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## Regulatory and Enforcement Developments at OSHA – What's Up?

**Pulp and Paper Safety Association**

**June 12, 2012**

**Orlando, Florida**

Eric E. Hobbs, Esq.  
Kelly R. Rourke  
Michael Best & Friedrich LLP  
100 E. Wisconsin Ave., Ste. 300  
Milwaukee, WI 53202  
eehobbs@michaelbest.com  
414.225.4991

Charles H. Morgan  
Alston + Bird LLP  
1201 West Peachtree Street  
Atlanta, Georgia 30309-3424  
charlie.morgan@alston.com  
404.881.7187

## Secretary of Labor

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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 of Labor (cont'd)

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- “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, 2010, Regulatory Agenda unveiled new mantra at DOL: Plan/Prevent/Protect.
- Multi-agency approach, OSHA, MSHA, Wage and Hour (minimum wage, overtime).

## **Assistant Secretary of Labor - OSHA**

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“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



## **Assistant Secretary of Labor - OSHA**

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- 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.

## **Assistant Secretary of Labor - OSHA**

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- Belief that enforcement is the key.
  - April 22, 2010, OSHA memo changing penalty assessments to increase them – deterrent.
  - Diminished support for compliance assistance (VPP, SHARP, On-Site Consultation) by compliance “clarification” rulemaking.
  - OSHA just reported that 2011 showed the fewest number of new VPP/cooperative candidates since programs were established.

## Coincidence?

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- 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.

## **Revised OSHA Internal Penalty Guidelines**

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- 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 – big surprise.
- New Guidelines announced April 22, 2010; effective October 1, 2010.

## **Revised OSHA Internal Penalty Guidelines (cont'd)**

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- 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)**

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- 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.
- OSHA reports no significant increase in contest rate, slight increase in number of informal conferences, increase in number of payment plans in some offices.

## **Informal Conference Consideration**

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

## **Informal Conference Consideration (cont'd)**

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- **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.

## **Legislative Reform – A Requiem**

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- Robert C. Byrd Miner Safety and Health Act -  
named after late Senator from West Virginia.
  - Introduced in 2010 and 2011
  - Died with last Congress
- Protecting America's Workers Act.
  - Introduced in 2009 and 2011
  - Died with last Congress

## New Focus on Criminal Liability

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- OSHA now involving Department of Justice in review of *all* potential criminal cases.
- DOJ must prove:
  - Employer willfully violated *specific* OSHA standard, rule, order or regulation (not General Duty Clause); and
  - Employer's violation caused death of employee.
- Criminal liability under OSH Act generally not triggered by violation of General Duty Clause.

## **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 – Small Business Advocacy**

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- OSHA working with Small Business Administration's (SBA) Office of Advocacy.
- Under the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, agencies must:
  - Produce Small Entity Compliance Guides for some rules.
  - Be responsive to small business inquiries about compliance with the agency's regulations.
  - Submit final rules to Congress for review.
  - Have a penalty reduction policy for small businesses.
  - Involve small businesses in the development of some proposed rules through Small Business Advocacy Review Panels.

## **Rulemaking – Globally Harmonized System**

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- In an election year, rulemaking unlikely.
- Only rule published to date in 2012: Hazard Communication
  - “Globally Harmonized System” – uniform labeling
  - Final Rule published on March 20, 2012.
  - Was never controversial in concept.

## Rulemaking – Globally Harmonized System (cont'd)

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- Big problem of “unclassified hazard” (“other hazards which do not result in classification”)
  - Open-ended term: no certainty
  - Example given in preamble (guidance only): combustible dust
- Illogical deadlines: for example, training before labels and SDSs.
- Employers required to “find and fix” all hazards-including those not otherwise regulated, e.g. ergo, combustible dust
- Major uncertainty—employer won’t know if met obligations until OSHA inspects

## Rulemaking – Agenda

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- Most recent agenda published February 13, 2012
  - Confined spaces – construction (final)
  - Electrical power transmission/distribution, electrical protective equipment (final)
  - Crystalline silica (proposed)
  - Bloodborne pathogens (pre-rule)
  - Beryllium (long-term)
  - Food flavoring with diacetyl/diacetyl substitutes (long-term)
  - I2P2 NOT listed, but ....

## Rulemaking – I2P2

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- Injury and Illness Prevention Program = I2P2.
- In January 2012, OSHA released white paper, confirming I2P2 as a major priority for the agency.
- Next Step:
  - SBA is to hold small business review (SBREFA) panel to discuss the rule.
  - SBA is in the process of selecting individuals to serve on SBREFA panel.
  - SBA hopes to conclude SBREFA process within 60 days, with final rule proposal within the following six months.

## Rulemaking – I2P2 (cont'd)

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- Would require every employer – general *and* subs on a construction site -- to have written safety and health program (consistent with OSHA “Guidelines”).
- 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 – Cooperative Program “Clarification”**

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- Would “clarify the ability of the Assistant Secretary to define sites that 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.”
- Ultimate (desired?) result: fewer participants leading to fewer resources being allocated to these programs.

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

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- Withdrawn in January 2011; blocked by 2012 Appropriations Bill rider.
- 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.

## Rulemaking – Injury/Illness Reporting

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- November 2011: Proposed rule to “modernize” illness/injury reporting sent by OSHA to OMB.
- Would *require* electronic recordkeeping.
- Would make data collection/monitoring by OSHA much easier.
- Would link medical records to 300 Log entries, 301 Forms.
- NIOSH supportive.
- Concerns: expense of conversion; “expos[ure of] the sensitive nature of these injuries to the [www]”; confidentiality

## **Top Ten Manufacturing/General Industry Citations - FY 2011**

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- Hazard communication
- Respiratory protection
- Lockout/tagout
- Powered industrial trucks
- Electrical, wiring methods
- Electrical, general requirements
- Machine guarding
- Recordkeeping
- Personal protective equipment
- Guarding floor, hole openings and holes

