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39 OSHR 678

OSHA

Analysts Say Agency Nominee Michaels Has Potential to Generate Reform, Activism

David Michaels, President Obama's nominee to lead the Occupational Safety and Health Administration, could ultimately move the agency toward an approach that vests with employers more responsibility for identifying and assessing risks, Frank White, former deputy head of OSHA, told BNA Aug. 3.

"I think he has that potential," said White, vice president of the ORC Worldwide consulting firm's occupational safety and health practice. "He's certainly thought about this stuff. I think he could generate a lot of support on all ends of the spectrum."

Michaels has made no public remarks about his intentions for the agency since the president announced his intention to nominate him July 28. Michaels' nomination was sent to the Senate Aug. 6 (39 OSHR 631, 7/30/09).

In a January 2007 post on the Pump Handle blog, however, Michaels, a researcher at George Washington University, wrote, "I think having employers take active responsibility for surveying the hazards at their facilities and coming up with ways to control the hazards is an excellent first step. It is badly needed because, even if OSHA were functioning well (and it certainly isn't), the current system that requires standard-setting hazard by hazard, chemical by chemical, just does not, and cannot, work."

White said some stakeholders see that approach as an improvement in part because OSHA has not kept up to date in regulating new hazards.

A risk-based approach could also give employers the flexibility to prioritize risks at their own workplaces, White said. Under the current model, "all standards are created equal, no matter what a worker may be exposed to in a particular workplace," White said.

"If [Michaels] immediately starts talking about the general duty clause and issuing a [safety and health management program] standard, he's going to get some pushback from certain corners," White said. "But if he starts talking about the concept of a variety of ways we can advance this new approach, I think he could generate some support."

Broader General Duty Clause

Michaels, in his writings, has also advocated for a broader use of the general duty clause.

"I believe that OSHA doesn't need new standards if a hazard is serious and there are recognized measure[s] to mitigate the hazard," Michaels wrote in his January 2007 blog post. "It can invoke the general duty clause, but the agency has refused to do so. As things stand now: No standard, no responsibility. This works out nicely for the employers."

Michaels continued, "Require employers to come up with a plan. Write the regulations so that workers and their unions can have input. And make it so an employer can be cited for not having a plan and, if they don't follow it, for that too."

Sidney Shapiro, associate dean for research and development and university distinguished chair in law at Wake Forest University, applauded the possibility of a more activist administration under Michaels.

"We should welcome new approaches to health protection at OSHA, because I think everybody would have to agree that that aspect of OSHA is just entirely broken," Shapiro told BNA July 30. "David's coming in with some new ideas about at least working with the status quo and seeing how we might do things [differently], and I think that's really refreshing."

Shapiro was a trial attorney with the Federal Trade Commission and deputy legal counsel of the secretary's review panel at the U.S. Department of Health, Education, and Welfare

"OSHA's at such a nadir now that [Michaels] is starting from a really low baseline," Shapiro continued. "So even if he can't reinvent the agency or get Congress to give it new statutory authority, I think workers are going to benefit, if even there are marginal improvements in what [OSHA] is doing."

Hank Cox, vice president of media relations at the National Association of Manufacturers, told BNA Aug. 10 that employers would welcome a more cooperative relationship with OSHA.

"The concept of dynamic safety and health programs based upon performance is widely regarded as preferable to enforcement of static rules because it is more flexible and results-oriented," Cox said. "But it can present challenges to OSHA inspectors who

find it simpler to enforce static rules.”

Cox agreed with Michaels that the most effective approach to workplace safety is for industry, labor, and government representatives to collaborate on identifying and eliminating potential hazards.

“Cooperation is key,” Cox said. “No responsible employer wants employees to be injured or suffer work-related illnesses. Enforcement should be employed only where safety and health do not receive appropriate priority.”

Employers, Health Advocates Split

Marc Freedman, director of labor law policy at the U.S. Chamber of Commerce, said some employers would prefer to stay with OSHA's current approach.

“The current system may not be the best, but employers have learned how to work with it,” Freedman told BNA Aug. 11. “It provides clearer indications of what is required—although certainly there is confusion and a need for guidance and clarity—and workplace injury and fatality rates have been improving steadily since the creation, which suggests that this system has had a positive impact.”

Similarly, Adam Finkel, former head of OSHA's health standards division, warned that moving too far toward an employer-directed safety and health management system could erode worker protections.

“To the extent that it jump-starts companies that are not going to be visited by OSHA to do a better job, that's great,” said Finkel, now executive director at the University of Pennsylvania Law School program on regulation. “But you don't want it to turn into a situation where companies say, ‘Yes, we had a terrible problem, but it's not a violation, because we had a plan and we simply missed it.’ A safety and health management system is a good backstop, but it doesn't substitute for a lot of specific standards that need to be retained and improved, and standards that need to be written.”

Michaels' nomination must be confirmed by the Senate after approval by the Labor Committee. The Senate will not reconvene until Sept. 8.

By Stephen Lee

The Pump Handle blog is available at <http://thepumphandle.wordpress.com/>.

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