

U . S . C H A M B E R O F C O M M E R C E



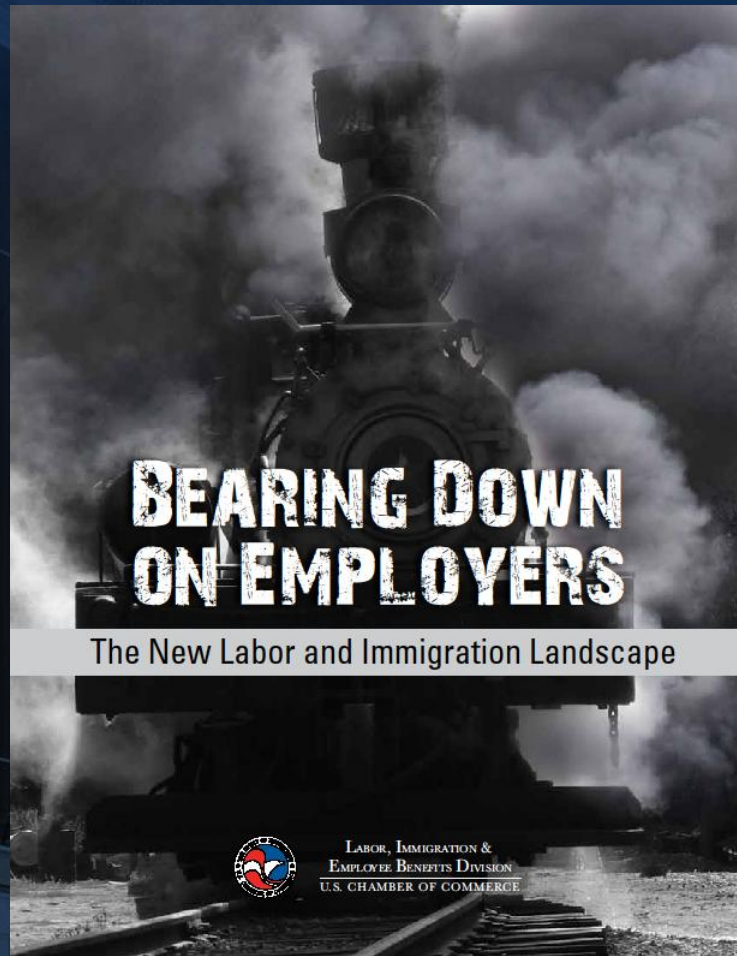
## National Grain and Feed Association Regulatory Overreach

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# Bearing Down on Employers



“There must be a recognition by the administration and Congress that the regulatory burden they have imposed on the U.S. economy has reached a tipping point. Unless the cumulative impact of existing regulations, newly mandated regulations, and proposed regulations is seriously addressed, the economy will not create the jobs Americans need. We will lose even more jobs. They will simply disappear or be sent offshore.”

# Regulatory Overreach Has Several Dimensions

- Overly broad regulations
  - Not all regulations are bad, but badly conceived and poorly written regulations are bad.
    - See OSHA GHS, I2P2—lead to uncertainty
- Non-regulatory (sub-regulatory) actions—substantive changes without transparency, involvement, or accountability
  - Guidance—interpretations (noise), preamble discussion
  - Penalty policies—increased penalties, longer lookback period for repeat violations
  - New compliance directives—incentive programs, workplace violence
  - National Emphasis Programs—recordkeeping, combustible dust
  - Appointments—NLRB, DOL

# OSHA Agenda

- Obama OSHA agenda tracks recommendations from AFL-CIO made during administration transition:
  - Revive the safety and health program rulemaking, initiated during the Clinton Administration.
  - Refocus on ergonomics. Reinstate the column for recording musculoskeletal disorders (MSDs) on the OSHA log.
  - Step up enforcement under the General Duty Clause and recordkeeping standard.
  - Place less emphasis on voluntary programs, and reform existing programs to make them more strategic and effective and enhance worker rights.
  - Develop initiatives to address workplace violence.



# OSHA Injury and Illness Prevention Programs (I2P2)

- I2P2- Would require all employers to implement S&H programs that meet requirements specified by OSHA
  - Employers would be required to “find and fix” all hazards—including those not otherwise regulated, e.g. ergo, combustible dust
    - Major uncertainty—employer won’t know if met obligations until OSHA inspects
  - Backdoor ergonomics regulations—same structure: OSHA doesn’t know how to do this, but employers will be held accountable
  - General duty clause on steroids; potential clash with legislation
  - Rulemaking started by Clinton administration but abandoned in favor ergonomics
    - Small business panel review criticized the concept in 1998

# OSHA Injury and Illness Prevention Programs (I2P2)—II

## ● Threshold Questions

- What is significant risk which this regulation would seek to reduce?
- What are the limits to “find and fix?” What level of foreseeability will employers need to have?
- How will OSHA enforce this standard? Will they “double dip?” Will OSHA second guess employers on what’s best for their workplaces?
  - This standard is all about enforcement—the difference between a good idea (safety and health programs) and a regulation.
- Will internal reviews be privileged/protected?
- How will OSHA deal with currently existing programs? How to define “effective?”
- What has OSHA learned since 1998?

