**COMMITTEE ON EDUCATION AND THE WORKFORCE**
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

# HOW THE ADMINISTRATION'S REGULATORY ONSLAUGHT IS AFFECTING WORKERS AND JOB CREATION

**Testimony of Brad Hammock**

Good morning, I am Brad Hammock and I manage the Workplace Safety and Health Practice Group at the law firm of Jackson Lewis. Founded in 1958, Jackson Lewis is one of the largest law firms dedicated to representing management exclusively in workplace law.

Before joining Jackson Lewis in 2008, I spent 10 years at the Department of Labor in the Office of the Solicitor's Occupational Safety and Health Division, working on various matters on behalf of OSHA. I worked specifically on OSHA's regulatory program, including serving as Counsel for Safety Standards for the last few years of my tenure there.

When I originally joined the Department during the administration of President Clinton, I spent most of my first few years working with OSHA to promulgate its Ergonomics Program Management standard. During my career, I also assisted OSHA in finalizing major regulatory initiatives such as the Employer Payment for Personal Protective Equipment standard, OSHA's update to its electrical utilization standard, and others. Many of my former colleagues at the Department still work there. They are dedicated to worker safety and I hold them in high regard.

Since leaving the Department, I have had the privilege of working with countless employers across the country and safety and health professionals in a variety of industries in a compliance assistance capacity, as well as helping them navigate OSHA enforcement actions. I have been impressed with the dedication of these employers in ensuring the safety and health of their employees. Ensuring a safe worksite takes a collective effort from OSHA, employers, safety professionals, and employees.

I am pleased to offer my perspective on regulatory burdens on employers from my experience working for OSHA, as well as representing employers across the country. Many employers I work with are feeling the full weight of OSHA and fear the onset of new burdens, based upon OSHA's recent announcements in the Regulatory Agenda of its intent to finalize several new rules. I discuss just a few of these regulatory initiatives below.

In addition, now more than ever, employers are facing compliance challenges, resulting from ambiguous OSHA guidance in such areas as ergonomics, workplace violence, and process safety management ("PSM"), causing employers to spend significant resources simply discerning OSHA's expectations in these areas. Unfortunately, despite employers' best efforts at compliance, many employers find themselves on the wrong end of an OSHA citation when they only find out at the time of the inspection the requirements to which they are being held. In these closing months of this administration, OSHA is increasingly looking to expand the use of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("OSH Act"), also known as

the General Duty Clause, to create *de facto* regulations – effectively issuing new regulations through enforcement actions.

The combination of new regulatory requirements and aggressive enforcement places significant pressure on employers. And employers must at the same time deal with the vast array of regulatory burdens from other federal and state agencies. That is why it is critical that agencies be mindful of the cumulative impact of regulations on employers and be judicious with promulgating new regulations and limit issuing civil penalties for alleged violations which are not defined at all in standards or regulations.

## OSHA Regulatory Activity

From a regulatory perspective, OSHA is extremely active and, if the Department of Labor's latest Regulatory Agenda is correct, 2016 will bring significant new and burdensome regulations on employers. OSHA has the statutory authority and obligation to promulgate standards and regulations that are reasonably necessary and appropriate to protect the safety and health of employees. I do not question this and was a part of the regulatory process during my tenure at the Department of Labor. However, we are seeing OSHA now put forth several regulatory initiatives that have questionable benefits for employees or lack statutory authority altogether, and at the same time place significant burdens on businesses, both large and small.

### 1. Improve Tracking of Workplace Injuries and Illnesses

One of the regulatory actions that my clients raise with me – with great concern – is OSHA's Proposed Rule to "Improve Tracking of Workplace Injuries and Illnesses." 78 Fed Reg. 67254 (Nov. 8, 2013). This rule is currently under review at the Office of Management and Budget and is projected to be issued as a final rule in March 2016.

As proposed, this rule would amend the Agency's recordkeeping regulations to add new electronic reporting obligations. OSHA would require employers with over 250 employees (per establishment) to submit their OSHA 300 Logs to the Agency on a quarterly basis and OSHA would, in turn, post those OSHA 300 Logs on its website to make the information publicly available.

