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OSHA's Last Year and "New" Direction – An Update

Presented By: Eric E. Hobbs

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OSHA is Alive and Well ... So Far

- New “Improve Tracking of Workplace Injuries and Illnesses” Rule
- New Walking/Working Surfaces Standard
- New Silica Standard (delayed)
- New Beryllium Standard (delayed)

OSHA is Alive and Well ... So Far

- Multiple “interpretations”/changes of interpretation
 - Hearing conservation
 - Walk-around representatives
 - PSM retail exemption
 - Safety incentive programs

OSHA Is Alive And Well ... So Far

- Proposed standards/amendments of standards/rules
 - “Standards Improvement Project”
 - Removal from Lockout/Tagout Standard of “unexpected”
 - Inclusion of presumption of work-relatedness of hearing losses
 - Elimination of all “outdated” PELs
 - Watch for Fall regulatory agenda; not likely to see the light of day

OSHA Is Alive And Well ... So Far

- But ... Congress kills the “*Volks*” regulation
 - Magic! OSHA’s six-month statute of limitations becomes five-year statute of limitations
 - *Volks* decision – 2012 (D.C. Cir.): “OSHA, you can’t do that.”
 - OSHA’s solution: Amend the recordkeeping regulation to include six-month s/l (July 29, 2015)
 - Congress (March 22, 2017): “OSHA, you can’t do that.”



New Penalty Amounts Effective August 1, 2016

OSHA Fines Increasing Approximately 78 Percent on August 1

Going forward, the agency will adjust its penalties for inflation each year

Violation	Old Maximum	New Maximum
Serious, Other Than Serious	\$7,000	\$12,471
Failure to Abate	\$7,000 Daily	\$12,471 Daily
Repeat, Willful	\$70,000	\$124,709
Increase May Boost Lesser Fines	Old Penalty	New Penalty
	\$1,000	\$1,780
	\$2,500	\$4,450
	\$5,000	\$8,900
	\$7,500	\$13,350
	\$10,000	\$17,800
Increase of Average Penalty for Serious Violation	Old Average	New Average
1-250 Employees	\$1,298	\$2,294
251 or More Employees	\$2,481	\$4,416
Source: OSHA, BBNA Calculations		A BNA Graphic/ osh629g1

Additional Increase in Penalties in 2017

- 1% increase effective January 13, 2017 for violations occurring after November 2, 2016 (tied to CPI)
- From \$12,471 to \$12,675 (Serious/Other-than-Serious)
- From \$124,709 to \$126,770 (Repeat/Willful)

Improve Tracking of Workplace Injuries and Illnesses

OSHA's Form 300 (Rev. 10/2004)

Log of Work-Related Injuries and Illnesses

Note: You can type. Because the forms in the OCF documents, you can then take your inputs of the forms are program.

You must record information about every work-related death and about every work-related injury or illness that results in lost work days or medical treatment beyond first aid. You must also record all recorded health care professional. You must also record work-related injuries and illnesses through 1994. You must use the form for a single case if you need to. You must complete each injury or illness recorded on this form. If you're not sure whether a case is recordable, it is.

Identify the person			Describe the case	
(A) Name or	(B) Employee's name	(C) Job title (e.g., Farmer)	(D) Date of injury or onset of illness (e.g., 1/10)	(E) Where the case occurred (e.g., Loading)
Person				

Electronic Recordkeeping Rule

Part I Electronic Filing

- Injury and illness records filed electronically every year
- Phased in beginning in 2017

Part II Anti- Retaliation

- By OSHA interpretation, limits post-incident drug testing and safety incentive programs
- Unlikely to survive under Trump OSHA



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"I'm here about the details."

Electronic Recordkeeping Rule

Submission year	Establishments with 250 or more employees	Establishments with 20-249 employees	Submission deadline
2017	Form 300A	Form 300A	July 1, 2017
2018	Forms 300A, 300, 301	Form 300A	July 1, 2018

- July 1, 2017, deadline delayed indefinitely on May 17.
- Beginning in 2019, reports due on March 2.

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Section 11(c) Of OSHA Act

Prohibits retaliation for reporting injury or illness; unsafe work conditions; etc.

Employee must file complaint with within **30 days** of violation

Federal district court jurisdiction

Remedies include back pay, reinstatement, bonus for employee

New Anti-Retaliation Provisions

OSHA may initiate investigation of alleged violation **without an employee complaint**

Six months (instead of 30 days under Section 11(c)) to discover and cite for a violation

Review Commission jurisdiction

Remedies similar to 11(c)

Retaliatory Policies and Procedures

- Focus has been on safety incentive programs and post-accident drug testing, but prohibition in Rule is broader
- E.g., immediate injury reporting rules are problematic
- No specific reference to drug testing or safety incentive programs in Rule, itself; instead,

Retaliatory Policies and Procedures

- In *preamble* to Final Rule, OSHA discusses how drug testing and safety incentive programs may violate the anti-retaliation provisions
- Fleshed out in Guidance published by OSHA in October 2016

Drug Testing - Preamble

Automatic post-incident
drug testing **deters**
employees from
reporting injuries

Employers may not use
drug testing or the threat
of drug testing as a form
of adverse action
against employees who
report injuries

Blanket post-incident
drug testing not
permitted

Drug Testing - Preamble



Drug Testing - Preamble

Limit drug testing to incidents where there is a “reasonable possibility” that drug use was a contributing factor

The drug test must “accurately identify impairment [at time of accident] caused by drug use”

Employers may continue to conduct drug testing mandated by law, e.g., workers’ comp, DOT

Safety Incentive Programs - Preamble



If safety incentive programs are “not structured carefully, they have the potential to discourage reporting of work-related injuries and illnesses without improving workplace safety.”



