LEGISLATIVE UPDATE: 2016

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PRESENTER

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The common threads found throughout most of the 114th Congressional Bills include:

- **Transparency in the Rule Making and the Rule:** Several Bills require facilities to publically post staffing levels and another Bill will require the posting of healthcare acquired infections.

- **Input from Vested Participants and the Regulated Community:** Most of the staffing Bills will require nurses and other staff member to participate in determining the safest staffing level.

- **Stiffer Financial Penalties with Focus on Increased Criminal Action:** We have already seen the tremendous increase – more than 78% - in OSHA penalties thanks to the Federal Civil Penalties Inflation Adjustment Improvements Act. On December 17, 2015, the U.S. Department of Justice (DOJ) announced a major new initiative to increase the number of criminal charges in worker endangerment and worker safety cases and to more effectively prosecute such crimes. The Protecting America’s Workers Act (PAWA) degree of available criminal charges would increase from the level of a misdemeanor to that of a felony. The potential targets of criminal charges would also broaden to include “any officer or director.” The maximum prison sentence under the legislation would increase from six months to 10 years for a first offense, and from one year to 20 years for repeat convictions. Significantly, under the modifications to the bill, PAWA also would lower the level of conduct triggering criminal liability. Specifically, the reform legislation would amend the OSH Act to change the burden of proof in a criminal case from “willfully” to “knowingly.”

- **Whistleblower Protection:** All of the staffing Bills, and most of the other 114th congressional Bills, provide for “whistleblower protections.” We see Congressional concern to provide whistleblower protection for employees who refuse to work in conditions they consider unsafe and even for those who complain in good faith about the quality of care or services at a healthcare facility. This Congress has even extended “whistleblower coverage” to patients and residents who feel the level of staffing or other conditions in their facilities unsafe.

**114TH Congress**

As of July 15, 2016, in the House of Representatives, there are 248 Republicans (including 1 Delegate), 192 Democrats (including 4 Delegates and the Resident Commissioner of Puerto Rico), and one vacancy. The Senate has 54 Republicans, 44 Democrats, and 2 Independents, who both caucus with the Democrats.

As of July 15th there are 10,896 bills and resolutions currently before the United States Congress, but of those only about 4% will become law. Congress works in two-year legislative sessions tied to the elections. The current session is called the 114th Congress and it began on January 6, 2015. All bills not enacted by the end of the session on January 3, 2017 die, and Congress will start over. We have listed some of the bills which, if passed and signed into law by the President, may impact how occupational health conducts its services in the upcoming years.
H.R. 128  Worksite Reporting Act
Introduced:  January 6, 2015

Directs the Secretary of Labor to revise certain regulations under the Occupational Safety and Health Act of 1970 so as to require site-controlling employers to keep a site log (OSHA 300 log) for all recordable injuries and illnesses occurring among all employees on the particular site, whether such employees are employed directly by the site-controlling employer or are employed by contractors or temporary help or employee leasing services.

H.R. 1602  Nurse Staffing Standards for Patient Safety and Quality Care Act of 2015
S. 864  National Nursing Shortage Reform and Patient Advocacy Act

Both Bills Introduced:  March 25, 2015

Amends the Public Health Service Act to require hospitals to implement and submit to the Department of Health and Human Services (HHS) a staffing plan that complies with specified minimum nurse-to-patient ratios by unit.

- Requires HHS to develop a transparent method for establishing nurse staffing requirements above minimum ratios.
- Directs HHS to adjust Medicare payments to hospitals to cover additional costs incurred in providing services to Medicare beneficiaries that are attributable to compliance with such ratios.
- Allows a nurse to object to, or refuse to participate in, any assignment if it would violate minimum ratios or if the nurse is not prepared by education or experience to fulfill the assignment without compromising the safety of a patient or jeopardizing the nurse's license.
- Prohibits a hospital from:
  (1) taking specified actions against a nurse based on the nurse's refusal to accept an assignment for such a reason; or
  (2) discriminating against any individual for good faith complaints relating to the care, services, or conditions of the hospital or of any related facilities.
- Adds stipends to the nurse workforce loan repayment and scholarship program.
- Expands the nurse retention grant program to authorize programs to implement nurse preceptorship and mentorship projects.

