

Edison Electric Institute Safety and Health Committee **OBSERVATIONS ON THE NEW OSHA**



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OBSERVATIONS ON THE NEW OSHA

YOU CAN BELIEVE CHANGE
IS COMING

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FIRST CLASS SERVICE, COAST TO COAST

EMPLOYERS & LAWYERS, WORKING TOGETHER

OSHA'S NEW LEADERSHIP

- Secretary of Labor: Hilda Solis (former Rep. D-Calif.)
 - *“Champion of working families”*
 - Change to Win Chair Anna Burger
 - *“Finally Americans will have a Secretary of Labor who represents working people, not wealth [CEO’s]”*
- Jordan Barab – Deputy Assistant Secretary and Acting Assistant Secretary for OSHA
 - Comes from Rep. Miller’s (D-CA) Workforce Committee
 - Aggressive pro-employee and pro-labor advocate.
 - Will he at least listen to industry concerns?
- Nominee for Solicitor of Labor: M. Patricia Smith, Esq.
 - Self-described “lifelong labor advocate”
 - “There are still many who are victimized by employers who blatantly break the law.”

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TWO INITIAL OBSERVATIONS

- After years of “Compliance Assistance” and relatively passive enforcement, many employers do not take OSHA enforcement very seriously
 - A challenge – to persuade management that increased enforcement is likely
- Vigilance and energy in addressing new rules is needed at the precise time that resources are severely limited
 - A challenge for EEI members

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OUR EXPERIENCE WITH THE “NEW” OSHA

- More difficult to settle routine cases
- Regional and Area officials, and their attorneys, desire to be seen as “tough” on enforcement
- OSHA encouraged by judicial deference to agency in important recent decisions
 - Multi-employer citations
 - Hexavalent chromium standard
 - Recent OSHRC decision on lead in construction
- Cooperation with US Dept. of Justice in environmental crimes investigations

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OSHA GETTING MORE RESOURCES

- FY 2009 budget of \$513 Million
- \$27 Million increase over FY 2008
- Enforcement and standards setting are top priorities listed in explanatory note
- Budget provides \$1 Million for recordkeeping enforcement initiative

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RECORDKEEPING

- Some advocates of more aggressive enforcement suspect that reporting is being suppressed
 - Some skepticism about reward programs premised on low numbers of recordables
- In construction, there is concern in some quarters that contractors are not properly reporting injury accidents and sickness
 - The perception is that contractors are under pressure to keep their incident reporting rate low in order to bid on the next job

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Aggressive Enforcement to be expected

AGGRESSIVE ENFORCEMENT – SOME RECENT EXAMPLES

April 6, 2009: \$180,950 for allegedly failing to protect employees against fall, drowning and other hazards on bridge project

March 10, 2009: \$201,600 – Trench collapse killing 4 workers; 3 willfuls alleging failure to instruct employees on hazard recognition

Feb. 25, 2009: \$273,000 – sheet metal and structural steel fabricator, for failing to provide required safeguards for temporary employees removing asbestos-containing insulation from steam pipes

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AGGRESSIVE ENFORCEMENT

- February 25, 2009 - **\$1.2 Million**;
East St. Louis, MO; hospitalization of chemical handlers; 21 willfuls related to PPE, training and fit testing
- Feb. 24, 2009 - \$192,000;
Hamilton, Ala., 36 safety and health violations; 1 willful for not enforcing lockout/tagout procedures
- August 25, 2008 - \$9 Million
Postville, IA; Kosher meat processor; 9,000 criminal child labor violations; \$101,000 OSHA fines for 21 serious, 6 repeats, etc. for compressed gas storage and unsafe staircases

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“Egregious” citations for PPE and training violations

- New standards effective January, 2009
 - 29 CFR 1909(a) and (b)
- Each failure to provide personal protective equipment (PPE) that is required by a standard, and each failure to provide training required by a standard allows “egregious” or “instance by instance” penalties for “each” employee who does not get PPE or training
 - Each failure can be a separately citable violation
- No allegation of willful violation is required
- Review Commission new decision reinforces that any standard that arguably is for benefit of individual employees may support separate citation (even a standard requiring a “training program.”)

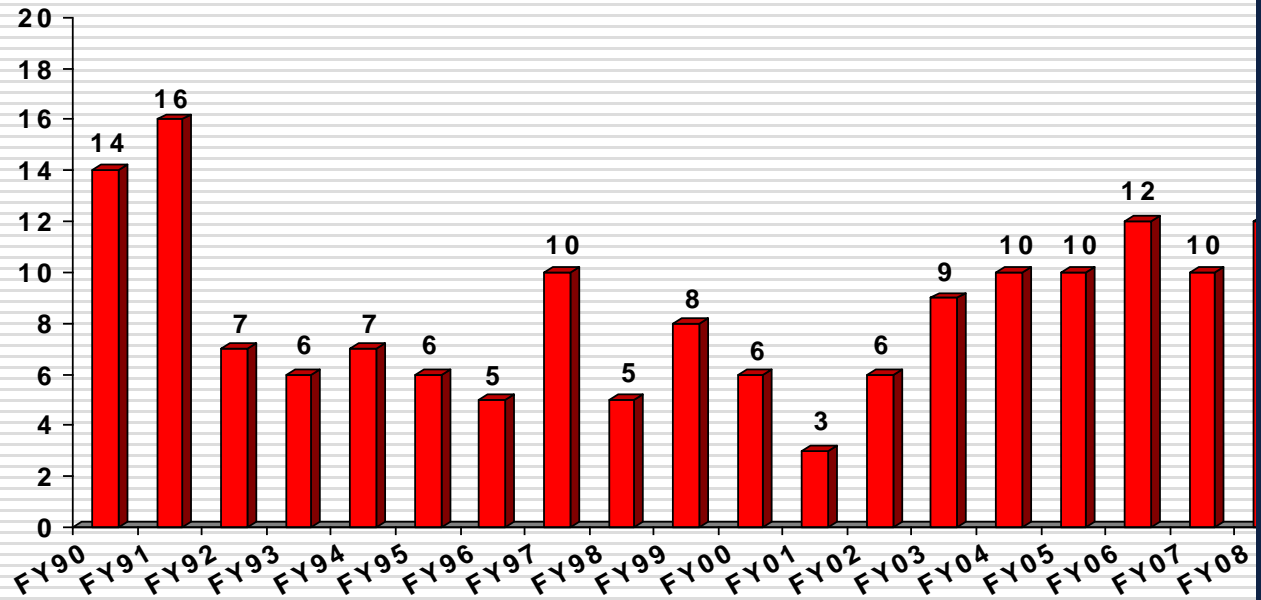
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FIELD OPERATIONS MANUAL