There are several problems with this rule. First and foremost, OSHA has inadequate data or evidence to justify any safety and health benefits from the proposal.

OSHA "anticipates that establishments' electronic submission of establishment-specific injury/illness data will improve OSHA's ability to identify, target, and remove safety and health hazards, thereby preventing workplace injuries, illnesses, and deaths." 78 Fed. Reg. at 67276. OSHA believes – based on what appears to be simple speculation – that making a company's recordkeeping logs public will increase worker safety. For example, in the preamble to the proposal, OSHA states:

> Using data collected under the proposed rule, potential employees could examine the injury and illness records of establishments where they are interested in

> working, to help them make a more informed decision about a future place of employment. This would also encourage employers with more hazardous workplaces in a given industry to improve workplace safety and health, since potential employees, especially the ones whose skills are most in demand, might be reluctant to work at more hazardous establishments. 78 Fed Reg. at 67259.

This shows how misguided the proposed rule is and, frankly, offensive to many safety and health professionals that work tirelessly to protect workers. OSHA should know that the occurrence of an injury, in and of itself (and its subsequent recording) is not a complete or fair indication of an employer's safety and health program and its effectiveness. To suggest that individuals (whether it be researchers, workers, unions, or other employers) should make these types of conclusions about a workplace based on just the public report of an OSHA 300 Log is insulting.

In fact, in many instances an effective safety and health management system will initially result in an increase in injury reporting, which can be reflected in an OSHA 300 Log. Having more injuries and illnesses reported for a certain amount of time is not an indication – necessarily – that a worksite is unsafe. It may mean the exact opposite.

And yet, OSHA would have the public draw negative inferences on an employer's safety and health program based on this one lagging indicator that it has decided to make publicly available. This is particularly wrongheaded, given OSHA's rhetorical emphasis on employers stressing leading indicators to promote safety in the workplace. OSHA wants employers to implement and track leading indicators, but then asks the public to draw conclusions about worksite safety based on one lagging indicator.

Take the following hypothetical employer. This employer has fully implemented a robust safety and health management system in its worksite, based upon OSHA's guidelines regarding effective safety and health programs. The employer incentivizes leading indicators of safety. Employees are financially rewarded for identifying hazards in the worksite and suggesting controls to address those hazards. Employees are financially incentivized to report near misses. Employees are rewarded for participating in monthly safety committee meetings. The employer has embraced the concept of continuous improvement in safety, performing regular evaluations of its safety and health management system with full employee participation. Yet, this employer does not go injury free for a calendar year and the injuries that do occur are published on OSHA's website so that OSHA, potential and current employees, researchers, unions, and the surrounding community (as well as people around the globe) can determine that, in fact, despite all of the efforts of this employer to proactively approach safety and health, this employer is a "bad" employer that potential employees should avoid. This, of course, is wrong.

Aside from the policy perspective, OSHA lacks the statutory authority to publish the injury and illness information as it intends to do. While the OSH Act gives OSHA authority to collect and compile data regarding workplace safety and health, the statute says nothing about making that information open to the public across the globe. Had Congress empowered OSHA to take such action, it would have explicitly provided the Agency the authority to do so. It did not.

As you can imagine, employers are very concerned with this proposal. It will force them away from leading indicators. It may unfairly tarnish a worksite as unsafe, having a negative impact on the employer of the site, regardless of the true effectiveness of the employer's safety and health program. And, above all, OSHA cannot credibly claim that this will produce any improvement in workplace health and safety. Yet, if this rule goes forward, potentially starting in 2016, employers will be faced with this prospect.

These and other concerns were raised with OSHA during the comment period for this rulemaking. Despite the intense opposition to the proposal, OSHA seems intent on proceeding with this rulemaking. In fact, as a follow-on to the initial proposal, OSHA issued a supplemental notice of proposed rulemaking (79 Fed. Reg. 47605 (August 14, 2014)) seeking comment on whether the electronic reporting rule would encourage employers to under-record their injuries and illnesses and suggesting that it would prohibit in a final rule employer practices that it determines discourage injury and illness reporting.

