

## U.S. CHAMBER OF COMMERCE



### NGFA Regulatory Update: What to Expect in the Second Obama Term

Marc Freedman  
Executive Director, Labor Law Policy  
Labor, Immigration, and Employee Benefits

### Personnel Is Policy: DOL Political Leadership



Thomas Perez,  
Secretary of Labor



Patricia Smith,  
Solicitor of Labor



David Weil, Wage and  
Hour Administration  
Nominee

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## Secretary of Labor Thomas Perez

- Confirmed June 2013
- Previously Assistant Attorney General for Civil Rights
- Previously Maryland Secretary of Labor
- Has very quickly remade role of Secretary from Hilda Solis
- Extremely engaging, outgoing, confident
- Very effective face and voice for DOL/Administration agenda

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## WHD Nominee David Weil

- Will be first Wage and Hour Administrator in Obama administration; haven't even had nominee
- Only needs 51 votes for confirmation
- Has done the pioneering research on "fissured" industries—where outside employers supply workers
- Expert on enforcement strategies so WHD can best apply resources

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## Personnel Is Policy: OSHA Political Leadership



Dr. David Michaels,  
Asst. Secretary for  
OSHA



Jordan Barab,  
Deputy Asst.  
Secretary for OSHA



Deborah  
Berkowitz, Senior  
Policy Advisor

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## Three Key Areas to Watch

- Regulations
  - First Tier: Revised Silica Standard, Injury and Illness Electronic Reporting, MSD Recordkeeping
  - Second Tier: SIC to NAICS Code
  - Wild Cards: Combustible Dust, OIRA Leadership, I2P2
- Subregulatory Actions
- Appropriations/Funding

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## Regulatory Concerns

- Not all regulations bad, but badly conceived and poorly written regulations are bad
  - MSD Recordkeeping—not based on solid data or science; definitions and causes of MSDs not settled
  - Silica—no demonstration that new PEL is justified, technologically and economically infeasible
  - GHS/HCS—widely supported but OSHA added problems—HNOC, combustible dust, mixtures, compliance deadlines
- Lack of SBREFA panels—OSHA avoids whenever possible getting direct input from small businesses
- Flawed impact analyses
  - MSD Recordkeeping—only five minutes to comply
  - Injury and Illness Reporting reg—no accounting for electronic only; only \$11.9 million a year

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## Subregulatory Problems

- Subregulatory actions—substantive changes without transparency, involvement, or accountability
  - Guidance—interpretations such as union walk around rights
  - Penalty policies—increased penalties, longer look-back period for repeat violations
  - New compliance directives—incentive programs, combustible dust under GHS
  - National Emphasis Programs—recordkeeping, combustible dust, nursing homes (read: ergo)

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## Silica Rulemaking

- NPRM took more than 2.5 years to clear OIRA—had to conduct fracking industry analysis
- Revised standard would lower general industry PEL from 100 to 50  $\mu\text{g}/\text{m}^3$  and construction from 250 to 50 and add programmatic requirements such as monitoring
- Would mean any workplace with silica would be out of compliance
  - Problem is not PEL but compliance with current PEL
  - Silicosis rates declining
- Advocates want this reg
- Chamber submitted extensive comments and testified at hearing



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## Injury and Illness Electronic Reporting

- Would require employers to submit logs to OSHA *only* electronically
- Employers with 250 or more employees would have to submit quarterly
- Employers with 20-249 employees would only have to submit annually
- Records would then be published on internet with company and incident specific information
- No statutory authority to publish records

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## Injury and Illness Electronic Reporting--II

- Requested by AFL-CIO in submission to Obama transition: “regulation by shaming”
- OSHA can’t say how it will protect employee information
- Absurd cost and benefit estimate
  - Benefits pure conjecture with no data to support
  - Costs would be \$183 for larger companies and \$9 for small
  - Ignores costs for determining MSDs; electronic only
- Swift and strong reaction from employers
- Comments closed March 10; Chamber and Coalition for Workplace Safety submitted
  - CWS comments signed by 101 groups

