



OSHA Regulatory and Legislative Updates

Food Marketing Institute

March 16, 2010

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Topics for Discussion:



- OSHA Leadership in the new Administration
- OSHA's Regulatory Agenda
- OSHA Rulemaking
- Enforcement
- Backdoor Ergonomics Rules
- On the Hill – Protecting America's Workers Act

OSHA Leadership in the New Administration



▪ **Hilda Solis: Secretary of Labor**

- Graduate from CA State Polytechnic University, Pomona
- Earned MPA from the University of Southern CA
- Former Congresswoman from California
- Authored the Green Jobs Act which provided funding and training for veterans, at risk youth, displaced workers, and families under the federal poverty line
- **Vocally Pro-Union**
 - Former Volunteer Board Member, treasurer of American Rights at Work – a pro-labor advocacy group
 - Father was a Teamsters shop steward, worked in a battery recycling plant for more than 20 years
 - Mother worked at a toy factory and was a member of the United Steel Workers Unions
- **“There is a new Sheriff in Town...Make no mistake about it, the Department of Labor is back in the enforcement business. We are serious, very serious.” -Solis**

OSHA Leadership in the New Administration

- **Jordan Barab: Deputy Assistant Secretary and Acting Assistant Secretary for Occupational Safety and Health**
 - Special Assistant to the Assistant to the Secretary of Labor for OSHA from 1998 to 2001
 - U.S. Chemical Safety and Hazard Investigation Board from 2002 to 2007
 - Confined Spaces Blog <http://spewingforth.blogspot.com/>
- **Deborah Berkowitz: Chief of Staff**
 - Former health and safety director at the United Food and Commercial Workers' Union
 - Active for the union during OSHA's first round of ergonomics cases in the meatpacking industry in the 1980s and during the Clinton Administration's Ergonomic Rulemaking

OSHA Leadership in the New Administration

▪ David Michaels

- Assistant Secretary of Labor for OSHA
- Senate confirmation on 12/4/09
- Professor at GWU
- Conducted numerous studies of the health effects of occupational exposure to toxic chemicals, including asbestos, metals and solvents
- From 1998 to 2001, served as assistant secretary of energy for Environment, Safety and Health
- Author of *Doubt is Their Product: How Industry's Assault on Science Threatens Your Health* (Oxford University Press, 2008)
- Contributor to *The Pump Handle*, a public health and occupational safety blog



OSHA Regulatory Agenda



- Published every 6 months
- Agenda can be found at www.osha.gov
 - search for Regulatory Agenda
 - select Federal Register Notices

OSHA's 2009 Regulatory Agenda

- **Pre-Rule Stage**

- Total of (9)
- **Of Importance to FMI members:**
 - Crystalline Silica
 - Diacetyl and Food Flavorings Containing Diacetyl
 - Combustible Dust
 - Airborne Infectious Diseases
 - Bloodborne Pathogens (610 Review)
 - Emergency Response and Preparedness

OSHA's 2009 Regulatory Agenda Cont.

- **Proposed Rule Stage**

- Total of (8)
- **Of Importance to FMI members:**
 - Confined Spaces in Construction
 - Walking Working Surfaces and Personal Fall Protection
 - Standards Improvement
 - Hazard Communication GHS Update
 - Occupational Injury and Illness Recording and Reporting Requirements

OSHA's 2009 Regulatory Agenda Cont.

- **Final Rule Stage**

- Total of (8)
- **Of Importance to FMI Members:**
 - Electric Power Transmission and Distribution; Electrical Protective Equipment
 - Procedures for Handling Discrimination Complaints (3) Under Federal Employee Protection Statutes, Employee Retaliation Complaints Under the National Transit Systems Security Act of 2007; Surface Transportation Assistance Act of 1982, as Amended, Federal Rail Safety Act, and Consumer Product Safety Improvement Act (CPSIA) of 2008

Regulatory Agenda: Crystalline Silica

- **Occupational Exposure to Crystalline Silica**

- **Draft Proposed Standard**

- See OSHA asbestos and lead standards

- **SBREFA Review and Report**

- Critical of standard and need for standard
- PEL too low and compliance infeasible
- Scope and application too broad
- Underestimated costs
- Difficult to monitor exposure

