OSHA:
New Personnel,
the General Duty Clause, and
Revised Penalty Structures

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"To those who have for too long abused workers, put them in harm's way, ... let me be clear, there is a new sheriff in town."

Hilda Solis
U.S. Labor Secretary
“Secretary Solis' phrase that ‘There's a new sheriff in town’…. is not an abstract wish; it's a description of how OSHA is now working.”

David Michaels
Assistant Secretary of Labor For Occupational Safety and Health
New Assistant Secretary - David Michaels, Ph.D.

- Confirmed by unanimous consent - December 3, 2009
- Former Asst. Secretary of Energy for Environment, Safety and Health
- George Washington University Researcher
- CIH
- Priorities: Streamline rulemaking; set health exposure limits for hazardous chemicals; adopt mandatory s/h program standard
New Political Deputy Asst. Secretary – Jordan Barab

- Former Acting Assistant Secretary – April 13, 2009 to December 3, 2009
- Former Senior Policy Advisor on health and safety for House Education and Labor Committee - 2007 to 2009
- Worked with U.S. Chemical Safety and Hazard Investigation Board - 2002 to 2007
New Career Deputy Asst. Secretary– Rich Fairfax

- Former Director of Directorate of Enforcement, Construction Directorate
- Long-term career OSHA executive
- Guru of enforcement
- Yin to Barab’s yang
New Solicitor of Labor – Patricia Smith

- Very controversial appointment
- Confirmed by party-line vote (60-37) on Feb. 4, 2010
- Former NYS Labor Commissioner
- Former Chief, NYS Attorney General’s Labor Bureau
Occupational Safety and Health Review Commission

- First full complement since April 2007
- Backlog of cases
- Likely to get busier
OSHRC New/Old Chair - Thomasina Rogers

- Confirmed by unanimous consent May 13, 2009
- Three-term member of Commission; Chair during Clinton Administration
- Former Chair, Administrative Conference of the United States
- Former Counsel, Equal Employment Opportunity Commission
OSHRC New Member – Cynthia Attwood

- Confirmed by unanimous consent Feb. 11, 2010.
- Former Associate Solicitor for Occupational Safety and Health, Associate Solicitor for Mine Safety and Health
- Former Administrative Appeals Judge, U.S. Department of Labor Administrative Review Board
OSHRC Member – Horace (Topper) Thompson

- Chair during Bush II Administration
- Southern gentleman
- Consensus Builder
General Duty Clause

- Section 5(a)(1) of the OSH Act
- Requires employers to furnish a place of employment free from recognized hazards that are likely to cause death or serious harm to employees
- Catchall Provision –
  - Where no specific OSHA standard applies, employers must nevertheless reduce risk of employee injury through
    - Engineering, workplace procedures, human behavior methods
General Duty Clause (cont’d)

- OSHA may cite an employer for violating the General Duty Clause under the following conditions:
  - a workplace hazard exists;
  - the hazard is (a) recognized by the employer; (b) recognized by the industry; or (c) common sense;
  - the hazard caused or is likely to cause serious harm or death; and
  - the hazard is correctable.
- Sometimes cited “in the alternative” to a specific standard.
General Duty Clause (cont’d)

Examples of violations cited under the General Duty Clause:

- Employee not properly trained to keep his hands and other parts of his body out of the points of operation of the envelope manufacturing machinery.
- Explosion hazard resulting from the operation of forklifts and mechanical handling equipment near unprotected natural gas lines and meters.
- Exposure to risk of amputation and severe lacerations from saws automatically restarting upon restoration of power after a power interruption.
General Duty Clause (Cont’d)

- More examples of violations cited under the General Duty Clause:
  - Containers of ethyl ketone peroxide were stored within 25 feet of flammable liquids and were not stored within the recommended storage temperature range.
  - Waste hauling company did not maintain adequate illumination and proper drainage at the waste pad.
  - Exposure to fall hazard while working from a platform raised greater than 6 feet by a forklift.
OSHA Penalties

- We Will Consider:
  - Factors Relevant to Penalty Assessment
  - Informal Conference Consideration
  - Revised OSHA Internal Penalties Guidelines – April 2010
  - Robert C. Byrd Miner Safety and Health Act of 2010
  - New Focus on Criminal Liability
Factors Relevant to Penalty Assessment

- In calculating the appropriate penalty for a violation, Section 17(j) of the OSH Act requires the Commission to consider:
  - (1) the size of the employer's business;
  - (2) the gravity of the violation;
  - (3) the good faith of the employer; and
  - (4) the employer's prior history of violations.
Revised OSHA Internal Penalty Guidelines

- OSHA penalties had not been adjusted for several decades
- Work group assembled to evaluate the Agency’s penalty policies
- Conclusion of the work group: current penalties are too low to have an adequate deterrent effect
- New Guidelines announced April 22, 2010
- New Guidelines apply only to inspections with an opening conference date on or after August 23, 2010
Informal Conference Consideration

- **Old Policy**
  - Area Director could reduce penalty up to 50%
  - Greater than 50% required approval of Regional Director

- **New Policy**
  - Area Director may reduce penalty up to 30%
  - Greater than 30% requires approval of Regional Director
  - Area Director may offer additional 20% reduction if employer hires an outside Health & Safety consultant
  - Penalty reduction no longer allowed if employer has an outstanding balance owed to OSHA
    - If employer is on a penalty payment plan, however, reduction may be granted
Revised OSHA Internal Penalty Guidelines (cont’d)

- Increase average penalty for serious citation from $1000 to $3500 (driven by gravity prong)
- Repeat citations up to 5 (v. 3) years after citation
- Employer-size discounts reduced – max of 40% (v. 50%); none for employer of more than 250 employees (v. 500 employees)
Revised OSHA Internal Penalty Guidelines (cont’d)