H.R. 2083/S. 1132  Registered Nurse Safe Staffing Act of 2015
Introduced:  April 4, 2015 and April 29, 2015 respectively

Amends title XVIII (Medicare) of the Social Security Act to require each Medicare participating hospital to implement a hospital-wide staffing plan for nursing services furnished in the hospital.

- Requires the plan to require that an appropriate number of registered nurses provide direct patient care in each unit and on each shift of the hospital to ensure staffing levels that:
  (1) address the unique characteristics of the patients and hospital units; and
  (2) result in the delivery of safe, quality patient care consistent with specified requirements.
• Requires each participating hospital to establish a hospital nurse staffing committee which shall implement such plan.

• Specifies civil monetary and other penalties for violation of the requirements of this Act.

• Sets forth whistleblower protections against discrimination and retaliation involving patients or employees of the hospital for their grievances, complaints, or involvement in investigations relating to such plan.

**H.R.1932** To Amend the Occupational Safety and Health Act Of 1970 To Allow Employers A Grace Period To Abate Certain Occupational Health and Safety Violations Before Being Subject To A Penalty Under Such Act.

Introduced: April 22, 2015

This bill amends the Occupational Safety and Health Act of 1970 to prohibit the assessment of penalties against employers for non-willful, unrepeated, or non-serious violations of occupational safety and health standards during the time period fixed for abatement of such a violation in any citation or final order. Furthermore, no penalty shall be assessed for a violation if it shall be abated by the employer in accordance with the citation or order before the end of that period.

**S. 1112/ H.R. 2090** Protecting America’s Workers Act

Introduced: April 28, 2015 and April 29, 2015 respectively

• Authorizes the Secretary of Labor to cede OSHA jurisdiction to another federal agency with respect to certain occupational standards or regulations for such agency's employees.

• Declares OSHA inapplicable to working conditions covered by the Federal Mine Safety and Health Act of 1977.

• Increases protections for whistle blowers under OSHA.

• Prescribes requirements relating to:
  • a employer's duty to furnish a place of employment free from recognized hazards causing or likely to cause death or serious physical harm to any individual (not just an employer's employee) performing work there;
  • the posting of employee rights;
  • employer reporting of employee work-related deaths or hospitalizations;
  • a site-controlling employer's duty to keep a site log for recordable injuries and illnesses of all employees, including employees of the site-controlling employer or others (including independent contractors) performing work there;
  • a prohibition against employers adopting or implementing policies or practices that discourage or discriminate against employee reporting of work-related injuries or illnesses;
  • a prohibition against the loss of wages or employee benefits due to an employee participating in a workplace inspection;
  • investigations of incidents resulting in death or the hospitalization of two or more employees which occur in a place of employment; and,
• a prohibition against the issuing, modifying, or settling of unclassified citations for occupational health and safety standard violations.

• Continues requirements relating to:
  
  (1) the rights of an employee (including a former employee or family member in lieu of an employee) who has sustained a work-related injury or illness that is the subject of an inspection or investigation;
  
  (2) an employer's right to contest citations and penalties; and,
  
  (3) periods permitted for an employer to correct serious, willful, or repeated violations pending an employer's contest to a citation and procedures for stays of the time period for abatement of those violations.

• Increases civil and criminal penalties for certain OSHA violators.
• States that pre-final order interest on any penalties owed shall begin to accrue on the date a party contests a citation, at an interest rate calculated at the current underpayment rate.
• Prescribes requirements for the Secretary's evaluation of state occupational safety and health plans as well as workplace health hazard evaluations by the National Institute for Occupational Safety and Health.
• Requires a state that has an approved plan for the development and enforcement of occupational safety and health standards to amend its plan to conform to the requirements of this Act within 12 months after enactment of this Act.

**H.R.1314 Bipartisan Budget Act of 2015 Federal Civil Penalties Inflation Adjustment Improvements Act**

Became Law on November 2, 2015 as Public Law No: 114-74

On June 30, 2016, the U.S. Department of Labor issued an Interim Final Rule to implement the *Federal Civil Penalties Inflation Adjustment Improvements Act* passed November 2, 2015 as part of the highly publicized “Bipartisan Budget Act of 2015” negotiated between the Republican-controlled Congress Interim Final Rule and the White House.

Although the *Federal Civil Penalties Inflation Adjustment Improvements Act* applies to all federal regulatory agencies, its impact will be felt most by employers receiving citations from OSHA. OSHA has been statutorily prohibited from raising penalties for the last 25 years under a budget bill passed in the 1990s. As a result, OSHA’s August 2016 penalty “catch-up” hike was the most significant of all federal agencies, raising penalties a whopping 78%, and increasing employers’ burden by an estimated $111M in the first year.