- **Status**

- Peer Review initiated in June 2009 and to be completed by Jan. 2010
- NPRM scheduled for 7/2010
- No transparency



Regulatory Agenda: Diacetyl



- **Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl**
 - Currently no specific standard
 - Solis sponsored bill in 2008
 - Petition to DOL for an emergency Temporary Standard (ETS) denied in September 2007
 - Withdrew ANPRM
 - Final report released July 6, 2009
 - Covers employers using small amounts
 - Exempts naturally occurring diacetyl (wine, beer)
 - OSHA has suggested (4) different PELS (0.05, 0.1, 0.5, or 1 ppm)
 - Peer review assessment in 10/2010
 - NIOSH research on other flavorings available online at <http://www.cdc.gov/niosh/topics/flavorings/current-niosh.html>

Regulatory Agenda: Combustible Dust

- **CSB study**
- **281 incidents 1980 - 2005**
- **Killed 119 workers**
- **Injured 718**
- **ANPRM 10/21/2009**
 - See 74 *Federal Register* 54334
 - Industries with at least one recorded combustible dust incident since 1980
 - Retrofitting engineering controls major issue
 - Incorporation by reference of National Fire Protection Association Code 654, *Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids*
 - Deadline for submissions is **January 19, 2010**
- **Stakeholder's meetings were held 12/14/2009**
- **No other meetings scheduled at this time**



Regulatory Agenda: Combustible Dust

- **OSHA Initiatives**

- Reissues Combustible Dust National Emphasis Program
- Information Bulletin
<http://www.osha.gov/dts/shib/shib073105.html>
- Safety and Health Topics Page for Combustible Dust
<http://www.osha.gov/dsg/combustibledust/index.html>

- **HR 5522: Combustible Dust Explosion and Fire Prevention Act of 2008**

- Would require adoption of interim final standard in 90 days and a final standard in another 18 months
- Never made it out of the Senate Committee on Health, Education, Labor, and Pensions
- **Reintroduced earlier this year as H.R. 849 the *Worker Protection Against Combustible Dust Explosion Act***

OSHA Rulemaking: Confined Spaces



■ Construction Industry

- Increases number of space categories
- Would require controlling contractors to coordinate confined space operations among a site's multiple employers
- Proposed rule published 11/28/2007
- Comment period closed 10/2008 (extended)
- Record analyzed 3/2010
- Applies to (1) employers whose employees actually are performing work in confined spaces; (2) host employers and; (3) controlling contractors
- Overview
 - Provides a detailed hazard assessment guide
 - Eliminates requirements for hazardous enclosed spaces
 - Clarifies controlling employer requirements

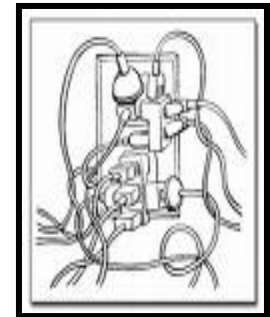
OSHA Rulemaking: Electrical Power & Protective Equipment

- **Revisions of 1910.261**
- **Maintenance of electric power transmission and distribution installations**
- **Identical to construction requirements**
- **Fall protection in aerial lifts for power generation, transmission, and distribution work**
- **Agency Action**
 - Public hearing was held October 28, 2009
 - Comment period closed October 15, 2009
 - Post-Hearing comment period to end 2/2010
 - Final action to be taken 9/2010
- **Implementation of NFPA 70E and Arc Flash**



OSHA Rulemaking: Electrical Power & Protective Equipment

- Stealth Rulemaking: Regulation by Enforcement
- NFPA 70E
 - Rising Number of Electrical Safety Violations
 - OSHA incorporation by reference
 - What to look for....
 - Description of the circuit or equipment at the job location?
 - Description of planned work?
 - Justification for not de-energizing?
 - Workers qualified to perform work?
 - Review OSHA electrical standard at 1910.300



OSHA Rulemaking: Cranes and Derricks

- **Proposed rule published in August 2008**
 - *See 73 Federal Register 59,713*
- **Final rule projected for 7/2010**
- **Content**
 - Training
 - Third party certification



