

# EDISON ELECTRIC INSTITUTE SAFETY AND INDUSTRIAL HEALTH COMMITTEE OSHA UPDATE



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# Overview

EEI v. OSHA (3d Circuit) (challenge to standard on hexavalent chromium)

## Regulatory Developments

- Combustible Dust – Revised National Emphasis Program
- Proposed standard on confined spaces in construction
- Lockout/Tagout compliance directive
- Possible reopening of rulemaking record on proposed revision of 1910.269 and Part 1926 Subpart V

## Overview (cont'd.)

### Enhanced Enforcement Program

### Review Commission and court cases

- Summit Contractors, pending in 8<sup>th</sup> Circuit (Multi-employer citations in “construction work”)

General Motors – Review Commission case on lockout tagout under 1910.147

## Enforcement issues

Kansas City Power & Light – piping life expectancy issue

Kentucky Utilities – Kentucky OSHA rejects free climbing in tower construction

Legislative developments – a look into the future?

# COMBUSTIBLE DUST

- OSHA has reissued combustible dust National Emphasis Program
- Includes agricultural, chemical, textile, furniture, metal processing, paper products, pharmaceuticals, food
- Each area office will conduct 4 inspections this year
- Enforcement trend: Major accident in an industry = NEP

# COMBUSTIBLE DUST

EEI had complained to OSHA about original NEP, and met with Rich Fairfax, Director of Enforcement

It had appeared that based on an NFPA standard, OSHA would cite where coal dust accumulations exceeded 1/32" in a power plant over a relatively small area

In reissued NEP, OSHA removed reference to 1/32"

- acknowledges that in "coal handling areas" in a power plant, OSHA can only cite under 1910.269 if anti-combustion steps not taken, not under general housekeeping standard

- OSHA now must prove a combustion hazard where coal dust accumulates outside coal handling area

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- Combustible Dust Legislation
  - U.S. Reps. George Miller (D-CA) and John Barrow (D-GA) introduce legislation on combustible dust on March 3, 2008
  - OSHA must issue interim standard within 90 days
  - Standard would apply to industries producing or working with products that expose workers to combustible industrial dusts, including coal dust.

## Combustible Dust Legislation (cont'd.)

- Requirements include “explosion protection”
- MSDSs must list dust combustion as physical hazard
- Georgia just adopted state requirements for combustible dust
- May be preempted by the OSH Act

# Proposed Rule for Confined Spaces in Construction

29 CFR 1910.146 – General Industry standard

- Proposal is needlessly complicated – Why not just use general industry standard for “construction work”
- Proposal contains requirements for “host employer,” but what if host employer is not “engaged in construction?”

EEL submitted comments and will testify at public hearing – no date yet

Large number of other industries commented –nearly universal disapproval for similar reasons

Wind energy industry among those who will testify

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## Regulatory Developments (cont'd.)

- OSHA Directive – Lockout/Tagout
  - Compilation of 18 years of interpretative letters issued since the original CPL in 1990
  - Clarification on “minor servicing exemption,” machine-specific procedures and “unexpected energization”
  - Is this back-door rulemaking?

# Enforcement Trends

- OSHA's Enhanced Enforcement Program (EEP)
- Triggered by fatality or high gravity violations
- Follow-up and programmed inspections
- "Enhanced" settlement provisions
- Section 11(b) enforcement in Federal Court

## Enforcement Trends (cont'd.)

- Significant cases and egregious cases
- Unclassified violations
- Inspection of “related” worksites
- Follow-up inspections
- Settlement agreements as tools for future enforcement measures
- Apparently, no more “unclassified” or “Section 17” settlements of willful citations

# Legislative Developments (cont'd.)

Kennedy (D-MA)/Woolsey (D-CA)

OSHA Reform Legislation (S.1244/H.R. 2049)

## ■ Civil Penalty Increases

- Willful or Repeated -- \$100,000 maximum
- Willful or Repeated Causing Death -- \$50,000 minimum; \$250,000 maximum
- Serious -- \$10,000 maximum
- Serious Causing Death -- \$20,000 minimum; \$50,000 maximum
- FTA -- \$10,000 maximum
- FTA Causing Death -- \$20,000 minimum; \$50,000 maximum

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## Legislative Developments (cont'd.)

### Kennedy/Woolsey Legislation

- Will it pass?
- S. 1244 – 24 Co-Sponsors, including Clinton and Obama
- S. 2049 – 61 Co-Sponsors
- *NY Times* series: Many workplace fatalities/catastrophes with egregious facts result in small fines

# Legislative Developments (cont'd.)

## Kennedy/Woolsey Legislation

- Criminal Penalty Increases
  - Willful Violation Causing Death -- \$500,000 maximum fine for organization
  - Maximum prison sentence of 10 years or 20 years for repeated violation for an individual (not applicable to corporations)
  - Criminal penalties available any time a violation causes “serious bodily injury” to an employee
  - State prosecutions for manslaughter are not preempted

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# Legislative Developments (cont'd.)

## Kennedy/Woolsey Legislation

- Preemption of OSHA standards by another agency's standards (*i.e.* FAA, DOT) may be challenged
- Section 11(c) whistleblower provisions expanded
- Victim or family may make a statement at settlement negotiations
- Employees have the right to contest/object to modification of citations or "improper" classification

## Case Law Update

- *Secretary v. Summit Contractors*
  - Multi-employer worksites in construction
  - OSHA is no longer permitted to cite a “controlling employer” that has neither created the safety hazard nor exposed “his employees” to the hazard
  - On appeal to the 8<sup>th</sup> Circuit

## Case Law Update (cont'd.)

- *Secretary v. General Motors Corp.*
  - Citations issued 1991; oldest case on docket
  - Review Commission allowed “per employee” penalties for failure to train under LOTO standard
  - Contrasts with *Eric K. Ho* decision that held that “per employee” penalties were not permitted under asbestos training standard