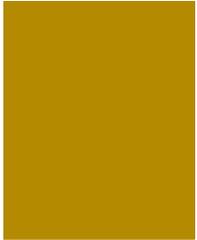


MICHAEL BEST

& FRIEDRICH LLP



OSHA Developments & Review

Pulp and Paper Safety Association 28th
Annual Safety Conference

June 21, 2011

Eric E. Hobbs

Michael Best & Friedrich LLP

100 East Wisconsin Avenue, Suite 3300

Milwaukee, WI 53202

eehobbs@michaelbest.com

414.225.4991

"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



- “We are focused on workers — not voluntary programs and alliances...As I have said since my first day on the job — make no mistake, the Department of Labor is back in the enforcement business.” June 29, 2009
- April 26 Regulatory Agenda unveiled new mantra at DOL: Plan/Prevent/Protect
- Multi-agency approach, OSHA, MSHA, Wage and Hour (minimum wage, overtime)

“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

- Belief that enforcement is the key
 - April 22 OSHA memo changing penalty assessments to increase them deterrent
 - Diminished support for compliance assistance (VPP, SHARP, On-Site Consultation) compliance “clarification” rulemaking

- Regulatory agenda tracks with recommendations by AFL-CIO made during transition:
 - Revive safety and health program rulemaking, initiated during Clinton Administration.
 - Refocus on ergonomics: column for recording musculoskeletal disorders (MSDs) on OSHA log; enforcement under General Duty Clause, recordkeeping rule.
 - Less emphasis on voluntary programs; reformation of existing programs to make them more strategic and effective, enhance worker rights.

New Political Deputy Asst. Secretary – Jordan Barab

- Former Acting Assistant Secretary – April 13, 2009 to December 3, 2009
- Former Senior Policy Advisor on Safety and Health – House Education and Labor Committee
- Former Safety and Health Adviser — AFSCME



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

- Just lost full complement in place since 2009 – Commissioner Thompson’s term ended April 27
- No apparent replacement
- 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
- Unfortunate loss

OSHA Funding – Nearly a Crisis

- House-proposed continuing resolution adopted February 19.
- Proposed cut in OSHA funding (by \$99M through September 30) restored as part of deal in April.
- Would have devastated OSHA – resulting in layoffs of 200 or so COSHOs hired in past two years (presently 1200 COSHOs in 23 FedOSHA states).
- OSHA budget will be target again in the Fall.

OSH Act Penalties

- Statutory Factors — In calculating appropriate penalty for violation, Section 17(j) of OSH Act requires Commission to consider:
 - Size of the employer's business;
 - Gravity of the violation;
 - Good faith of the employer; and
 - 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 Agency's penalty policies.
- Conclusion of work group: current penalties too low to have adequate deterrent effect.
- New Guidelines announced April 22, 2010; effective October 1, 2010.

Revised OSHA Internal Penalty Guidelines (cont'd)

- Increases average penalty for serious citation from \$1000 to \$3500 (driven by gravity prong)
- Repeat citations “look-back” -- 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” retained
 - But 10% discount for employers with a strategic partnership agreement eliminated
- History of violations now only an aggravator; no discount for good history

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 outside health and safety consultant.
 - Penalty reduction no longer allowed if employer has outstanding balance owed to OSHA.
 - If employer on penalty payment plan, however, reduction may be granted.

Robert C. Byrd Miner Safety and Health Act

- Named after late Senator from West Virginia.
- Died with last Congress; has been reintroduced in Senate by Sen. Rockefeller; unlikely to emerge from committee in introduced form.
- Would affect all private industries.
- Includes many provisions from never-enacted Protecting America's Workers Act.
- Protecting America's Worker's Act has been reintroduced in House by Rep. Woolsey; also unlikely to make it out of committee in introduced form.