## **Top Ten All-Industry Citations - FY 2011**

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- Scaffolding
- Fall protection
- Hazard communication
- Respiratory protection
- Lockout/tagout
- Electrical/wiring methods
- Powered industrial trucks
- Ladders
- Electrical – general requirements
- Machine guarding

## **Top Ten Standards with Most Serious Citations - FY 2011**

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- Scaffolding
- Fall protection
- Hazard communication
- Lockout/tagout
- Electrical/wiring methods
- Ladders
- Powered industrial trucks
- Machine guarding
- Respiratory protection
- Electrical – general requirements

## **Top Ten Standards with Most Willful Citations - FY 2011**

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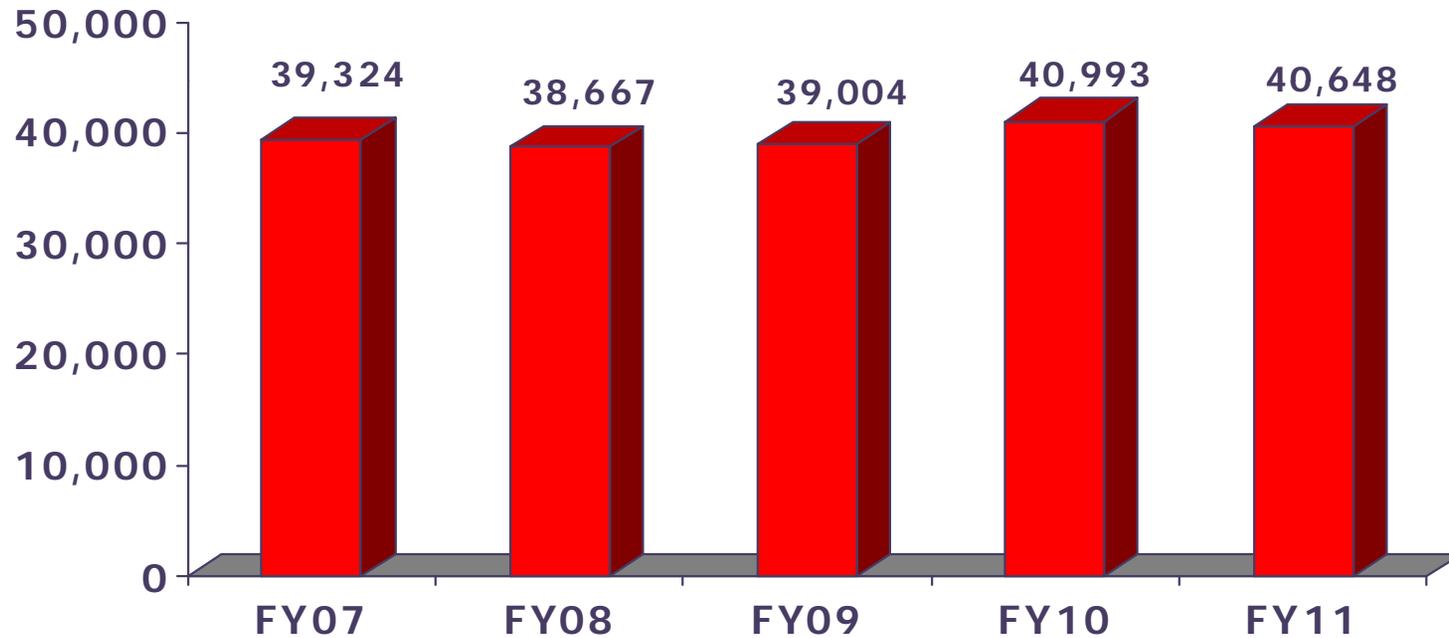
- Excavation/trenching protective systems
- Fall protection
- Process safety management
- Grain handling facilities
- Asbestos
- Lockout/tagout
- Machine guarding
- Specific excavation requirements
- General recording criteria
- General Duty Clause

## **Top Ten Standards Cited - Complaint Inspections FY 2011**

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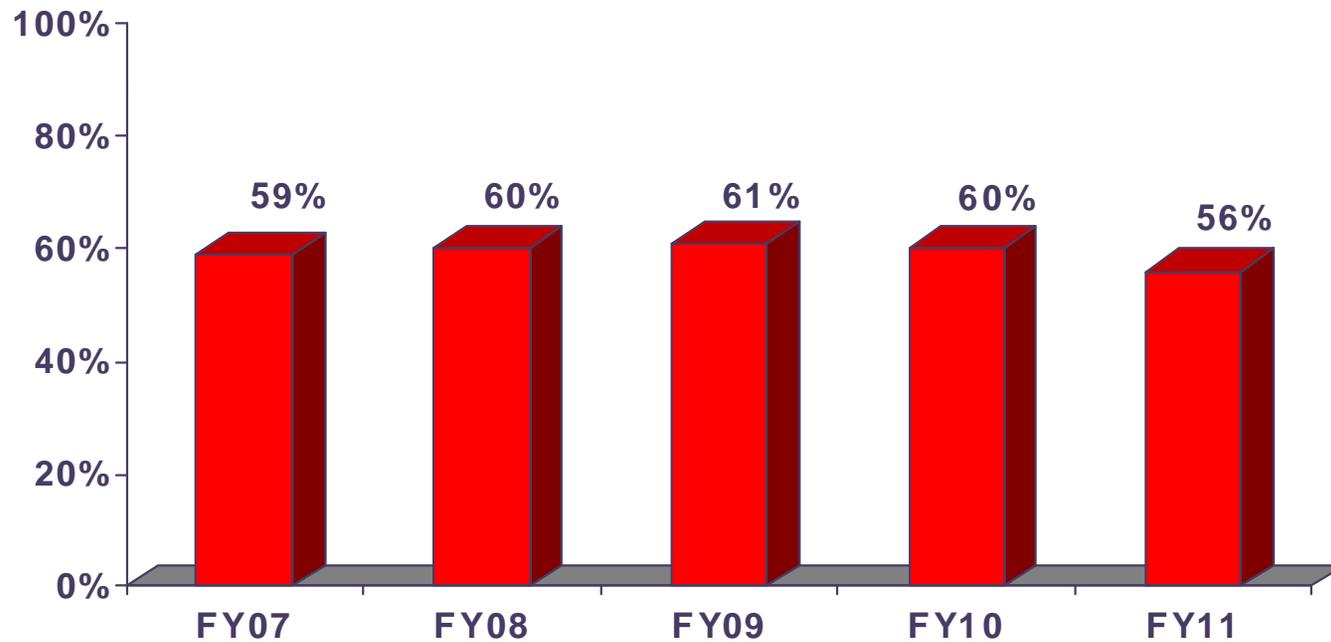
- Hazard communication
- Powered industrial trucks
- Respiratory protection
- Electrical – wiring methods
- Lockout/tagout
- Electrical – systems design
- Personal protective equipment
- Machine guarding
- Recordkeeping – forms
- Bloodborne pathogens