- Revision issued March 26, 2009
- Some significant changes. Example:
 - Compliance Officers are told they must ask for three years of recordkeeping in each inspection
 - Compliance Officers told they must ask for whatever PPE hazard evaluations the employer has prepared

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FY 1990 – FY 2008 **Criminal Referrals**



Source: Richard Fairfax, OSHA



National Emphasis Programs

- Lead
- *Crystalline Silica*
- Amputations
- *Combustible dust*
- Oil refineries
- Ship breaking operations
- Trenching

■ *Source: Richard Fairfax, OSHA*

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NATIONAL EMPHASIS PROGRAMS

- NEPs Under development
 - Chemical Plants – process safety management
 - Primary metals
 - Occupational asthma
 - Flavorings and Diacetyl
 - Oil and gas well drilling
 - Recordkeeping

■ *Source: Richard Fairfax, OSHA*

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MULTI- EMPLOYER LIABILITY UNDER OSHA

What are an employer's obligations under OSHA?

- Comply with OSHA General Duty Clause and standards:
 - 29 USC 654(a)
 - Each employer-
 - (1) Shall furnish to **each of his employees** employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
 - (2) shall comply with occupational safety and health standards promulgated under this chapter.
 - 29 CFR 1910.12(a) states in pertinent part:

Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

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What is “construction work” and what is “general industry” work as defined by OSHA?

- In the world of OSHA, “construction work” does not mean “the construction industry”
- 29 CFR 1910.12(b) states:
 - For purposes of this section, construction work means work for construction, alteration, and/or repair, including painting and decorating
- There is no description of the employer who performs this work. Any employer can perform “construction work.” *It’s the nature of the work that controls.*
- There’s no definition of operations and maintenance work in OSHA standards

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To whom does a contractor owe a duty under OSHA?

- For violations of the OSHA General Duty Clause (29 USC 654(a)(1)), a contractor may be cited only where his own employees are exposed to a violative hazard
 - The General Duty Clause applies where there is no standard addressing a specific hazard
- OSHA takes a different view, however, when there is a violation of a standard

OSHA's Multi-Employer Citation Policy

- Enforcement policy – employer may be cited in four situations
 - (1) **Created** the violative condition at issue;
 - (2) Employees **exposed** to the hazard;
 - (3) Can **Correct** the hazard; or
 - (4) **Control** the work site

OSH Review Commission decision in *Summit Contractors, Inc.*

- The Review Commission majority (2-1) held that where work is “for construction” as defined in 29 CFR 1910.12,(b), general contractors cannot be cited if they have not created the cited hazard, and have no employees exposed employees to such hazards
 - Note that this does not apply where work is NOT “for construction,” but is subject to OSHA’s general industry standards in 29 CFR Part 1910-
- OSHA appealed to 8th Circuit Court of Appeals in St. Louis

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EIGHTH CIRCUIT DECISION

- *Solis v. Summit Contractors*
 - Eighth Circuit three-judge panel, with a strong dissent, deferred to OSHA reading of construction regulation to allow citations to general contractors with no employees expose to hazards
 - Court suggested that issue should go through rulemaking and wondered if the Act really allows multi-employer liability, but did not decide the issue
 - Summit has asked for “*en banc*” review by full Eighth Circuit
- OSHA continues to issue citations to “controlling employers” on multi-employer worksites
 - Host employers who engage contractors directly
 - General contractors on construction projects

Multi-employer obligations built into specific standards

- Examples:
 - Hazard Communication standard
 - Asbestos standard
 - Lockout/tagout standard for general industry
 - Electric Power Generation Standard for general industry
 - Proposed cranes and derricks standard

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OSHA Reform Legislation?

OSHA REFORM LEGISLATION?

- Last year, the Protecting America's Workers Act proposed significant changes:
- Civil penalty increases
 - Will or repeated - **\$100,000** max
Causing death - \$50,000 - \$250,000
 - Serious - **\$10,000** max
Causing death - \$20,000 - \$50,000
 - FTA - **\$10,000/day** max
Causing death - \$20,000/day - \$50,000/day

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OSHA REFORM LEGISLATION?

- Criminal penalty increases
 - Willful violation for causing death - **\$500,000** max for organization
 - Repeated violation – **10-20 years** max. for individual
 - Criminal penalties for violations causing “**serious bodily injury**” to an employee
- Not clear how Democrats will approach OSHA reform in the current Congress
 - Senator Murray holding hearing April 28, 2009
 - Seen as predicate to some kind of reform proposal

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