

The Known Unknowns of Workplace Safety Under a New Administration

By Joshua M. Henderson & Sierra Vierra

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Transcript

INTRO

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Joshua M. Henderson

Principal, San Francisco

Hi everyone. My name is Josh Henderson. I am a partner of Jackson Lewis in the San Francisco office, and I am the National Practice Group Leader for the Jackson Lewis Workplace Safety and Health Group.

I'm very pleased to be here today to talk about 2025 and what to expect from OSHA and workplace safety and health in general. I am joined today by my very talented partner, Sierra Vierra. Sierra, good to have you on board.

Vierra

Principal, Salt Lake City

It is a pleasure to be with you today, Josh.

Henderson

Always good to talk to you about these developments. If we look back at 2024, just briefly, you and I would both say there was never a dull moment for us OSHA lawyers and for our clients who are having to navigate workplace safety and health requirements, new rules, and new decisions. 2025, to my mind, looks different in a number of ways.

Maybe we can kick it off with that in mind about what we can expect.

Vierra

We thought that COVID years were wild, but in 2024, we had a lot of rulemaking going into effect. I am curious to get your thoughts, Josh. What do you expect, given that we have a new administration taking over in 2025?

Henderson

The watchword is uncertainty. I mean that in a few different respects. Let me unpack that. I don't think there's any question that the Trump administration is going to usher in a more pro-business, anti-regulatory administration and emphasis. We see that already with the influence that Elon Musk and his D.O.G.E., Department of Government Efficiency Group, anti-regulatory emphasis. There's a lot that remains to be seen about how that will actually go into effect. A couple of things come to mind.

Last summer, the Supreme Court issued a series of decisions that really changed the administrative law landscape. The key decision was *Loper Bright*, which held basically that courts will no longer defer to agency interpretations of ambiguous statutes. Rather, the courts will have to interpret and reach the "best reading" of a statute. Now, the uncertainty there is we don't exactly know how courts will interpret a number of statutes. That's true in the OSHA context as well.

Now, I am of the mind that *Loper Bright* may not change very much ultimately. So, whereas before we had Chevron deference, now we might very well have *Loper Bright* deference, just a different sort of deference by courts. Maybe they don't call it deference, but it will be deference all the same. Still, what we'll have is agencies and courts taking a lot longer to, with respect to agencies, promulgate the regulations. I expect it would take a lot longer for agencies to push regulations through knowing that they're going to be scrutinized very carefully by courts. *Loper Bright* will have that effect on agency interpretations and on agency rulemaking.

What do you think about that, Sierra?

Vierra

I'm really curious to hear if you think *Loper Bright* is going to have an impact on the national heat standards from being released. We've had a heat illness prevention standard in California forever. We had indoor standards going into effect this year. Other states around the country have been enacting heat illness prevention standards. We have Maryland, we have Oregon, we have Washington. But now the feds have been thinking about releasing a standard. In light of *Loper Bright*, you're right. Are they going to be going back to the drawing board to

make sure whatever regs they put forward are really solid and not subject to challenge, like they may have been protected under the prior Chevron deference?

Henderson

A couple of things might be at work there with the proposed heat safety rule for OSHA. One is, like you say, they're going to be concerned that will the rule survive judicial scrutiny. But number two, and maybe more important, with this new administration, the public comment period on the new heat illness safety standard is set to expire at the end of this month. I highly doubt they'll be able to consider the public feedback and promulgate the rule in the three weeks that the Biden administration will have. So, will the new administration walk back the rule? Will they cancel it altogether? It remains to be seen. It's most likely going to be scaled back and possibly eliminated.

Vierra

Along those lines, we have a new labor secretary nominee. The labor secretary, pardon the pun, but they set the temperature for the whole administration. This new nominee, Lori Chavez-DeRemer, how do we expect her to impact OSHA's regulatory agenda nationwide?

Henderson

This was a very interesting pick by Donald Trump. Lori Chavez-DeRemer, for those who don't know, is a former Congresswoman from Oregon. Chavez-DeRemer is a Republican, but she has also voted in ways that labor unions have favored. In fact, the president of the Teamsters Union has come out in favor of this pick. He's praised Donald Trump's selection of Ms. Chavez-DeRemer for labor secretary. That's certainly an unusual development.

I don't think we know enough about her background and the way that she's voted in Congress to be able to say with any certainty that she'll either push forward a labor-friendly agenda or not. On the margins, things like the 'Walkaround Rule' that touch upon labor issues, workplace safety, and health issues. She could really be a factor there.

