Top Regulatory Issues Facing the Grain, Feed and Processing Industry in 2016

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National Grain and Feed Association
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Grand Island, Neb.
Overview of Presentation

- Is OSHA Still Focusing on the Grain Industry for Enforcement?
- What Current Regulatory Issues Directly Impact the Grain Industry?
- What Does the End of President Obama’s Second Term Mean for OSHA and Industry?
U.S. Grain Entrapments

Year | Annual Incidents
---|---
2007 | 15 Non-Fatal, 16 Fatal
2008 | 17 Non-Fatal, 17 Fatal
2009 | 22 Non-Fatal, 19 Fatal
2010 | 26 Non-Fatal, 31 Fatal
2011 | 19 Non-Fatal, 11 Fatal
2012 | 11 Non-Fatal, 8 Fatal
2013 | 20 Non-Fatal, 13 Fatal
2014 | 21 Non-Fatal, 17 Fatal
Regional and Local Emphasis Programs FY 16

• Local Emphasis Programs
  o Region V (IL, IN, WI, MI, OH) 10/01/2014
  o Region VII (IA, KS, MO, NE) 10/01/2014
  o Region VIII (CO, MT, ND, SD, UT, WY) 10/01/2014
  o Region X (AK, ID, OR, WA) 12/04/13
    o Region VI (AR, LA, NM, OK, TX) removed grain elevators from LEP

• Combustible Dust NEP
# Proactive Targeting Philosophy

<table>
<thead>
<tr>
<th>OSHA Inspection Statistics (Federal and State)</th>
<th>FY10</th>
<th>FY11</th>
<th>FY12</th>
<th>FY13</th>
<th>FY14</th>
<th>FY15</th>
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<tbody>
<tr>
<td>Total Inspection</td>
<td>296</td>
<td>380</td>
<td>438</td>
<td>356</td>
<td>312</td>
<td>237</td>
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<tr>
<td>Percent Programmed Inspections</td>
<td>46%</td>
<td>60%</td>
<td>63%</td>
<td>61%</td>
<td>58%</td>
<td>48%</td>
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</table>

(Federal and State)
<table>
<thead>
<tr>
<th>Rank</th>
<th>Violation Description</th>
<th>Cited Standard</th>
<th>No. of Violations</th>
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<tbody>
<tr>
<td>1</td>
<td>Fall Protection</td>
<td>1926.501</td>
<td>6,721</td>
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<tr>
<td>2</td>
<td>Hazard Communication</td>
<td>1910.1200</td>
<td>5,192</td>
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<td>3</td>
<td>Scaffolding</td>
<td>1926.451</td>
<td>4,295</td>
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<td>4</td>
<td>Respiratory Protection</td>
<td>1910.134</td>
<td>3,305</td>
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<td>5</td>
<td>Lockout/Tagout</td>
<td>1910.147</td>
<td>3,002</td>
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<td>6</td>
<td>Powered Industrial Trucks (Forklifts)</td>
<td>1910.178</td>
<td>2,760</td>
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<td>7</td>
<td>Ladders</td>
<td>1926.1053</td>
<td>2,489</td>
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<tr>
<td>8</td>
<td>Electrical Wiring Methods</td>
<td>1910.305</td>
<td>2,404</td>
</tr>
<tr>
<td>9</td>
<td>Machine Guarding</td>
<td>1910.212</td>
<td>2,295</td>
</tr>
<tr>
<td>10</td>
<td>General Electrical Requirements</td>
<td>1910.303</td>
<td>1,973</td>
</tr>
</tbody>
</table>
Most Frequently Cited OSHA Standards in Grain Handling Industry

Most frequently cited standards in 1910.272 include:

- 1910.272 J01 – failure to implement a written housekeeping program for fugitive dust.
- 1910.272 J02II – failure to immediately remove fugitive dust accumulations, or provide equivalent protection.
- 1910.272 G01 III – failure to test the atmosphere within a bin before employees enter.
- 1910.272 G01 II – failure to deenergize and disconnect all equipment in a grain storage.
- 1910.272 M03 – failure to maintain a certification record of performed preventative maintenance inspections.
- 1910.272 G01 I – failure to issue a permit prior to entering the bin.
- 1910.272 G04 – failure to provide rescue equipment suitable for the bin being entered.
- 1910.272 D – failure to implement an emergency action plan.
- 1910.272 E02 – failure to train employees for special tasks, such as bin entry.
- 1910.272 G02 – failure to provide lifelines and harnesses for employees entering the bin at or above the level of the grain.
OSHA’s Budget

National Grain and Feed Association
OSHA Budget

The agency’s funding has remained at roughly the same amount for the previous three fiscal years.

