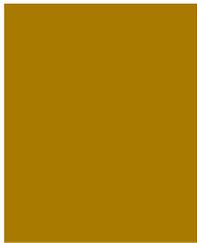


MICHAEL BEST

& FRIEDRICH LLP



2013 - 2014 OSHA Developments and Review – What's New? And What Impact Does It Have on Handling and Inspection?

Pulp and Paper Safety Association

71st Annual Safety Conference

June 24, 2014

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New Personnel at OSHA and SOL

- New political second-in-command at OSHA – Dorothy Daugherty
 - Replaces Rich Fairfax.
 - 32 years with OSHA and MSHA as IH and coal mine inspector.
 - Previously Director of OSHA's Directorate of Standards and Guidance.
 - Most experience in technical side of OSH.

New Personnel at OSHA and SOL

- Associate Solicitor of Labor for OSHA now retired – Joe Woodward.
 - In position for over 30 years.
 - A check and balance (like Rich Fairfax at OSHA).
 - No replacement yet named.
 - Acting Associate Solicitor – Anne Rosenthal.

Rulemaking

- More activity than expected
- “Subregulatory agenda and activity” continues
 - President’s vow to use executive authority to advance agenda (end-run Congress and rulemaking)
 - Nothing new for OSHA, e.g., 2013 outsider walk-around “interpretation”; 2013 small farm employer “guidance”; 2012 safety incentives program “ban”; 2011 noise control “interpretation”.

Rulemaking – Crystalline Silica

- Notice of proposed rulemaking published in August 2013.
- Would create a “vertical” standard for silica in general industry and in construction.
- Would establish PEL of 25 micrograms per cubic meter of air (25 $\mu\text{g}/\text{m}^3$)
- If employees reasonably might be exposed at/over PEL, would require air sampling every six months until two consecutive assessments show under PEL.

Rulemaking – Crystalline Silica (Cont'd)

- Would require establishment of “regulated area” or “written access control plan.”
- Construction employers given option of implementation of and adherence to engineering and work practice controls as specified in table to proposed construction standard.
- Comment period repeatedly extended; closed February 11, 2014.

Rulemaking – Final Rules “Planned”

- Most recent agenda published November 26, 2013
- Includes as “proposed final rules”:
 - Confined spaces – construction (final)
 - Electrical power transmission/distribution, electrical protective equipment (final)
 - Walking-working surfaces/fall protection (final)
 - Injury/illness recording (NAICS)/reporting (final)
 - Vertical tandem lifts (final)
 - Handling of retaliation complaints (final)

Rulemaking – Other Rules in Pipeline

- Bloodborne pathogens (pre-rule)
- Beryllium (NPRM in April 2014?)
- Food flavoring with diacetyl/diacetyl substitutes (long-term)
- Injury/illness “tracking” and accurate recording
- Combustible dust
- Eye/face protection consensus standards update (September 2014)

Rulemaking – I2P2

- Injury and Illness Prevention Program = “I2P2”
- In January 2012, OSHA released white paper, confirming I2P2 as a major priority for the agency.
- David Michaels’ legacy ...
- ... **BUT** OSHA on May 23 announced in its “Spring” regulatory agenda that rule has been relegated to “long term action” list – no action in next 12 months ... maybe not under Obama/Michaels Administration.

Rulemaking – I2P2 (cont'd)

- Problems:
 - NOT performance-based: Would require every employer to have written safety and health program.
 - One-size-fits-all syndrome
 - Vehicle for ergonomics (require employers to do hazard risk-assessment including for ergonomic risks)?
 - Double jeopardy for employers: violation = bad program.
 - Contradictions/reversals of old policy guidance included (e.g., employer self-audits)
- Subject to congressional oversight – in the works

Rulemaking – Injury/Illness Reporting

- “Improved Tracking of Workplace Injuries and Illnesses” – notice of proposed rulemaking published November 2013
- Would require quarterly reporting (250 or > employees) and annual reporting (20 or > employees) of all illness and injury data to OSHA for publication on OSHA website.
- Clear goal: shaming

Rulemaking – Injury/Illness Reporting (Cont'd)

- Problems
 - Not authorized by 1910.1904 or OSHA Act.
 - Would disclose confidential information on employers and employees and proprietary information (hours worked).
 - Result in competitive injury.
 - Would not provide tools for understanding/use of data.
 - No allowance for correction of data (work-relatedness; DAFWIs; DARTs; ...).