**The New Penalties**
Currently, the maximum penalty that OSHA can impose for “other-than-serious” and “serious” violations is $7,000, and the maximum penalty for “willful” or “repeat” violations is $70,000. This new law directs OSHA to increase both of those penalty amounts to correspond with the rate of inflation as it was recorded between 1990 and 2015. The relevant CPI data were released on November 17, 2015 and the maximum increase has accordingly been set at **78.16 percent.**
“Other Than Serious” and “Serious” Citations:
- OSHA has the authority to increase the maximum penalties from current maximum fine of $7,000 to $12,471 for other-than-serious and serious violations.

“Willful” and “Repeat” Citations:
- OSHA can increase the fine from the current maximum of $70,000 to a new maximum fine of $124,709 for willful or repeat violations.

S. 2408/H.R.4266 Nurse and Health Care Worker Protection Act of 2015
Both Bills Introduced: December 16, 2015

This bill amends Title XVIII (Medicare) of the Social Security Act to apply the standard to hospitals receiving Medicare funds.

This bill also requires the Department of Labor to establish a standard on safe patient handling, mobility, and injury prevention to prevent musculoskeletal disorders for health care workers. The final written standard must require the use of engineering and safety controls to handle patients.

The standard must require health care employers to:

1. develop and implement a safe patient handling, mobility, and injury prevention program;
2. train their workers on safe patient handling, mobility, and injury prevention; and,
3. post a notice that explains the standard, procedures to report patient handling-related injuries, and workers' rights under this Act. The Department of Labor, through OSHA, must conduct unscheduled inspections to ensure compliance with the standard.

S. 2467 Patient Safety Improvement Act of 2016
Introduced: January 27, 2016

This bill is supposed to reduce health care-associated infections (HAI) and improve antibiotic stewardship through enhanced data collection and reporting, the implementation of State-based quality improvement efforts, and improvements in provider education in patient safety, and for other purposes. This legislation improves communication and transparency by requiring hospitals to report HAIs to healthcare providers involved in a patient’s post-hospital care no later than 24 hours after diagnosis. This bill would help our healthcare system better address healthcare-acquired infections (HAIs) by improving data on the prevalence of HAIs reported to the National Healthcare Safety Network at the Centers for Disease Control and Prevention (CDC).

The bill will also address the issue of antimicrobial stewardship to address the growing prevalence of antibiotic-resistant bacteria in hospitals (a.k.a. superbugs) by establishing a grant program to support statewide collaboratives for the prevention and control of HAIs.
Introduced:  February 11, 2016

This bill will provide for a safe harbor for reports to potential employers by current or former employers of violent behavior or threats thereof by employees.

a. Safe Harbor for Employer Reports Of Violent Behavior Or Threatened Violent Behavior

(1) In General — Any employer who, in good faith and based on objectively reasonable suspicion, makes, or causes to be made, a voluntary report about violent behavior, or threatened violent behavior, by an employee or former employee to a potential employer of that employee shall be immune from civil liability under Federal, State, and local law for such report.

(2) False Reports—Paragraph (1) shall not apply to any report if it is shown by clear and convincing evidence that the employer knew such report to be false or that such report was made with reckless disregard for the truth at the time that employer made such report.

b. Safe Harbor For Response

(1) Any potential employer who observes or receives a report from an employer acting pursuant to subsection (a) about violent behavior, or threatened violent behavior, of an employee or potential employee and takes reasonable action in good faith to respond to such activity shall be immune from civil liability under Federal, State, and local law for such action.

HR 5543:  The Environmental Health Workforce Act
Introduced:  June 22, 2016

H.R. 5543 directs the Secretary of Health and Human Services (HHS), in conjunction with relevant stakeholders, to develop model standards, guidelines, and technical assistance for credentialing environmental health workers as well as developing a comprehensive workforce plan that identifies and addresses ways to strengthen the environmental health workforce. Finally, H.R. 5543 would direct the Comptroller General of the United States to examine and identify best practices related to training and credentialing requirements for environmental health workers.

