

OSHA in 2013 What's Old is New Again...

**Carla J. Gunnin
Baker, Donelson, Bearman
Caldwell & Berkowitz, P.C.
3414 Peachtree Road, Suite 1600
Atlanta, GA 30326
cgunnin@bakerdonelson.com
404.589.3404**

BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

Players at OSHA

- December 2009 – **David Michaels** became the new head of OSHA.
- Deputy Assistant Secretary – **Jordan Barab**.
- Chief of Staff – **Deborah Berkowitz**.

All reports are that these players hope to remain in their positions...but, who will be the new Secretary of Labor?

to be continued....

Alabama OSHA Offices

- Birmingham Area Office
 - Area Director – Ramona Morris

- Mobile Area Office
 - Area Director – Kurt Petermeyer

What have we seen under the Michaels era?

- More inspections, more enforcement, bigger penalties.
- Fewer partnerships and cooperative programs.
- New Standards and Interpretations.
 - Revival of safety and health program standard – I2P2.
 - Enforcement initiatives directed at claims of under-reporting of injuries and illnesses.
- Ergonomics enforcement.
- “Regulation by shaming.” “. . . more hard hitting press releases that explain more clearly why we cited a specific employer.” D. Michaels, Letter to OSHA Colleagues, 7/19/10.
- Heavy use of the general duty clause – Section 5(a)(1) of the OSH Act.

Enforcement

2012 OSHA Inspections - Summary

- Seventy-five percent of all inspections resulted in citations being issued.
- The number of significant cases - those with fines totaling more than \$100,000 - increased by 32% from 2010.
 - a number that has increased every year since Michaels' appointment
- More use of willful characterizations.
- Average cost of a serious violation is \$3000.
- Repeat look back is five years from the date of the final order.
 - Other than serious citations CAN result in repeat citations
- Increased use of SVEP – Severe Violator Enforcement Program.

Severe Violators Program

- June 2010 - Severe Violators Enforcement Program (SVEP)
 - Willful or Repeat Violations related to serious hazards.
 - Does not have to be final order only issued citations
 - Enhanced follow-up inspections at cited facility after abatement verification to determine if there are similar violations.
 - Nation-wide follow-up inspections at other facilities.
 - Increased company awareness, e.g., citations sent to corporate headquarters; issuance of news releases.
 - Enhanced settlement provisions – consultants; corporate-wide.
 - Increased use of Federal court enforcement action - contempt of court under Sec. 11(b) of the OSHA Act.

SVEP – GET ME OFF THE LIST

- August 2012 – OSHA finally provided criteria for removal
 - 3 years since case became a final order
 - All items have remained abated
 - All penalties have been paid
 - No additional related serious hazard have been identified at the initially inspected worksite or any related establishments

Duties of Employers

Section 5 of the OSH Act

Each employer-

- shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;
- shall comply with occupational safety and health standards promulgated under this Act.

Overview of OSHA Process

Process Begins with an Inspection:

- What Causes an Inspection to Occur?
 - Strategic Targeting Inspection (SST)
 - Complaints
 - National Emphasis Programs
 - Referral – Media, Other agencies, Plain View
 - Fatality/Multiple Hospitalization
- What Does an Inspection Consist Of?
 - Opening Conference
 - Walkaround Inspection
 - Closing Conference
 - 6 Month Limitation

Site Specific Targeting – January 4, 2013 Program

- 2012 Program is based on the 2010 data that was collected by the 2011 Data Initiative.
- Primary Inspection List
 - Manufacturing Establishments with a DART rate at or above 7.0, or a DAFWII case rate at or above 5.0.
 - Non-manufacturing Establishments with a DART rate at or above 15.0, or a DAFWII case rate at or above 14.0.
- Secondary List
 - Nursing and Personal Care Facilities with a DART rate at or above 10.0. Inspections will focus specifically on ergonomic stressors; exposure to blood and other potentially infectious materials; exposure to tuberculosis; and slips, trips, and falls.
- What About 2011 OSHA Data Survey Non-Responders? A random sample will be added to the Secondary Inspection List.