OSHA Rulemaking: GHS Initiative

- **Hazard Communication Standard (HCS) to integrate the U.N. Globally Harmonized Classification and Labeling System (GHS)**
- **GHS adopted in 2003 by United Nations**
- **Revisions affect ALL establishments:**
 - Producing hazardous chemicals
 - Where there is employee exposure to hazardous chemical
- **Compliance will be costly**
- **Proposed rule published in 9/30/2009 Federal Register**
- **Deadline for comments is 12/29/2009**
- **Possibility for extension?**
- **Hearing was held 3/3/2010**
 - **Evaluation of evidence on weight of the risk**
 - **Labor seeking to have “one study trigger”**

Enforcement in the Current Administration

- **Increased Funding for Enforcement and Rulemaking**
 - 130 more inspectors
 - 25 more discrimination investigators to pursue whistleblower complaints
 - 20 more staff members who will help develop workplace standards for safety and health
- **Is there chronic underreporting of workplace injuries and illnesses**
- **Significant increase in \$100,000+ proposed penalty citations since Jan. 2009**

Enforcement

OSHA's top 10 most cited violations for 2009:

1. Scaffolding, General (29 CFR 1926.451) - 9,093 violations
2. Fall Protection (29 CFR 1926.501) - 6,771 violations
3. Hazard Communication (29 CFR 1910.1200) - 6,378 violations
4. Respiratory Protection (29CFR 1910.134) - 3,803 violations
5. Lockout/Tagout (29 CFR 1910.147) - 3,321violations
6. Electrical Wiring (29 CFR 1910.305) - 3,079 violations
7. Ladders (29 CFR 1926.1053) - 3,072 violations
8. Powered Industrial Trucks (29 CFR 1910.178) - 2,993 violations
9. Electrical, General (29 CFR 1910.303) - 2,556 violations
10. Machine Guarding (29 CFR 1910.212) - 2,364 violations

Enforcement

- **BP \$87,430,000 in Proposed Penalties**
 - Largest in OSHA's history
 - Prior largest total penalty, \$21 million, was in 2005, also against BP
 - 270 violations totaling \$56.7 million in penalties for failure to comply with 2005 settlement agreement with OSHA.
 - 439 new willful violations totaling \$30.7 million in penalties for failure to repair pressure release safety devices

Enforcement

Top OSHA Enforcement Citations

1.	BP Products North America*	(Proposed)	\$87,430,000
2.	BP Products North America	09/21/05	\$21,361,500
3.	IMC Fertilizer /Angus Chemical	10/31/91	\$11,550,000
4.	Imperial Sugar	07/25/08	\$8,777,500
5.	Samsung Guam Inc.	09/21/95	\$8,260,000
6.	Citgo Petroleum	08/29/91	\$8,155,000
7.	Dayton Tire	04/18/94	\$7,490,000
8.	USX (aka U.S. Steel Corporation)	11/01/89	\$7,161,100
9.	Phillips 66/Fish Engineering	04/19/90	\$6,395,200
10.	Hercules, Inc.	09/08/93	\$6,328,000
11.	TPM Macomber et. al	10/22/87	\$5,114,000

Enforcement

- Severe Violators Enforcement Policy
 - Higher basic penalties
 - Per employee, per instance citations and penalties
- Administrative revisions of penalty policy
 - Start at a higher number
 - Increased minimum penalties
- NEPs increasing
 - Increasingly detailed
 - Coordinated multiple site inspections

Enforcement

- Enforcement a **top priority**
- To Prepare....
 1. Carefully Review and Update Written Programs after Re-assessing Risks in your Workplace
 2. Leaders should Communicate a Compelling Vision for Safety
 3. Keep Records Organized and Accessible
 4. Develop an OSHA Inspection Protocol for your Company (e.g. consider the benefits of having two employee escort inspectors and who is the best employees to escort)
 5. Find Good OSHA Counsel
- Don't be Afraid to Assert your Rights!