## FY 2007 – FY 2011 Inspections Conducted

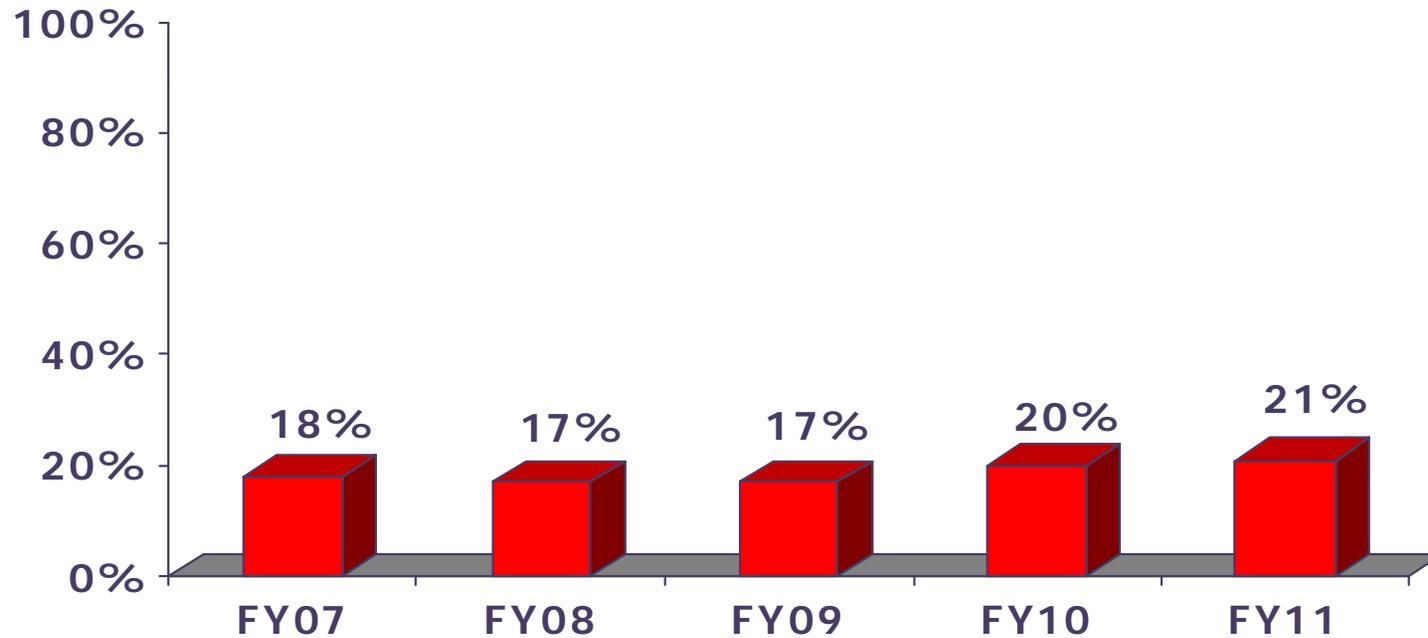


## **FY 2007 – FY 2011 - % Construction Inspections**

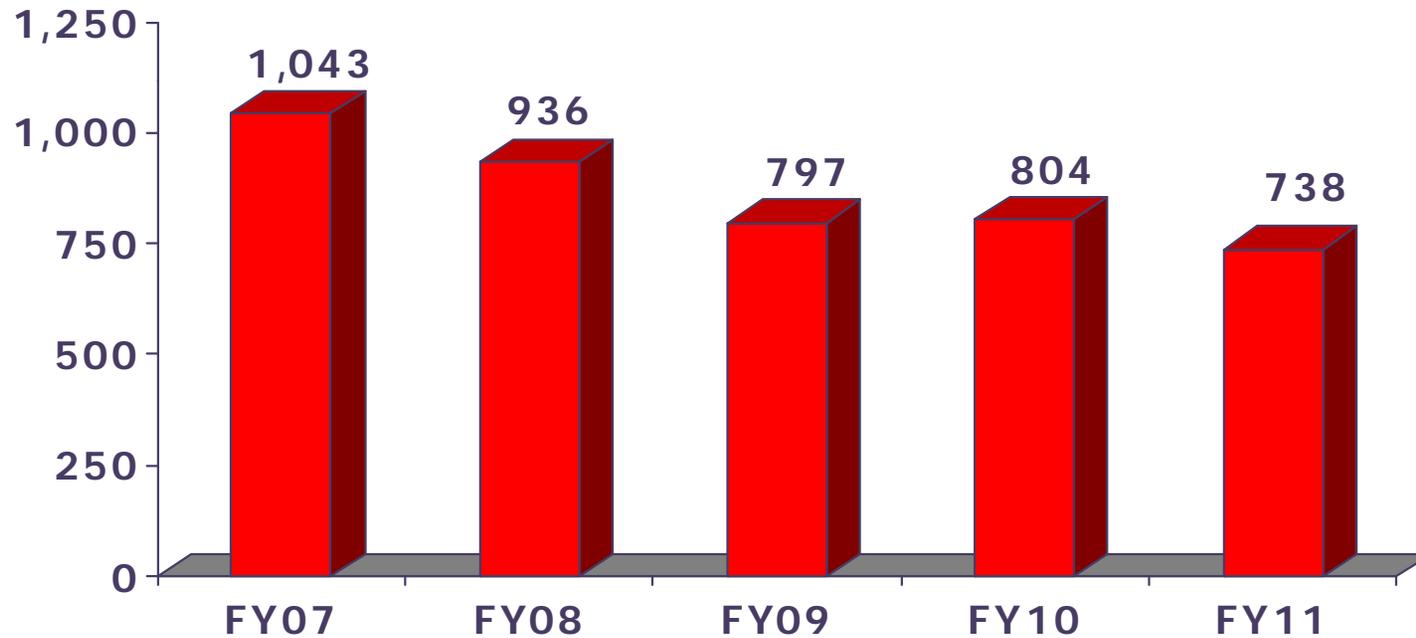
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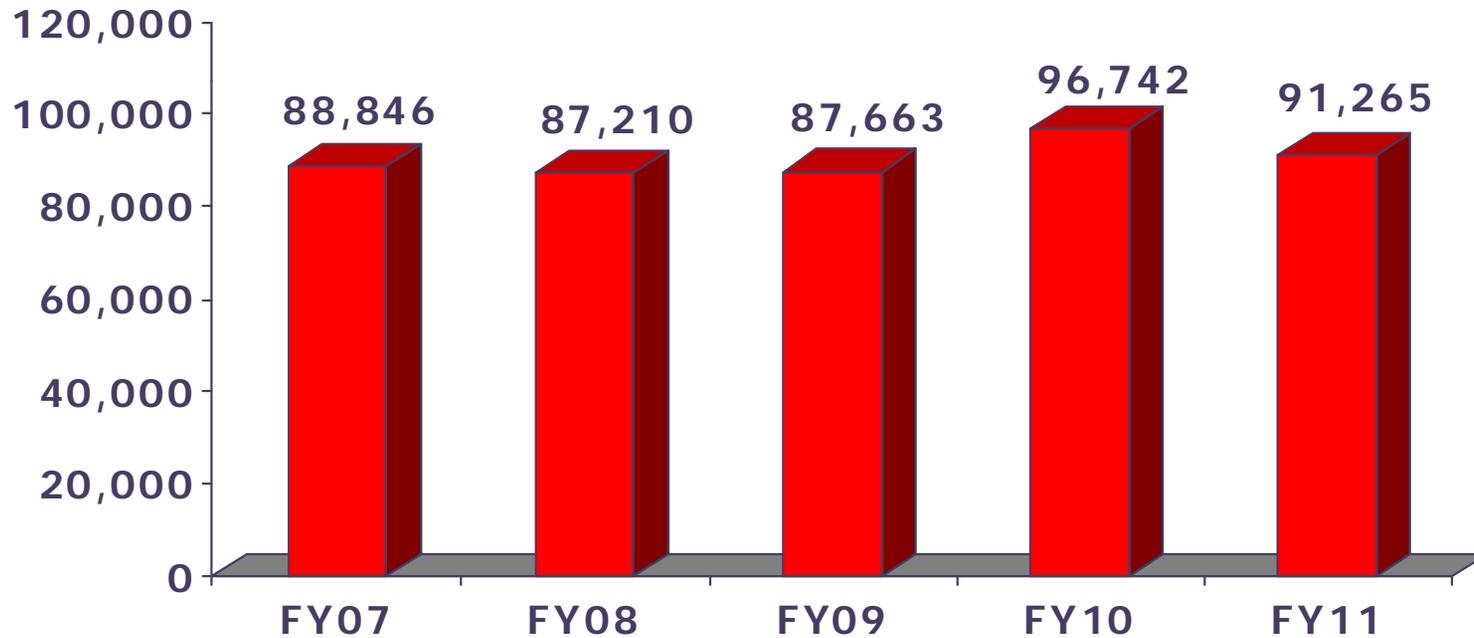
## FY 2007 – FY 2011 % Complaint Inspections



