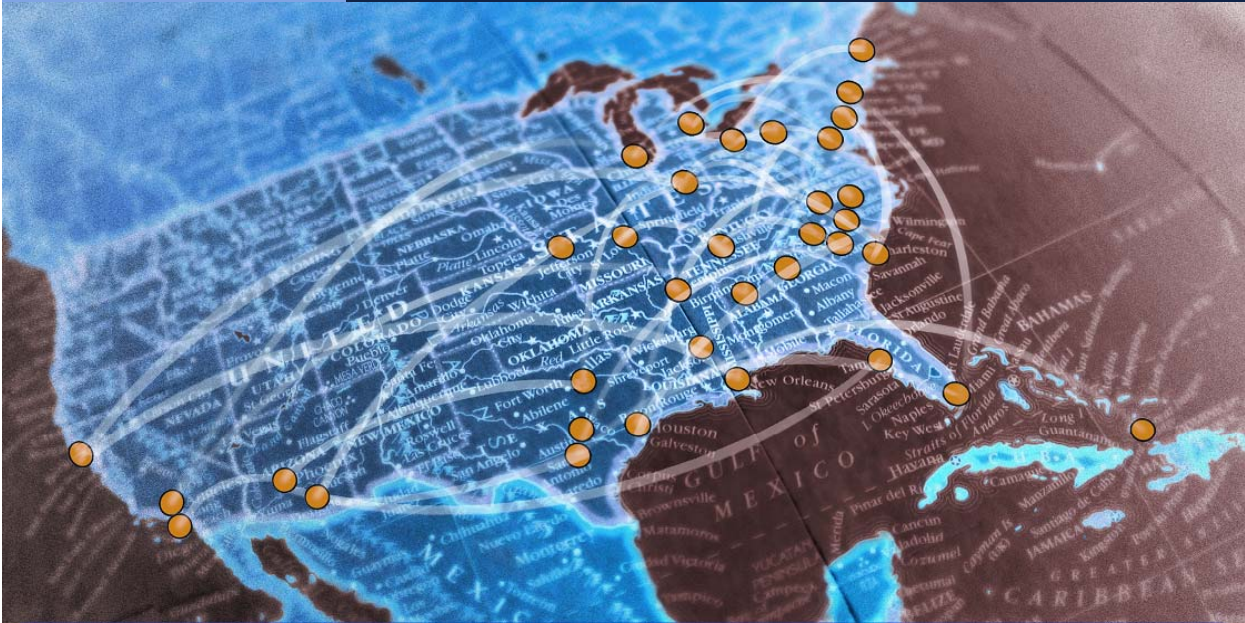


OSHA UPDATE EDISON ELECTRIC INSTITUTE SAFETY AND HEALTH COMMITTEE



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Issues for Today

- OSHA leadership
- OSHA enforcement activities in the industry
- OSHA rulemakings of concern to electric utilities
- Review Commission developments
- OSHA reform legislation

OSHA Leadership

- David Michaels nominated as Assistant Secretary
 - Interim Head, Department of Environmental and Occupational Health, George Washington University School of Public Health
 - Epidemiologist
 - Author, *Doubt is Their Product: How Industries Assault on Science Threatens Your Health*

- Michaels has urged a comprehensive safety and health program standard
 - Place onus on the employer, not OSHA to identify and abate hazards
 - Opposition to his nomination seemed to be building, but recently, rumors of confirmation without a hearing

OSHA Leadership

- Jordan Barab - Acting Assistant Secretary
 - Also serves as Deputy Assistant Secretary (“the political deputy”)
 - Worked for House of Reps. under Cong. George Miller (D-CA)
 - Long-time “blogger” for employee safety causes

- Deborah Berkowitz – Chief of Staff
 - Formerly, Safety and Health Director, United Food & Commercial Workers (UFCW)
 - Recruiter for Change to Win
 - Strong advocate for ergonomics regulation
 - Chief of Staff is “right-hand person” to the OSHA administrator; handles day-to-day operations

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OSHA Leadership

- Richard Fairfax - Director of Enforcement and Acting Director of Construction Directorate
 - Career OSHA Official
 - Trained as Industrial Hygienist

Emerging Enforcement Trends

- Larger penalties; willful and “repeat” citations
 - Mr. Barab: OSHA will push penalties to extent allowed by current OSH statute
 - Not just for fatalities or serious accidents
 - Even for non-accident violations, as a “deterrent”
 - Not concerned if higher penalties means more contested citations
 - Publicly rejects going slowly due to economic conditions

What You Can Expect

- As usual, swift reaction to major accidents
- In-depth investigations; aggressive attitudes
 - Increased threat, and perhaps use, of criminal process where fatalities occur
- Corporate-wide abatement will be sought
- Contractor safety issues – multi-employer responsibilities
 - Even in criminal cases
- Much less interest in cooperative programs such as VPP

Recent Significant Enforcement Action Teaches Important Lessons

- Investor-owned electric utility, and contractor's officers, indicted in federal court for fatal confined space accident
 - Company may be criminally liable where a willful violation of a standard causes an employee fatality
 - Individuals may be criminally liable for other violations, such as obstructing justice, misleading investigators

