

HOT TOPICS: NEP'S LOCAL EMPHASIS EFFORTS, RECORDKEEPING, INDUSTRIAL HYGIENE ISSUES & HEXAVALENT CHROMIUM, COMBUSTIBLE DUST, CONSTRUCTION FOCUSES

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THE ADMINISTRATION'S OWN DESCRIPTION OF ITS FOCUS

- Secretary of Labor Hilda Solis:
“Let me be clear, the Labor Department is back in the enforcement business.”
April 28, 2009 “Workers Memorial Day” Speech
- Assistant Secretary of Labor David Michaels:
“There is a new sheriff in town . . . this is not an abstract wish . . . it is a stern description of how OSHA is now working . . . and I take this phrase seriously.”

March 10, 2011, ABA

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UNDERSTAND THE ADMINISTRATION'S UNDERLYING ENFORCEMENT GOALS

- inspections have not yet increased, but “inspections found in compliance” have declined 30%, and “egregious cases” have increased;
- quiet but efficient OSHA working groups focusing on issues from raising penalties without passage of the PAW to recordkeeping;
- efforts to focus on larger multi-location employers, and to determine “patterns,” possibly triggering willful, repeat, or item-by-item classification, or placement in EEP-type programs;

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UNDERSTAND THE ADMINISTRATION'S UNDERLYING ENFORCEMENT GOALS

- shift from an “establishment” focus to a “corporate wide” analysis.
- Patiently taking methodical steps such as with Ergonomics issues
 - proposal to add MSD's to 300 Log.
- Change in tone – see the www.OSHA.gov weekly list of catastrophic injuries with employer identifiers, and ongoing efforts to make other employer information public

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OSHA WEBSITE: WORKER FATALITIES

- **Worker Fatalities**
- 2/17/2010 WV – Worker was working in the kitchen area and fainted / fell to the floor, grabbing hold of a deep fryer, spilling hot grease out onto her and burning 30 percent of her body.
- **5,071 workers died on the job in 2008**
- "With every one of these fatalities, the lives of a worker's family members were shattered and forever changed. We can't forget that fact."
- **-Hilda Solis, Secretary of Labor**
- [Weekly Fatality Reports](#) - through 2/26/2010

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WEEKLY FATALITY/CATASTROPHE REPORT

- Weekly Fatality/Catastrophe Report
- This table contains the weekly summaries of fatalities and catastrophes resulting in the hospitalization of three or more workers. Employers must report these incidents to OSHA within eight hours. The summaries below include only preliminary information, as reported to OSHA Area Offices or to States which operate OSHA-approved State Plans. The fatalities listed here include only those that initially appear to be work-related, but excludes fatalities that do not appear to be work-related, such as an apparent heart attack of a sedentary worker. OSHA investigates all work-related fatalities and catastrophes. After OSHA's investigation is complete, these reports will be updated with inspection results and citation information.
- Weekly Summary (Federal and State data tabulated week ending Feb 26, 2010)

FATALITIES	Date of Incident	Company and Location	Preliminary Description of Incident
2/4/2010	Hansell Mitzel Homes LLC, Mt. Vernon, WA 98273	Worker was crushed by the bulldozer he was operating. He was transported to the hospital where he later died.	
2/14/2010	Severstal Sparrows Point, LLC, Sparrows Point, MD 21219	Worker was descending from the cab/platform built into the side of the vehicle. The worker fell backwards and landed on the concrete floor.	
2/16/2010	Sound Storage Management, Everett, WA 98201	Worker was bitten by a customer's dog at a gated storage facility while on duty. Worker passed away two days later at the hospital from blood poisoning related to the dog bite.	
2/18/2010	A to Z Island Maintenance, Inc., Chinquapin, NC 28521		

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UNDERSTAND HOW D.C. IS CHANGING OSHA'S "METHODS"