## **FY 2007 – FY 2011 - Fatality Investigations**

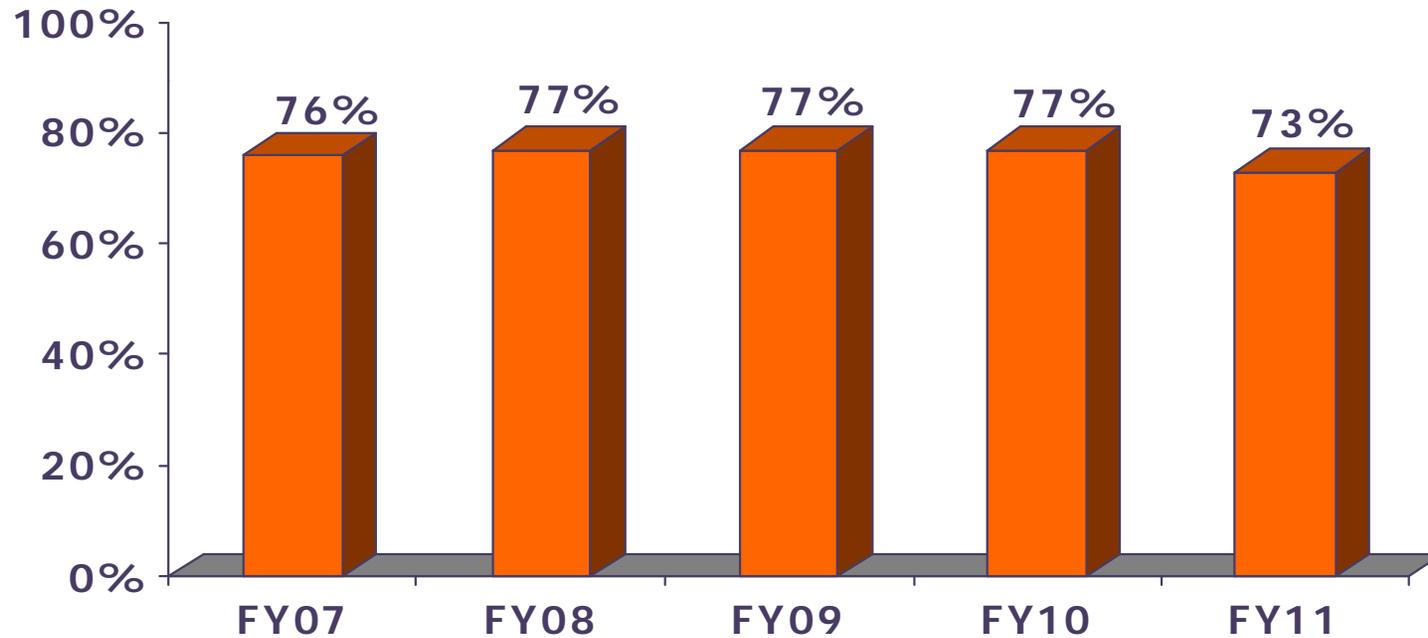


## **FY 2007 – FY 2011 - Total Violations Issued**



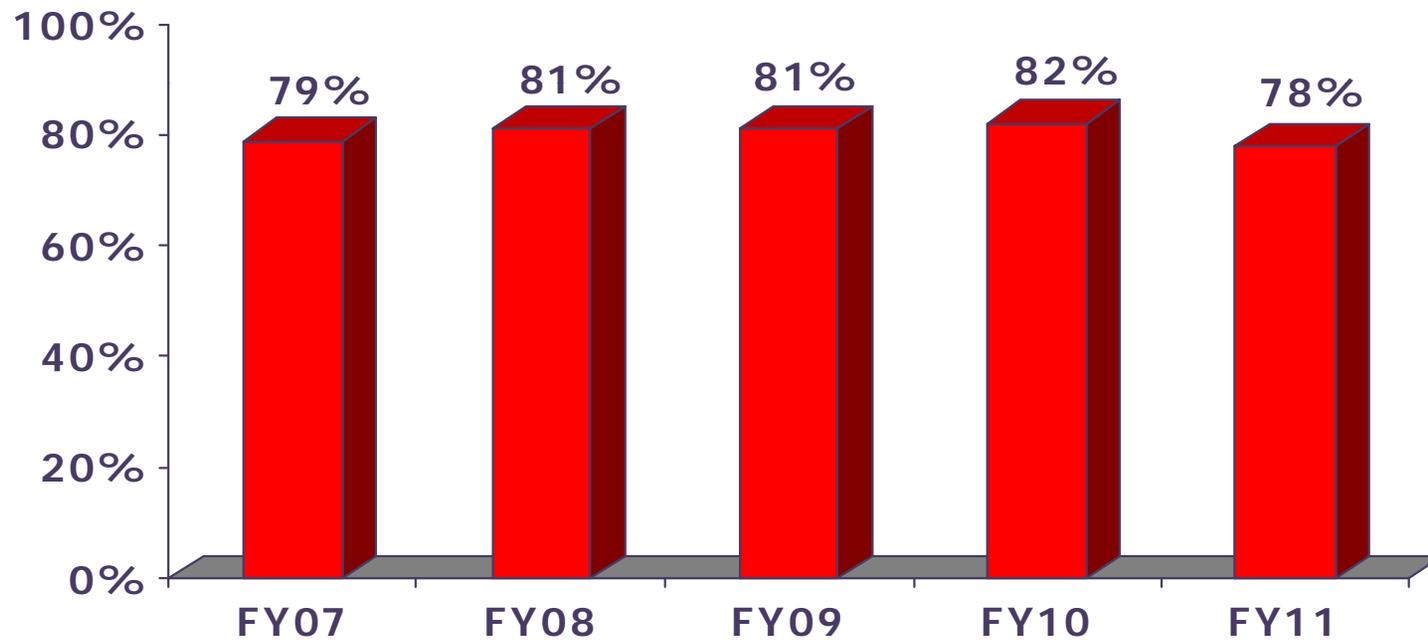