Most Frequently cited OSHA Standards for Oct. 2011 – Sept 2012

1. 1926.501 - Duty to have fall protection.
2. 1910.1200 - Hazard Communication
3. 1926.451 - Scaffolding
4. 1910.134 – Respiratory Protection
5. 1910.147 – Lockout/Tagout
6. 1910.178 – Powered industrial trucks
7. 1910.305 – Electrical wiring
8. 1926.1053 - Ladders
9. 1910.212 – Machine Guarding
10. 1910.303 - Electrical Systems

Complaint-Based Inspections

- Over 20% of all OSHA inspections are complaint based.
- OSHA allows complaints to be filed on-line.
 - See <http://www.osha.gov/as/opa/worker/complain.html>
- The GAO determined that the OSHA inspection rate at establishments that experienced labor unrest was 6.5 times higher than at establishments that did not experience such unrest.
 - See www.gao.gov/archive/2000/he00144.pdf

Handling Complaints

- Review procedures for employees to raise safety and health concerns. Are your procedures confidential, credible, and responsive?
- Look at work order system. Are safety issues given priority? Are work orders timely processed? Is feedback provided?
- Survey employee perceptions of safety commitment and program.
- Investigate accidents/near misses.

Preparing for An Inspection

- First Impressions are important
- Train Receptionist/Security Officer
- Plan for Opening Conference
 - who will attend
 - where will it be held
 - train participants
- Supervisors/Foremen/Managers are Spokespeople
 - knowledge attributed to company
- Organize Compliance Records
 - training
 - OSHA 300 Log
 - inspections

Preparing for An Inspection (Cont'd)

- Ensure Closure of Inspections
- Develop a Reporting or Employee Complaint System
- Enforce Safety Rules
 - Available Defense – Employee Misconduct
 - Work Rule
 - Adequate Training
 - Enforcement of Work Rule
 - Monitoring for Violations of Work Rule

Six Types of OSHA Violations

- Other than Serious – up to \$7000
- Serious – up to \$7000
- Repeat – up to \$70,000
- Willful – up to \$70,000
- Failure to Abate - \$7000 per day
- Criminal Sanction - \$250k - \$500K

What about the REALLY Big Fines?

- BP Oil – about \$150.6 Million in total
 - Egregious Policy
 - Per instance Violations, Per Employee
 - Standard must allow for Per Employee Violations
 - Example:
 - No Fall Protection – 10 Employees X \$70,000 = \$700,000
- Is this really allowed under the OSH Act?
- How about the Alabama offices?
 - Phenix Lumber – issued 2011
 - 1.9 million fine
 - 27 willfuls

Per Employee Citations for PPE and Training Violations

- Effective January 12, 2009, OSHA amended its PPE and training rules in 33 Standards to provide that each instance of failure to provide PPE or training be considered a separate violation subject to a separate penalty.
 - http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEERAL_REGISTER&p_id=21370
 - Why? Erik Ho, Houston businessman, hired 11 undocumented workers to handle asbestos removal – failed to provide PPE. Cited for per-employee violations of the asbestos standard. OSHRC vacated most of citation because the Standard addressed employees “in the aggregate, not individually.” *Sec. of Labor v. Erik K. Ho*, 20 O.S.H. Cas. (BNA) 1361 (OSHRC 2003), *aff’d*, 401 F.3d 355 (5th Cir. 2005).
- **NOTE:** *Natl. Assn. of Home Builders v. OSHA*. On April 16, 2010 – the D.C. Court of Appeals rejected the challenge to the amended Standards.

After the Citation

- 15 days to contest citation / have informal OSHA.
- Filing your notice of contest - 29 USC §659(a) - employers have **15 working days** (from citation receipt) to file a **notice of contest**. Failure to file within such time means that “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.”
- Effect on OSHA relations...

What Happens after Contest?