Rulemaking – Injury/Illness Reporting (Cont'd)

- Proposed rule would require reporting of incident in event of hospitalization of one (not three) employees and reporting of amputations w/in 24 hours.
- Still pending

Rulemaking – Recordkeeping

- Three rules
- First would update recordkeeping requirements based on illness/injury rates and NAICS (not SIC).
- Second would “clarify” employer’s ongoing duty to maintain accurate records.
 - No expiration
 - Response to *Volks Constructors (AKM)* decision

Rulemaking – Recordkeeping

- Third would add column to 300 Log for recording/tracking of musculoskeletal disorders – ergonomics reinvented.
 - Rider to FY 2012 appropriations bill blocked further action.
 - No rider to most recent appropriations bill.
 - But most recent regulatory agenda refers matter to “long term action” list – no action at least for next 12 months.

Enforcement Activities - SVEP

- SVEP (“Severe Violator Enforcement Program”).
- Following circumstances will be reviewed for possible handling as SVEP case:
 - Fatality or catastrophe with one willful or repeat citation or failure-to-abate (FTA) notice;
 - Industrial operations or processes exposing employees to “high-emphasis hazards”, with two or more high-gravity willful or repeat citations or FTA notices;
 - Exposure of employees to hazards related to potential release of highly hazardous chemical, with three or more high-gravity willful or repeat citations or FTA notices; or
 - An egregious (per-instance/ per-employee citation) enforcement action.

Enforcement Activities - SVEP (cont'd)

- SVEP “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 (one case referred to Solicitor/filed with court)
 - Corporate-wide settlement agreements

Enforcement Activities - SVEP (cont'd)

- Big problem: how to get out of SVEP once in it?
- Employer must ask
 - Three years since “final disposition” of SVEP case
 - No citations since for similar alleged violations; otherwise three more years before reevaluation
 - After follow-up inspection (abatement)
 - In discretion of Region if no corporate-wide settlement; in discretion of OSHA HQ otherwise
 - Public log – deletion/line-out

Enforcement Activities – National Emphasis Programs - Others

- Other NEPs
 - Nursing and Residential Care Facilities
 - Chemical Plants (PSM)
 - Primary Metals
 - Shipbreaking
 - Hexavalent Chromium
 - Food Flavorings/DiAcetyl
 - Lead

Enforcement Activities – National Emphasis Programs – Others (cont'd)

- Other NEPs (cont'd)
 - Combustible Dust
 - Crystalline Silica
 - Amputations
 - Trenching
 - Isocyanates (under development)

Enforcement Activities – Local Emphasis Programs

- More than 150 LEPs nationwide
- Grain facilities in OSHA Region V – Wisconsin, Minnesota, Illinois, Indiana, Michigan, Ohio
- Three LEPs in Regions III, IX, and X focused on hotels and hospitality workers

Enforcement Activities –Whistleblower

- New online complaint form
- Reorganization within OSHA so whistleblower program directly under/reporting to Asst. Secretary.
- New whistleblower directorate/director
- Investigators now must make “every attempt” to interview complainant; intake supervisor must insure coverage requirements met, *prima facie* case elements identified.
- New guidance to ensure consistency and quality of investigations

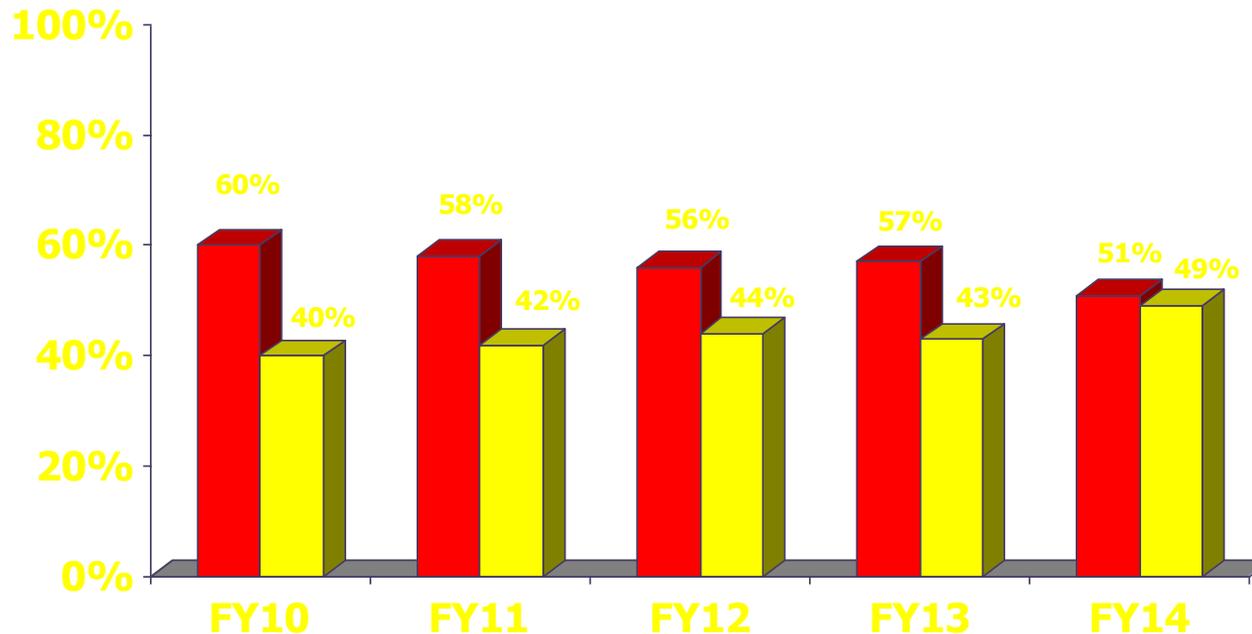
Enforcement Activities – Incentive Program Directive