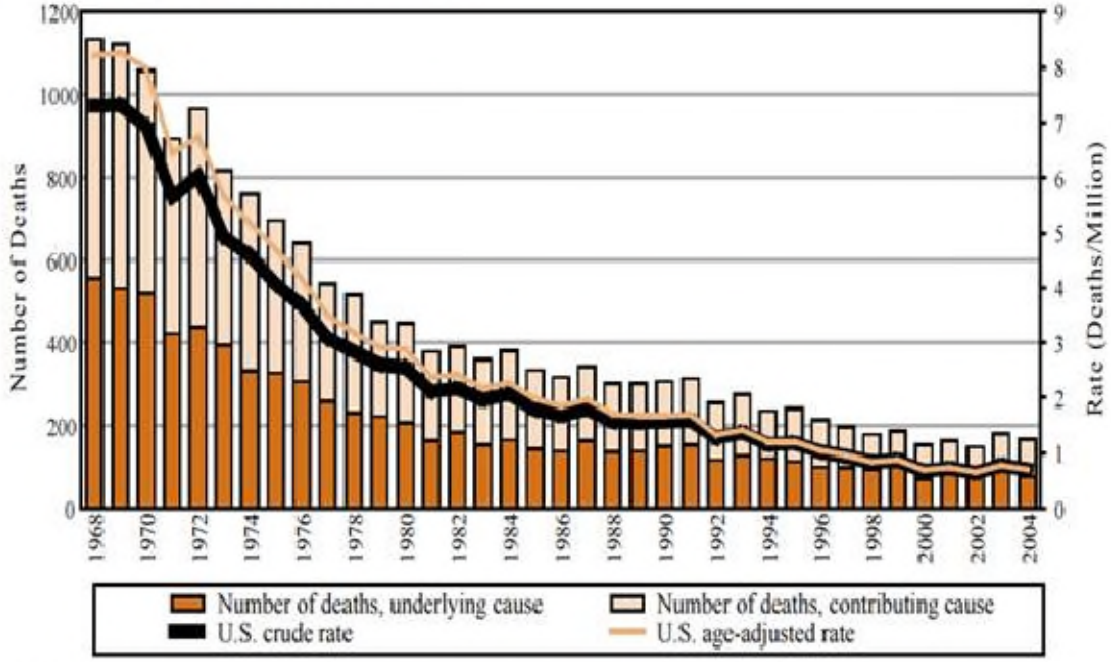
The supplemental proposal suffers from the same problem as the initial proposal: it provides no data or evidence to support the information presented. In addition, it provides no real notice of what OSHA intends to prohibit in a final rule. There is no actual regulatory text proposed. Instead, the supplemental is just a series of questions dealing generally with disincentives to reporting. It would not further workplace safety and health for OSHA to prohibit certain workplace policies and programs without really doing its homework on the effect of those policies and programs in various worksites across the country. It appears, though, that OSHA intends to do precisely that.

## 2. Occupational Exposure to Crystalline Silica

Another significant regulatory initiative that will have major impacts on many employers is OSHA's proposed rule regulating crystalline silica. OSHA is proposing to reduce the permissible exposure limit ("PEL") for respirable crystalline silica down from its current levels to 50 $\mu g/m^3$. The Agency has also proposed an action level ("AL") of 25 $\mu g/m^3$, which triggers certain aspects of the proposed rule. The impact of this rule cannot be overstated.

OSHA has been working on a respirable crystalline silica rule for decades. To be clear, crystalline silica at certain exposure levels has been shown to cause silicosis, a potentially fatal lung disease. Over the course of the last several decades, however, the incidences of silicosis have been steadily and rapidly declining, according to the Centers for Disease Control.

**Figure 3-1. Silicosis: Number of deaths, crude and age-adjusted death rates, U.S. residents age 15 and over, 1968–2004**




NOTE: See selected limitations for general cautions regarding inferences based on small numbers of deaths, and see appendices for source description, methods, and ICD codes.
SOURCE: National Center for Health Statistics multiple cause-of-death data. Population estimates from U.S. Census Bureau.

