OSHA Direction and Update

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

Presented by
Eric E. Hobbs
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)

Blanket Policy
Post-Accident Drug Testing (Prior)

Blanket Policy
Post-Accident Drug Testing (Prior)

Reasonable Suspicion Policy

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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 superseded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
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

HOW DO I REPORT?

Call 1-800—321-OSHA (6742) or your local OSHA office
Report online at www.osha.gov/report_online

OSHA's NEW REPORTING EXPLAINED

WORKER IS INJURED

WAS IT FATAL?

NO

WAS THE WORKER ADMITTED TO A HOSPITAL?

NO

WAS THERE AN AMPUTATION?

NO

NO REPORT REQUIRED

YES

WAS SOMEONE LOSE AN EYE?

NO

YES

REPORT TO OSHA WITHIN 24 HOURS

REPORT TO OSHA WITHIN 8 HOURS
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
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 µg/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
8th 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
Mar-Jac

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
Improper probable cause standard applied

Hazard v. Violation misunderstood

Reasonable suspicion established by 300 Logs

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

It is *violation* which must be established by reasonable suspicion to justify warrant
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
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 OSHAAct
- 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

**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

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#### 29 CFR Ch. XVII (7-1-18 Edition)

**1926 Designations for Applicable 1910 Standards—Continued**

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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
October 2018

Assistant Secretary
Loren Sweatt (A)

Chief of Staff vacant

Office of Communications
Francis Mellinger

Deputy Assistant Secretary
Loren Sweatt

Directorate of Administrative Programs
Kim Loeey
Director of Standards and Guidance
Bill Perry
Director of Technical Support and Emergency Management
Amanda Edens

Directorate of Cooperative and State Programs
Doug Kelinowski

Directorate of Whistleblower Protection Programs
Francis Yebesi (A)

Region I
Boston
Galyn Benton

Region II
New York
Robert Kulick

Region III
Philadelphia
Richard Mendelson

Region IV
Atlanta
Kurt Petersmeyer

Region V
Chicago
Ken Aita

Region VI
Dallas
Eric Harbin (A)

Region VII
Kansas City
Bonita Winingham (A)

Region VIII
Denver
Rita Lucero (A)

Region IX
San Francisco
Barbara Goto

Region X
Seattle
Barbara Goto (A)

Directorate of Enforcement Programs
Kim Stile (A)

Directorate of Training and Education
Nancy Hauer (A)

Directorate of Construction
Dean McKenzie
OSHRC Losses

Heather MacDougall  Cynthia Attwood
OSHRC Complement

Jim Sullivan
Questions?
Thank You!

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