***FY 2007 – FY 2011 - % Total Violations Issued As Serious***

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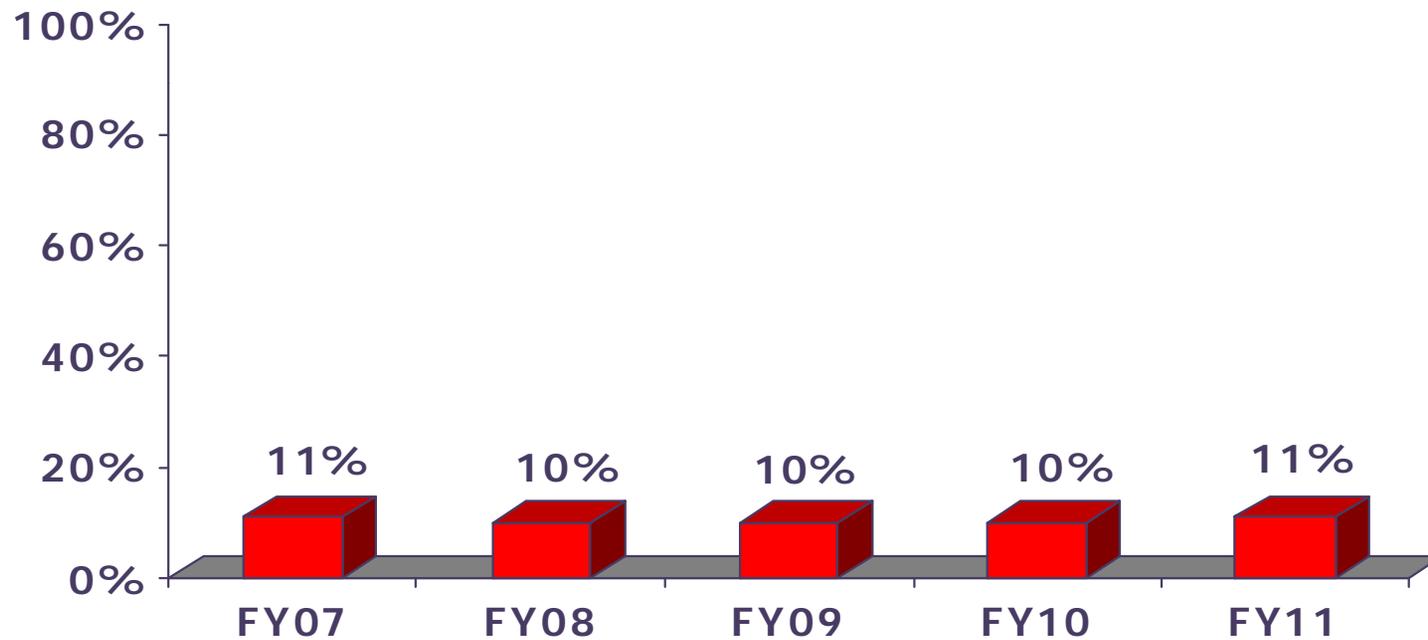
***FY 2007 – FY 2011 - % Total Violations Issued As Serious, Willful, & Repeat***