- Case Moves to Solicitor's Office
- Attorneys for OSHA (and other DOL agencies)
- OSHA must prove all elements of citation
- Most cases settle, but opportunity for hearing
- After a hearing, cases may be appealed to Review Commission, the Appellate Courts and then U. S. Supreme Court

Regulations and Legislation

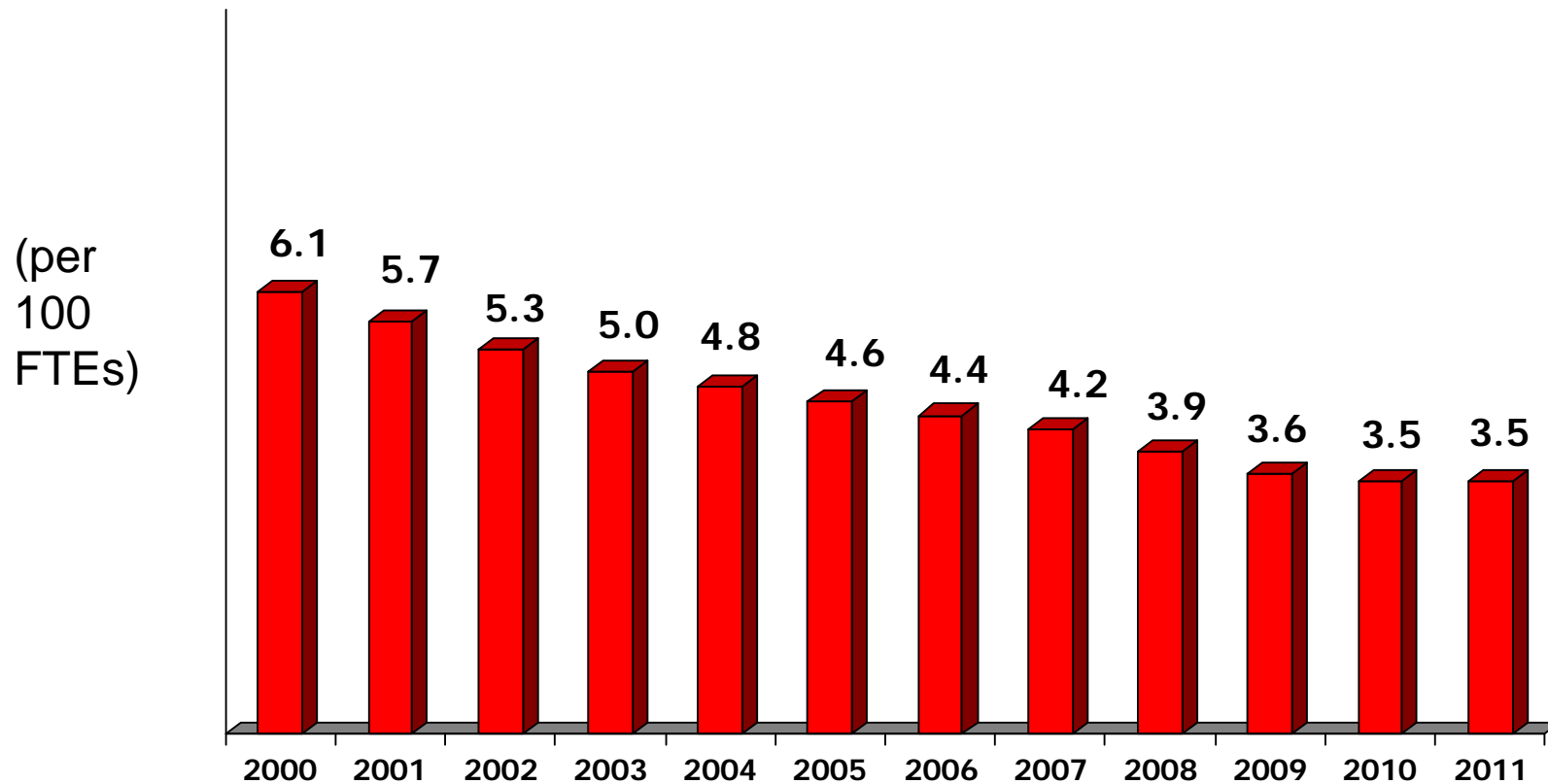
I2P2 – More to Come...

- 2010 – OSHA held stakeholder meetings on I2P2.
- On February 7, 2011, Dr. David Michaels told BNA that, “The agency is continuing to work actively on a proposal, and we believe it will be welcomed by a range of stakeholders.”
- January 2012 – I2P2 White Paper making the case for I2P2.
- Notice for proposed rulemaking expected in December 2013.

