

OSHA – The New Risk Factor for Grain, Feed and Processing Facility Managers



Presented By:

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Overview

- Today's OSHA
- Current climate in DC
- OSHA's Rulemaking Agenda
- Enforcement Crackdown on Grain
- Sweep Auger Issue

Today's OSHA

- OSHA leadership is:
 - Vocal about protecting workers
 - Familiar with making industry a target
 - Inclined to treat non-union employers harshly to help advance organized labor's agenda
 - Enforcement driven – “there is a new sheriff in town”
 - Focused on big penalties and daily press releases

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2010 Elections

House of Representatives

- Republicans hold a majority of 242 to 193 seats
- Many Rs are “anti-regulation” – OSHA should be more of a resource for business, not a “sheriff”
- The Tea Party effect



Senate

- Ds hold a majority of 47 to 53 seats
- Some risk that Ds will lose the Senate in 2012

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Congress: Too many regs!

- Both Democrats and Republicans have criticized OSHA for the regulatory burden placed on businesses
- Senators Snowe (R-ME) and Lieberman (I-CN): OSHA should be “working to mitigate the regulatory burden on small businesses, not increase it”
- Rep. Darrell Issa (R-CA), Chairman of the Committee on Oversight and Government Reform, sent letters to trade associations and private businesses asking them to identify regulations that are inhibiting job growth (OSHA made the list!)

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Congress's Response

- Obama's proposed budget for FY 2012 was \$583 million – \$24 million increase; House Republicans want a 20% cut
- Continuing resolution left OSHA with a \$459 million for the remainder of this fiscal year (ending September 2011)
- According to Secretary of Labor Hilda Solis, a cut would force layoffs of “many of the new staff we brought in two years ago” (OSHA has added 200 new inspectors during the Obama administration)

The 2010 Elections

White House

- Regardless of government policies, need businesses to create jobs!
- If regulations are inhibiting job growth, we need fewer regulations
- More communication with business community

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The President's Response

- Executive Order requiring federal agencies to review existing regulations and remove “outdated regulations that stifle job creation and make our economy less competitive”
- WSJ op-ed piece: Agencies must strike a balance between protecting the public interest and regulations that place significant burdens on businesses
- “...we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb”

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President's Response

- Appointed Richard Daley to White House Chief of Staff
- Appointed GE Chief Executive Officer Jeffery Immelt as Chairman of the President's Council on Jobs and Competiveness
- Met with the US Chamber of Commerce in February 2011

Impact on OSHA – Rulemaking Retreat

- In January, OSHA withdrew two significant proposed regulatory initiatives
 - Interpretation of the Occupational Noise Exposure Standard
 - Ergonomics provision
- Why? Politics and the Economy

Injury and Illness Prevention Program – Better known as I2P2

- OSHA's highest regulatory priority
- Requirement to develop and implement a plan that identifies hazards in the workplace and establishes methods to eliminate or mitigate the hazards – shifts the burden to employers
- Held five stakeholder meetings in 2010 to solicit comments
- Small Business Review Panel – June 2011



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I2P2

- OSHA would never have to issue another standard
 - Employer responsible for addressing and mitigating all hazards, including ergonomics
- Risk of “Monday-morning quarterbacking” is substantial
 - If an employer has an accident, then their program must not be sufficient
- Most significant rulemaking in OSHA’s history
- Proposal by the end of 2011

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I2P2

- The White House supports this initiative
- Business has already identified this regulation as “job-killer”
- Significant questions about whether OSHA can legally promulgate this type of standard
- A standard will take years to promulgate and will be challenged

Combustible Dust

- March 2008: OSHA implements a National Emphasis Program (NEP) for combustible dust
- October 2009: OSHA says it will issue a standard
- Stakeholder meeting 2009 and 2010; site visits
- Small Business review (SBREFA) is expected to be initiated in April 2011 – OSHA has asked NGFA for data
- Industries have taken issue with the “one size fits all” approach to combustible dust

ENFORCEMENT CRACKDOWN

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Enforcement

- What is missing from the debate on the impact of federal regulations on job growth?
ENFORCEMENT
- “Regulation by shaming”
 - More “willful” citations (4x as many in 2009)
 - Higher penalties
 - Hard-hitting press releases
- Attitude of some at OSHA: “Issue the press release and worry about the facts later”; “Let the lawyers sort it out”
- What is the impact on jobs?