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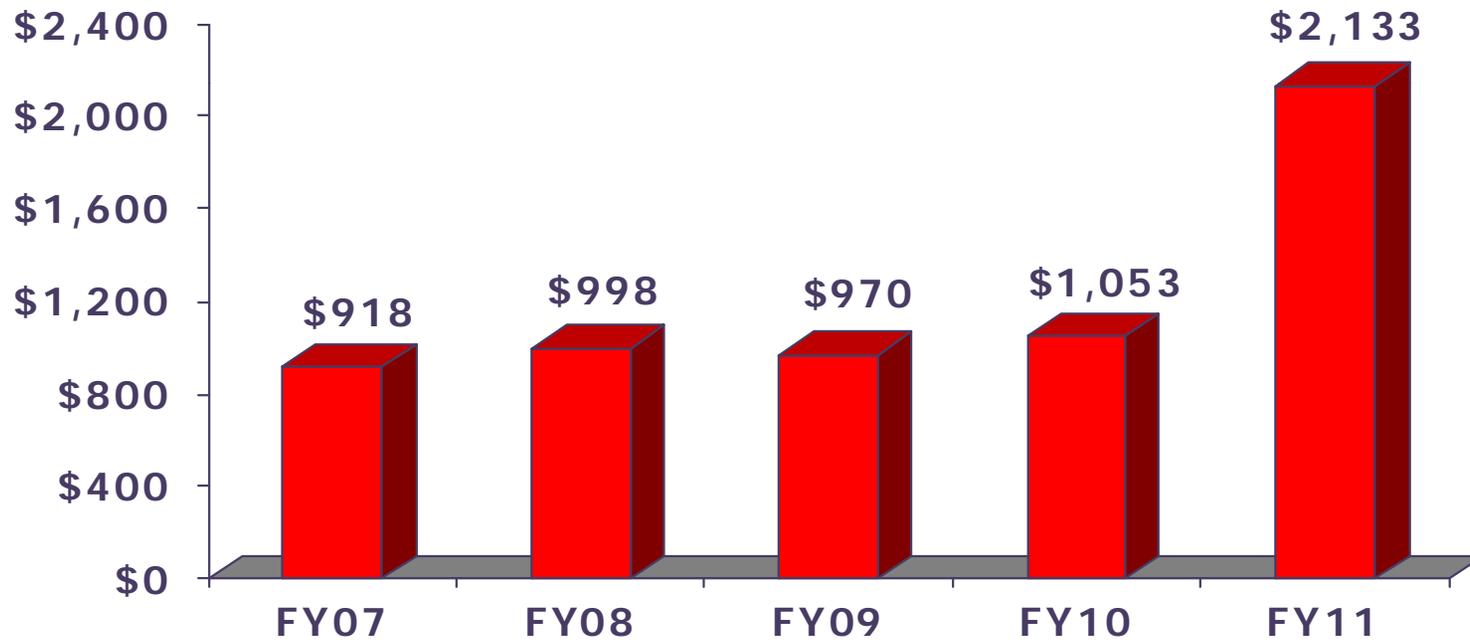