Disqualifying an employee, who reports an injury, for a monetary bonus would discourage or deter a reasonable employee from reporting a work-related injury or illness.

Safety Incentive Programs - Preamble



Entering employees who do not report injuries in a drawing



Awarding a bonus to a team if no one is injured



Rewarding employees for low injury rates and training



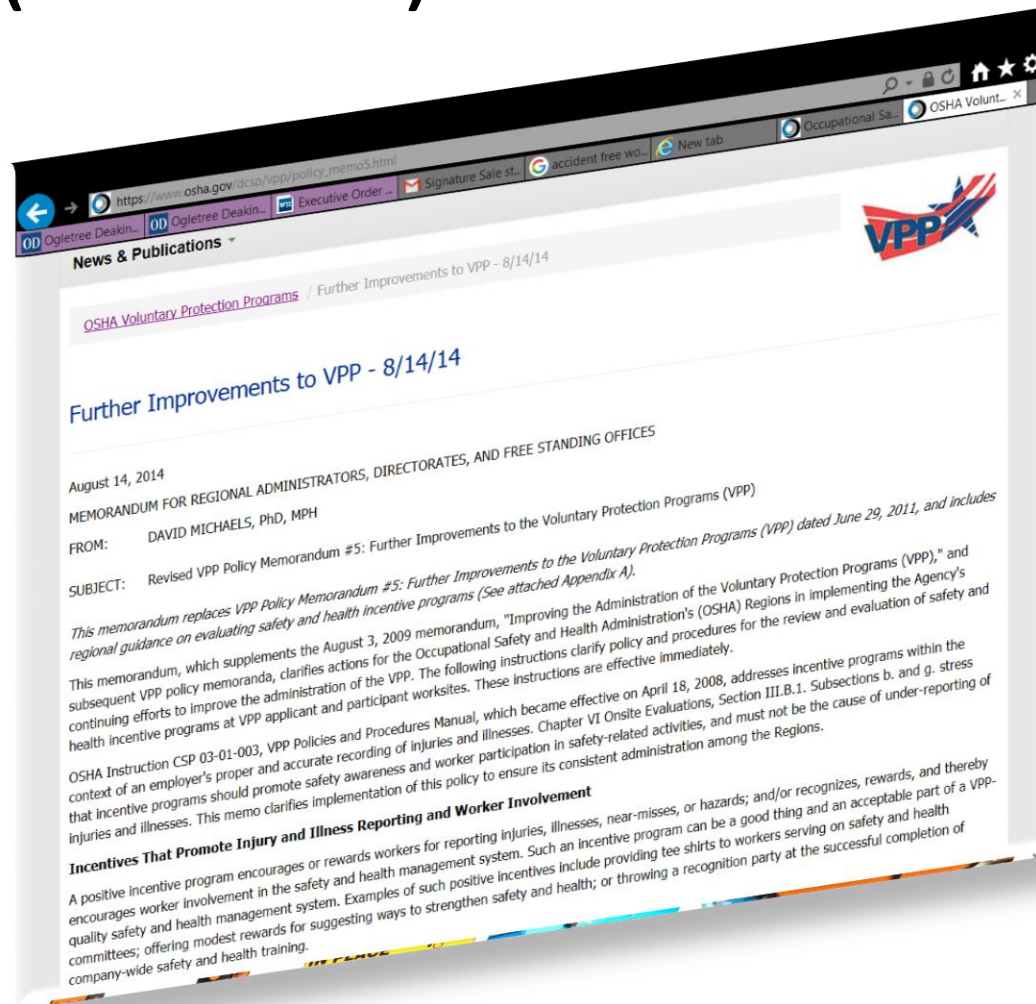
Party for completion of plant-wide safety training

Safety Incentive Programs - “Fairfax Memo” (2012)

Injury-based safety incentive programs “might be well-intentioned efforts by employers to encourage their workers to use safe practices.

“However, there are better ways to encourage safe work practices, such as incentives that promote work participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or ‘near misses.’”