S 697/HR 2576  Frank R. Lautenberg Chemical Safety for the 21st Century Act aka The Toxic Substances Control Act
Signed into Law:  June 22, 2016

President Obama signed the “Frank R. Lautenberg Chemical Safety for the 21st Century Act” into law on June 22, 2016, making comprehensive changes to the Toxic Substances Control Act (TSCA). This step comes after years of congressional attempts to update the Act.
The changes to TSCA will have sweeping effects on various industries including healthcare, as the law regulates a wide variety of household, commercial, pharmaceuticals, and industrial chemicals. In the past, TSCA had been criticized in part due to its piecemeal regulation of only certain industries and chemicals, and the regulation of certain chemicals only through more stringent state-enacted rules. The new law provides more certainty for regulated parties and grants the U.S. Environmental Protection Agency (U.S. EPA) broader authority to regulate chemicals currently in the stream of commerce. The new law will require that all chemicals in commerce, including those "grandfathered" under TSCA, undergo a comprehensive safety review and will require a safety finding for new chemicals before they can enter the market.

The changes will also strengthen protections for the most vulnerable by placing greater emphasis on, and requiring protection of, those who may be more exposed or particularly vulnerable to the effects of exposure to chemicals, and clearly defines them for the first time as including infants, children, pregnant women, workers and the elderly.

**Spring 2016 Regulatory Agenda: Department of Labor**

On May 18, 2016 the spring semiannual regulatory agenda for OSHA was published. This Regulatory Agenda provides a complete list of all regulatory actions that are under active consideration for promulgation, proposal, or review and covers regulatory actions for over 60 federal departments, agencies, and commissions. The Regulatory Agenda for the Department of Labor includes a total of thirty two regulatory entries for OSHA specific actions. This is up from twenty three regulatory actions identified last year. The increase is due to more pre-rule stage regulatory actions that OSHA has identified where the agency is gathering relevant information. In this year’s regulatory agenda there are nineteen regulatory actions in the pre-rule stage, which is up from seven pre-rule regulatory actions identified last year. Seven regulatory actions are in the proposed rule stage and six of these specific actions are in the final rule stage.

**What’s On The Horizon For OSHA?**

The recently published spring 2016 Unified Agenda of Regulatory and Deregulatory Actions for federal agencies provides a look into new OSHA rulemaking activity as well as a status update on regulations already in the works. The latest agenda includes new regulatory actions that could impact many employers in construction and healthcare, new attention on PELs for styrene, and more. Read on for a summary of notable additions and updates in various rulemaking stages.

**Prerule Stage:**

- **Updating Requirements for the Selection, Fit Testing, and Use of Hearing Protection Devices:** The requirements to use hearing protection devices (HPD) in general industry and construction are inconsistent and outdated. This project would harmonize the two regulations to provide more consistency, improve the construction requirements so adequate hearing protectors are selected, and allow the use of newer technologies that make it possible to fit test hearing protectors so each worker has personalized HPD to assure adequate protection.

- **Preventing Workplace Violence in Healthcare (New to the Agenda):** OSHA intends to gather information from healthcare employers, workers and stakeholders on the impact of violence in healthcare workplaces to determine whether to move forward with new rulemaking around industry workplace violence prevention programs.
The Request for Information (RFI) will provide OSHA’s history with the issue of workplace violence in healthcare, including a discussion of the Guidelines that were initially published in 1996, a 2014 update to the Guidelines, and the recently published tools and strategies that were shared with OSHA by healthcare facilities with effective violence prevention programs. It will also discuss the Agency’s use of the General Duty Clause [5(a)(1)] in enforcement cases in healthcare. The RFI solicits information primarily from health care employers, workers and other subject matter experts on impacts of violence, prevention strategies, and other information that will be useful to the Agency if it decides to move forward in rulemaking. OSHA will also solicit information from stakeholders, including state officials, employers and workers, in the nine states that require certain health healthcare facilities to have some type of workplace violence prevention program.

Potentially impacting AOHP members, OSHA anticipates issuing a Request for Information (RFI) in November of 2016. In reference to workplace violence in healthcare, OSHA states that the RFI will solicit “information primarily from health care employers, workers and other subject matter experts on impacts of violence, prevention strategies, and other information that will be useful to the Agency if it decides to move forward in rulemaking. OSHA will also solicit information from stakeholders, including state officials, employers and workers, in the nine states that require certain health healthcare facilities to have some type of workplace violence prevention program.”