- Focus on “routine” items, but using “repeats” to increase penalties for multi-location employers
- Less flexibility in negotiations
- Effective use of NEP’s, especially Combustible Dust and Amputations; similar to the success of the PSM NEP
 - Over 140 Local Emphasis Programs
- Anticipate further NEP emphasis on lead, silica, PSM – chemical plants, Hex, and industry sectors, such as poultry, and foundries
 - D.C. reviewing Regional comments about high hazard facilities
 - D.C. evaluating the amputations NEP
 - NEP for Hexavalent Chromium
- More follow-up’s; especially about abatement

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UNDERSTAND HOW D.C. IS CHANGING OSHA'S "METHODS"

- focus on recordkeeping enforcement and changes in how injury and illness data is viewed and utilized;
 - proposed requirement to record MSDS's and reliance on "subjective symptoms"
 - removal of language from the Recordkeeping Directive that minor musculoskeletal discomfort is not recordable if a hcp determines that the employee is able to perform his job functions and the employer assigns a work restriction to prevent more serious injury
 - reasons for the Recordkeeping NEP
 - Oct. 1, 2009 Directive – focus on employers in high hazard industries who have low rates

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UNDERSTAND HOW D.C. IS CHANGING OSHA'S "METHODS"

- larger penalties;
 - already risen 20% per serious item since Mr. Barab complained about the average serious penalty amount
 - Use of significant cases and egregious citations.
- emphasis on the elements of a comprehensive safety & health management program;
 - Could elements of HR 2113, "Corporate Injury, Illness & Fatality Reporting Act" be required?
- There were as many egregious citations in the first quarter of 2009 as all of the last fiscal year
- unclear what constitutes "egregious"
- Pending suit against OSHA writing standards to focus on per-condition or per-employee violations
- GM decision- a standard must require or prohibit individual acts

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UNDERSTAND HOW D.C. IS CHANGING OSHA'S "METHODS"

- reliance on professional safety and industrial hygiene groups to establish standards and an emphasis on chemical exposure issues;
- ongoing review and revision of the OSHA FOM and Directives, especially with regard to IH (Industrial Hygiene) issues;
 - update of TB and Bloodborne Pathogens Directives
 - June 6, 2010 requirement that employers notify employees of all Hex exposure monitoring results

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UNDERSTAND HOW OSHA IS CHANGING THE METHODS: IH ISSUES

- OSHA requests comments on Direct Final Rule and Notice of Proposed Rulemaking to protect workers from exposure to hexavalent chromium
- **WASHINGTON** -- The Occupational Safety and Health Administration is publishing for public comment a direct final [rule](#) requiring employers to notify workers of exposures to hexavalent chromium. OSHA is responding to the Third Circuit Court's decision that the agency failed to explain why it departed from the proposed rule that would require notifying workers of all hexavalent chromium exposures.
- OSHA currently requires employers to alert workers only when they experience hexavalent chromium exposures exceeding the permissible exposure level. After reviewing the issue, OSHA decided to make hexavalent chromium consistent with other OSHA standards on hazardous substances such as lead and arsenic that require worker notification of all exposures, whether above or below the limit.

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- US Labor Department's OSHA announces informal public hearing on hazard communication in Pittsburgh on March 31
- **PITTSBURGH** -- The U.S. Department of Labor's Occupational Safety and Health Administration will hold an informal public hearing in Pittsburgh on March 31 regarding a proposed rule to align the agency's Hazard Communication Standard with the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals.

The system provides a single, harmonized system to classify chemicals, labels and safety data sheets with the primary benefit of increasing the quality and consistency of safety information provided to workers, employers and chemical users. Inconsistencies in warnings, such as unfamiliar symbols and misunderstood hazard statements, could cause workers' deaths.

The agency will consider participants' comments in developing a proposed rule on aligning HCS and GHS. A number of countries, including the United States, along with stakeholder representatives and international organizations, participated in developing the GHS to address inconsistencies in hazard classification and communications.

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UNDERSTAND HOW D.C. IS CHANGING OSHA'S "METHODS": OSHA INTERPRETATIONS

- Hi-Viz clothing required safety attire for highway and road construction workers
- http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27155
- Published Aug. 25, 2009
- Construction fall protection rules do not apply to vehicles
- Published March 16, 2009

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UNDERSTAND HOW D.C. IS CHANGING OSHA'S "METHODS": OSHA GUIDANCE

- 'New' guidance on controlling silica exposures in construction
- <http://www.osha.gov/Publications/3362silica-exposures.pdf>
- 'New' guidance and training materials on scaffolding
- <http://www.osha.gov/dte/library/scaffolds/scaffolding/index.html>

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WHAT DO WE LEARN FROM THESE RECENT OSHA PRESS RELEASES?