Safety Incentive Programs - VPP Memo (Blended)



Immediate Injury Reporting Rules

- OSHA: Requiring employees to report injuries/illnesses immediately deters reporting by instilling fear of discipline for untimely reporting
- How long is enough?
- *Secretary, et al. v. U.S. Steel* (U.S. District Court of Delaware)
 - OSHA said not less than seven days
 - Then settled for eight hours after employee becomes aware of work-relatedness

OSHA Compliance Guidance

- October 19, 2016 – OSHA guidance in form of internal memorandum and “fact sheet” for public
- Explains “in more detail” OSHA’s position on “reasonable reporting procedures”, safety incentive programs and post-accident drug testing provisions of Preamble

OSHA Compliance Guidance

- Implies that safety incentive programs and post-accident drug testing policies potentially violate Section 1904.35(b)(1)(iv), rather than Section 1904.35(b)(1)(i)
- Means simply having a program isn't enough to show violation; *OSHA must show specific instance of retaliation*

OSHA's Compliance Guidance

- Post-accident testing prohibited only when conducted “without an objectively reasonable basis”
- “Central inquiry” will be whether employer had “reasonable basis for believing” drug use “could have contributed”

OSHA's Compliance Guidance

- One factor: whether uninjured employees involved are tested
- Safety-sensitivity of job being performed could be a consideration

OSHA's Compliance Guidance

- Notably: OSHA will consider whether drug test methodology is capable of measuring impairment at time of injury/illness:
 - Only “where such a test is available” and
 - Only for alcohol, not for other drugs
- Reaffirms that testing employee “whose injury **could not possibly have been caused by drug use**” is not reasonable

OSHA's Compliance Guidance

- Doesn't address types of safety incentive programs described in 2014 VPP memorandum as "blended"
- Blended = one component is reaching injury/illness rate goals
- *Implication* is that such programs do not violate Section 1904.35(b)(1)(iv)

Two Suits Challenging Rule

- One in Dallas Federal Court and one in Oklahoma City Federal Court
 - Dallas – Judge has delayed decision until after July 1
 - Oklahoma City – Judge has extended OSHA's time to answer by 60 days (July)

The New OSHA

- Likely much more conservative
- Likely to reverse interpretations
- Might try to “undo” new standards
- Might try to “undo” old standards
- Not likely to publish (m)any new standards
- “Two-for-one” Executive Order – January 30, 2017

The New OSHA

■ But

- Bureaucracies are run by bureaucrats
- Policy change takes a while to “trickle down”
- *HQ v. Regions v. Areas*

■ Consequence: lots of lag time

■ Result: more of the same in the field for a while



Enforcement Environment

- Enforcement focus is “enterprise-wide”, not just single geographic locations.
- Settlement strategy - OSHA
- Inspection of one location more likely to lead to inspection of other locations.
- Potential major negative impact:
 - Potential higher future penalties
 - Potential future repeat and willful citations
 - Potential loss of bids/contracts tax incentives

Revised “Enforcement Weighting System”

- Greater weight given internally to inspections requiring more time and resources
- $2 + 2 = 4$, but $4 = 6$
- Encourages CSHOs to expand scope and complexity of inspection (e.g., for combustible dust, airbornes, ergo, ...)

OSHA's Intake/"Triage" Process For Injury/Illness Reporting

- New injury/illness reporting requirements
=> internal intake/"triage" process.
- Result of triage process
 - Category 1 – Inspection
 - Category 2 – Possible Inspection
 - Category 3 – Rapid Response Investigation (RRI)
(and potential random follow-up onsite inspection)

“Triage” Process

- RRI letter instructs employer to do all of the following:
 - Conduct investigation
 - Document findings and corrective actions
 - Post copy of RRI letter where employees can readily review it – NO!!
 - Fax or e-mail signed copy of Certificate of Posting – NO!!

“Triage” Process

- RRI response to be in writing, with supporting documentation to confirm abatement (presumptuous).
- Response due within 5 working days (extensions for “complicated events”)

“Triage” Process

- “Non-Mandatory Investigation Tool”
- To “assist [employers] in conducting an effective investigation...in identifying the root causes of the incident and taking the necessary steps to ensure employees are protected from future injuries”
- NO!!

“Triage” Process

- Assume all information provided can, and will be, used against you:
 1. To initiate an inspection; and/or
 2. As the basis of a citation
- Establish internal standard operating procedures

Contingent Worker Issues

- Joint employer theory
- Stepped up enforcement and inspections for temporary/contingent worker issues
- Suspected employer mindset:
Contingent workers = “second class citizens”
- OSHA statistics: Temps four times more likely to get injured during first week

Contingent Worker Issues

- In most cases, host employer responsible for site-specific training and supplying employer responsible for generic safety and health training.
- “High priority” inspections initiated, in consultation with OSHA’s regional attorneys, when CSHO finds contingent worker exposure to violative condition

Contingent Worker Issues

■ Best practices

- Clearly assign in contracts all responsibilities for training, PPE, recordkeeping, accident investigations, procedures for discipline/removal of workers who violate safety rules, etc.
- Regularly monitor compliance with training, PPE requirements, work and safety rules, etc.
- Obtain/file copies of staffing agency training materials and records and ensure quality/proper content.

Questions?



Thank You!

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