- OSHA hates incentive/disincentive programs based on belief they discourage injury/illness reporting – “intentionally or unintentionally”.
- Culprit programs subject to scrutiny/citation are “blame the employee” programs.
- Focus should not be on fact/frequency of injury:
 - Underlying conduct leading to injury
 - Accounting for near misses

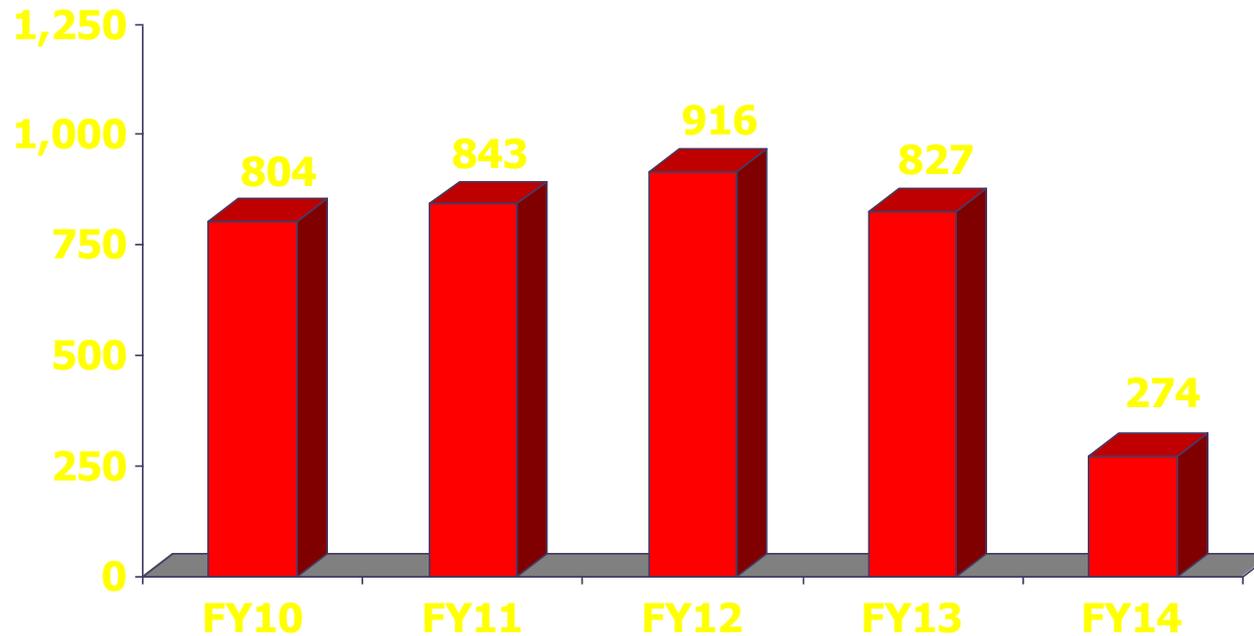
Hot Issues

- Workplace Violence
- Health Hazards
- Heat campaign
- Fall Protection campaign
- Customer Service