Backdoor Ergonomics Rules

- EEOC Proposal to conform ADAAA published 9/23/ 2009
- Public comment period ended 11/23/09
- Congress intended to significantly expand the scope of what a covered “disability” under the ADA
- Courts must now construe “disability” “in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA”
- Changed definitions of:
 - “major life activities”
 - “substantially limits”
 - “regarded as”



Backdoor Ergonomics Rules

- Broad definition of "major life activities"
- Two non-exclusive lists of major life activities:
 - (1) Participatory activities
 - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working
 - additional activities proposed for inclusion by the EEOC-- sitting, reaching, and interacting with others.
 - (2) the operation of major bodily functions
 - bodily functions specified in the ADAAA-- normal cell growth, and immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
 - additional bodily functions proposed for inclusion by the EEOC – functions of the special sense organs and skin, and genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions.

Backdoor Ergonomics Rules

- Inclusion of “musculoskeletal functions” in ADAA rule
- November 2000, OSHA published an ergonomics standard to address “musculoskeletal disorders” (MSDs)
- March 2001, President Bush rescinds rule
 - Enormous anticipated costs
 - Uncertain science
 - Practical difficulties in interpreting and enforcing the rule
- Protections and accommodation remedies beyond rescinded OSHA ergonomics rule

Backdoor Ergonomics Rules

- Ergonomics returns AGAIN in 1/29/2010 OSHA proposal (75 *Fed. Reg.* 4728)
 - Restores column to OSHA 300 Log used for recording work related MSDs
 - Virtually restates requirements proposed in 2001
- Comments were due 3/15/2010
- Public meeting held 3/9/2010
- If finalized, would take effect 1/1/2011

On the Hill – Major OSHA “Reform” Bill

- **Protecting America’s Workers Act**
 - HR 2067 (4.26.09) and S.1580 (8.5.09)
 - Reflects a seismic shift in philosophy, going beyond recent Mine Safety legislation
- **OSHA Jurisdiction**
 - Extended to federal, state, and local government employees
 - Extended to activities presently covered by other federal agencies’ safety and health regulations (e.g. DOT, EPA), unless OSHA certifies other regulations are at least as effective as OSHA’s, with OSHA certifications subject to court challenge – a legal nightmare

On the Hill – Protecting America’s Workers

- **Required Rulemaking**

- Requires OSHA to adopt rule prohibiting employers from discouraging injury/illness reporting and prohibiting retaliation for reporting

- **Expanded Whistleblower Provisions:**

- Codifies existing OSHA rule prohibiting termination for refusal to work if:
 - Employee has reasonable apprehension of serious injury or impairment of the employee’s health, and
 - Employee sought (where practical) and was unable to obtain correction of the problem by his/her employer
- Extends deadline for filing complaint from 30 to 180 days
- Gives OSHA power to order reinstatement, back pay and attorney’s fees without going to court, and employer appeal would not suspend reinstatement order.

On the Hill – Protecting America’s Workers

▪ Enforcement

- Employer payment for employee participation in OSHA inspections
- Employers to notify OSHA of any “serious incident” and to preserve the site of the accident leading to the death/serious incident (open ended)
- Codify and expand “victims rights” to information, participation in meetings with OSHA, to be notified of proposed settlements, and to participate in settlement negotiations
- NOC would not suspend abatement of alleged violations
 - Would turn “due process” on its head
 - Would permit OSHA to issue failure to abate citations while earlier citations are under challenge

On the Hill – Protecting America’s Workers

- Grants employees/unions full party status for all issues raised by a citation
 - Challenge classification, penalty and abatement period even if employer did not file a contest
 - Challenge an informal or formal settlement agreement before OSHA and the Review Commission on the basis that it failed to further the purpose of the OSHAct
- Prohibits unclassified citations
- Consequences
 - Undermine the settlement process, encouraging litigation
 - Undermine OSHA’s prosecutorial discretion
 - Shared authority for prosecution invites the worst sorts of abuses by employees/unions seeking to advance agendas unrelated to workplace safety and health

On the Hill – Protecting America’s Workers

▪ Criminal Penalties

- Dramatic increase potential jail time for willful violations by employers or “any responsible corporate officer”
- For fatalities: 10 years for first willful criminal violations and 20 years for the second
- For serious injury: 5 years for first willful criminal violation and 10 years for the second



Q&A Session

At this time we welcome your questions !