- **Occupational Exposure to Styrene** (*New to the Agenda*): This rule will determine the need for a revised permissible exposure limit (PEL) for workplaces with employees exposed to styrene – a chemical used in manufacturing various plastic and rubber products that has been linked to respiratory, eye and nervous system ailments. In healthcare, it is frequently used in the making of protective styrofoam blocks for radiation oncology.

- **Blood Lead Level for Medical Removal** (*New to the Agenda*): OSHA is exploring options to further prevent harmful exposure to lead for workers in construction and general industry, as current standards are based on toxicity information that is over 35 years old. In healthcare, lead and cadmium are both often melted and used as blocking alloy for radiation oncology.

- **Updating Requirements for the Selection, Fit Testing, and Use of Hearing Protection Devices** (*New to the Agenda*): This rule would update requirements around hearing protection devices in general industry and construction to help better ensure adequate hearing protection and allow the use of newer technologies to personalize hearing protectors to workers.

**Proposed Rule Stage:**

- **Infectious Diseases** (*Moved from Prerule Stage to Proposed Rule Stage*): “OSHA is developing a standard to ensure that employers establish a comprehensive infection control program and control measures to protect employees from infectious disease exposures to pathogens that can cause significant disease.” This affects workplaces such as health care facilities, laboratories and other facilities where there could be increased exposure risk to infectious people. Employees in health care and other high-risk environments face long-standing infectious disease hazards such as tuberculosis (TB), varicella disease (chickenpox, shingles), and measles (rubeola), as well as new and emerging infectious disease threats, such as Severe Acute Respiratory Syndrome (SARS) and pandemic influenza.
Health care workers and workers in related occupations, or who are exposed in other high-risk environments, are at increased risk of contracting TB, SARS, Methicillin-resistant Staphylococcus aureus (MRSA), and other infectious diseases that can be transmitted through a variety of exposure routes. OSHA is concerned about the ability of employees to continue to provide health care and other critical services without unreasonably jeopardizing their health. OSHA is developing a standard to ensure that employers establish a comprehensive infection control program and control measures to protect employees from infectious disease exposures to pathogens that can cause significant disease. Workplaces where such control measures might be necessary include: health care, emergency response, correctional facilities, homeless shelters, drug treatment programs, and other occupational settings where employees can be at increased risk of exposure to potentially infectious people. A standard could also apply to laboratories, which handle materials that may be a source of pathogens, and to pathologists, coroners’ offices, medical examiners, and mortuaries.

Final Rule Stage:

- **Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness (Moved from Proposed Rule Stage to Final Rule Stage):** OSHA has amended recordkeeping regulations which is meant to “clarify that the duty to make and maintain an accurate record of an injury or illness continues for as long as the employer must keep and make available records for the year in which the injury or illness occurred. The duty does not expire if the employer fails to create the necessary records when first required to do so.” OSHA is proposing to amend its recordkeeping regulations to clarify that the duty to make and maintain accurate records is an ongoing obligation. The duty to make and maintain an accurate record of an injury or illness continues for as long as the employer must keep and make available records for the year in which the injury or illness occurred. The duty does not expire if the employer fails to create the necessary records when first required to do so. This agency action is an attempt by OSHA to undo the holding in the U.S. Court of Appeals for the District of Columbia’s decision in the Volks case, which held that OSHA could not issue citations for failing to record an injury or illness beyond the six-month statute of limitations set out in the statute. [AKM LLC d/b/a Volks Constructors v. Sec’y of Labor, 675 F.3d 752 (D.C. Cir. 2012)].

- **Walking Working Surfaces and Personal Fall Protection Systems (Slips, Trips, and Fall Prevention) (Has remained in Final Rule Stage since last year):** This rule will update regulations around slip, trip and fall hazards, which are among the leading causes of workplace injuries and fatalities. Slips, trips, and falls are among the leading causes of work-related injuries and fatalities. Since that time, new technologies and procedures have become available to protect employees from these hazards. The Agency has been working to update these rules to reflect current technology. New regulations will account for updated industry practices and technology.