It is with this backdrop that OSHA's proposal was issued. For many employers, particularly small employers, the rule will be highly burdensome. Take the construction industry for example. OSHA is proposing to reduce the PEL for respirable crystalline silica from its current level of 250 $\mu g/m^3$ to the 50 $\mu g/m^3$ level, discussed above. It is proposing other extensive requirements, including requirements for regulated areas or written access control plans; prohibitions on work practices on construction sites such as compressed air, dry sweeping, and dry brushing; medical surveillance; respiratory protection; training and hazard communication; and recordkeeping.

Even OSHA's attempt to make compliance easier for construction employers under the proposed rule was a failure. OSHA proposed as an alternative to the rule's exposure monitoring provisions compliance with a "Table 1." Table 1 set forth specific job activities, engineering and work practice controls, and respiratory protection that if followed, would exempt employers from compliance with the standard's exposure monitoring requirements. OSHA's intent with Table 1 was to devise a simple compliance option for construction employers with respect to implementation of engineering controls and respiratory protection. Unfortunately, OSHA failed to do so. Table 1 required practices so burdensome – such as performing a task using wet

methods without producing any visible dust – that no construction employer would ever be able to comply.

The burdens of this rule are reflected in OSHA's own estimate of the costs of compliance. Using the construction industry as an example again, OSHA has estimated that the cost of compliance with the rule will be approximately $511 million annually. This is significant in its own right. However, other stakeholders have done separate analyses of the costs for construction and estimate that it will be approximately $4.9 billion a year, an amount nearly ten times larger than OSHA's estimate.

I raise the crystalline silica rule not to suggest that silica is not hazardous or that it should not be regulated, which it already is. But, OSHA's approach to the standard, given the ongoing decline in silicosis cases, is not justified and will be highly burdensome to many employers, both large and small.

### 3. *Volks* Rule

Finally, employers expect to be facing yet another new rule related to recordkeeping in 2016. The proposal, "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," 80 Fed. Reg. 45116 (July 29, 2015), is an attempt by OSHA to overturn a decision by the U.S. Court of Appeals for the D.C. Circuit, *AKM LLC d/b/a Volks Constructors v. Sec'y of Labor* ("Volks"), 675 F.3d 752 (D.C. Cir. 2012). In *Volks*, the D.C. Circuit held that the six-month statute of limitations for issuing citations and penalties set forth in the OSH Act is applicable to recordkeeping violations and OSHA cannot cite employers for alleged violations for recordkeeping beyond the six-month time period.

Employers are highly concerned with this proposal and see it as an attempt to circumvent the D.C. Circuit's decision – and the statute – through rulemaking. The proposal is about OSHA's enforcement authority and capabilities, something that Congress established in the OSH Act. While employers agree with OSHA that it is important to maintain accurate records, many fundamentally disagree that the Agency should be able – through rulemaking – to overturn a Court of Appeals decision that held OSHA does not have the authority to issue recordkeeping citations beyond the OSH Act's statute of limitations, because *Congress* did not allow for it in the OSH Act. Unfortunately, that is precisely what OSHA is attempting to do here.

The regulatory actions I have highlighted above are just a few of the potential rules facing employers from OSHA in the coming months. There are others. For example, OSHA issued a Request for Information ("RFI") regarding how to more quickly update regulations for chemical health hazards in the worksite. As a possible follow-on to that RFI, OSHA just announced a new regulatory initiative to delete from its standards outdated PELs for certain chemicals. By doing so, OSHA would be able to enforce lower PELs through the General Duty Clause – regulation through enforcement, rather than rulemaking. In the most recent Regulatory Agenda, over 30 regulatory initiatives are proposed by OSHA. This comprises almost 45% of the regulatory burden of the Department of Labor. The next closest DOL agencies from a regulatory perspective are the Employee Benefits Security Administration and the Mine Safety and Health Administration, each with eight (8) regulatory initiatives a piece.