- BP – Husky Refinery (3/8) \$3,000,000 penalties (following 2009 \$87,000,000 in Texas City Refinery “follow-up”)
- Contempt Order against Andre Tuckpointing and Brickwork (AT&B) for “ignoring” citations (2/11)
 - OSHA cites C.A. Franc \$599,000 for willful fall protection violations following worker’s death and owner pleads to criminal charges
 - Recent criminal action against Company personnel in NYC crane collapse and in World Trade Center building case

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WHAT DO WE LEARN FROM THESE RECENT OSHA PRESS RELEASES?

- Broadway Concrete (2/19) agrees to pay \$750,000 and take comprehensive jobsite safety steps, including:
 - Select and employ a full-time chief of construction operations and a corporate safety director to oversee construction operations and have authority over senior job superintendents in safety and health related issues.
 - Employ a full-time site safety director on each large project and have a safety director inspect smaller projects at least once a week; the safety directors will have authority to stop work and direct changes to ensure site safety.
 - Reduce the salary of senior job superintendents who fail to comply with applicable OSHA and job safety practices.

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WHAT DO WE LEARN FROM THESE RECENT OSHA PRESS RELEASES?

- Complete a comprehensive review of current construction means, methods and safety procedures, including a crew-based, task specific hazard assessment for every phase of current construction operations.
- Develop a new corporate safety and health plan.
- Finalize a site specific safety and health plan for each new project before work begins, ensure the job superintendent reads it and provides copies to onsite employees.
- Provide safety and health management training to superintendents and supervisory personnel working on each site, and train company and subcontractor employees on each site's safety and health plan.
- Provide OSHA officials with information on major projects and access to all jobsites without need of a warrant for the next four years.

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WHAT DO WE LEARN FROM THESE RECENT OSHA PRESS RELEASES?

- US DOL/OSHA orders E-Smart Technologies, Inc. to pay wages with interest and approximately \$600,000 in compensatory damages and to reinstate the alleged “whistleblower.” (3/3)
- DOL orders Tennessee whistleblower reinstated with \$1,000,000+ in back wages (3/18)
- OSHA cites a New York retail store over \$240,000 for serious and repeat violations, mainly for allegedly blocked exits, electric cabinets, and extinguishers.
 - Focused on “common” challenges.
 - In response to criticism of the dramatic press release, Asst. Secretary Michaels stated, “shame is a great regulator.”

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RECORDKEEPING AND DATA GATHERING

- **Stepping Up Surveillance**

We're also looking to see whether management is discouraging workers from reporting injuries and illnesses, which undermines worker safety and OSHA's ability to assess and target hazardous practices and dangerous worksites.

In October 2009 we initiated a National Emphasis Program to ensure workplace injuries and illnesses are accurately reported. We were very concerned about recent studies, Congressional hearings and a GAO report that touch on two related issues. These reports not only documented serious underreporting, but also highlighted certain incentive and disciplinary programs that encouraged workers and employers to underreport injuries and illnesses to OSHA. This is unacceptable.

OSHA is deadly serious about increasing our surveillance efforts and enforcing our requirements to ensure that workers and employers understand how important accurate data is to workplace safety and health.

Gathering accurate data is only part of the battle. OSHA is also challenged to view data that is up-to-date. Currently we focus our inspections through our Site-Specific Targeting program using injury data that is often more than two years old. We need to find ways to implement 21st century technology to give us timely information that can enable us to react swiftly and effectively when we detect troubling trends. Last fall, OSHA held a meeting of industry experts to seek solutions to this "data delay," and we're preparing to make changes — both in how reports are recorded and sent to OSHA as well as how OSHA manages the information.

