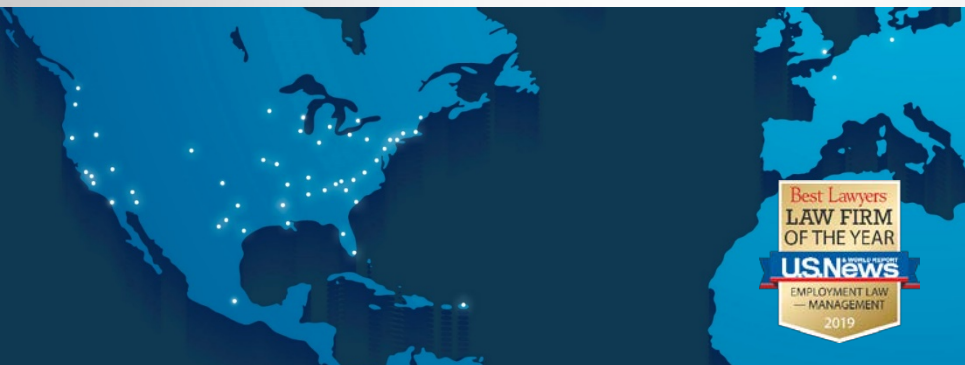


OSHA Direction and Update

PPSA 2019 Safety and Health Conference
June 25, 2019 – San Antonio, Texas

Presented by
Eric E. Hobbs



**Ogletree
Deakins**

Employers & Lawyers. Working Together

Overview

- Introduction
- The Memo: Incentive Program/Drug Testing
- Site-Specific Targeting Resurrected
- New Rules and Standards
- OSHA Regulatory Agenda
- Important Commission and court decisions
- Scott Mugno Update
- Significant Retirements at/and Losses from OSHA



**Clarification of OSHA's
Position on Workplace
Safety Incentive Programs
and Post-Incident Drug
Testing Under 29 C.F.R.
§1904.35(b)(1)(iv)**

Prior OSHA Policy

Safety Incentive Programs (Prior)



Safety Incentive Programs (Prior)



Post-Accident Drug Testing (Prior)



Post-Accident Drug Testing (Prior)



Then, ... The Memo

October 11, 2018

MEMORANDUM FOR:

REGIONAL ADMINISTRATORS

STATE DESIGNEES

THROUGH:

AMANDA EDENS

Director

Technical Support and Emergency Management

FRANCIS YEBESI

Acting Director

Whistleblower Protection Programs

FROM:

KIM STILLE

Acting Director

Enforcement Programs

SUBJECT:

Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)

The Memo

- “The purpose of this memorandum is to clarify the Department’s position that 29 C.F.R. § 1904.35(b)(1)(iv) **does not prohibit workplace safety incentive programs or post-incident drug testing.**”
- Other OSHA interpretive documents inconsistent with The Memo => superseded

Safety Incentive Programs (Now)

- Reporting hazards or near misses?
- “Positive action” taken under this type of program always permissible



Safety Incentive Programs (Now)

- Rate-based incentive programs?
- E.g., “No injuries this month and everyone gets a bonus”
- Rate-based incentive programs also permissible . . . as long as not implemented in a manner that discourages reporting
- No change in law



Safety Incentive Programs (Now)

- So, if employer takes negative action against employee under “rate-based” incentive program (e.g., withholding prize or bonus because of a reported injury), okay so long as employer has implemented “adequate precautions to ensure that employees feel free to report an injury or illness”



“Adequate Precautions?” - Examples

- Incentive program that rewards employees for identifying unsafe conditions in workplace
- Training program for all employees to reinforce reporting rights and responsibilities and emphasizes employer's non-retaliation policy

OR

- Mechanism for accurately evaluating employees' willingness to report injuries and illnesses

Post-Accident Drug Testing (Now)