- No good faith discount if “high gravity” violation
- 15% discount for “quick fix” is retained
  - But 10% discount for employers with a strategic partnership agreement is eliminated
- History of violations now only an aggravator; no discount for good history
Robert C. Byrd Miner Safety and Health Act

- Named after the late Senator from West Virginia
- Not yet enacted
  - Pending vote by the House of Representatives
- Affects all private industries
- Includes many provisions from the never-enacted Protecting America’s Workers Act
Robert C. Byrd Miner Safety and Health Act (cont’d)

- Increases Maximum Civil Penalties
  - **Serious and Other than Serious Citations**
    - From $7000 to $12,000 per violation
    - (maximum $50,000 where violation contributed to the death of an employee)
  - **Willful or Repeat Citations**
    - From $70,000 to $120,000 per violation
    - (maximum $250,000 where violation contributed to the death of an employee)
  - **General Duty Clause Citations**
    - From $7000 to $12,000 per violation
Robert C. Byrd Miner Safety and Health Act (cont’d)

- **Civil Penalties**
  - Amounts will be adjusted at least once every four years, beginning January 1, 2015, to reflect the Consumer Price Index
  - Repeat citations can be based on prior citations of the federal OSH Act or of state occupational safety and health law
Robert C. Byrd Miner Safety and Health Act (cont’d)

- **Criminal Penalties**
  - May be applied to any:
    - Employer
      - “Person engaged in a business affecting commerce who has employees”
    - Officer
      - Undefined
    - Director
      - Undefined
  - May be applied when any employer, officer, or director:
    - “Knowingly” violates an OSHA standard, rule, or order
Robert C. Byrd Miner Safety and Health Act (cont’d)

- **Criminal Penalties**
  - Potential for Imprisonment
    - Where a violation caused or significantly contributed to the death of an employee
      - Up to 10 years for first conviction
      - Up to 20 years for subsequent convictions
    - Where a violation caused or contributed to the serious bodily harm (but not death) of an employee
      - Up to 5 years for first conviction
      - Up to 10 years for subsequent convictions
Robert C. Byrd Miner Safety and Health Act (cont’d)

- **Potential Responses by Employers, Officers, Directors**
  - Micro-manage corporate health and safety plans to ensure compliance
    - Would be difficult, considering other demands on employers
  - Distance themselves from corporate health and safety plans
    - *Might* allow them to avoid liability for having “knowingly” violated an OSHA standard, rule, or order
New Focus on Criminal Liability

- OSHA now referring all potential criminal cases to Department of Justice for review
- Prosecutor must prove:
  - The employer willfully violated a specific OSHA standard, rule, order or regulation; and
  - The employer’s violation caused the death of an employee
- Appears that criminal liability is not applicable to violations of General Duty Clause
Enforcement Activities - SVEP

- SVEP ("Severe Violator Enforcement Program")
- Effective June 18, 2010
- The following circumstances will be reviewed for possible handling as SVEP cases:
  - A fatality or catastrophe situation;
  - Industrial operations or processes that expose employees to the most severe occupational hazards and those identified as “high-emphasis hazards”;
  - Exposure of employees to hazards related to the potential release of a highly hazardous chemical; or
  - An egregious enforcement action.
SVEP (cont’d)

- “High-emphasis hazards” means only high gravity serious violations of specific standards covered under falls or the following NEPs:
  - Amputations
  - Combustible dust
  - Crystalline silica
  - Lead
  - Excavation/ trenching
  - Ship breaking
- Regardless of the type of inspection being conducted
SVEP (cont’d)

- SVEP also includes the following “action elements” for employers who meet SVEP criteria:
  - Enhanced follow-up inspections
  - Nationwide referrals, to include State Plan States
  - Increased company awareness, to include News Releases
  - Enhanced settlement provisions
  - Increased use of Federal court enforcement action (contempt of court) under Sec. 11(b) of the OSH Act
SVEP (cont’d)

- Corporate-Wide (Now Called “Enterprise Liability”) Settlement Agreements
  - Tied into the SVEP
  - Working to update the existing directive
  - Intent is to ensure agreements are developed with input from affected parties
  - Ensure consistency for execution and abatement
  - Consider overall value of the agreement to the Agency
  - Available in cases of systemic patterns of violation
Cases

- *W.G. Yates & Sons Construction Co v. OSHRC* (5th Cir. 2006) – Supervisory employee’s misconduct not imputable to employer unless misconduct was foreseeable by employer.
Cases (cont’d)

- United States v. L.E. Myers Co. (7th Cir. 2009) – (1) Supervisory knowledge imputable to employer only if knowing employee had duty to report or ameliorate hazard; (2) deliberate ignorance provable only with showing that employer took deliberate steps to ensure it did not gain knowledge of nature of problem.
Cases (cont’d)

- Secretary of Labor v. Summit Contractors Inc. (OSHRC July 27, 2009) (on remand from 8th Cir.) - General (i.e., controlling) employer may be liable for exposure of other employers’ employees depending upon degree of supervisor capacity practiced by first employer and nature/extent of safety measures it employs.
Cases (cont’d)

- *Nat’l Assoc. of Home Builders v. OSHA* (D.C. Cir. 2010) – OSHA has prosecutorial discretion to cite on per-employee basis for violations related to PPE provision, safety training (affirming OSHA’s new rule re: per-employee citation).
Cases (cont’d)

- *United States v. Franc*, W.D. Pa., No. 09-CR-00353 (June 24, 2010) – Pennsylvania construction contractor sentenced in federal court in Pittsburg to three years of probation and six month of home detention for violations of OSHA’s fall protection regulations, leading to the death of an employee.
Thank You

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