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Gaining Advantage in a
Dynamic Project Landscape



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Gaining Advantage in a Dynamic Project Landscape



**OSHA's Message To Industry:
"There is a New Sheriff in Town"**

**What Does This Mean & What
Should You Do?**

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The New Sheriff In Town

- ***“There is a new Sheriff in town.... Make no mistake about it, the Department of Labor is back in the enforcement business. We are serious, very serious.”*** Secretary of Labor, Hilda Solis
- ***“Under this Administration, OSHA is returning to the original intent of the OSH Act. We're a regulatory and enforcement agency and we're going to act like it. ... Make no mistake. In addition to sending a message to these companies that we will not tolerate neglect of worker safety and health, we also want the entire industry to hear that OSHA will reactive swiftly and strongly when workers are put at risk.”*** Assistant Secretary, David Michaels
- ***“You are not alone. We have your back and your fight is our fight ... there's a new sheriff in town.”*** Deputy Asst. Secretary, Jordon Barab

The New Sheriff

- ***“I know that by now you've all heard Secretary Solis describe DOL under this Administration as the "new sheriff in town." This is not an empty slogan; it is a stern description of how OSHA is now working — and I take this phrase seriously. For too long, in too many workplaces in our country, employers have run their businesses like the “Wild West” — ignoring laws governing wages and work hours, employment standards, whistleblower protections, and safety and health regulations. In this "anything goes" atmosphere, good employers running responsible businesses resent the unfair advantage of their less law-abiding neighbors. Well, the new sheriff is here to make sure everyone obeys the law.”*** Assistant Secretary, David Michaels

The New Sheriff

- A bigger budget, more inspectors, more inspections, more citations, higher penalties
 - “With a renewed emphasis on enforcement, look for more - and bigger - citations to make sure that employers follow the rules and take worker protection seriously.” Deputy Asst. Secretary, Jordon Barab
 - “For many employers, investing in job safety happens only when they have adequate incentives to comply with OSHA’s requirements. Higher penalties and more aggressive, targeted enforcement will provide a greater deterrent and further encourage these employers to furnish safe and healthy workplaces for their employees.” Asst. Secretary David Michaels

The New Sheriff

- October 2009: The highest penalty in OSHA history – \$87.4 million, BP (Texas) failures to abate prior citations & new citations)
- August 2010: \$16.6 million – 3 construction companies and 14 contractors (including \$8.3 & \$6.6 million penalties to two companies) (CT)
- August 2010: E.N. Range Inc – \$2 million (FL)
- March 2010: \$3 million - BP (Ohio)
- January 2010: \$1.4 million – CES Environmental Services
- November 2009: \$1.6 million - Tempel Grain Elevators
- May 2010: \$1.6 million – South Dakota Wheat Growers
- June 2009: \$1.1 million – Milk Specialties Co.

The New Sheriff

- Working more closely with the Department of Justice to increase the number of criminal prosecutions for workplace fatalities.
 - “Nothing focuses the mind like the prospect of time in prison.”
David Michaels, 6/14/10
- More “egregious” cases: “In the last fiscal year we filed four egregious cases; in the last quarter, we initiated seven.” David Michaels, 1/22/10
- “Severe Violators Inspection Program” focusing on large employers whose histories of OSHA violations demonstrate to OSHA that they do not take their compliance obligations seriously. These companies will be targeted for aggressive enforcement to make sure they “get the message”
- Supporting legislative OSHA reform efforts (PAWA/Miner Act) to substantially increase penalties, both criminal and civil
- Focusing on specific enforcement issues through National Emphasis Programs (NEP) and a SWAT Team approach
- Deemphasizing Voluntary Protection Programs, partnerships, and alliances to free up more resources for enforcement

Severe Violator Enforcement Program (SVEP)

- Purpose: Concentrate resources on inspecting employers who have demonstrated indifference to their OSHA Act obligations by committing willful, repeated, or failure-to-abate violations
- “SVEP will help OSHA concentrate its efforts on those repeatedly recalcitrant employers who fail to meet their obligations under the OSH Act. It will include a more intense examination of an employer’s practices for systemic problems that would trigger additional mandatory inspections.” Asst. Secretary David Michaels
- The criteria to trigger an SVEP case are different for four situations