Majority of cuts have been to the compliance assistance programs. Minor increase to enforcement and whistleblower programs.

- FY 2013: $535 million
- FY 2014: $552 million
- FY 2015: $553 million
- FY 2016: $552 million
Key Areas to Watch in 2016

• Regulations
  • Revised Silica Standard
  • Injury and Illness Electronic Reporting
  • Walking Working Surfaces

• Sub regulatory Actions
  • Combustible Dust
  • Repeal of retail agriculture exemption from PSM
  • Increased fines
Sub regulatory Problems

- Sub regulatory 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)
Increased OSHA Penalties

• The Bipartisan Budget Act of 2015 was quickly negotiated between the Democrats and Republicans in Congress to avoid a default on the nation’s debt. However, it included an unexpected surprise: an increase in OSHA penalties.

• The initial “catch-up” adjustment amount will be the percentage difference between the CPI in October 2015 and the CPI in October 1990, which was the year that OSHA penalties were last adjusted.

• Will be publishing a notice in the Federal Register that should take effect in late 2016-early 2017.
Increased OSHA Penalties (cont.)

Penalties will increase up to 82%. The approximate numbers shake out as follows (approximately):

- **Other-than-Serious Violation**: Maximum of approximately $12,476 (The current maximum is $7,000.)
- **Serious Violation**: Maximum of approximately $12,476 (The current maximum is $7,000.)
- **Repeat Violation**: Maximum of approximately $124,765 (The current maximum is $70,000.)
- **Willful Violation**: Minimum of approximately $8,912; maximum of approximately $124,765 (The current minimum is $5,000; the current maximum is $70,000)
- **Failure-to-Abate**: Maximum of approximately $12,476 per day (The current maximum is $7,000)
OSHA’s Weighted Inspections

• On October 1, OSHA began a new process for implementing and planning inspections. Under the new “Enforcement Weighting System,” routine inspections are valued as one “Enforcement Unit,” while more complex categories are valued at up to eight Enforcement Units.
  • For example, process safety management inspections are valued at seven units, workplace violence inspections are three units, and inspections involving a chemical for which there is no permissible exposure limit are also three units.

• The agency said the values are based on historical data and will be monitored and adjusted as necessary.

• OSHA’s new “weighted inspection” process rewards Compliance Officers for longer inspections, and focusing on general duty items such as ergonomics and workplace violence.
Top Grain Handling Issues for 2016

- Combustible Dust Rulemaking
  - Globally Harmonized System for Labeling
  - Industry Consensus Standards e.g. NFPA
- Injury and Illness Recordkeeping and Reporting
Globally Harmonized Standard For Labelling
Revised Hazard Communication Standard

• May 26, 2012 - Updates to the Hazard Communication Standard (HCS) became final
• Majority of revisions involved OSHA adopting the Globally Harmonized Standard for Classification of Chemicals (GHS)
• Most significant changes to 2012 HCS for grain/feed industries are how combustible dust is addressed and distribution of safety data sheets and labels
## Phase-in Dates for HCS 2012

<table>
<thead>
<tr>
<th>Effective Completion Date</th>
<th>Requirement(s)</th>
<th>Who</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 1, 2013</td>
<td>Train employees on the new label elements and safety data sheet (SDS) format</td>
<td>Employers</td>
</tr>
<tr>
<td>• June 1, 2015</td>
<td>• Compliance with all modified provisions of this final rule, except:</td>
<td>Chemical manufacturers, importers, distributors and employers</td>
</tr>
<tr>
<td>• December 1, 2015</td>
<td>• The Distributor shall not ship containers labeled by the chemical manufacturer or importer unless it is a GHS label</td>
<td></td>
</tr>
<tr>
<td>June 1, 2016</td>
<td>Update alternative workplace labeling and hazard communication program as necessary, and provide additional employee training for newly identified physical or health hazards</td>
<td>Employers</td>
</tr>
</tbody>
</table>
On Feb. 9, 2015, OSHA issued a memorandum to its Regional Administrators outlining how OSHA enforcement personnel will enforce the HCS for chemical manufacturers, importers, and distributors who may have difficulty complying with the June 1, 2015, regulatory deadline by establishing a 6 month extension on future compliance.