- “Most instances of workplace drug testing are permissible



Examples of Permissible Drug Testing

- Random drug testing
- Drug testing unrelated to reporting of work-related injury or illness
- Drug testing under state workers' compensation law
- Drug testing under other federal law, such as U.S. Department of Transportation regulation
- Drug testing to evaluate root cause of workplace incident that harmed or could have harmed employees
- Note: If employer chooses to use drug testing to investigate incident, employer should test all employees whose conduct could have contributed to incident, not just employees who reported injuries

Site-Specific Targeting (SST)



SST-16

- Based on CY 2016 injury and illness Information submitted electronically
- OSHA will perform inspections of employers it believes should have provided 300A data, but did not
- Who was required to submit 300As electronically?
 - Establishments with 250 or more employees
 - Establishments with 20 – 249 employees in industries with high injury rates

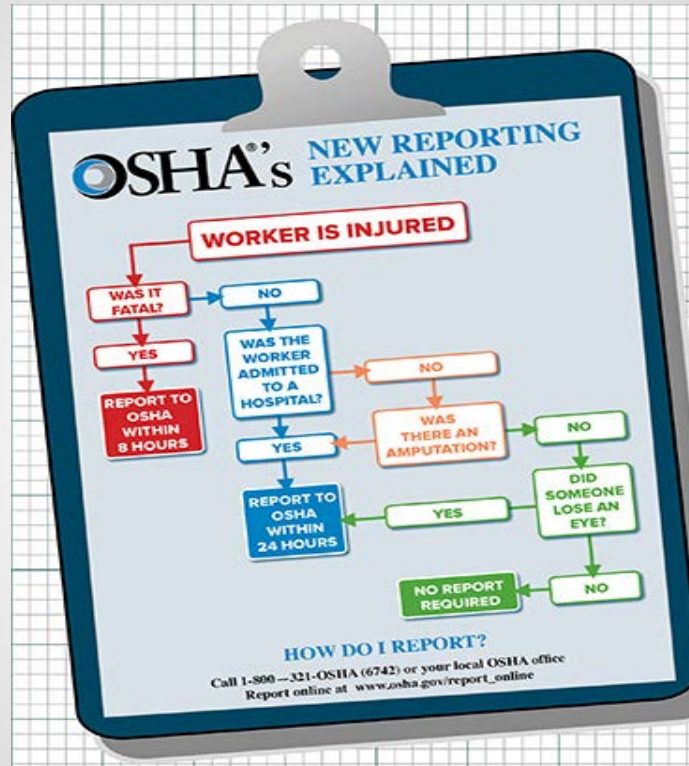
Site-Specific Targeting 2016

- Whom will OSHA inspect?
 - Establishments with above-industry-average DART rates
 - Random selection of establishments with low DART rates
 - Random selection of establishments that failed to file 300As
- What kind of inspections will OSHA conduct?
 - Comprehensive (safety or health)

New Maximum Penalties

- Serious and Other-than-Serious: \$12,934 => \$13,260
- Repeat: \$129,336 => \$132,598
- Willful: \$129,336 => \$132,598
 - Minimum: \$9239 => \$9472
- Failure to Abate: \$12,934 => \$13,260 (per day)
- Failure to Post: \$12,934 => \$13,260

New Injury Reporting Flowchart



New Rules and Standards

- Electronic Reporting Rule – Final Rule January 25, 2019
 - Employers with 250+ employees in a single establishment — no need to e-file 300 Logs or Forms 301
 - Still must e-file 300A summaries annually
 - Reason: Collection of 300 logs/301s “adds uncertain enforcement benefits, while significantly increasing the risk to worker privacy”
 - Employers must include EINs when e-filing Forms 300A to “reduce or eliminate duplicative reporting”

New Rules and Standards

■ Electronic Reporting Rule

- Public Citizen suit: New rule changing old rule violates APA
- Two suits challenging — Texas and Oklahoma — still pending
 - Oklahoma judge lifted stay on March 20, 2019
 - Issue in Oklahoma case: citations for employee whistleblower discrimination or retaliation without a complainant
- Public Citizen FOIA litigation - pending

