

# OSHA 101

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# Players at Federal OSHA

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- December 2009 – **David Michaels** became the new head of OSHA
- Deputy Assistant Secretary – **Jordan Barab**
- Chief of Staff – **Deborah Berkowitz**
- Very Pro-union group
- Director of Enforcement – Tom Galassi

## What have we seen under the Michaels era?

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- 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.

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# Enforcement

# Duties of Employers

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## 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; (known as the general duty clause or Section 5(a)(1))
- shall comply with occupational safety and health standards promulgated under this Act. (all of the promulgated regulations, sometimes referred to as Section 5(a)(2) violations)

# Federal vs. State Plans

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- Federal OSHA has oversight of all OSHA enforcement
- States given the ability to opt out of federal enforcement so long as their plan is at least as effective as the federal plan
  - Section 18 of the OSH Act
- About half of the states operate under their own state plan
- Federal OSHA approves each state plan

# State Plans

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- Alaska
- Arizona
- California
- Connecticut
- Hawaii
- Illinois
- Indiana
- Iowa
- Kentucky
- Maryland
- Michigan
- Minnesota
- Nevada
- New Jersey
- New Mexico
- New York
- North Carolina
- Oregon
- Puerto Rico
- South Carolina
- Tennessee
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- Wyoming

**NOTE:** The Connecticut, Illinois, New Jersey, New York and Virgin Islands plans cover public sector (State & local government) employment only.

# Regional Offices

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Click on your region of interest





# Overview of OSHA Process

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## 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

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- 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

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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

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- 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](http://www.gao.gov/archive/2000/he00144.pdf)

# Handling Complaints

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- ❑ 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

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- 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)

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- Ensure Closure of Audits
  - Careful of those “free” audits offered by insurers
- 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

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- 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?

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- 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?

# Per Employee Citations for PPE and Training Violations

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- 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](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

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- Typical rule - 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.”
- In some state plans, the rule can be different, such as allowing for 20 ***calendar*** days to contest citation.
- Also, some states have 2 parts to contest (or appeal), such as Michigan and Washington

# What Happens after Contest?

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- FEDERAL OSHA
- SOL -Attorneys for OSHA (and other DOL agencies)
- OSHA must prove all elements of citation
- After a hearing before ALJ, cases may be appealed to Federal Occupational Safety and Health Review Commission, the Appellate Courts and then U. S. Supreme Court
- State OSHA
- State must prove elements of citation
- State Occupational Safety and Health Review Commission
- Further appeals: State District Court, State Court of Appeals, State Supreme Court

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# Regulations and Legislation

# Electronic reporting of Injury and Illness Data

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- Comment period until February, 2014
- OSHA's reaction to DC Circuit Court ruling that limited the statute of limitations period to 6 months for recordkeeping violations
- Would require all employers to report data to OSHA every quarter
- Also allows OSHA to post Injury and Illness data on their website

## I2P2 – More to Come...

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- 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.
- Not making much progress on the rulemaking front, but OSHA has cleverly started using this as a “sweetner” for big OSHA cases. See, *Republic Steel settlement, April 2014.*