What do you think about that, Sierra?

Vierra

I am very curious to see what happens with the new challenge to the 'Walkaround Rule.' As many folks know, there are some motions pending in that case. OSHA has filed a Motion to Dismiss the case or, in the alternative, for Summary Judgment. The Motion was recently fully briefed. We're waiting to hear more from the court.

If that Motion to Dismiss is successful, that will solidify the agency's power in this regard. However, if the Motion gets denied, we're going to proceed to see whether or not we can curtail OSHA being allowed to invite third parties with them to site inspections. So, employers all across the country are going to be impacted by the outcome of this rule.

Does the new labor secretary take a different stance with regard to the rule, withdraw it altogether or maybe go in a very different direction to derail the pending litigation? That remains to be seen.

Henderson

It really does. Other areas that we might see some changes in the new administration from OSHA, the emphasis on whistleblower and anti-retaliation protection will diminish. I don't think there's any question about that, Court decision notwithstanding. Just enforcement we're going to see diminish. Even with a pro-labor secretary nominee, that's going to happen.

But what about other proposed regulations that we've heard a lot about? For example, workplace violence in the healthcare industry. Any thoughts about where that's headed?

Vierra

What a timely topic, Josh. It's like we planted that topic ourselves. So, nationwide, we haven't had any actual regulations for workplace violence prevention in the healthcare industry. But that is one of the industries where workplace violence incidents happen frequently. There have been guidelines. OSHA has had an emphasis on reducing workplace violence in healthcare, and they are supposed to be dropping some draft regulations for us in December 2024. We have not seen them yet. We are eagerly awaiting them if they do actually release those regulations.

As many of our listeners probably know, other states this year have been very aggressive on the workplace violence prevention front. California enacted regulations that impact pretty much every employer, requiring them to have a workplace violence prevention plan and training.

Then to segue to another state, New York, New York. Retail employers in New York, starting in March of 2025, will also have a workplace violence prevention plan and training requirement. Josh, tell me, what's the status? Do we have that template program and template training from the grand state of New York yet?

Henderson

I was going to ask you that. That's the interesting thing. There was a promise of a model program and model training. I don't believe we've seen that as of yet.

Vierra

We have not.

Henderson

What's curious about that is, like the California law that took effect in July of 2024, the New York law applies to retail employers. It also would seem to require a site-specific plan. Yet, New York has promised a model program for employers to use and to adopt. Somewhat like Cal OSHA did, which proved to be very useful, but it still needs to be modified. There's an implementation deadline of

March 3rd, 2025, for New York. So, I do imagine there's going to be a lot that will need to be accomplished in the first two months of the new year.

Vierra

One of the more time-consuming aspects that we saw on the California side was each site needed to have its own inspection to identify workplace violence, risk factors, corrective actions we can take and any open hazards. Employers in New York who are subject to this new law may want to get started on that component early. So, by the time the model template gets released, you're not behind the ball.

Henderson

One last thing I would like to discuss with you, Sierra, since we've been talking about OSHA and agency interpretations and the like, where do things stand on having a quorum for OSHRC, for the Review Commission, to actually decide cases?

Vierra

I have no idea.

Henderson

Well, neither do I. But in all seriousness, OSHRC has not had a quorum, namely two or more members, to decide cases since April 2023. Here we are going into 2025. Chairman Atwood is still the only member of the OSHA Review Commission, so they can't decide cases. ALJ decisions remain out there. If you're an employer that has an adverse ALJ decision, you can't get a review commission to take up your case. If you're an employer that got a favorable ALJ decision, maybe you're okay with it, but for the sake of having a judicial body, a review commission that can actually decide cases brought under the OSH Act. I do hope that Congress will turn its attention to confirming nominees to the Review Commission in 2025.

Vierra

It's a due process issue for employers. There needs to be a meaningful appellate review process.

Henderson

For sure. It's a core health and safety issue too. Ultimately, if there are issues that need to be addressed through the citation process and the review process, then we do need an appellate body to be able to ultimately decide those issues.

So, that's my wish for the new year, Sierra.

Vierra

You have interesting wishes, Josh.

Henderson

I don't ask for much. Well, everyone, thank you for your time today. It's always a

pleasure to talk to you and talk with you about these issues. Stay tuned for more. We'll have developments throughout 2025 and look forward to discussing them further with you.

OUTRO

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