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PUTTING THE HURT ON

OSHA enforcement is muscling up: Here's what you can do about it.

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EVERY APRIL 28, ORGANIZED LABOR celebrates Workers' Memorial Day to honor workers harmed by job site hazards and to commemorate the founding of the Occupational Safety and Health Administration (OSHA). This year, workers' groups will celebrate a reinvigorated OSHA under new leadership committed to restoring the agency to what they believe is its rightful regulatory and enforcement stature.

Anyone who doubts the pro-enforcement mind-set of the new OSHA should consider a reference to New York's Triangle Shirtwaist Factory fire in a recent press release announcing a \$230,000 citation against an employer with blocked exits at a retail location. Many employers might not see a true parallel between a situation that resulted in no deaths and the March 25, 1911, Triangle fire, in which 146 workers, mostly young immigrant women, died because the exits from their workplace were locked. (Triangle's owners were acquitted at trial.)

Yet, Dr. David Michaels, OSHA's new director and a former professor of occupational and environmental health, chose to draw a rhetorical and moral parallel—and back it up with a sizable fine, stating, “Blocked fire exits can be deadly. It is that simple.” Asked about the release

announcing the citation, Dr. Michaels replied that “regulation by shaming” can be “very effective.”

Where shaming falls short, there is pending legislation in Congress. The Protecting America's Workers Act (H.R. 2067; S. 1580), if adopted, will significantly increase OSHA's punitive powers. The act's provisions include raising the criminal penalty from a misdemeanor to a felony for a willful violation involving a fatality, and extending individual criminal liability to “any responsible corporate officer,” as well as significantly raising OSHA's civil penalties.

What can you do to ensure that your company institutes best practices to safeguard itself from the sting of stepped-up OSHA enforcement? Several practical suggestions appear below. But first, some particulars as to what your company is going to be up against.

THE AGGRESSIVE, PRO-LABOR agenda that is unfolding at OSHA is expected to have major consequences for employers beginning this year. Under Dr. Michaels, the agency is committed to more aggressively enforcing existing workplace standards with more inspections, more high-penalty citations for egregious violations, fewer unclassified settlements, and expanded use of the general duty clause in ergonomics and other areas. The newly reenergized OSHA is also intent on significantly scaling back compliance assistance and cooperative programs, and imposing new standards and requirements for employers through changes to OSHA's regulatory agenda.

Looking ahead, counsel for employers should expect to see all of the following: more enforcement, more inspections, and more citations for alleged misconduct.

To accomplish all this, OSHA is being beefed up by the Obama agency. OSHA's 2010 budget of \$558 million is up nearly 12 percent, and the agency is already in the process of hiring up to 120 new enforcement personnel to dramatically boost work-site inspections. Last fall, just as the agency was levying the largest fine in its history (quadrupling the previous record), OSHA also expanded the use of its egregious violations policy to raise penalties. It issued seven of these egregious citations in the first quarter of fiscal 2010, compared with four in all of 2009.

The agency has also embarked on a historic departure from permitting willful citations in fatality cases to be reduced to Section 17 unclassified citations or settled. It will likely further constrict its use of settlements and the unclassified citations policy.

In addition, OSHA is expected to issue repeat citations for violations at multiple facilities of a single employer, and also to expand the use of repeat citations in performance standards such as the Process Safety Management Standard.

The agency is also on track to revise its EEP (Enhanced Enforcement Program). It plans to transform EEP into a Severe Violators Enforcement Program (SVEP) for employers with three or more willful or repeat violations, or those who experience fatalities or catastrophes. The biggest area of concern is that it could be much easier to be placed in this program and much harder to get out.

When asked about a \$230,000 citation for blocked exits at a retail location, OSHA director Dr. David Michaels said that “regulation by shaming” can be “very effective.”

Finally, employers should watch out for expanded and new national, regional, and local emphasis programs. Reflecting OSHA leadership's belief that workplace injuries are significantly underreported, the agency has already announced a new National Emphasis Program to investigate the accuracy of employer reporting in certain high-hazard industries.