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

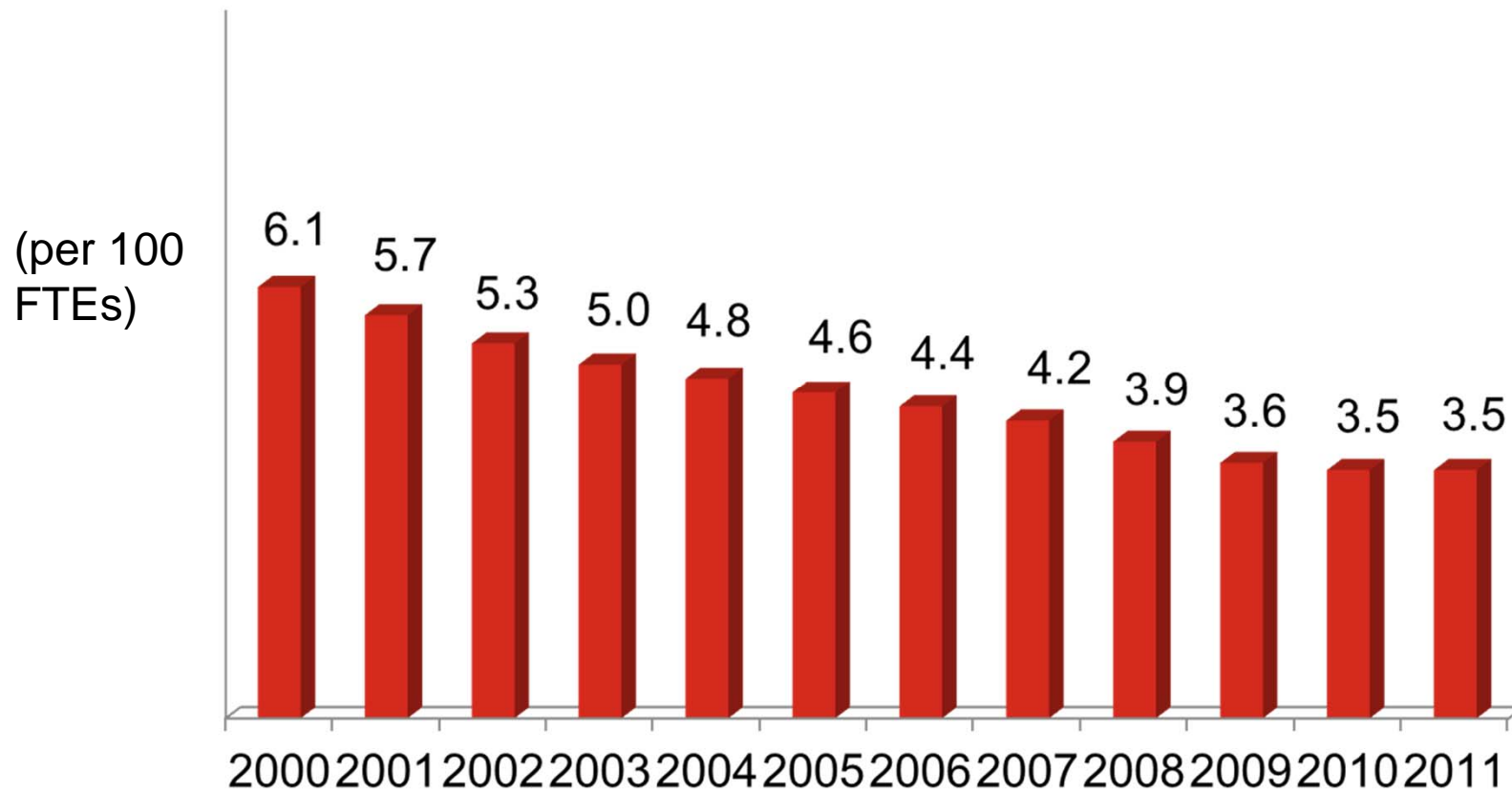
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- I2P2 Elements:
  - Management responsibilities (e.g., establishing a policy, setting goals, planning, etc.);
  - Employee participation;
  - Hazard identification and assessment (e.g., information gathering, inspections, incident investigations, 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

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

# Recordkeeping & Incentive Programs

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- 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

# Whistleblowers

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- 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

## Guidance Documents

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# OSHA's Guidance on Heat & Consensus Standards

# Heat Stress Guidance

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- 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

# Consensus Standards

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- 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?

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- 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
- Multiple citations have been issued for heat stress and OSHA has relied upon its guidance as “notice” of the recognition of the hazard.

# Employee Misconduct Defense (Actually improves safety)

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1. Work rule
2. Adequately communicated
  - Importance of training
  - Multiple Languages
3. Monitoring for compliance with work rule
  - 24/7 monitoring not required
  - Must be regular monitoring by safety, managers and/or supervisors
  - Documentation important
4. Enforcement of work rule
  - Progressive Discipline
  - Cardinal rule violations (immediate termination of employment)



# QUESTIONS?

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- Remember you can sign up for OSHA Quick Takes to get an overview of what's going on at the agency.
- Look for monthly OSHA updates in the L&E Baker Donelson newsletter.