On July 9, OSHA issued its updated HCS compliance directive for their inspectors that specifically stated "operators" of grain elevators meet the definition of a chemical manufacturer.

As of Dec. 1, the six-month compliance extension period outlined in the Feb. 9 memo is expired and compliance to the new standard's labeling and SDS provisions are required.
2012 HCS: What’s Changed

- **Hazard classification:** Chemical manufacturers and importers are required to classify the hazards associated with chemicals
  - Hazard classification under the revised standard provides specific criteria to address health and physical hazards, as well as classification of chemical mixtures

- **Labels:** Chemical manufacturers and importers must provide labels that include signal words, pictograms, hazard statements, and precautionary statements for each hazard class and category

- **Safety Data Sheets:** The new format includes 16 specific sections
<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification of Preparation and the Supplier</td>
</tr>
<tr>
<td>Composition</td>
</tr>
<tr>
<td>Hazard Identification</td>
</tr>
<tr>
<td>First Aid Measures</td>
</tr>
<tr>
<td>Fire Fighting Measures</td>
</tr>
<tr>
<td>Accidental Release Measures</td>
</tr>
<tr>
<td>Handling and Storage</td>
</tr>
<tr>
<td>Exposure Controls/Personal Protection</td>
</tr>
<tr>
<td>Physical and Chemical Properties</td>
</tr>
<tr>
<td>Stability and Reactivity</td>
</tr>
<tr>
<td>Toxicological Information</td>
</tr>
<tr>
<td>Ecological Information</td>
</tr>
<tr>
<td>Disposal Considerations</td>
</tr>
<tr>
<td>Transport Information</td>
</tr>
<tr>
<td>Regulatory Information</td>
</tr>
<tr>
<td>Other Relevant Information</td>
</tr>
</tbody>
</table>
New Combustible Dust Requirements

- Combustible dust is expressly classified as a “hazardous chemical”
  - Classification means new SDS’s and labels for manufacturers, distributors and importers. Based on final rule, grain handling, feed/pet food, processing and milling facilities are considered manufacturers and distributors of an explosive hazard if the product handled/distributed is combustible
- Food/feed products, such as grain and feed/pet food, are subject to FDA labeling requirements and, therefore, exempt from OSHA HSC labeling requirements
  - New standard does not change longstanding food exemption
Labeling of Whole Grain

• Whole grains (e.g., corn, wheat and soybeans) are also subject to labeling requirements of the FFDCA and are therefore, exempt from the HCS labeling requirements.

• HCS also states whole grain is required to be labeled since when processed produces combustible dust.

• **Individual companies should make their own determination on whether or not to provide such label with the SDS to a downstream user.**
Frequently Asked Questions
Q 1: Who develops the initial Safety Data Sheet (SDS) for combustible dust in the grain, feed, pet food supply chain?

- The first point where compliance is mandated – The commercial storage operation or grain processing operation i.e. chemical manufacturer which first receives the product, and not the farm handling the grain

- **EXCEPT...** If a farm maintains a **grain handling operation and stores and sells grain grown on other farms** – then the grain handling operation would not be exempt from OSHA enforcement.

- **OSHA Guidance on Small Farms (July 2014)** – A farm with 10 or fewer employees **storing and selling its own grain is exempt** from OSHA enforcement.
Q 2: Does OSHA require labels under the HCS for grain, feed and pet food products?

No, OSHA’s “FDA labeling exemption” provisions apply.

- If a product is “subject to labeling” under FDA requirements, it is NOT required to be OSHA labeled under the HCS

- Exemption applies to complete feeds, pet food, supplements, grains, protein sources, premixes, additives, etc.

The FDA Exemption applies to...

