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A (Belated) Year-End OSHA Update Webinar

Presented by:

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**Ogletree
Deakins**

Overview

- Introduction
- Post-Incident Drug Testing and Incentive Programs
- New Rules and Standards
- OSHA Regulatory Agenda
- What's Current in Enforcement
- Repeat Citations Case
- OSHA Personnel Update
- OSHRC Personnel Update

Post-Incident Drug Testing and Safety Incentive Programs

New Position as of October 11, 2018

- Reversed OSHA's position in Preamble to 2016 Electronic Recordkeeping Rule
- "... [T]he Department [of Labor]'s position [is] that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing"
- Other inconsistent OSHA interpretive documents superseded

Post-Incident Drug Testing

- “Most instances of workplace drug testing are permissible...”



Key Example of Permissible Drug Testing

- 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

Safety Incentive Programs

- How about “rate-based” incentive programs?
 - *E.g.*, “No injuries this month and everyone gets pizza”; OR
 - *E.g.*, “Any injuries this quarter and bonus is reduced”
- Permissible... as long as not implemented in a manner that discourages reporting
- No change in law



Safety Incentive Programs

- “Positive action” taken under this type of program always permissible
 - *E.g.*, rewards for reporting hazards, near misses
- But what’s “positive action”?



Safety Incentive Programs

- Negative action against employee under rate-based incentive program permissible as long as employer has implemented “adequate precautions to ensure that employees feel free to report an injury or illness”
- Say what??



“Adequate Precautions” – Examples

- Incentive program that rewards employees for identifying unsafe conditions in workplace; OR
- Training program for all employees to reinforce reporting rights and responsibilities and emphasize employer’s non-retaliation policy; OR
- Mechanism for accurately evaluating employees’ willingness to report injuries and illnesses

What's Current in (Relevant) Rules and Rulemaking

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>

New Rules and Standards

- Quantitative Fit Testing Protocol: Amendment to Final Rule on Respiratory Protection – Sept. 26, 2019
- Recognizes (App. A) two new quantitative fit test protocols that reduce time required to complete test while maintaining acceptable test sensitivity, specificity, and predictive value
- Modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol:
 - For full-facepiece and half-mask elastometric respirators
 - For filtering facepiece respirators

New Rules and Standards

- Electronic Reporting Rule (Final) – Pub. 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

- Challenges to Electronic Reporting Rule
 - Public Citizen suit: New rule changing old rule violates APA – dismissed Sept. 26, 2019
 - One suit (left) challenging – 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

Regulatory Agenda of Interest



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
- Comments received in response to March 11, 2019, RFI now being analyzed



Walking-Working Surfaces

- “OSHA has received feedback from stakeholders indicating that several regulatory provisions of the 2016 final rule on Walking–Working Surfaces (81 FR 82494) are unclear”
- Plan: (a) to correct formatting error in Table D-2; (2) to revise language of requirements for stair rail systems to make clearer and “reflect OSHA's original intent”
- NPRM: April 2020

Standards Improvement Project

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



Hazard Communication Standard Update

- Purpose to catch up with GHS updates since March 2012
- NPRM January 2020 (oops)
- Postponed twice 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?
- NPRM November 2020



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 $\mu\text{g}/\text{dL}$
- ANPRM date unpublished



What's Current in Enforcement

New Maximum Penalties

- Serious and Other-than-Serious: \$13,260 → \$13,494
- Repeat: \$132,598 → \$134,937
- Willful: \$132,598 → \$134,937
 - Minimum: \$9472 → \$9639
- Failure to Abate: \$13,260 → \$13,494 (per day)
- Failure to Post: \$13,260 → \$13,494

New FOM

- Effective September 13, 2019
- Updated to include changes in enforcement policy
 - Walkaround representatives
 - Reversion to pre-Obama Administration penalty calculation/adjustment factors (mitigation v. aggravation)
 - “Probable cause” standard for expansion of complaint/referral inspection
- No change in look-back period for repeat citations

Site-Specific Targeting (SST)



SST-16

- Program adopted in FY18; Inspections began in FY19
- Based on CY 2016 injury and illness information submitted electronically
- Whom will OSHA inspect?
 - Establishments with above-industry-average DART rates
 - Random selection of establishments with low DART rates
- What kind of inspections will OSHA conduct?
 - Comprehensive (safety or health)

SST-16

- OSHA also 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

Recent OSHA Enforcement Trends

- Majority of inspections now unprogrammed: e.g., FAT/CAT, amputations, hospitalizations, losses of eyes, complaints
- Generally true of state-plan inspections, too
- Examples of programmed inspections:
 - National/regional/local emphasis program inspections
 - SST inspections
- Increase in SST-16 inspections