SVEP

- Fatality/Catastrophe cases: One or more willful, repeated, or FTA serious violations (do not have to be High Emphasis Hazards)
- Non-FAT/CAT but High Emphasis Hazards: Two or more willful, repeated, or FTA high gravity serious violations related to a “High Emphasis Hazard”
 - High Emphasis Hazards: High Gravity Serious violations of specified standards addressing fall hazards, amputations, crystalline silica, lead, excavation/trenching, and shipbreaking, and combustible dust hazards
- PSM violations: Three or more willful, repeated or FTA high gravity serious violations
- All egregious (instance-by-instance) enforcement actions

SVEP

- SVEP consequences:
 - Enhanced follow-up inspections
 - Nationwide inspections of related work-places of employer
 - For PSM violations, inspections for violations of cited section, but does not include units inspected in prior 2 years
 - Increased company awareness of SVEP enforcement action
 - Citations and penalties mailed to company's national HQ & unions
 - News releases
 - Letters to officers, requests for meetings and notification of employee representatives

SVEP

- Enhanced settlement provisions
 - Hiring of safety and health consultants
 - Company-wide settlements
 - Interim abatement controls
 - Notification to OSHA of new job sites (construction)
 - Submission of OSHA 300 logs quarterly to Area Director
 - Notification to Area Director of any serious injury or illness and consent to inspection
 - Employer consent to entry of court enforcement orders

National Emphasis Programs

- Refinery NEP
- Chemical NEP
- Combustible Dust NEP
- Recordkeeping NEP

Whistleblowers

- The New Sheriff has vowed to more aggressively pursue whistleblower claims
- In one recent whistleblower case, “U.S. marshals and OSHA took a page from the Repo Man’s notebook and seized the company president’s black Corvette. At auction, that shiny car brought enough funds to pay the whistleblower and recoup our agencies’ costs.” Asst. Secretary David Michaels

OSHA Reform Legislation

- A call for OSHA reform has often been made over the years, but reform efforts have gained more traction in light of multiple industrial disasters and with the vocal support of the New Sheriff.
- Under various versions of introduced reform legislation, criminal liability against companies and individuals would be expanded in meaningful ways
 - The burden of proof to establish criminal liability would be eased from “willful” to “knowing”
 - The term “employer” for prosecution purposes would be broadened to include “any responsible corporate officer.”
 - Criminal liability would be expanded to cover not just fatal accidents but serious injuries as well.

OSHA Reform Legislation

- The level of criminal charges would be increased from misdemeanors to felonies (making OSH Act criminal prosecutions much more attractive to prosecutors)
- Maximum prison sentences would be increased (e.g., from six months to ten years for first offenses, and from one year to twenty years for repeat convictions)
- Civil penalties for OSHA violations, including increasing civil penalties for willful and repeated violations would be substantially increased (e.g., from current maximum of \$70,000 per violation to \$120,000; for willful or repeated violations resulting in an employee fatality, to a *minimum* of \$50,000 and a maximum of \$250,000 per violation.
 - “Clearly, OSHA can never put a price on a worker's life and that is not the purpose of penalties — even in fatality cases. OSHA must, however, be empowered to send a stronger message in cases where a life is needlessly lost,” and “the current penalties do not provide an adequate deterrent.” Asst. Secretary David Michaels

OSHA Reform Legislation

- Require abatement of *alleged* serious, willful, and repeated hazards during the period that contested OSHA citations are on appeal.
- Substantially expand whistleblower protections and remedies
- Substantially expand the rights and involvement of workers and victims' families in the enforcement and appeal process.
- Prohibit the modification of citations to "uncharacterized" in OSHA Settlement Agreements.
- Possibly expand coverage of the OSH Act to Federal, State and local government employees.

Strategies for Survival

- Pre-Inspection Preparations
- Managing OSHA Inspections
- Handling OSHA Citations

Pre-Inspection Preparations

- Prepare in advance – NOW – to confirm that your safety & health house is in as good order as you think it is
 - Audit and constantly police your key risks
 - Make sure your written policies are actually implemented in the field
 - Aggressively enforce your policies & procedures
 - Review and update policies & procedures that are showing their age
- Educate all levels of HQ and site management concerning the fact that there is a New Sheriff in Town and that the stakes for OSHA violations have been substantially raised
 - The stakes involve not just significant civil & criminal liabilities, but reputational risks, and not just for companies, but for individuals as well
- Review your company's safety & health commitment, safety & health programs, safety & health staffing, and safety & health efforts – from top to bottom

Pre-Inspection Preparations

- In the New Sheriff's town, it is far too easy for a "good guy" to end up looking like a "bad guy"
- Your "good guy" *image* must be provable by demonstrable, consistent "good guy" *efforts*
- How do you prove you are a "good guy" and not a "bad actor"?