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## MSD Recordkeeping

- Final regulation submitted to OMB July 14, 2010
- Withdrawn from OMB review January 25, 2011 citing need to get more small business input
- Small business teleconferences held April, 2011
- FY 2012 Omnibus bill included rider blocking any further action—not continued in FY 2014 Omnibus; greenlighted to be finalized
- These new logs would be required to be submitted by the I/I reporting reg

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## MSD Recordkeeping--II

- Would require employers to record MSDs in new column on OSHA 300 log
- No reliable medical/scientific definition for MSDs
- Role of non workplace activities—one definition of work related injury is a pre-existing injury aggravated by workplace activities
- Caterpillar case—went to extraordinary lengths to determine not work-related but OSHA still cited; long litigation history finally vindicated Caterpillar
- Would give inspectors road map for citations; data will drive other OSHA efforts

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## SIC to NAICS—Reporting of Hospitalizations, Amputations

- OSHA's recordkeeping rule excludes certain employers in relatively low hazard industries from the basic recordkeeping requirements—300 Logs, 301 incident report forms.
- OSHA's proposed rule (June 22, 2011) will re-categorize the exempt industries from SIC codes to the North American Industrial Classification System (NAICS).
- Now at OIRA undergoing review for finalization

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## SIC to NAICS—Reporting of Hospitalizations, Amputations--II

- Current rule: employers must report to OSHA within 8 hours all work-related fatalities and in-patient hospitalizations of 3 or more employees.
- OSHA's proposal requires:
  - Work-related in-patient hospitalization of any employee would have to be reported within 8 hours—work relatedness issues
  - Work-related amputations would have to be reported within 24 hours of the occurrence of the incident –conflict with hospitalization requirement; which controls?
  - Only way to report is by toll free phone—no record and very limiting with all the options available

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## OSHA LOI Allowing Union Reps to Accompany OSHA Inspectors at Non-Union Workplaces

- Feb. 2013 letter responding to Dec. 2012 inquiry from United Steelworkers
- Employees at non-union workplace can designate a union representative as their representative to accompany OSHA inspector on walk-around
- Regs say rep “shall be” employee of company or third party with particular expertise—IH
- Will help unions and others use OSHA inspections as organizing, harassment tool
- Recent media coverage based on SEIU inspections of janitorial company in Houston

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## Memorandum to Field Staff on Enforcing Comb. Dust Requirement Under GHS

- Dec. 2013 OSHA issued memo to field staff instructing them how to enforce the Combustible Dust requirement under the GHS reg because no definition for CD
- CD does not fit GHS model; not intrinsic hazard, based on conditions
- Memo effectively codifies outside standards from NFPA, ASTM without rulemaking
- Ironically rulemaking on CD underway

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## OSHA Whistleblower Enforcement and Safety Incentive Programs

- March 2012 memo issued to OSHA senior staff: "Employer Safety Incentive and Disincentive Policies and Practices"
- Outlines several workplace policies including certain incentive programs that "could discourage reporting and could constitute unlawful discrimination and a violation of whistleblower protection statutes."
- Signals OSHA's intent to carefully scrutinize traditional incentive programs that OSHA believes prevent employees from not reporting injuries
- No rulemaking or opportunity to comment; no data or evidence to support

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## Revisions to Overtime Regulations

- March 13 President directed Sec. Perez to conduct rulemaking
- No details but wide consensus believes:
  - Income threshold will be raised from \$455/week
  - Primary Duties will be subject to some form of quantification analysis
- Clearly want to restrict use of OT exemptions
- Many employers and sectors very concerned; likely very disruptive and employees will not benefit
- Proposed reg expected in fall before elections

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## What to Do?

- Regulatory Process
  - Basic action is to file comments—sets table for future efforts; useful with Congressional offices, press
  - Must show agency that you care
- Legislative—Appropriations process
  - Possible riders, other actions, puts key MOCs on notice
- Grassroots—make red state Dems squirm
  - They need to know the consequences of administration actions
- Political—Senate in play
  - Republican majority would help with oversight, Approps, nominations
- Judicial—legal challenges such as NGFA challenge to OSHA GHS on combustible dust
- HOLD ON tight—next 2+ years will be bumpy ride

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