project partners are an integral part of the agency’s national effort, and that information about the products and activities of the alliance may be shared with these partners for the advancement of common goals.

Raising awareness:

- To convene or participate in forums, roundtable discussions or stakeholder



meetings on construction hazards, fall hazards, struck-by hazards, caught-in or between hazards, and electrical hazards to help forge innovative solutions in the workplace or to provide input on safety and health issues.

- To encourage worker participation in workplace safety and health by including workers as members of the alliance implementation team and other planning committees as they are formed, and providing training and increased access to safety and health information.

Training and education:

- To deliver or arrange for the delivery of semiannual OSHA seminars on a wide variety of topics.
- To deliver or arrange for training events during the term of the agreement.

Training may be delivered via webinar and/or appearances at WCCA meetings or OSHA events.

Outreach and communication:

- To develop information on the recognition and prevention of workplace hazards, and to develop ways of communicating such information (e.g., print and electronic media, electronic assistance tools, and OSHA’s and WCCA’s websites) to employers and workers in the construction industry.
- To share information among OSHA personnel and industry safety and health professionals regarding best practices or effective approaches through training programs, workshops, seminars and lectures (or any other applicable forum) developed by the participants.

Excerpted from osha.gov/dcsp/alliances/regional/region8/renewal-agreement_20190919.

In Other News...

OSHA issues temporary enforcement policy on crane operator certification

OSHA has issued a temporary enforcement policy for the construction industry after being informed by the Sanford, FL-based Crane Institute Certification that the organization no longer is accredited by a nationally recognized accrediting agency, as required under section 1926.1427(d) of OSHA's Cranes and Derricks in Construction Standard.

In a Nov. 25 memo, Scott Ketcham, director of OSHA's Directorate of Construction, writes that many employers "may have acted in good faith by obtaining crane operator certifications from CIC that they believed would comply with OSHA's requirements," adding that, "Where such good faith is found, employers should not be cited for violating the operator certification requirement of 29 CFR 1926.1427(d)."

Ketcham warns that this policy will apply only until the certification expiration date. OSHA will not accept CIC crane operator certification issued on or after Dec. 2 "as evidence of compliance" with federal regulations.

NSC is first OSHA Alliance Program Ambassador

The National Safety Council is the first organization to become an ambassador of OSHA's Alliance Program.

Ambassadors serve as an extension of the alliance program, and the designation "marks a progression in the collaborative or cooperative relationship."

As a member of the program since 2003, NSC agrees to share "information, guidance and access to training resources that address occupational hazards, and promote understanding of the rights of workers and the responsibilities of employers under the Occupational Safety and Health Act," a Nov. 18 press release states.

OSHA STANDARD INTERPRETATIONS

OSHA requirements are set by statute, standards and regulations. Interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Enforcement guidance may be affected by changes to OSHA rules.

Personal Fall Arrest System or Ladder Safety System on Fixed Ladders, and Fixed Ladders Used on Grain Silos for Emergency Escape

Standards: 1910.23(a)(1) and 1910.28(b)(9)(i)(B)

Date of response: Oct. 18, 2019

Background: Multiple sections of offset ladders are being designed to be installed on the outside of grain silos 80 feet or more in height. Rest platforms will be installed at each offset and will be provided with guardrail systems to meet OSHA requirements. The rest platforms measure 3 feet by 3 feet in area. Some of the ladder sections are less than 24 feet in length.

Question 1: *Does each section of ladder above 24 feet from the ground require a ladder safety system or is the 24-foot height measured from rest platform to rest platform?*

Response 1: Under 29 CFR 1910.28(b)(9)(i)(B), employers must ensure that each new fixed ladder extending more than 24 feet above a lower level is equipped with a personal fall arrest system or a ladder safety system. For purposes of determining whether a fixed ladder extends more than 24 feet above a lower level within the meaning of 29 CFR 1910.28(b)(9)(i), the employer must measure the distance from the ground/lower level to the top of the fixed ladder. The distance a ladder section is located above the ground or a rest platform, and thus the distance that a worker climbing on the ladder could fall, determines whether a personal fall arrest system or a ladder safety system is required. If the fall distance exceeds 24 feet, regardless of the length of the ladder section, the employer must equip the fixed ladder with a personal fall arrest system or a ladder safety system.

Furthermore, if the size of a rest platform is such that a worker climbing the fixed ladder could fall past the platform and more than 24 feet to the ground or a lower level, the employer must equip the ladder with a personal fall arrest system or a ladder safety system. In the example you provided, where the rest platform measures 3 feet by 3 feet, it is possible that a worker climbing the fixed ladder could fall past the platform and to a lower level. Thus, the distance the ladder is considered to extend above a lower level would be measured from the ground and not from the lower rest platform.

Background: Under 29 CFR 1910.23(a)(1), there is an exception for ladders used in emergency operations such as firefighting, rescue and tactical law enforcement operations, or training for these operations. The ladders described in Question 1 are only in place for emergency escape from the roof level of the structure should there be an emergency and personnel are on the roof at the time of the emergency. An elevator is normally used to access the roof of the structure.

Patrick Kapust, Acting Director
Directorate of Enforcement Programs

Excerpted from [osha.gov/laws-regs/standardinterpretations/2019-10-18](https://www.osha.gov/laws-regs/standardinterpretations/2019-10-18).

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Publisher

Deborah Meyer, deborah.meyer@nsc.org

Editor

Melissa J. Ruminski, melissa.ruminski@nsc.org

Managing Editor

Jennifer Yario, jennifer.yario@nsc.org

Copy Editor

Paul Wlekinski, paul.wlekinski@nsc.org

Assistant Editor

Tracy Haas-Depa, tracy.haas-depa@nsc.org

Associate Editors

Barry Bottino, barry.bottino@nsc.org

Kevin Druley, kevin.druley@nsc.org

Alan Ferguson, alan.ferguson@nsc.org

Senior Graphic Designer

Michael Sharkey

Online Content Manager

Amy Bellinger

Production Coordinator

Joy Tan-Pipilas

Subscriptions/Circulation

subscriptions@nsc.org

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Two OSHA regulations have been completed since the previous regulatory agenda:

- The addition of two quantitative fit testing protocols for respirators
- Standards Improvement Project IV

A rule on communication tower safety has moved to the proposed rule stage from the pre-rule stage. It was cleared by a Small Business Advocacy Review Panel in October 2018. A notice of proposed rulemaking could be issued in September.

A pair of OSHA regulations have been added to the list of standards in the

proposed rule stage. One seeks to update the Safety Standard for Powered Industrial Trucks. The agency currently is using ANSI's 1969 safety standard. An NPRM could be issued as early as January.

Regarding the other, OSHA is seeking to clarify regulatory language in its 2016 final rule on walking-working surfaces. The agency could issue an NPRM by April.

Meanwhile, OSHA has withdrawn final approval for a State Plan for Puerto Rico because of an "uncertain timeline in meeting the statutory and regulatory criteria for final approval."

To see the full agenda, go to sb-m.ag/2pTT3HV.

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