New Rules and Standards

■ Beryllium

- Effective date of May 11, 2018; extended to December 12, 2018, in part
- For: methods of compliance, beryllium work areas, regulated areas in which employees may be exposed to beryllium, PPE, hygiene facilities and practices, housekeeping, hazard communication, and recordkeeping

New Rules and Standards

■ Miscellaneous

- Crane and Derricks in Construction – training/certification requirements – effective December 9, 2018
 - Retains option of an audited employer program
 - Adds a step that, after operators obtain certification based on crane type, employers must evaluate operators on equipment that they will use
- Silica – Challenge to Standard rejected by D.C. Circuit
 - New FAQ:
<https://www.osha.gov/dsg/topics/silicacrystalline/SilicaGeneralIndustryFAQs.pdf>

OSHA's Regulatory Agenda (Examples)



Lockout/Tagout Update

- New technology and computer-based controls compels another look at updating the Standard
- RFI: October 2018



Powered Industrial Trucks

- 1910.252 based on 1969 ANSI Standard
- Currently covers 11 types of trucks; there are now 19 types
- RFI: March 11, 2019



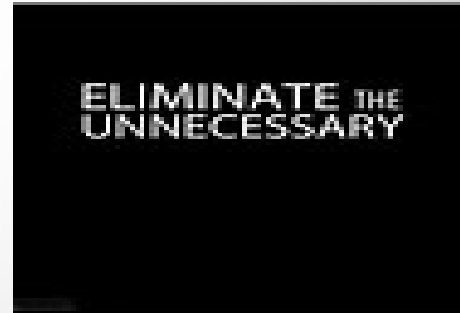
Quantitative Fit Testing Protocol: Amendment to Final Rule on Respiratory Protection

- Final Rule
- December 2018



Standards Improvement Project

- Purpose: “To remove or revise duplicative, unnecessary, and inconsistent safety and health standards”
- Final Rule stage
- Target: May 2019 (oops)



Update to Hazard Communication Standard

- Purpose to catch up with GHS updates since March 2012
- NPRM December 2019
- Postponed from March 2019



Drug Testing/Safety Incentive Update

- Long-term agenda
- Proposal to include in 1904.35(b)(1)(iv) drug testing/safety incentive program language of October 2018 Memorandum
- Attempt to stall pending case in Oklahoma?



Reduction of Lead Level for Medical Removal

- Long-term agenda
- Lead standards presently based on 35-year-old lead toxicity information
- Recommendation of third parties to reduce permissible blood lead level to 10 $\mu\text{g/dL}$
- ANPRM to be published



11th Circuit's *Mar-Jac* Decision

Mar-Jac



Mar-Jac

■ OSHA Comprehensive Inspection

- Electrical
- PPE
- Machine Guarding
- Lockout/Tagout
- Recordkeeping
- Ergonomics
- Biological
- Chemical
- Struck-by hazards
- Slip trips falls
- PSM
- Confined Space
- Hazard Communication
- Hexavalent Chromium



Mar-Jac

- 4th Amendment: Employers have right to deny access without a warrant
- To get court to issue inspection warrant, OSHA must establish probable cause:
 - Specific evidence of existing violation
 - Reasonable legislative or administrative standard/scheme



Warrant Application

- Hazards implicated by accident
- Hazards implicated by 300 Logs
- Hazards implicated by Poultry REP

Mar-Jac

- Warrant granted for
 - Electrical hazards
 - PPE
 - Machine Guarding
 - Lockout/tagout
 - Recordkeeping
- Warrant denied for
 - Hazards implicated by 300 Logs (except recordkeeping)
 - Poultry REP