## **FY 2007 – FY 2011 - % NIC Inspections With Only Other-Than-Serious Violations Cited**

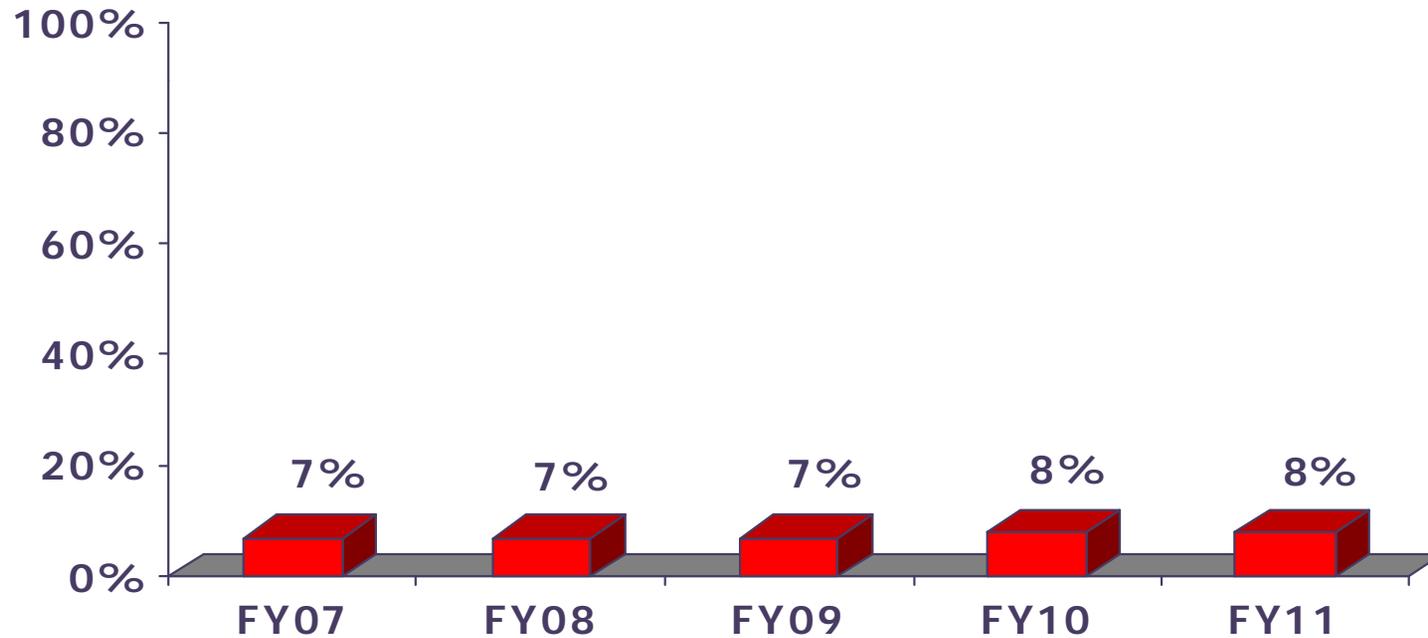
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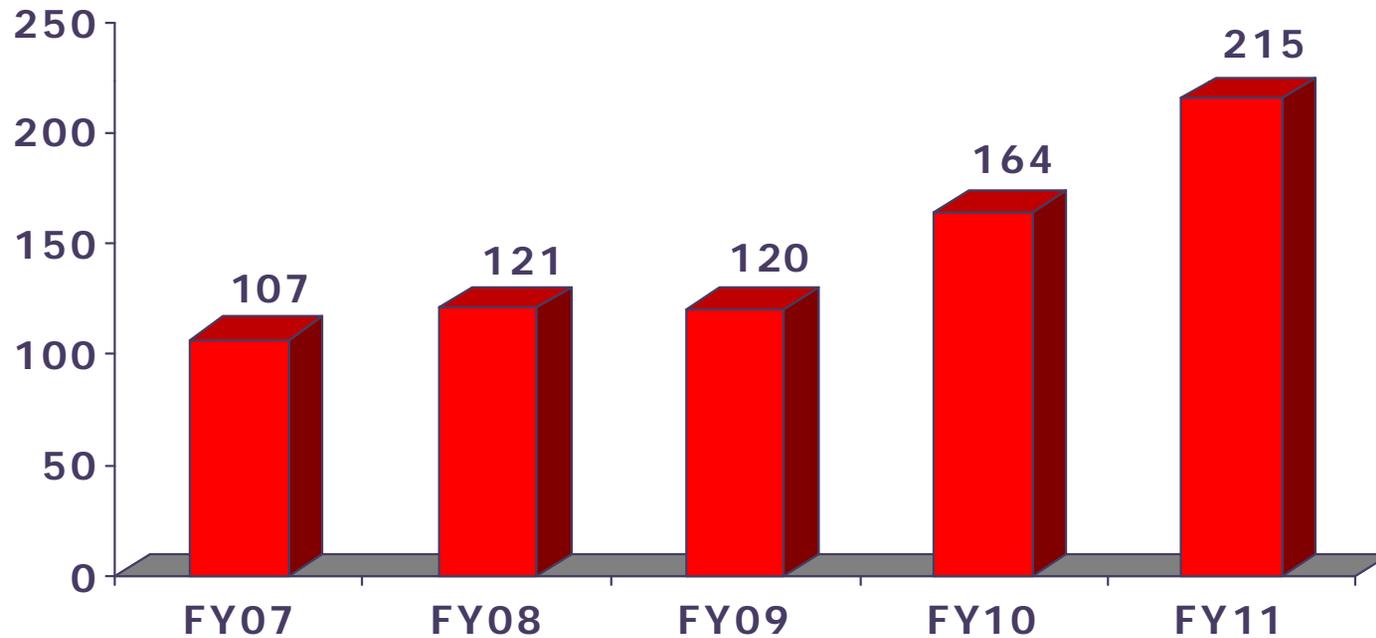
**FY 2007 – FY 2011 - Average Penalty Per Serious Violation**



**FY 2007 – FY 2011 - % Inspections W/ Violations Contested**



## **FY 2007 – FY 2011 - Significant Cases**



## Enforcement Activities - SVEP

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- SVEP (“Severe Violator Enforcement Program”).
- 242 cases as of 1/31/12; 27 = “egregious cases”
- 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)

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- “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)**

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- 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 (one case referred to Solicitor/filed with court).

## **Enforcement Activities - SVEP (cont'd)**

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- 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 – National Emphasis Programs – Recordkeeping

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- 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.”).
  - Withdrawn suddenly in early 2010 (supposed to run through September 2010); revised to adjust criteria for targeting (“We just *know* you’re lying.”).

## **Enforcement Activities – National Emphasis Programs – Recordkeeping (cont’d)**

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- November 2011: Deputy Asst. Secretary Barab reports about half of workplaces inspected under revised NEP found to be underreporting injuries/illnesses.
- February 19, 2012: NEP terminated.
- 350 inspections conducted.
- BNA Study/Report (April 26, 2012):
  - OSHA found violations in 66% of inspections (266 of 351).
  - OSHA issued 731 citations: 10 willful/repeat citations; NO serious citations; 99% of citations other-than-serious .

## **Enforcement Activities – National Emphasis Programs - Others**

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- Other NEPs
  - Combustible dust
  - Diacetyl (food flavoring)
  - Primary metals (noise, silica, lead)
  - PSM-Covered Chemical Plants
  - Amputations
  - Microwave popcorn processing plants
  - Hexavalent chromium

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

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- Other NEPs
  - Crystalline silica
  - Lead
  - Petroleum refineries
  - Shipbreaking
  - Nursing homes (under development)
  - Isocyanates (under development)

## **Enforcement Activities – New Local Emphasis Program**

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- There are more than 150 LEPs nationwide.
- Agriculture in OSHA's sights now because of grain accidents/fatalities – ND, CO, IL, WI.
- February 1, 2011 (echoing August 4, 2010) letter to grain storage facility operators.
  - To give notice of increased likelihood of inspection.
  - To give notice of hazards and targets - willful violations.