(Dr. Michaels 3/25/10)

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SELF-AUDITING FOR RECORDKEEPING EXPOSURE IN ANTICIPATION OF THE NEP

- Site Coordination
 - are 300's maintained onsite, by whom, or at Corporate?
 - who completes 301's? What is Corporate's role?
 - does more than one set of 300's exist?
- Overall Coordination
 - Who onsite handles Injury Reports, Accident Investigations, Workers Comp Issues, leave and return-to-work, absenteeism, first-aid, and other paperwork?
 - What is Corporate's role?
 - At Corporate, who coordinates OSHA Recordkeeping, Workers Comp, STD/LTD/FMLA, Health Insurance, and other personnel matters?
 - What training do you provide Corporate and site employees with recordkeeping responsibilities about OSHA records?
 - Who deals with physicians?

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SELF-AUDITING FOR RECORDKEEPING EXPOSURE (cont'd)

- What safety-related incentive programs do you maintain for Corporate and site employees and managers?
- What instruction do you give first-aid personnel?
- How often do you self-audit and/or update 300's within a five (5) year period?
- Do managers and recordkeepers appreciate the differences and conflict between the OSHA and Workers Comp processes?

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ERGONOMICS

- As for the question on many minds — "What is OSHA going to do about ergonomics?" — let me say two things:
- First, if we look at this problem honestly, there is little doubt that musculoskeletal injuries remain one of the biggest workplace health and safety problems in American industry. Something has to be done. No agency calling itself the Occupational Safety and Health Administration can go long without addressing this issue.
- Second: OSHA has not decided yet the best way to confront this problem, given the daunting regulatory process and the complicated political issues surrounding ergonomics.
(Dr. Michaels 3/25/10)

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CONSTRUCTION ISSUES

- Standards and Guidance
- OSHA has accelerated its efforts to develop long-awaited standards addressing worker exposure to numerous on-the-job hazards.
- In recent months we have -
- revised our enforcement policies for fall protection during steel erection
- posted a letter of interpretation requiring the use of high-visibility warning garments to protect construction workers in highway work zones
- issued a direct final rule to protect workers from acetylene hazards
- In the coming months, OSHA will -
- continue working on a final rule for confined spaces in construction
- rescind OSHA's compliance directive on residential construction
- Most important, we are preparing the final rule in the new cranes and derricks rulemaking. We plan to issue this new standard in July 2010.
- We're also looking forward to your comments on the three rulemakings we have asked you to consider at this meeting - the MSD column regulation, the silica standard, and the standards improvement project. **Dorothy Dougherty** and her staff will be briefing you on these rulemakings later today. We look forward to your input.

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“GREEN JOBS”

- **Green Jobs**

OSHA is also carefully examining worker safety and health issues related to green jobs. Green jobs promise to be kinder to our environment and transform our economy, but they're not necessarily safer for American workers.

Many of these new jobs pose old occupational hazards, while some new, energy-efficient products expose workers to new, hazardous substances. For example, building and placing modern wind turbines still expose workers to the same dangers faced by traditional welders and tower erectors. Meanwhile, new spray polyurethane foam insulation, used to reduce energy costs in green buildings, expose workers to highly hazardous fumes during installation.

So, products and services advertised as "earth-friendly" don't get an automatic pass on the legal obligation to protect workers. Employers who rush into the green economy without paying attention to worker safety and health will blunder into many preventable injuries and deaths.

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ACTION PLAN GOING FORWARD

- A. Evaluate Legal Risk and Strategy in Federal versus State-plan States and by Region, and expect State Plan changes.
- B. Prepare for continuing changes in Enforcement efforts, as well as the possible effects of the PAW or similar legislation.
- C. Review your Preparation For OSHA Inspections and anticipate:
 - 1. More focus on training provided employees before assignment or exposure.
 - 2. More focus on recordkeeping.
 - 3. More focus on job safety analysis (JSA), and on providing and paying for PPE and Training.
 - 4. More focus on IH, including reviewing your basics or history for your respiratory protection approach.