Robert C. Byrd Miner Safety and Health Act (cont'd)

- Would increase 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 would be adjusted at least once every four years, beginning January 1, 2015, to reflect Consumer Price Index
 - Repeat citations could be based on prior citations under OSH Act or of state occupational safety and health laws

Robert C. Byrd Miner Safety and Health Act (cont'd)

- Criminal Penalties
 - Could be applied to any:
 - Employer -- “person engaged in a business affecting commerce who has employees”
 - Officer -- undefined
 - Director -- undefined
 - When any employer, officer, or director “knowingly” violates OSHA standard, rule or order

Robert C. Byrd Miner Safety and Health Act (cont'd)

- Criminal Penalties
 - Imprisonment
 - Where violation caused or significantly contributed to death of employee;
 - Up to 10 years for first conviction
 - Up to 20 years for subsequent convictions
 - Where violation caused or contributed to serious bodily harm (but not death) of 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 selves from corporate health and safety plans
 - Might allow avoidance of liability for having “knowingly” violated 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:
 - Employer willfully violated specific OSHA standard, rule, order or regulation; and
 - Employer's violation caused death of employee
- Criminal liability generally not triggered by violations of General Duty Clause.

Rulemaking – New Crane Standard

- A construction standard (1926.1501)
- Addresses ground conditions, assembly/disassembly, power lines, operator certification, signals, rigging, inspection, etc.
- Terrain forklifts generally exempted
- Very controversial in context of preemption

Rulemaking – Publication of Final Rules Planned

- Hazard Communication – uniform labeling
- Cooperative Agreements – participating employers to be subject to inspection
- Silica in Construction
 - Proposed rule sent to OMB for review in February
 - PEL v. task-based approach

Rulemaking – Formal Review Mechanism - House

- House passed resolution February 11, 2011.
- Directs committees to review existing and proposed regulations for impact on economic growth/job creation.
- OSHA clearly in Congress's sights.

Rulemaking – Proposed/Agenda

- New agenda to be published in May or June
- Reinforced and post-tensioned steel construction
- Beryllium
- Silica
- Vehicle back-up in construction
- Confined spaces in construction
- Infectious diseases
- Permissible exposure limits (PELs)
- I2P2

Rulemaking – Cooperative Program “Clarification”

- Would “clarify the ability of the Assistant Secretary to define sites which would receive inspections regardless of Safety and Health Achievement and Recognition Program (SHARP) exemption status;”
- Would “allow CSHOs to proceed with enforcement visits resulting from referrals at sites undergoing Consultation visits and at sites that have been awarded SHARP status;” and
- Would “limit the deletion period from OSHA’s programmed inspection schedule for those employers participating in SHARP program.”
- Would result in fewer participants leading to fewer resources being allocated to these programs

Rulemaking – Musculoskeletal Disorders (MSDs) - Withdrawn “Temporarily”

- Withdrawn in January.
- Would have required employers to record MSDs in new column on OSHA 300 log—opening salvo in ergo battles.
- No reliable medical/scientific definition for MSDs
- Would merely capture MSDs in one column, provide no useful data for employers or OSHA—too many different types, causes.
- Would have dropped exemption for “minor musculoskeletal discomfort” -- major expansion of injuries to be considered/recorded.

Enforcement Activities - SVEP

- SVEP (“Severe Violator Enforcement Program”)
- Effective June 18, 2010
- Following circumstances will be reviewed for possible handling as SVEP case:
 - Fatality or catastrophe;
 - Industrial operations or processes exposing employees to most severe occupational hazards, those identified as “high-emphasis hazards”;
 - Exposure of employees to hazards related to potential release of highly hazardous chemical; or
 - An egregious (per-instance/ per-employee citation) enforcement action.

Enforcement Activities - SVEP (cont'd)

- “High-emphasis hazards” means *only* high gravity serious violations of specific standards covered under 1) fall protection standard or 2) any of following NEPs:
 - Amputations
 - Combustible dust
 - Crystalline silica
 - Lead
 - Excavation/ trenching
 - Ship breaking
- Regardless of type of inspection being conducted

Enforcement Activities - 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 publicity, to include news releases
 - Enhanced settlement provisions (e.g., full time safety specialist, inspections without warrant, reports to OSHA)
 - Increased use of Federal court enforcement action (contempt of court) under Sec. 11(b) of OSH Act

Enforcement Activities - SVEP (cont'd)