## OSHA Enforcement

Aside from the new regulatory requirements discussed above, for the last several years many employers have been challenged by OSHA enforcement initiatives in areas where the Agency has provided little to no guidance. This puts employers in a difficult position of having to try to discern OSHA's positions on how to address certain hazards, often in the context of an ongoing OSHA inspection. Three examples of this are in ergonomics, workplace violence, and process safety management.

Over the last few years, OSHA has been active in attempting to utilize the General Duty Clause to cite employers for failing to take certain actions to protect employees from musculoskeletal disorders ("MSDs"). We have seen this most recently in OSHA's National Emphasis Program for the nursing home industry.

The problem with this for many employers, and particularly small employers, is that OSHA has provided little guidance on what its expectations are for compliance with respect to ergonomics. OSHA has issued some guidance documents related to ergonomics, but in my experience, often it views its own guidance as outdated. Thus, employers that are following OSHA's own ergonomics guidelines for a particular industry, may be cited because OSHA believes that they need to be doing something "more" in the worksite, even though there is no clear guidance as to what that "more" should be. Unfortunately, employers are frequently told of that expectation in the midst of an inspection or even after an ergonomics citation is issued.

Having worked with OSHA on its Ergonomics Program Management standard and on several ergonomics guidance documents while with the Agency, I can tell you that effective ergonomics is anything but simple. Employers need access to compliance assistance material and they cannot be expected to just "guess" about OSHA's compliance expectations.

The same is true in the area of workplace violence, where OSHA also does not have a standard setting forth employer obligations to address this hazard. Workplace violence can surface in many ways in a worksite, but there is often not one approach for managing the hazard, and indeed, too often the causes of workplace violence are outside of the workplace and beyond the reach of the employer. OSHA, however, seems to be vigorously pursuing General Duty Clause enforcement against employers for workplace violence trying to create a *de facto* standard where none exists.

Finally, process safety management is another area where employers are often forced to guess as to their compliance obligations. OSHA's PSM standard is a performance-oriented rule, designed to allow employers to analyze risks from processes involving highly hazardous chemicals. The nature of the rule itself does not allow for a one-size-fits-all approach to assessing and mitigating risk.

The difficulty for employers, however, is that the rule forces covered worksites to engage in a seemingly endless pursuit of industry and national consensus standards that might be relevant to a covered process and potentially change their process and equipment in accord with

these non-OSHA standards. OSHA recently published a memorandum to Regional Administrators and State Plan Designees detailing how they should interpret and enforce the PSM standard. It discusses these industry and national consensus standards as representing recognized and generally accepted good engineering practices ("RAGAGEP"), which employers must follow under the rule, thereby endorsing and effectively adopting them. The memorandum was not put out for notice and comment, but will be a key part of future OSHA PSM enforcement.

The memorandum highlights the difficulties for OSHA and employers in characterizing and complying with RAGAGEP. The memorandum describes the vast array of "consensus" and "non-consensus" documents employers may need to consult to meet the requirements that their covered processes conform to RAGAGEP, an alphabet soup of non-OSHA produced material from organizations such as the NFPA, ANSI, ASME, IIAR, and CCPS. Generally, these standards are not free and are updated frequently. Employers covered by OSHA's process safety management standard must continually monitor these outside standards' organizations and ensure that their processes and equipment either comply with the standards or are otherwise documented as safe, considering updates to the published standards. This is incredibly resource-intensive and places significant burdens – financially and technically – on covered employers.

* * * * *

I want to leave one final thought with the Committee. All of these burdens placed on employers may actually take resources away from workplace safety and health. Certainly in the case of the proposed "electronic recordkeeping" rule, employers will be forced to divert resources and time to lagging indicators, rather than leading indicators. While OSHA compliance is important to employers, so is the day-to-day job of working to prevent injuries. When OSHA proposes a rule or embarks on an enforcement initiative, it must truly analyze how necessary the rule is, the benefits of the rule, and the adverse consequences of it.

Employers are faced with mounting challenges economically and from a regulatory perspective. It is incumbent upon all agencies to only issue regulations necessary to fulfill their agency obligations, to only do so when there is adequate data and science to support these actions, and to not use the enforcement process as a substitute for rulemaking.

I appreciate the opportunity to share my thoughts with the Committee.