- **Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records:** OSHA’s regulation at 29 CFR 1913.10 includes internal procedures to be followed by OSHA personnel when obtaining and using personally-identifiable employee medical information. After careful review, OSHA has identified several provisions in need of revision. The Agency plans to amend the regulation to improve its efficiency in implementing these internal procedures. To improve efficiency, OSHA is considering placing responsibility and management of the program to OSHA’s Chief Medical Officer (e.g. namely authority to sign Medical Access Orders) and to remove requirements for redacting records since this is duplicative of current privacy requirements that are already strictly enforced.
OSHA Raises Fines and Increases Scrutiny for Reporting Violations

On September 18, 2014, OSHA issued a final rule revising its occupational injury and illness recordkeeping and reporting requirements in 29 C.F.R. 1904. This rule expanded the list of severe injuries which all OSHA-covered industries must report to OSHA, regardless of size or partial exemption status. Under the new rule, a fatality (within 30 days of the work-related incident) must still be reported within 8 hours of the death. However, employers will now have a 24 hour window in which to report to OSHA all work-related inpatient hospitalizations that require care and treatment of a single employee, all amputations, and all losses of an eye which occur within 24 hours of the incident.

Shortly before OSHA’s new injury and illness reporting requirements came into effect last January, OSHA issued “Interim Enforcement Procedures for New Reporting Requirements under 29 C.F.R. 1904.39.” These interim procedures served as enforcement guidance for Area Offices and compliance officers when issuing citations to employers for failing to report injuries under the new requirements. On March 4, 2016, the Agency issued revised enforcement procedures, “Revised Interim Enforcement Procedures for Reporting Requirements under 29 C.F.R. 1904.39” due to the “influx of workplace incident reports to OSHA and the field’s experiences with the new reporting requirements.” A top OSHA official reported that OSHA received over 10,000 employer reports in 2015, only 38% of which resulted in an on-site inspection. Instead, most reportable injuries and illnesses trigger a “Rapid Response Investigation” (RRI). The RRI consists of detailed information requests to the employer.

The revised procedures include two significant departures from the previous guidance and offers employers a safe harbor to protect the internal investigation from being used against the employer to cite condition(s) discovered during Rapid Response Investigation.

- **Maximum Fine Increased For Failing To Report A Reportable Incident Within 24 Hours Of Learning Of The Incident.** Previously the maximum fine was $1,000 with an option to reduce the fine for, e.g., small businesses. The maximum fine is now set at $5,000 with the same reductions still available. This does not, however, change the Area Director’s authority to raise the unadjusted penalty as high as $7,000 if s/he “determines that it is appropriate to achieve the necessary deterrent effect.”

- **Monitoring Inspections.** After an employer has reported a reportable event (fatality, in-patient hospitalization, amputation, or loss of an eye) OSHA makes a decision based on the “Category” of the incident whether to conduct an on-site inspection or a Rapid Response Investigation (RRI). If an RRI is initiated, OSHA sends a letter to the employer and the employer agrees to conduct its own internal investigation, take steps to abate any hazards, and provide a written response to OSHA. The new guidance provides for monitoring inspections of closed RRIs “based on a randomized selection of closed investigations.” Meaning that in some cases, where OSHA informs an employer an RRI is closed, there still remains the potential for an on-site inspection to confirm abatement of the hazardous condition that resulted in the reportable injury. The Agency claims this is to ensure accuracy in the reporting and has said that the inspection “will be limited to an inspection of the previously reported condition.” Further, OSHA has said that anything uncovered by the employer in the course of its internal investigation will not be used by the Agency to cite the employer provided “employees are not exposed to a serious hazard” and “the employer is taking diligent steps to correct the condition.”

- **Safe Harbor:** As part of the RRI, OSHA will ask employers to conduct an internal investigation to discover the reasons for the reportable injury or illness, the hazards involved, and the corrective measures to be taken. OSHA recognizes that a critical part of the RRI procedure is an employer’s willingness to conduct their own internal investigation to determine the reasons for the occurrence of a
work related incident, to identify related hazards, and to implement corrective measures. Therefore, if OSHA conducts a monitoring inspection or an inspection for any other reason of a worksite previously subject to an RRI, OSHA will not use the employer’s internal investigation to cite condition(s) discovered by the employer during its internal investigation as long as employees are not exposed to a serious hazard and the employer is taking diligent steps to correct the condition. OSHA’s move to create a “safe harbor” for employer investigation reports is a step in the right direction.