Pre-Inspection Preparations

- Make sure your safety program is more than procedures and slogans
- Review your actual key risks and the programs you have in place to control them. Refresh them & make them stronger
- Re-examine the training programs you rely on to convince new hires & all other employees of your safety seriousness and the vital importance of their obeying your safety rules
- Ensure that your safety program actually *is implemented and followed in the field*, by your site managers as well as your field workers
- Constantly anticipate, prevent, look for, find, and eliminate potential serious hazards
- Consistently generate clear, easily retrievable, substantial documentation reflecting all of your safety efforts – Training, meetings, communications, inspections, corrective actions & discipline

Managing Inspections

- Review and revisit your inspection management plans – do you have one? Do all your key players know what it is?
- Do your key front line project personnel really know what to do if a serious accident occurs or an inspector arrives?
- Who are you actually putting in charge of handling this potentially significant liability matter?
- Are they really up to the task of balancing all of the competing interests in a way that best serves your overall interests?
- Do they understand the systems needed to be out in place to manage site walkthroughs? Document requests? Interviews? Discussions with the agency?
- Is enough being done to present the company in its best light at its darkest hour?
- What happens during inspections largely determines the final outcome

Handling OSHA Citations

- What system do you have in place to systematically assess, address & resolve *any* OSHA citation that is issued?
- Is the potential importance and consequences of an OSHA citation to your organization properly evaluated?
 - The citation's validity? (Does it have merit? Are the facts relied on correct? Is the standard being interpreted and applied correctly? How do you determine this?)
 - The citation's effect on future repeat or willful citations company-wide?
 - The citation's potential effect on civil injury-related litigation?
 - The citation's impact on contract pre-qualifications, bids and awards?

Dealing With Citations

- What should your company's goals be as to each citation?
 - Why?
 - Are the goals realistic?
- What should you do about the citations?
 - Accept?
 - Attend an Informal Conference? Enter into an “Informal Settlement”?
 - Appeal?
 - Litigate? How far? How hard?

Summary – Key Points

- Recognize that the New OSHA Sheriff's #1 priority is **strong** enforcement – and that this is not an empty slogan
- Make sure your executives, your managers and your entire work force understand this
- Review & update your written safety programs and the actual field implementation of your programs
- Prepare in advance for the New Sheriff's arrival
- Carefully manage OSHA inspections
- Systematically evaluate all OSHA citations
- Make sure the resolution of all citations is on appropriate and acceptable terms



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Jim Lastowka is a partner in the law firm of McDermott Will & Emery LLP based in Washington, D.C. Jim is a member of the Firm's OSHA, MSHA & Catastrophe Response Group. Jim has practiced exclusively in the field of occupational safety and health for 35 years. He is a former Commissioner and General Counsel of the Federal Mine Safety & Health Review Commission, and a former Assistant General Counsel of the U.S. Occupational Safety & Health Review Commission. He is a recognized authority on safety & health law and has a nationwide practice. He was selected by EHS Today as one of 2010's 50 Most Influential EHS Leaders.

Jim's practice includes responding onsite to catastrophic industrial and construction workplace accidents, including explosions, chemical releases and collapses of buildings, tunnels, scaffolds, and cranes, conducting internal investigations of fatal and other workplace accidents, managing investigations by OSHA, MSHA, CSB, EPA, ATF, and state and local agencies, and structuring industrial hygiene surveys and exposure assessments concerning potential employee exposures to toxic chemicals and mold. In addition, Jim's practice includes providing compliance counseling, conducting safety and health audits and due diligence reviews, handling the full range of OSHA and MSHA litigation, including appeals of citations, penalties and withdrawal orders, investigating and defending discrimination and whistleblower complaints, and participating in rulemaking proceedings.

Jim is a member of the American Bar Association, including its Labor and Employment Law Section, Occupational Safety and Health Law committee, and its Forum on the Construction Industry. He is a frequent speaker and writer on OSHA and MSHA compliance issues, workplace catastrophes, and accident investigations..