- Corporate-Wide Settlement Agreements
 - Tied into SVEP
 - OSHA working to update existing directive
 - Intent to ensure agreements developed with input from affected parties (*i.e.*, give unions more say than OSH Act provides)
 - Ensure consistency for execution and abatement
 - Consider overall value of agreement to OSHA
 - Available in cases of allegedly systemic patterns of violation

Enforcement Activities – New National Emphasis Programs – Recordkeeping

- Recordkeeping
 - Launched October 2009 -- intensive, intrusive audit of employer OSHA logs
 - Targeted employers with better than average safety records in high hazard industries (“We think you’re lying.”)
 - Includes looking at employee medical records to see if employees being treated for injuries not logged (“Medical Access Orders”)
 - Also includes “taking into account” whether employer has safety incentive program (OSHA believes inhibit employees from coming forward)

Enforcement Activities – New National Emphasis Programs – Recordkeeping (cont'd)

- Withdrawn suddenly in early 2010 (supposed to run through September 2010); revised to adjust criteria for targeting (“We just *know* you’re lying.”)
- Some violations found but not systemic underreporting or employers flouting the regulations
- December 2010: OSHA reports finding recordkeeping violations in 60% of 192 inspections conducted under revised NEP
- Data mean little

Enforcement Activities – New National Emphasis Programs – Others in Manufacturing/General Ind

- Other NEPs
 - Combustible dust
 - Isocyanates
 - Diacetyl (food flavoring)
 - Primary metals (noise, silica, lead)
 - PSM (in the works)
 - Amputations
 - Chemical plants/PSM
 - Grain handling

Enforcement Activities – New PPE Directive

- Based on 2007 (who pays) and 2009 (consensus standard PPE requirements) OSHA rules.
- What PPE must be provided at no cost to employees and when; when it must be replaced at no cost (damaged v. requested upgrade v. lost); payment for PPE owned by employees, that must remain on premises, that can be worn off-site.
- E.g., rubber boots with steel toes, respirators, non-prescription safety glasses, fall protection
- Exceptions: non-specialty eye/foot protection if worker can wear off-site, ordinary clothes, employee-owned equipment

Enforcement Activities – Rescission of Fall Protection Guidelines for Residential Construction

- Presently, residential roofers allowed not to implement conventional fall protection systems.
- New guidance would require use of conventional fall protection systems unless “infeasible” or would pose “greater hazard”.
- Effective June 16, 2011.

Enforcement Activities – Occupational Noise “Interpretation” - Withdrawn

- Mysteriously withdrawn January 19, 2011.
- Would have required all employers to review hearing conservation plans, even those that are working.
- All employers would have had to implement “feasible administrative or engineering controls” before using PPE – irrespective of relative expense.
- “Feasible,” “capable of being done,” “achievable”
- Expense too great only if it would put employer out of business.

Top Ten Manufacturing/General Industry Citations - FY 2010

- .212(a)(1) – Area machine guarding
- .1200(e)(1) – Hazard communication program
- .147(c)(4)(i) – Lockout/tagout procedures
- .147(c)(1) – Lockout/tagout program
- .212(a)(3)(ii) – Point of operation guarding
- .147(c)(6)(i) – Certification of periodic inspections
- .1200(h)(1) – Hazard communication training
- .23(h)(1) – Guarding of open-sided floors/platforms
- .178(l)(1) – Powered industrial truck training
- .151(c) - Eyewash

Cases – Supervisor Misconduct

- *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 – Supervisor Misconduct (cont'd)

- *United States v. L.E. Myers Co.* (7th Cir. 2009) – (1) Supervisor 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 – Multi-Employer Worksite Policy

- *Summit Contractors Inc.* (OSHRC August 19, 2010) (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 – Egregious Case Policy

- *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 rule regarding per-employee citation).

Cases – Egregious Case Policy (cont'd)

- *Dayton Tire Co.* (OSHRC Sept. 10, 2010) – Citations for failures to have machine-specific lockout/tagout policies issued on per-machine basis affirmed; penalty of \$517,000 assessed by Commission Judge increased to \$1,975,000 (OSHA had proposed \$7 million)

Cases – Continuing Violation Theory

- *Volks Constructors*, (OSHRC March 11, 2010) – failures to record injuries can be cited as “continuing violations,” even if originally occurred outside six-month statute of limitations.