Is your Long Term Care Facility Prepared for an OSHA inspection?

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

• Similar language in TN OSH Act

• States’ plans must be at least as effective as the Federal Plan
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.
Poll Question
OSHA’s emphasis on the LTC industry

• You’ve got your own webpage on OSHA’s website…

• OSHA issued a National Emphasis Program in 2012

• Ergonomics…
  – One of the biggest ergo cases involved a LTC facility – Beverly Enterprises
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.
Poll Question
Most Frequently cited OSHA Standards for SIC 8059

1. 1910.1030 - Bloodborne pathogens.
2. 1910.303 - General requirements.
4. 1904.29 - Forms.
5. 1910.151 - Medical services and first aid.
6. 1910.305 - Wiring methods, components, and equipment for general use.
7. 1910.37 - Maintenance, safeguards, and operational features for exit routes.
8. 1904.41 – Completing annual survey form
10. 1904.8 - Recording criteria for needlestick and sharps injuries.
11. 1904.32 - Annual summary.
Most Frequently cited OSHA Standards for SIC 8051

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- 1904.29 -Forms.
- 1910.151- Medical services and first aid.
- 1910.303 -General requirements.
- 1910.37 -Maintenance, safeguards, and operational features for exit routes.
- 1910.305 -Wiring methods, components, and equipment for general use.
- 1904.41 – Complete of annual survey.
- 1910.147- The control of hazardous energy (lockout/tagout).
- 1904.32 -Annual summary.
Complaint-Based Inspections

- Over 20% of all OSHA inspections are complaint based.
- OSHA allows complaints to be filed on-line.
- 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.
Poll Question
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 Audits
  – Careful of those “free” audits offered by insurers
• Develop a Reporting or Employee Complaint System
• Enforce Safety Rules
  o Available Defense – Employee Misconduct
    o Work Rule
    o Adequate Training
    o Enforcement of Work Rule
  o 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 $70,000 = $700,000
- **Is this really allowed under the OSH Act?**
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.
  - 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).

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.”

• In TN, the rule is different – 20 calendar days to contest citation.

• Effect on OSHA relations…
What Happens after Contest?

• 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
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.”


• 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


- 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)?!?
Poll Question
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
Guidance Documents

OSHA’s Guidance & Consensus Standards
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

• OSHA’s ergonomic guidelines for nursing home
A Tool for Staying On Top of OSHA Developments

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

• **Subscribe on-line at:** [www.osha.gov](http://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