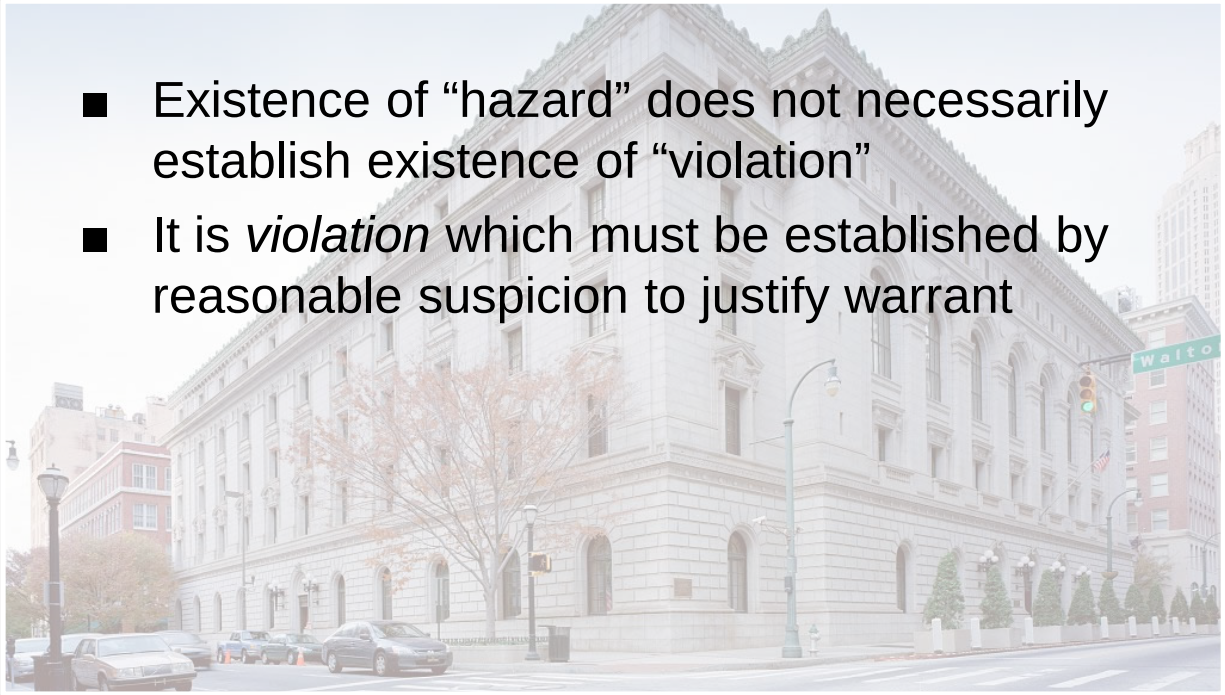
Quash
warrant

United States Court of Appeals *for the* Eleventh Circuit

Existence of “hazard” does not necessarily establish existence of “violation”, and it is violation which must be established by reasonable suspicion to justify warrant

United States Court of Appeals for the Eleventh Circuit

- Existence of “hazard” does not necessarily establish existence of “violation”
- It is *violation* which must be established by reasonable suspicion to justify warrant



United States Court of Appeals *for the* Eleventh Circuit

- 300 Logs fail to show violation or, therefore, establish reasonable suspicion
 - 300 Logs record injuries, not violations
 - Footnote on 300 Log form
 - Descriptions in 300 Logs vague
 - 300 Logs do not establish common thread among injuries
- So warrant inappropriately issued

■ Key Takeaways

- Presence of hazard does not necessarily establish existence of violation
- If OSHA attempts to expand inspection initiated pursuant to accident, employer should consider consenting to accident-related inspection and requiring warrant to expand beyond accident
- Caveat: Not every circuit allows for motions to quash warrants

5th Circuit's *Hensel Phelps* Decision

Hensel Phelps

- Under OSHA's Multiemployer Citation Policy
 - "Controlling employer" may be cited
 - Examples: general contractors, construction managers, building/project owners
 - Theory: controlling employers have knowledge, capacity and leverage to insure hazards identified and abated



Hensel Phelps

- Until 2019, 5th Circuit an outlier
- *Melerine v. Avondale Shipyards* – 1981
 - OSHA's standards protect only employer's own employees
 - Based on plain language of OSHAct
- All other circuits
 - "Controlling employer" may be cited
 - Theory: controlling employers have knowledge, capacity and leverage to insure hazards identified and abated