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ACTION PLAN GOING FORWARD

5. Possibly a more vigorous Federal application of “controlling employer” analysis.
 6. An increased willingness to cite employers for work practices that are not clearly regulated by a specific standard.
- D. Review Existing Safety and Work Procedures, Supervisor Safety Responsibilities, Internal Inspections, Training, and Disciplinary Procedures.
- E. Review jobsite “paper-handling,” site coordination, and shared safety responsibilities where multiple contractors are onsite.

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ACTION PLAN GOING FORWARD

- F. Use regular Audits and Inspections to prove that the employer was not “on Notice” of a hazard or violation, nor should it have known with the exercise of reasonable diligence.
- G. Use privilege/work product protections where appropriate to audit your compliance and incidents.
- H. If working in an industry affected by an NEP, analyze OSHA directives and citations, and prepare accordingly. Contractors on a general industry site may be affected.
- I. “Revisit routine” areas such as Fall-Protection, scaffolding, Haz Comm, JSA’s/PPE, Lockout/Guarding, Powered Industrial Trucks and other equipment, etc.

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ACTION PLAN GOING FORWARD

J. Procedures and Policies To Review

1. Written descriptions of the Role of Safety for every job classification.
2. Develop new incentives and accountability for supervisor and management safety compliance not heavily based on injury numbers.
3. Document how you train and manage temporary and leased employees, hiring hall referrals, etc.
4. Document OJT training, as well as hazard assessment.
5. Evaluate pre-work planning Job Safety Analysis, PPE, Training, and documentation.

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ACTION PLAN GOING FORWARD

6. Review all routine Accident Inspection, Audit, Inspection Procedures, and related Forms.
 7. Cranes, rigging management, and all equipment involved in lifting.
 8. Highway work and other “struck-by” avoidance.
 9. Respiratory Protection.
- K. Ensure that Supervisors are trained to respond to increases in whistleblower claims and employee complaints.
- L. Train Supervisors to understand the ADA, ADAAA and GINA as it relates to concerns about employees presenting a direct safety threat, an inability to meet FMCS physical qualifications, or to perform essential functions, including with regard to infectious disease.

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ACTION PLAN GOING FORWARD

M. Revise Catastrophe Management Procedures.

1. Do not assume that it cannot happen to you.
2. Designated Rally Points, Evacuation Plans, etc. and clear roles of all employers onsite.
3. Determine the different role of contractors onsite, owners, GC's, CM's, etc.
4. Multiple designated Managers to
 - (a) manage emergency response
 - (b) respond to Media
 - (c) respond to law enforcement
 - (d) manage OSHA and other governmental response
5. Plan for the loss of the jobsite office and of communications.
6. Prepare a Media Response Book.
7. Training to avoid obstruction, false statement, and conspiracy claims, including where a jobsite is declared a "crime scene."

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ACTION PLAN GOING FORWARD

- N. Review past OSHA Citations and Informal Complaints to ensure no weak areas or repeat exposure.
- N. Train Supervisors to recognize what OSHA must prove to make out a citation and their legal role.
 - To make out a federal OSHA citation, OSHA must prove that a hazard existed, that an employee was exposed, and that the employer knew of a violation or, having exercised reasonable diligence, could have known of a non-compliant condition.
 - In order to prove that an employer should have known of a violation with the exercise of reasonable diligence, OSHA must show that the employer could have discovered the violative condition with the exercise of reasonable diligence.
 - Whether a supervisor was reasonably diligent includes: maintaining adequate work rules including safety programs, adequately supervising employees, inspecting the workplace, anticipating hazards to which employees may be exposed, and taking measures to prevent the occurrence of violations.

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ACTION PLAN GOING FORWARD

- Consistent discipline is essential: the importance of the unpreventable employee Misconduct.
 - Establish work rules designed to ensure safe work and to avoid OSHA violations;
 - Communicate the work rules to employees;
 - Train the employees as needed;
 - Take appropriate steps to discover violations;
 - Effectively enforce the rules and practices when violations are discovered; and
 - Document the above actions.
- As you discipline, always focus on the actions, conduct, and attitude and not on injuries, health conditions, insurance usage, workers compensation or other legal claims or “complaint,” in order to avoid ADA/FMLA/workers comp retaliation claims.

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