Recent Significant Enforcement Action Teaches Important Lessons

- Consider the issues involved in the indictment
 - Host employer involvement with contractor
 - Determining whether confined space is permit-required under 29 CFR 1910.146
 - Emergency procedures and rescue; fire protection

- Most OSHA enforcement is civil, not criminal, but the point is clear: *This is not your father's or mother's OSHA!*

Emphasis on recordkeeping

- National Emphasis Program about to be announced, but “emphasis” is already evident in inspections for other reasons
 - Be certain current and past Logs are accurate and up-to-date
 - Recent citation in the industry for failing to state in Column F of 300 log how a reportable condition “happened”
 - Unclear what this means when condition not due to a discrete cause
 - OSHA leaders suspect widespread under-recording
 - Looking at reporting systems and incentive/disincentive systems (Mr. Barab really interested in this)
 - Medical treatment issues: are employees avoiding medical treatment to keep from recording?

Current issues in Electric Utility Inspections and citations

- Combustible dust/coal dust
 - In OSHA Region V (Chicago), at least three inspections involving coal dust in coal-fired power plants
 - Some of the issues:
 - When is a confined space “permit-required” under 1910.146?
 - What coal processing equipment in a power generation plant is considered “integral” to generation so that they are covered by 29 CFR 1910.269(d) lockout/tagout requirements, rather than 29 CFR 1910.147?
 - When engaging a contractor to perform work in a confined space where coal dust is present, what is utility’s obligation to inform contractor of risks of working with PRB coal?
 - Who is a “host” employer under 1910.146? How, and where, is that term defined?
 - Is NFPA 850 applicable to a power generation plant?

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Enforcement Issues, cont'd

- Still unresolved: One or two employees for work on low voltage equipment (1910.269(l)(1)(i))
 - OSHA Region V (Chicago) pushing hard for two-person crews

- MSHA asserting jurisdiction as to substations on mine operators (quarry property)
 - Issue goes back to case decided in 1985
 - *Old Dominion Power*, US Court of Appeals, 4th Circuit

Rulemaking

- Cranes and Derricks Proposed Standard
 - OSHA says final standard will be published “in the Spring”
 - Mr. Barab has stated: Finishing this standard is “OSHA’S No. 1 rulemaking priority.”

- Among the difficult issues for OSHA to resolve are:
 - Operator certification and third party review of in-house training and certification programs
 - Federal pre-emption of local crane regulations in state without state plans (e.g., New York City, Chicago)
 - Overreaching to involve electric utility industry created numerous issues

Rulemaking

- OSHA Proposal to update 29 CFR 1910.269 and Part 1926 Subpart V
 - Proposal issued in 2005; hearings held; record closed
 - OSHA has just reopened record on issue of minimum approach distances
 - Published Notice asking for comment on recent report of IEEE 516 Committee that clearance distances in OSHA tables are not correct
 - EEI will submit comments on October 15, 2009
 - EEI will participate in public hearing on October 28, 2009

Rulemaking

- Proposed rule on Confined Spaces in Construction
 - EEI submitted comments and testified
 - Will not be completed until after cranes and derricks rule

- Silica
 - OSHA conducting peer review of draft proposed standard
 - Proposed standard expected before end of 2009
 - EEI Task Group has been working on this issue
 - Another potential regulation of fly ash
 - OSHA recently published Guideline: Controlling Silica Exposures in Construction

Rulemaking

- Combustible Dust
 - OSHA soon to publish Advance Notice of Proposed Rulemaking to gather information
- Proposed Rule to Align Hazard Communications Standard With Globally Harmonized Labeling System

Occupational Safety and Health Review Commission

- Federal agency that decides contested OSHA cases
 - Thomasina Rogers – Chairman
 - Re-appointed by President Obama
 - Six-year term, expires 2015
 - Horace “Topper” Thompson - formerly Chair, now Commissioner
 - Appointed by President Bush
 - Term expires April 2010
 - Commission should have three members, but still no mention of nominee for third position
- Despite Commissioners’ best efforts, few decisions issued recently
- If citation contest rate rises, OSHRC vacancy becomes important problem

Protecting Americas Workers Act (OSHA Reform Legislation)

- Conventional wisdom is that this legislation must wait EFCA resolution
- Introduced in House of Reps in early 2009
- August 2009, introduced in Senate
- Proposed provisions of legislation are draconian for employers
- OSHA trying to implement enhanced enforcement concepts under existing law

OSHA Reform Bill – Key Provisions

- Civil Penalty Increases
 - “Willful” or “repeat” – \$100,000 maximum; \$250,000 maximum for fatality
 - “Serious” – \$10,000 maximum; \$50,000 maximum for fatality

- Criminal Penalty Increases
 - \$500,000 maximum fine for organization
 - Fine and potential prison sentence “for any responsible corporate officer” where willful violation causes death or serious bodily injury to any employee
 - “Serious bodily injury” to an employee includes “loss or impairment of . . . mental faculty”

OSHA Reform Bill – Key Provisions

- Employees would have the right to contest/object to modification of citations or “improper” classification

- Will it pass?
 - Will it be a priority for organized labor?
 - Will Congressional moderates be able to accept “criminalization” of workplace safety?