May 12, 2016  OSHA Issues Electronic Recordkeeping Final Rule

OSHA’s final electronic rule, “Improve Tracking of Workplace Injuries and Illnesses,” was finally released in the Federal Register on May 12, 2016. The new rule adds electronic recordkeeping requirements to the Recordkeeping Standard – §1904 - that would require certain employers to electronically submit to OSHA injury and illness recordkeeping information on an annual basis. Additionally, the rule establishes a public searchable website where OSHA will make employers’ injury and illness records available to the general public. In August 2014, OSHA issued a supplemental notice of proposed rulemaking to include provisions that would prohibit employers from taking adverse [termination, reduction in pay, reassignment to less desirable position] action against employees for reporting injuries and illnesses.

The final rule is similar to the proposed rule and has two main elements, electronic submission and updates to how employers inform employees to report work-related injuries or illnesses.

Electronic Submission

The final rule requires electronic submission of Part 1904 recordkeeping records to employers depending on their size and industry.

- **Requirements For Employers With More Than 250 Employees:** In the final rule at §1904.41(a)(1), establishments with 250 or more employees that are required to keep Part 1904 records must electronically submit some of the information from the three recordkeeping forms that they keep under part 1904 (OSHA Form 300A Summary of Work-Related Injuries and Illnesses, OSHA Form 300 Log of Work-Related Injuries and Illnesses, and OSHA Form 301 Injury and Illness Incident Report) to OSHA or OSHA’s designee once a year. In the proposed rule, these establishments would have been required to electronically submit all of the information from the OSHA Form 300 and OSHA Form 301 quarterly, and electronically submit all of the information from the OSHA Form 300A annually.

- **Requirements For Employers With More Than 20 but less than 249 Employees:** In the final rule at §1904.41(a)(2), establishments with 20-249 employees that are classified in a designated industry listed in appendix A to subpart E of part 1904 must electronically submit the required information from the OSHA Form 300A annually to OSHA or OSHA’s designee. This information must be submitted no later than March 2 of the year after the calendar year covered by the form.

- **Requirements For Employers in Smaller Establishments:** In the final rule at §1904.41(a)(3), establishments must electronically submit the requested information from their part 1904 records to OSHA or OSHA’s designee after notification from OSHA.
Worker Protection
In addition to these submission requirements, the final rule also contains sections intended to protect employees from retaliation when they report and injury or illness. Specifically, the rule:

- Requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation;
- Clarifies the existing implicit requirement that an employer’s procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and,
- Incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.

What's Next? Criminal Prosecution of OSHA Safety Violations: New DOJ Initiative to Increase Criminal Enforcement of OSHA Violations

On December 17, 2015, in an effort to prevent and deter crimes that put the lives and the health of employees at risk, the U.S. Department of Justice (DOJ) announced a major new initiative to increase the number of criminal charges in worker endangerment and worker safety cases and to more effectively prosecute such crimes.

Although the DOJ and the Occupational Safety and Health Administration (OSHA) have had a worker endangerment initiative for a number of years, the new changes are intended to bolster the likelihood and number of criminal prosecutions which historically have languished due to the OSH Act’s misdemeanor criminal provisions. According to a memorandum issued to the 93 U.S. Attorneys’ Offices across the United States, the DOJ is taking a series of actions to increase effective criminal prosecution in employee safety cases.

- First, prosecutors are being urged to charge other Title 18 crimes (those with felony provisions) that frequently occur with OSH Act violations, such as false statements, obstruction of justice, witness tampering, conspiracy, and environmental and endangerment crimes.
- Second, the Environmental Crimes Section of DOJ’s Environment and Natural Resources Division is being authorized to coordinate with the appropriate U.S. Attorney’s Office to handle the investigation and prosecution of cases under the OSH Act, the federal Mine Safety and Health Act (MSHA), and the Migrant Seasonal Agricultural Worker Protection Act. With penalties ranging from 5 to 20 years’ incarceration, plus significant financial fines, these felony provisions provide additional important tools to deter and punish workplace safety crimes.

The December 17 Memorandum of Understanding also says that the Environmental Crimes Section of the Environment and Natural Resources Division has trained “hundreds” of inspectors to recognize and document prosecutable offenses, and that it would be providing a designated Criminal Coordinator from the Department of Labor (DOL) to work with local U.S. district attorneys on prosecuting these crimes.

With the advent of this criminal prosecution initiative, employers must be extremely careful during OSHA inspections, particularly in the aftermath of a fatality or serious injury, not to engage in any conduct that remotely approaches lying during an inspection, obstruction of justice, tampering with witnesses and must engage knowledgeable counsel at the outset to be able to understand and avoid these liabilities.