OSHA Regulatory Agenda - Injury and Illness Prevention Plan (I2P2)

- I2P2 Elements:
 - Management responsibilities (e.g., establishing a policy, setting goals, planning, etc.);
 - Employee participation;
 - Hazard identification and assessment (e.g., information gathering, inspections, incident investigations, etc.);
 - Hazard prevention and control (e.g., what hazards must be controlled, control priorities, and control effectiveness);
 - Education and training (e.g., training content, relationship to other training requirements, and frequency); and,
 - Program evaluation and improvement (e.g., monitoring performance, and correcting program deficiencies).

The 12 Year Trend of Injury and Illness Rates



- Each year, these rates reflect the lowest levels since the BLS began reporting data.

Recordkeeping & Incentive Programs

- On September 30, 2009, OSHA published its Recordkeeping NEP, and updated it on September 28, 2010.
- The NEP went out with a whimper in 2012...but,
- Michaels still stands by the view that employer's are using incentive programs to improperly influence recordkeeping.
- In a March 12, 2012 Memo, Richard Fairfax, Deputy Assistant Secretary for OSHA stated that safety incentives could affect an employee's rights under Section 11(c) of the OSH Act.
 - Chilling effect on reporting safety concerns
- What's 11(c)?!?

Whistleblowers

- OSHA investigates multiple anti-retaliation laws
 - Section 11(c) of the OSH Act
 - The employee must show:
 - (1) Protected activity
 - (2) Adverse employment action
 - (3) Causal connection
 - Secretary of Labor has exclusive right to bring action
 - In 2012, 2,787 filed complaints - a record
 - OSHA's aggressive outreach about the program
 - Workplace violence –
 - The New Hot Topic for OSHA

Guidance Documents

OSHA's Guidance on Heat and Distracted Driving & Consensus Standards

Heat Stress Guidance

- Permitting workers to drink water or cold liquids (e.g., sports drinks) at liberty;
- Establishing provisions for a work/rest regimen so that exposure time to high temperatures is decreased;
- Elements of a heat stress program include:
 - A training program on the effects of heat stress, and how to recognize / prevent heat-related symptoms;
 - An acclimation program for new employees or employees returning to work from absences;
 - Specific procedures to be followed for heat-related emergency situations;
- OSHA Guidance on its website

Distracted Driving

- NHTSA – in 2008, 20% of all crashes involved some type of distraction. <http://www.distracted.gov/stats-and-facts/>
- Texting While Driving – Banned in Appox. 50% of States.
 - GA - "No person shall operate a motor vehicle on any public road or highway of this state while using a wireless telecommunications device to write, send, or read any text based communication, including but not limited to a text message, instant message, electronic mail, or Internet data."
- September, 2010 - OSHA / Dept. of Transportation Partnership – Sample Employer Policies
 - <http://www.distracted.gov/campaign-tools/employers/>

CONSENSUS STANDARDS

- ANSI STANDARDS
 - Compliance with an ANSI standard can either result in a de minimus violation or no violation
 - CPL 02-00-148, p. 4-36
- NFPA – National Fire Protection Association
 - Life Safety code
- ASME – American Society of Mechanical Engineers
- ASTM – American Society for Testing and Materials
- CAUTION – Should vs. Shall standards

Who Really Cares About OSHA's Guidance or Consensus Standards?

- You Do!
- Can be basis for 5(a)(1) Citations AKA, the General Duty Clause of the OSH Act.
 - Recognized hazard
 - Potential Serious Injury
 - Feasible abatement methods
- 2012 USPS issued willful violation for heat stress hazards - \$70k fine.

A Tool for Staying On Top of OSHA Developments

- Quick Takes – a bi-monthly newsletter from OSHA.



- **Subscribe on-line at:** www.osha.gov
- Baker Donelson's updates

Concluding Thoughts

- Ensure that all prior OSHA citations are resolved.
- Review your Company's internal complaint mechanisms.
- Audits, both internal and external, are good tools for determining compliance – but they must be closed out.
- Ensure that PPE and training is up to date and documented.
- Watch out for safety incentive programs.
- Remain up-to-date on OSHA regulatory developments.

The End