## **Enforcement Activities – New Local Emphasis Program**

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- Result: New local emphasis program.
  - Grain facilities in OSHA Region V – Wisconsin, Minnesota, Illinois, Indiana, Michigan, Ohio.
  - Increased likelihood of inspection.
  - More concentrated focus on safety-related grain handling policies and procedures.

## **Enforcement Activities – Local Emphasis Programs - Others**

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- Other LEPs
  - Building Renovation/Rehabilitation
  - Powered Industrial Vehicles
  - Fall Hazards in Construction
  - Dairy Farm Operations
  - Primary Metal Industry
  - Grain Handling/Storage Facilities

## **“Campaigns”**

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- Fall protection
- Heat
- Public sector workers

## Enforcement Activities – New PPE Directive

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- Based on OSHA rules published in 2007 (who pays) and 2009 (consensus standard PPE requirements).
- 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 – New Whistleblower Directive

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- GAO report in 2010 very critical of OSHA whistleblower program – agency responsible for investigating claims under 21 statutes.
- 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.
- Reorganization within OSHA so whistleblower program directly under/reporting to Asst. Secretary.
- New whistleblower directorate/director to be announced in February/March.

## Enforcement Activities – New Interpretation Letter – Employee Safety Incentive Programs

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- March 12, 2012, Memorandum to Whistleblower Program Managers
- Incentive programs encourage employee safety by rewarding safe behavior, collective or individual.
- “Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not “in any manner discriminate” against an employee because the employee exercises a protected right, such as the right to report an injury.”
- “Reporting an injury is always a protected activity. OSHA views discipline imposed under such a policy [of disciplining employees for safety violations, irrespective of fault] against an employee who reports an injury as a direct violation of section 11(c) or [the Federal Railroad Safety Act].”

## Enforcement Activities – Occupational Noise “Interpretation” - Withdrawn

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- 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.
- NOT gone altogether; only in process of reconsideration.

## **Chemical Safety Board Activities**

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- **Recent focus on hot work:**
  - DuPont – Buffalo, NY accident  
(<http://www.csb.gov/videoroom/detail.aspx?VID=65>)
  - “Dangers of Hot Work”  
(<http://www.csb.gov/videoroom/detail.aspx?VID=44>)
- **Combustible dust focus:**
  - Imperial Sugar  
([http://www.csb.gov/investigations/detail.aspx?SID=6&Type=2&pg=1&F\\_All=y](http://www.csb.gov/investigations/detail.aspx?SID=6&Type=2&pg=1&F_All=y))
- **Open CSB investigation:**
  - Packaging Corporation storage tank explosion  
([http://www.csb.gov/investigations/detail.aspx?SID=4&Type=1&pg=1&F\\_All=y](http://www.csb.gov/investigations/detail.aspx?SID=4&Type=1&pg=1&F_All=y))

## Cases – Supervisor Misconduct

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

## Cases – Supervisor Misconduct (cont'd)

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- *United States v. L.E. Myers Co.* (7<sup>th</sup> Cir. 2009) (criminal) – (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 – Supervisor Misconduct (cont'd)

- *Crowther Roofing & Sheet Metal of Florida v. OSHRC* (11<sup>th</sup> Cir. 2011) – Knowledge of employees' failures to use fall protection imputable to company where foreman, though not on roof at time of violations, was responsible for directing employees, including "ensuring that the workers complied with the company's Tie-Off Rule".

## Cases – Multi-Employer Worksite Policy

- *Summit Contractors Inc.* (OSHRC August 19, 2010) (on remand from 8<sup>th</sup> 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 – Multi-Employer Worksite Policy (cont'd)

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- Latest chapter: *Summit Contractors, Inc. v. Secretary of Labor et al.* (D.C. Cir. 2011) - Summit's challenge under Administrative Procedure Act rejected
  - Policy “simply provides guidance to OSHA inspectors on when it may be appropriate to cite a particular employer” – *i.e.*, is not subject to APA rulemaking requirements.
  - OSHA may “impose multi-employer liability through adjudication before the Commission rather than through rulemaking”.

## **Cases – Repeat Citations for Successor Employers**

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- *Sharon & Walter Construction, Inc.* (OSHRC November 18, 2010) - Repeat citations may apply, in appropriate cases, where an employer has altered its legal identity from that of a predecessor employer whose citation history formed the basis for the repeat classification.

## Cases – Contempt for Violating Warrant

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- *OSHA v. All-Feed Processing*, (CD IL 2012) - On two different occasions, All-Feed refused to allow OSHA inspectors on property for a court-authorized inspection and refused to allow subsequent inspections unless limited. “Hardship is irrelevant to . . . contempt.” Fined \$31,000 and ordered to pay \$10,964 in attorney’s fees.

## **Cases – Egregious Case Policy**

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- *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 per-employee citation policy).

## Cases – Egregious Case Policy (cont'd)

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- *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 \$7,000,000).

## Cases – Continuing Violation Theory

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- *Secretary of Labor v. AKM LLC d/b/a Volks Constructors* (D.C. Cir. April 6, 2012) – Court of Appeals reversed Commission’s decision that OSHA may cite failure to properly record injuries and illnesses as a “continuing violation”, enforceable throughout the required retention period of five years, even if the violation originally occurred outside six-month statute of limitations; Court held that failure to record must occur within six months before inspection.

## Cases – Safety and Risk Manager as “Company Executive”

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- *C.P. Buckner Steel Erection Inc.* (OSHRC April 25, 2012) – “Company executive” required to certify 300 Logs under 29 CFR 1904.32(b)(4), despite OSHA’s position, included safety and risk manager as “an officer of the corporation” because shareholders approved him as “safety officer” and shareholders intended, and president believed, s/r manager had full powers of an officer under NC law.



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Eric E. Hobbs, Esq.  
Kelly R. Rourke  
Michael Best & Friedrich LLP  
100 E. Wisconsin Ave., Ste. 300  
Milwaukee, WI 53202  
eehobbs@michaelbest.com  
414.225.4991

Charles H. Morgan  
Alston + Bird LLP  
1201 West Peachtree Street  
Atlanta, Georgia 30309-3424  
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