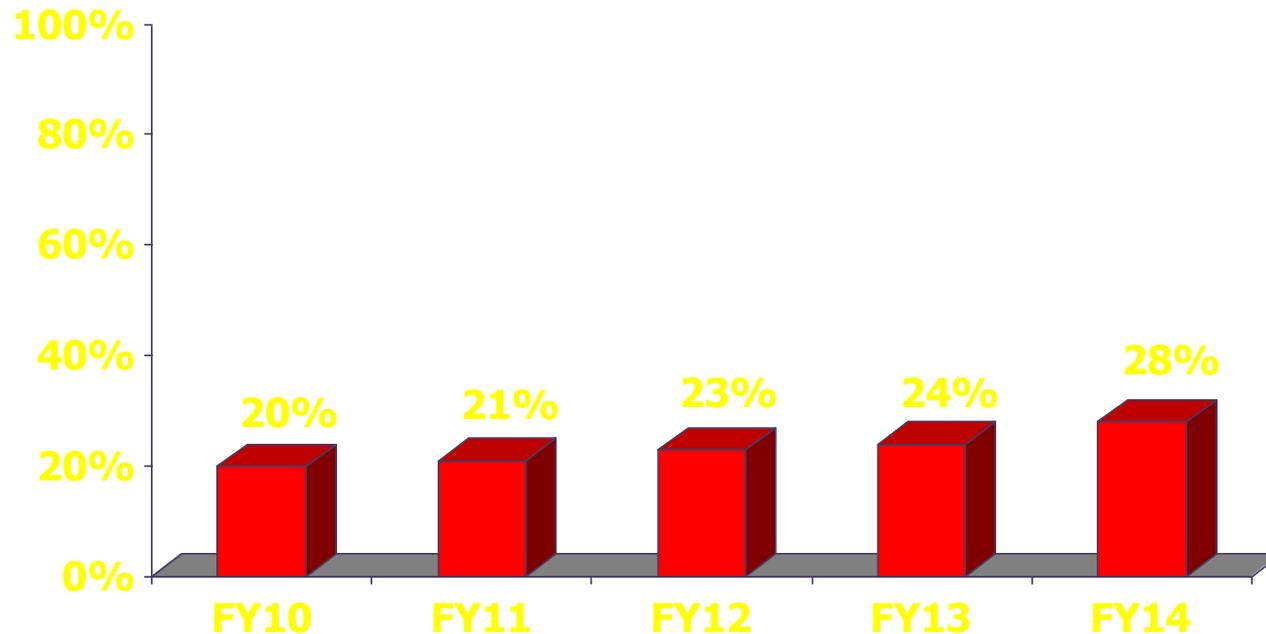
% of Inspections Programmed v. Unprogrammed (FY10–FY14)



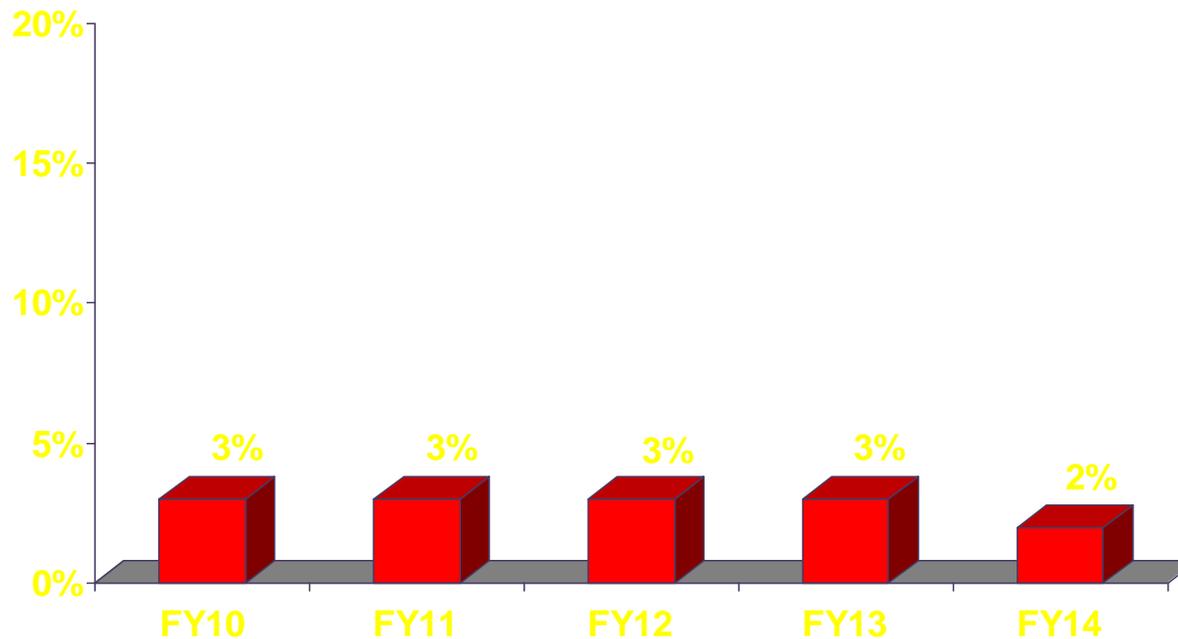
Fatality Inspections (FY10-FY14)