Enforcement

■ Bush Administration

- More compliance assistance
- Less enforcement
- Employers as OSHA “customers”
- Made examples of a few “bad actors”



■ Obama Administration

- More enforcement
- Less compliance assistance
- Unions as OSHA customers
- Everyone is a “bad actor”

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Enforcement

“I am committed to ensuring workers return home to their families safe and healthy at the end of every shift.”

“Let me be clear: the Department of Labor is back in the enforcement business. It’s time for a new direction in the Department. As long as I am the Secretary, the Department will go after anyone who . . . puts workers at risk.”

Secretary of Labor Hilda Solis



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Penalty Increases and Regulation by Shaming

- “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”
- “Fear of public disclosure (and the associated scorn and anger” encourages employers to eliminate hazards

- Assistant Secretary Michaels



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Higher Penalties

- Since legislative amendments to the OSH Act seem unlikely, OSHA is taking administrative measures to increase penalties within current provisions of OSH Act:
 - Expanding time frame for a repeat from 3 to 5 years
 - Only giving small employers a 10 to 40% reduction for size rather than 20 to 60% reduction
- OSHA: “Issue as many citations as you can”

Enforcement in the Grain Industry

- LEP – Local Emphasis Programs
 - All of Region V – Wisconsin, Ohio, Illinois and Michigan
 - Each Area Office in this Region will conduct 10 grain handling facility inspections by September 2011
- NEP – Combustible Dust
- Aggressive enforcement
 - Four cases in the last 15 months with penalties between \$720,000 and \$1.6 million
- What can be done politically?
 - Not much
 - Likely to continue to see increased, aggressive enforcement in the grain industry under this Administration

Open Letters to the Grain Industry

- After the death of two Illinois teenagers in July 2010 involving grain elevators, Assistant Secretary Michaels issued two open letters to grain storage facility operators
- “OSHA will not tolerate non-compliance with the Grain Handling Facilities standard.”
- “If any employee dies in a grain storage facility...OSHA will consider referring the incident to the Department of Justice for criminal prosecution.”
- February 1, 2011 letter: Researchers at Purdue University documented 51 grain entrapments in 2010
- August 13, 2010 letter: Researchers at Purdue University document 38 grain entrapments in 2009

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What does this mean for grain?

- Must be pro-active during inspections
 - How do you minimize liability during an OSHA inspection?
 - Do you have a plan in place to deal with OSHA in the event of an accident?
 - Do you know what rights you have during an inspection?
 - How and when do you communicate your position to OSHA?

What does this mean for grain?

- Settlement strategy
 - What reputational and other damage will result from “willful” violations?
 - What impact will current OSHA citations have on future liability?
 - What impact will current OSHA citations have on civil liability?
- Should you litigate?
 - How does OSHA prove a willful?
 - How do you position a case to settle?
- How can you use your political contacts?

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Sweep Auger Issue

- September 29, 2008: OSHA interpretation letter states that the use of a six-foot rule is not protective enough
- December 24, 2009: Workers cannot be in a bin while sweep augers are operating
- NFGA has asked OSHA to rescind the letters; Senator Grassley (R-IA) also sent a letter
- There are currently cases pending before federal OSHA offices challenging this policy

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Sweep Auger Issue

- Can OSHA do this?
 - Inconsistent with the language in the standard and in the rulemaking record
 - “Backdoor” rulemaking
- No consideration for the practical implications
 - View of experts: “You are going to need a lot of shovels and workers with strong backs”
 - Economic impact could be substantial

Sweep Auger Issue

- A recent state plan decision addressed the issue of unguarded sweep augers
- The Judge held that the Company “established that it is not possible to affix guards to the sweep auger’s point of operation without rendering the sweep auger ineffective” and also “established that its location guarding made it highly unlikely that an employee would touch the sweep auger’s point of operation”

Sweep Auger Issue

- Having employees in the bin during sweep auger violations does not violate the Grain Handling standard
 - With a “ground level opening” (standard two-ring door), employees are permitted to be inside the bin while sweep auger is running as long as there is no engulfment hazard
- Because this is a state plan decision it has *no impact on federal OSHA or in other state-plan states*

What can you do...

- Prepare for inspections
- Establish a management team including:
 - Contact person with OSHA on all aspects of the investigation
 - Those individuals who will participate in the walk around
 - May need legal counsel early on
- Do not accept citations without thinking through the implications
 - The penalties may be small, but impact on future liability may be significant

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