Hensel Phelps

- 5th Circuit reverses *Melerine*
 - Based on plain language of OSHAct
 - “Me, too!”
- Based on deference to agency interpretation required by U.S. Supreme Court 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*
 - Court’s must defer to reasonable interpretations by agency of statute it is charged with administering if ambiguity
 - Where’s ambiguity here?
 - *Chevron* (and 1997 sister decision in *Auer v. Robbins*) under siege

OSHRC's Angelica Textile Services **Decision**

Angelica

- OSHA's position: For repeat, need show only same type of equipment or process or involved standard/rule => "substantial similarity"
- OSHRC: Showing of disparate condition or hazards can rebut substantial similarity showing

Angelica

- Abatement steps employer took in response to first citation also may be affirmative defense to repeat classification in second case: seek out/address similar non-compliance
- OSHA's "acceptance" of abatement may reinforce affirmative defense
- In *Angelica*, complete deficiency of PRCS program in first case; only two minor deficiencies in second case

OSHRC's General Duty Clause Decisions

General Duty Clause

■ *A.H. Sturgill* – Heat illness

- OSHA failed to prove existence of hazard
- OSHA failed to prove feasible means of abatement
- Critical of OSHA's use of GDC as "crutch" in lieu of promulgating new standards
- Citation vacated
- On appeal

■ *Integra Health Management* – Workplace violence

- Employer on notice of potential hazard
- Commission split on applicability of GDC to workplace violence as general matter; fact-specific
- Citation affirmed

General Duty Clause

- *CSA Equipment Company* – PIT fatality
 - Abatement was issue
 - OSHA established abatement feasible – implemented in past
 - Citation affirmed
- *Mid-South Waffles* – Grease drawer fire
 - Employer on notice of hazard
 - OSHA failed to prove employer on notice of frequency of need to clean drawer/feasibility and effectiveness of abatement – “reasonable employer standard”
 - Commission split over burden of proof
 - Citation vacated

OSHA's Construction Eyewash Standard (§ 1926.50(g)) is Invalid

- *Kiewit Power* decision
- OSHRC: OSHA's eyewash/shower standard for construction (§ 1926.50(g)) invalid
- On appeal to D.C. Circuit Court of Appeals
- Many ramifications

Appendix A to Part 1926

Pt. 1926, App. A

29 CFR Ch. XVII (7–1–18 Edition)

APPENDIX A TO PART 1926—DESIGNATIONS FOR GENERAL INDUSTRY STANDARDS INCORPORATED INTO BODY OF CONSTRUCTION STANDARDS

New Designations for General Industry Standards Incorporated Into Body of Construction Standards

1926 DESIGNATIONS FOR APPLICABLE 1910 STANDARDS

New § no. and/or para.	Source § no. and/or para.
1926.20 (c)	1910.5 (a)
[Do.] (d)	[Do.] (c)
[Do.] (e)	[Do.] (d)
1926.32(g)	1910.12(b)
1926.33	1910.20
1926.34 (a)	1910.36(b)(4)
[Do.] (b)	1910.37 (a)(1)
[Do.] (c)	[Do.] (k)(2)
1926.35	1910.38(a)
1926.50(g)	1910.151(c)
1926.51(a)(6)	1910.141(a)(2)(v)
[Do.] (d)(2)	[Do.] (h)
[Do.] (f) (2)–(4)	[Do.] (d) (1)–(3)
[Do.] (g)	[Do.] (g)(2)
[Do.] (h)	[Do.] (a)(5)
[Do.] (i)	[Do.] (e)
1926.53 (c)–(r)	1910.96
1926.57 (f)–(i)	1910.94
1926.64	1910.119