% Complaint Inspections (FY10–FY14)



% Follow-up Inspections (FY10–FY14)



Average Penalty per Serious Citation (FY10–Y14)



Impact on Handling an OSHA Inspection

- What impact does OSHA's enforcement strategies and programs have on the handling of an OSHA inspection?
 - The stakes are higher.
 - The agency is more aggressive.
 - So taking and keeping control of the inspection and its scope are more critical that ever.

Do

- OSHA cases – can't be won during inspection, but can be lost.
- Keys:
 - Preparation
 - Training
 - Execution

Do

- Train everyone on what to do if OSHA shows up.
- Receptionist
- Okay to make COSHO wait.

Do

- Take control of the inspection from the outset.
- Don't allow the inmate to run the asylum.
- The COSHO is your guest.
- Rules must be followed – work, safety (PPE), etc. -- or else.

Do

- Be civil.
- Kindergarten
- Polite and firm

Do

- Get a warrant?
 - The process
 - “Fire in the eyes syndrome”
- Upsides and downsides
- Decide on policy in advance; be flexible.
- Negotiate timing or scope of inspection if necessary.

Do

- Get information and ask questions.
 - What's the reason for the inspection -- the scope?
 - How long does/do the COSHO/s intend to be there?
 - What does/do the COSHO/s intend to do – video, air sampling, noise sampling, employee interviews, ...?
- If the COSHO won't cooperate?

Do

- Choose the “right” people to participate.
 - Not Genghis Kahn
 - Safety Director
 - Safety Committee
 - Union/employee representative

- Who chooses?
 - COSHO
 - Company
 - Union

Do

- Accompany the inspector at all times.
- Photos
- Videos
- Sampling
- Interviews
 - Managers/supervisors
 - Rank-and-file

Do

- Follow a detailed OSHA inspection checklist.
- Create it beforehand.
- Cover these do's and don'ts.
- Be sure all those who will be involved in OSHA inspections have copies and have been trained on it.

Do

- Make the inspector explain everything until you fully understand.
 - No stupid questions
 - Don't pretend to know more than you do.
- Allow inspection *only* after you understand fully – before and during.

Do

- Get copies of all records which OSHA relies on/references.
 - Complaint
 - Referral
 - “SST” list/document
 - Interpretations/directives

Do

- Go through with the COSHO any OSHA standard s/he references.
 - Make sure s/he knows it, can point to specific provisions at issue.
 - Don't pretend to know more than you do.
- Challenge where appropriate.

Do

- Document everything concerning the OSHA inspection.
- Caution: employee witnesses' identities

Do

- Notify higher management when you are unsure how to proceed.
- It's okay to tell COSHO to wait.

Do

- Keep list of documents/records requested by COSHO during inspection.
- Tell COSHO to keep list (or that you will) and that you will collect all requested at end of day/next day and provide as promptly as possible.
 - NOTE: Certain documents must be produced within prescribed times under certain OSHA standards.

Don'ts

- Don't allow inspection to proceed until you have reviewed your detailed OSHA inspection checklist and followed the procedures.
- Don't allow the inmate to run the asylum.
- Don't allow the inspection until you understand basis, purpose and scope – and agree scope is reasonable.

Don'ts

- Don't give too much information.
- Explain v. volunteer
- Balance

Don'ts

- Don't provide access to records or work areas which are not permitted by Company policy.
 - Privacy
 - Clean rooms
- Identify trade secret operations/processes.

Don'ts

- Don't panic; when you are unsure about something, simply inform the COSHO that you will have to get back to him/her.
- If an inspector challenges your position, explain that your actions are mandated by Company policy and you do not have authority to vary from this policy.
- Don't over-argue a point: Make it; support it; let it go.

Don'ts

- Don't try to win the case in the inspection stage.
- Back to Introduction above.
- “Challenge” does not = “escalate”.
- Kindergarten

Don'ts

- Don't let COSHO leave without telling you what's next.
 - Coming back?
 - Interviewing (more) employees?
 - Closing conference?

- Don't let COSHO leave without telling you what his/her impressions of/conclusions of the day are.
 - Apparent violations
 - Imminent issues
 - Positives