# OSHA Injury and Illness Prevention Programs (I2P2)—III

- Small business review panel was expected by March 6, 2012—not clear when it will commence
- 1998 small business review found proposal more expensive than OSHA estimated, greater need for consultants than OSHA predicted
- OSHA will release draft proposal, economic analysis, and white paper on enforcement for panel
- Safety and health programs good things; regulation mandating them is not
  - Many employers have implemented programs tailored to their specific workplaces and employees
  - Moment regulation is issued, this goes from being good idea to legal requirement to satisfy OSHA; not the same thing

# OSHA GHS/HCS Regulation

- Would homogenize Globally Harmonized System of hazard labels and warnings (GHS) with Hazard Communication Standard (HCS)
- Rulemaking initiated under Bush administration, bipartisan support; proposed September 2009
- OSHA proposal added major problem of “unclassified hazard”
  - Open ended term—producers and employers would never know if they had satisfied regulation—major uncertainty
  - Gave combustible dust as example of unclassified hazard in preamble (i.e. mere guidance)—makes this a de facto combustible dust standard
- Obama administration touting this as “look-back regulation”
  - Claiming it will save \$2.5 billion over 5 years—grossly inflated, but even if accurate not significant
- Final reg. cleared OIRA on February 23—will be on OSHA website March 20, in Federal Register March 26



# OSHA MSD Recordkeeping

- Proposed Jan. 29, 2010, comments submitted March 30, 2010
  - Chamber with 18 other employer groups
- Would require employers to record MSDs in new column on OSHA 300 log
  - No reliable medical/scientific definition for MSDs or hazards—major uncertainty
  - Role of non workplace activities—work related injury includes pre-existing injury aggravated by workplace activities
  - Major expansion of injuries to be considered/recorded by dropping exemption for “minor musculoskeletal discomfort”
  - Would give inspectors road map for citations

# OSHA MSD Recordkeeping--II

- Final regulation submitted to OMB July 14, 2010
- Withdrawn from OMB review January 25, 2011 citing need to get more small business input
  - Tacit admission that they should have done SBREFA Panel
  - Three small business teleconferences held April 11,12, 2011
- Fall 2011 Regulatory Agenda (published in late January) lists as “long term action”
- Rider blocking in Omnibus Appropriations means it can't move until at least after this fiscal year (Oct. 2012)

# Department of Agriculture “Blacklisting” Rule

- Department of Agriculture proposed both a direct final rule and a proposed rule on Dec. 1, 2011
- Would have added a new clause to the Agriculture Acquisition Regulation entitled “Labor Law Violations” effective 1/30/12 unless “adverse” comments received
  - New subpart would have required a contractor to certify upon accepting a contract that it is in compliance with all applicable labor laws, and to the best of its knowledge, its subcontractors at any tier, and suppliers, are also in compliance with all applicable labor laws.
  - Would have held contractors accountable for mere allegations—violation of due process and creating opportunity for union abuse
- 1/24/12- Chamber filed “adverse comments”
- Agriculture Department withdrew both direct final rule and proposed rule simultaneously on 2/6/12

# OSHA Proposed Reinterpretation of Feasibility Under Noise Reduction Standard

- Reinterpretation of Feasibility under Noise Standard—proposed Oct. 19, 2010—not a regulation
- Withdrawn on Jan. 19, 2011: “need more outreach to dispel myths”
- Feasibility would mean anything that did not put you out of business
  - Would have required employers to implement hugely expensive engineering controls or administrative controls for noise exposure instead of relying on PPE—initial estimate over \$1 billion
  - No analysis from OSHA that this was necessary to improve protection for employees or that employees currently not protected—in fact, hearing injury losses declining



# OSHA Enforcement—The New Sheriff in Town...

Secretary of Labor Hilda Solis:

“We are focused on workers — not voluntary programs and alliances...As I have said since my first day on the job — make no mistake, the Department of Labor is back in the enforcement business.”

“To those who have for too long abused workers, put them in harm's way, ... let me be clear, there is a new sheriff in town.”

# Gary Cooper?



# Or Boss Hogg?



# Stepped up OSHA Enforcement

- October 1, 2010 OSHA changed penalty assessments to increase them as a deterrent—likely result in an overall 50% increase in the amount of penalties assessed
  - Repeat violation window changed from 3 years to 5
- OSHA using facilities in different locations to impose enterprise-wide consequences:
  - A rise in follow-up inspections and Repeat violations at sister facilities within a corporate family;
  - OSHA's increasing pursuit of company-wide abatement provisions in settlement agreements; and
  - OSHA's recent requests for enterprise-wide relief from the Occupational Safety and Health Review Commission—U.S. Postal Service.
- Aggressive use of press releases and website— “regulation by shaming”
  - Fatality reports with full employer descriptions which are never adjusted