1926 DESIGNATIONS FOR APPLICABLE 1910 STANDARDS—Continued

New § no. and/or para.	Source § no. and/or para.
[Do.] (o)	[Do.] (d)(10)
1926.156	1910.160
1926.157	1910.162
1926.158	1910.164
1926.159	1910.165
1926.200(c)(3)	1910.145(d)(4)
1926.250(c)	1910.176(c)
[Do.] (d) (1)–(4)	1910.30(a) (1), (2), (4) and (5)
1926.251(a)(5)	1910.184(a)
[Do.] (a)(6)	[Do.] (d)
[Do.] (b)(6)(i)–(ii)	[Do.] (e)(3)(i)–(ii)
[Do.] (c)(6)–(7)	[Do.] (c) (2)–(3)
[Do.] (c)(8)	[Do.] (c)(5)
[Do.] (c)(9)	[Do.] (c)(7)
[Do.] (c)(10)–(12)	[Do.] (c)(10)–(12)
[Do.] (c)(13)–(15)	[Do.] (f) (2)–(4)
[Do.] (d)(3)–(6)	[Do.] (h) (2)–(5)
[Do.] (e)(3)–(5)	[Do.] (i) (2)–(4)
[Do.] (e)(6)–(7)	[Do.] (i) (6)–(7)
[Do.] (e)(8)	[Do.] (i)(9)
1926.300(b) (3)	1910.212(a)(1)
[Do.] (4)	[Do.] (a)(3)
[Do.] (5)	[Do.] (a)(5)
[Do.] (6)	[Do.] (b)
[Do.] (7)	1910.215(b)(9)
[Do.] (8) and (9)	[Do.] (b) (3) and (4)
1926.302(b)(10)	1910.244(b)

What About State Plans?

- Will similar construction standards be enforceable in state-plan states?
- No simple answer
- Depends on state law's wording, how standard was adopted there
- Check with counsel

Scott Mugno Update

Scott Mugno Retired VP of Safety, FedEx Ground



Ground Hog Day?



Ground Hog Day?



Scott Mugno Update

- May 14, 2019 – Letter to President:
 - Withdrawing from consideration
 - “Enough is enough”
- Reportedly, decision = final
- Problem for Secretary of Labor
- Problem for Acting Assistant Secretary – OSHA
- Not a problem for ...