ANOTHER LOOMING CAUSE FOR concern is a decrease in cooperation by the agency. In a departure from standing policy for 30 years, OSHA has begun to reduce the size and scope of its cooperative compliance programs. As a first step, OSHA announced a suspension of annual goal-setting for new Voluntary Protection Plan sites by its regional offices.

The agency has also announced its intent to revise exemptions from enforcement for (mainly) small employers in its consultation program in a new rule to be issued by August 2010. Employers that have been awarded Safety and Health Achievement Recognition Program status exemptions based on recent inspections will be included under that new rule.

There are some specific areas of activity to be especially vigilant about, and ergonomics heads the list. Dr. Michaels has often stated that musculoskeletal injuries and disorders (MSDs) are the largest source of injury and illness in the workplace, and that workplace injuries are significantly underreported. This has given rise to major concern among a broad swath of employers that a renewed focus by OSHA on ergonomics could be imminent.

In the past, Dr. Michaels has advocated broader use of the general duty clause where there is no existing OSHA standard in place (such as in ergonomics), partly to get around rule-making constraints. Whenever a hazard is serious and there are recognized measures to mitigate it, Dr. Michaels has stated that the agency doesn't need a new standard, but should use the general duty clause. The agency has already initiated rule-making to add a column to the OSHA 300 log for reporting MSDs. (The 300 logs are used to compile records of work-related injuries.)

Industrial workplaces and construction work are additional areas in which we should expect to see increased activity. During his

nomination review, Dr. Michaels told the Senate Committee on Health, Education, Labor, and Pensions that instituting new rule-making on combustible dust was among his regulatory priorities. His other primary goals included speeding up rule-making with regard to beryllium, silica, cranes, and derricks, and also updating OSHA's hazard communication standard with a globally harmonized system.

Dr. Michaels is expected to add items to this agenda, creating new safety requirements. His past public testimony and writings suggest that he would also support a new comprehensive workplace safety and health program standard as well

as a comprehensive standard to cover many additional hazardous chemicals the agency does not currently regulate.

There's no need to give in to the gloom and doom outlined above. There are several prudent and proactive steps you can take to minimize the pain your company is likely to confront in dealing with the newly energized OSHA:

- Ensure that your record-keeping is in order and that injuries and illnesses are reported accurately in OSHA 300 logs. Take necessary steps to train your employees who are responsible for OSHA record-keeping. Consider regular and random privileged audits conducted by inside or outside counsel to identify errors and take corrective action.
- Evaluate your safety incentive programs to ensure that they do not discourage employees from reporting injuries and illnesses.
- Take seriously the likelihood of OSHA inspections and citations at multiple facilities, and be prepared to take advantage of OSHA's new corporatewide settlement policy expected later this year.
- Be aware of national, regional, and local emphasis programs applicable to every facility, including locations impacted by OSHA state plans.

■ Consider audits for specific issues and areas of potential concern to identify any vulnerability before OSHA inspectors arrive. If you have a significant OSHA citation history or may be the target under any emphasis programs, be particularly careful and take the necessary steps, including audits, to ensure that you are in full compliance.

■ Prepare an inspection protocol designating staff in your organization responsible for dealing with OSHA, and make sure you are fully aware of your rights and responsibilities in the event that the agency pays a visit.

■ If you receive an OSHA citation, exercise care in negotiating a settlement to minimize

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repeat, willful, and SVEP consequences. Consider using OSHA's new corporate settlement policy once it is released to the public.

■ If you receive an OSHA citation, prepare for reinspections to verify abatement of the cited hazard.

We could hear a lot about the Protecting America's Workers Act this April 28. And if those driving the new OSHA agenda get their way, we may find that critical provisions of the bill have passed into law by Workers' Memorial Day 2011. You, and your company, should take steps now to make sure you are prepared for ramped-up OSHA enforcement and regulatory activity in the months and years ahead.

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