# OSHA Severe Violator Enforcement Program

- Changes in OSHA's enforcement strategy (replaced Enhanced Enforcement Program)
  - Program focuses on employers who “demonstrate indifference to their OSH Act obligations by committing willful, repeated, or failure to abate violations,” as determined by DOL
  - Provides for supplemental enforcement tools: e.g., mandatory follow-up inspections
  - Not clear how company gets out—OSHA at ABA meeting March 2012: looking at ideas on how to get out, “but it won't be easy”

# New Compliance Directive Examples

## ● Workplace Violence

- Describes how to issue General Duty Clause citations for employee exposure to workplace violence
- Focuses on late night retail and hospitals with disturbed patients
- Workplace violence frequently unpredictable—domestic issues

## ● Incentive programs

- New memo going out targeting incentive programs as violation of whistleblower protections for employees coming forward with complaints
- Going after programs with rewards for no injuries, even as little as a pizza party or tee shirts

# OSHA National Emphasis Program on Recordkeeping

- Came into office determined to undercut otherwise consistently positive trends of annually lower I&I rates—got \$1 million in FY 09 Omnibus bill for NEP on recordkeeping
  - Want to show these are result of employer fraud; can't be the result of effective Bush OSHA policies
  - Supports desire to increase regulations and enforcement
- October 2009 OSHA launched NEP on Recordkeeping—intensive, intrusive audit of employer OSHA logs
  - Includes looking at employee medical records to see if employees being treated for injuries not logged
  - Also includes “taking into account” whether employer has a safety incentive program

# OSHA NEP on Recordkeeping--II

- August 2010 OSHA temporarily halts NEP due to lack of recordkeeping violations
  - Targeted employers with better than average safety records in high hazard industries --“We think you’re lying”
  - Some violations found but not systemic underreporting or employers flouting the regulations
- OSHA recalibrated targeting criteria to focus on companies with safety records not quite as good— “We just know employers are underreporting”
- Appropriations report language directs OSHA to report on assessment of employer recordkeeping—put up or shut up



# House- Labor/HHS Approps. Bill (H.R. 3070)

The draft bill would have prohibited funding to implement the following DOL regulations and programs (never moved):

## DOL

- PLA Executive Order
- OSHA I2P2 rulemaking
- OSHA MSD Column regulation
- FLSA “Right to Know” rulemaking
- Persuader rulemaking
- H-2B Wage Methodology
- “Bridge to Justice” ABA referral program

## NLRB

- Specialty Healthcare NLRB decision
- Lamons Gasket Co decision, which overturned Dana Corp.
- Electronic voting procedures
- Posting regulation
- “Ambush election” regulation

# Public Law 112-74

## (Conference Report to H.R. 2055)—Omnibus Appropriations

The law includes the following funding limitations and instructions:

### DOL

- MSD Column—defunding rider
- Requires OSHA to submit report on results from National Emphasis Program on recordkeeping
- H-2B Seasonal Worker Wage rate increase—defunding rider
- Bars DOL from implementing or enforcing its proposed “coal dust” rule until an independent assessment of the integrity of the data and methodology behind the rule is adopted
- Definition of fiduciary regulation blocked, but possible new version could move

### NLRB

- Electronic voting procedures rulemaking defunding rider

# Regulatory Accountability Act H.R. 3010/S. 1606

- Introduced September 22, 2011
- Broad update of Administrative Procedure Act
  - 65 year old law, out of date with contemporary regulatory process and impacts
- Bicameral, bipartisan support
  - Senate: Rob Portman (R-OH) with Mark Pryor (D-AR)
  - House: Lamar Smith (R-TX), with Collin Peterson (D-MN)
- Passed House on 12/9/11 by vote of 253-167 (19 Dems voted yes)

# Regulatory Accountability Act

## H.R. 3010/S. 1606--II

- Creates new category of reg: high impact=\$1 billion or more
- Increases public participation in rulemaking by requiring ANPRMs for high impact or major regulations
- Requires agencies to choose least costly alternative unless public health, safety, or welfare at stake
- Provides for on the record administrative hearings for all high impact regulations and major regulations by request
- Would subject Guidance to review for cost, impact



# Regulatory Accountability Act

## H.R. 3010/S. 1606--III

- Changes standard of judicial review for any regulation that had a hearing
  - Current standard of “arbitrary and capricious” too easy for agencies to meet
  - New standard of “substantial evidence” gives courts slightly greater authority to question determinations of the agency
- Would not effect final regulations or those that are “pending”—forward looking, process oriented
- Built on established principles of fair regulations—reflects executive orders from Reagan, Clinton, Bush and now Obama
- Long-term effort

# U.S. Chamber of Commerce Efforts

- Labor Relations Committee
  - Subcommittees : Wage, Hour and Leave; OSHA; NLRA; EEO; Immigration; International
- Strong presence on Capitol Hill—EFCA, health care reform, committee hearings
- Have always been active in regulatory process —submit substantive, well supported comments; meet with OIRA
- Dominant voice of employer interests
- Litigation when appropriate
- Egregious Enforcement effort—trying to catalog examples of how enforcement has changed