Every Day's a Saturday



Significant OSHA Retirements/ Losses



Ann
Rosenthal

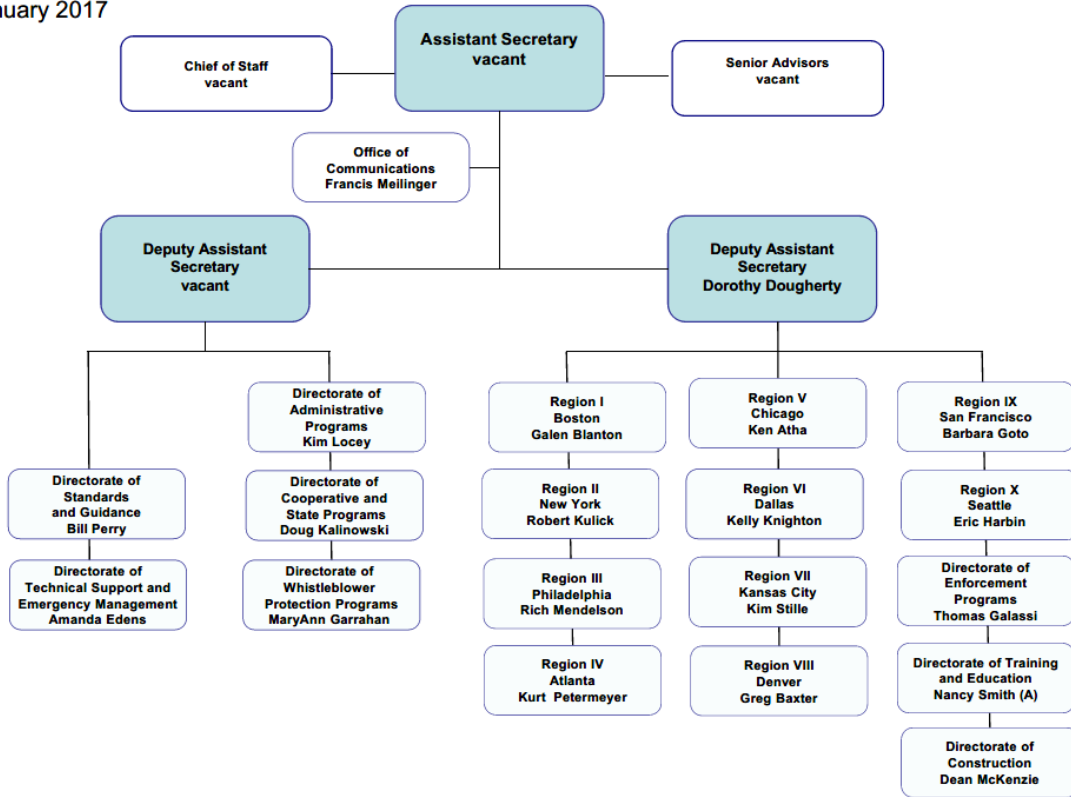


Dean
McKenzie

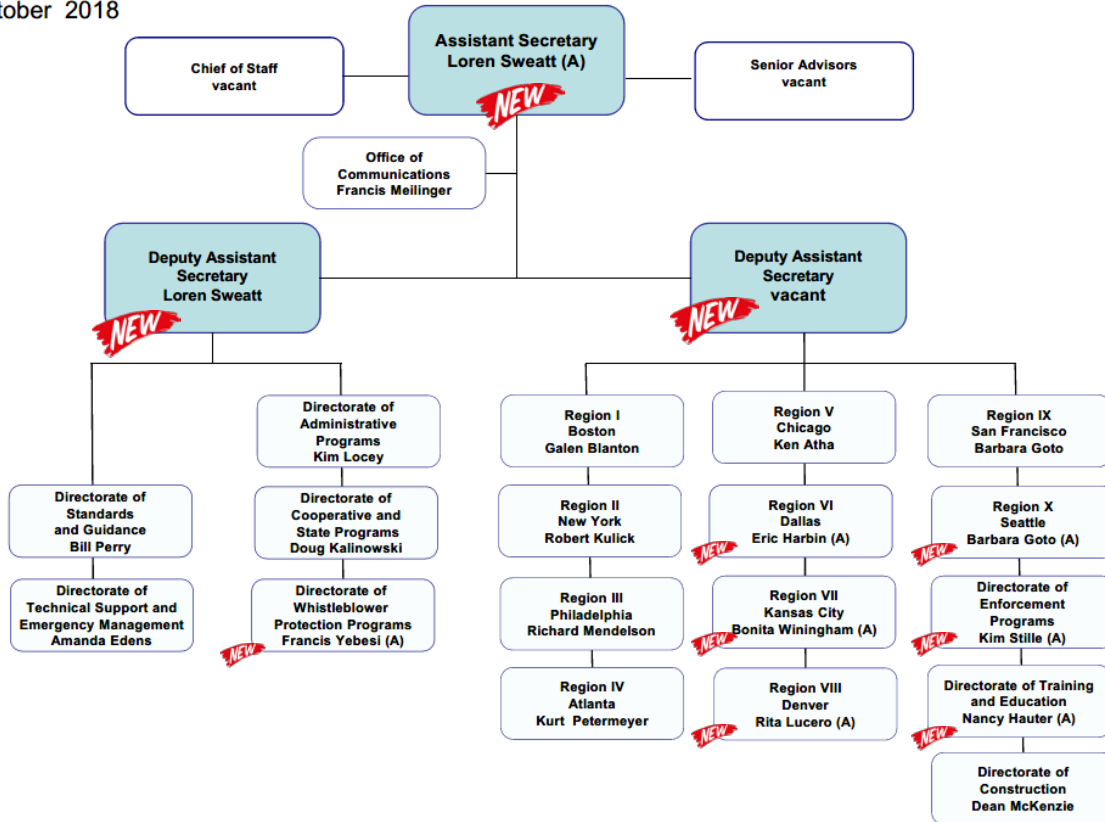


Tom
Galassi

OSHA Organizational Chart January 2017



OSHA Organizational Chart October 2018



OSHRC Losses



Heather MacDougall



Cynthia Attwood

OSHRC Complement



Jim Sullivan

Questions?



Thank You!

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