Recent OSHA Enforcement Trends

- Also, new emphasis on “EU” inspection credits (recently modified)
- Not all inspections equal
- Resulting incentive for CSHO/AD to expand inspections
 - “Plain sight”
 - NEP/REP/LEP
- Trend – Fewer inspection expansions ... but not by much

Recent OSHA Enforcement Trends

- Increased number of “RRI” responses to reports of hospitalizations, losses of eyes, even amputations
 - Reason: limited resources
 - Less often true in amputation cases
- Framing of report to OSHA critical; can invite or discourage inspection
- Critical to control scope of inspection, path of travel, information provided OSHA

OSHRC's Repeat Citations Decision

Angelica Textile Services

- OSHA's position: For repeat, need show only same type of equipment or process or involved standard/rule
 - “Substantial similarity”
 - Departure from *Potlatch* standard (1979 OSHRC decision)

Angelica Textile Services

- OSHRC: Showing of disparate condition or hazards can rebut substantial similarity showing
- OSHRC: 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
- OSHRC: OSHA's "acceptance" of abatement may reinforce affirmative defense
- On appeal to 2nd Circuit Court of Appeals

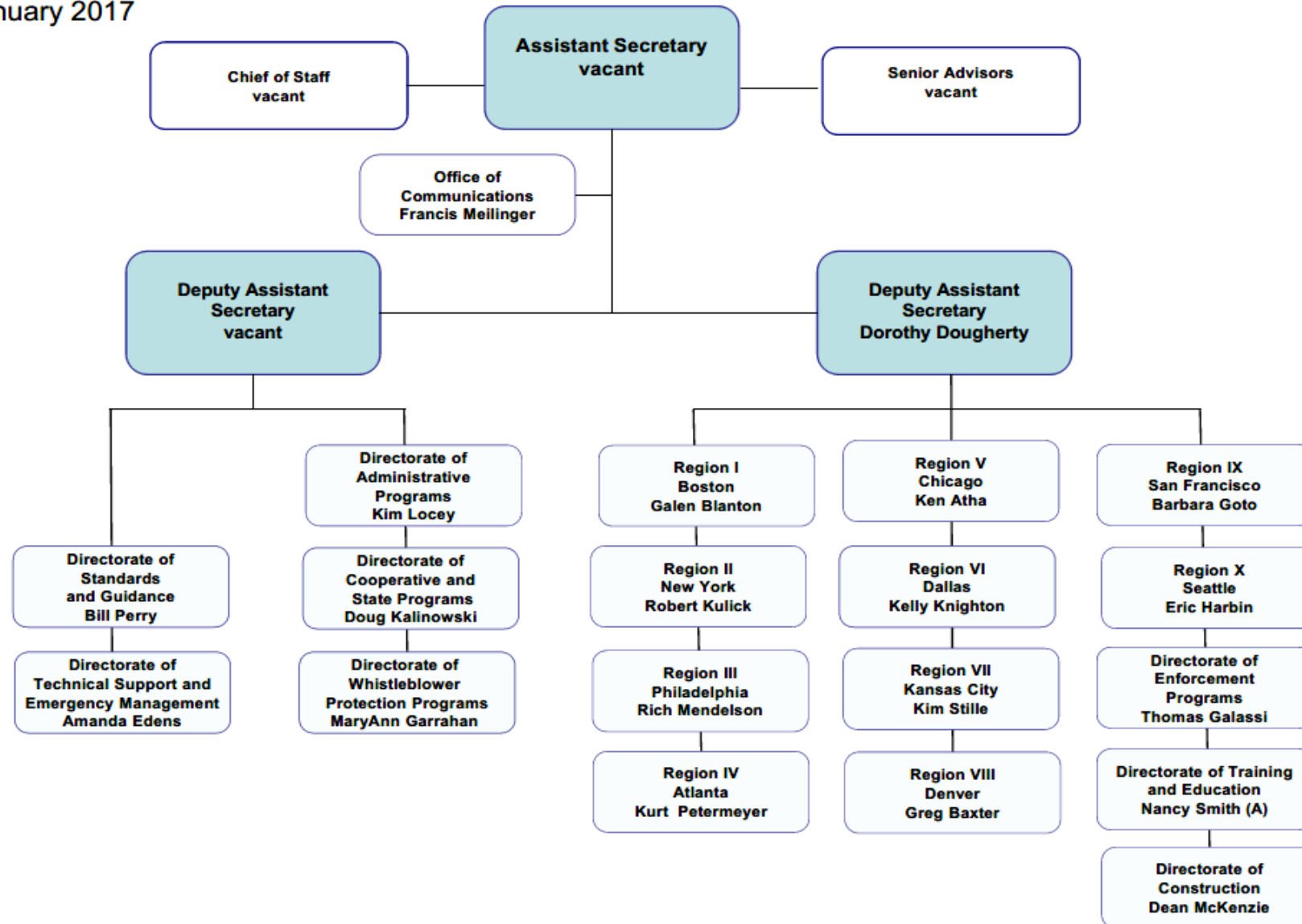
OSHA Personnel Update

Scott Mugno – Withdrew September 2019

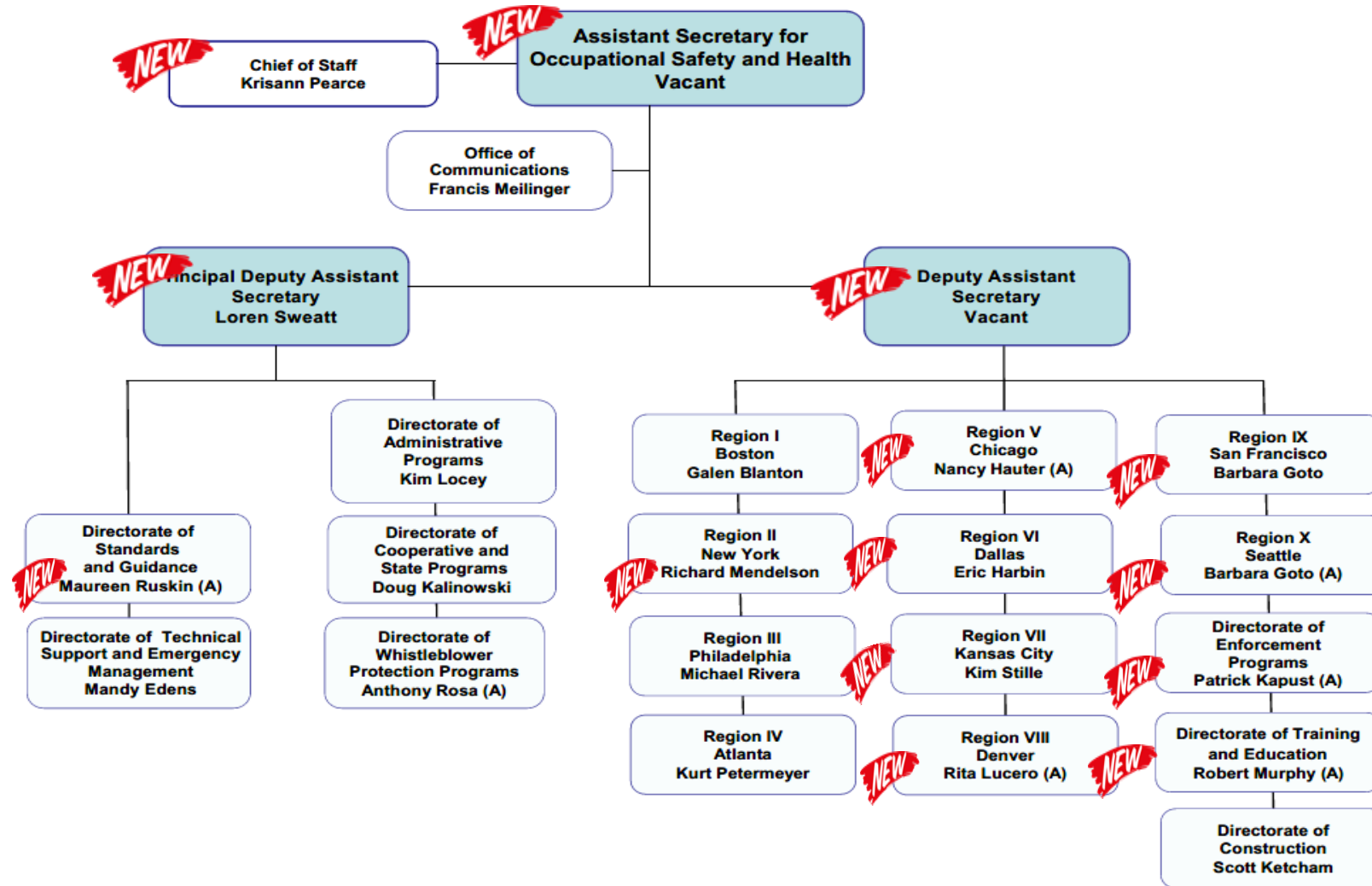




OSHA Organizational Chart January 2017



OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION



OSHRC Personnel Update

OSHRC Losses



Cynthia Attwood

Old OSHRC Faces



Jim Sullivan

New and Old OSHRC Faces



Amanda Wood Laihow



Cynthia Attwood

Questions?



Thank You!

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