“Any food, food additive, color additive, drug, or medical or veterinary device or product, including materials intended for use as ingredients in such products (e.g., flavors and fragrances), as such terms are defined in the Federal Food, Drug and Cosmetic Act (21 U.S.C 301 et seq.) or the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151 et seq.), and regulations issued under those Acts, when they are subject to the labeling requirements under those Acts by either the Food and Drug Administration or the Department of Agriculture.”
Q 3: Who determines if the use or sale of a company’s product requires a Safety Data Sheet for customers?

- OSHA does not make this determination
- If you produce, distribute or import a product, you are the responsible party under the Hazard Communication Standard
  - Evaluate and classify chemical hazards associated with grain, feed, pet food, ingredients, etc.
  - **Areas to Look for Potential Hazards:**
    - Combustible Dust
    - Ingredients, additives, etc.
- If either a “Chemical” or a resulting “Mixture” is determined to be hazardous – You are required to create and provide your “downstream users” with a SDS
Frequency for Sending a SDS

Q 4: How often do I need to provide a SDS to a downstream user or customer?

- **Initial Shipment** – A SDS only needs to be provided with the first shipment of a product to a customer.

- **Revised SDS** – A revised SDS needs to be provided if any changes to a specific product being shipped require changes to the SDS.
Q 4: Since grain dust is defined as a hazardous chemical by OSHA under the HCS, will truck drivers need any additional training or need to have a hazardous material certification?

No. Grain dust is not considered a hazardous material while being transported. The Department of Transportation, not OSHA, is responsible for codifying items as hazardous while being shipped.
Q 5: Are feed and pet food manufacturers required to develop a single SDS for a product that is a mixture?

- **Yes, multiple SDS’s are no longer allowed under the new standard.**
  - **No stapling** – Don’t staple together multiple SDS’s for a mixture distributed as a product – one SDS must be prepared for the mixture as a whole
  - **Preparation** – SDS information from suppliers can be used to prepare a single SDS that would then be provided to customers

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**National Grain and Feed Association**

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OSHA Revised
Hazard Communication Guidance Document

• Comprehensive 50-page document
APPENDIX C: Generic Safety Data Sheet for Grain - FOOD

SECTION 1: IDENTIFICATION

PRODUCT NAME: Whole Grain
SDS NUMBER: Grain
SYNONYMS OTHER MEANS OF IDENTIFICATION:
INTENDED USE: Food and animal feed
MANUFACTURER: Various
EMERGENCY HEALTH AND SAFETY NUMBER:
SDS INFORMATION: PHONE:
E-MAIL:
URL:

SECTION 2: HAZARD(S) IDENTIFICATION

CLASSIFICATION: Combustible dust/respiratory hazard if small particles are generated during further processing, handling or by other means.
Injury and Illness Recordkeeping and Reporting
Proposed Injury and Illness Electronic Reporting Regulation

• Would require employers to submit logs to OSHA only electronically
  • Employees with 250 or more employees would have to submit quarterly
  • Employees 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
• Requested by AFL-CIO in submission to Obama transition
• OSHA can’t say how it will protect employee information
Proposed Injury and Illness Electronic Reporting Regulation (cont.)

• 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, 2014; NGFA along with over 100 other groups like US Chamber
Employers Recordkeeping Obligations

• On July 29, OSHA published in the *Federal Register* a proposed rule to “clarify” employers’ recordkeeping obligations under 29 C.F.R. Part 1904.

• The proposed rule is aimed to circumvent the United States Court of Appeals for the D.C. Circuit’s decision in *AKM, LLC dba Volks Constructors v. Secretary of Labor*, which rejected OSHA’s efforts to extend the Occupational Safety and Health Act of 1970’s six-month statute of limitations.
No exempt employers! Everyone must report!

- Report all-work related fatalities within 8 hours
  - Includes only work-related heart attacks
  - Includes terrorist attacks
  - Excludes automobile accidents on public roads
    - Excepting construction work zones
    - Excludes commercial plane, train or bus accidents
    - If death occurs more than 30-days after a work-related incident, it is not reportable.
• Within 24 hours, report all work related:
  • In-patient hospitalization of any employee(s)
    • was previously 3 or more employees in 8 hours
  • Amputations
    • includes loss of fingertip without bone loss
  • Loss of an eye
    • Must be reported to OSHA only if they occur within 24 hours of the work related incident.
What Constitutes an In-Patient Hospitalization?

- Employers should focus on whether handled as “in-patient” or “out-patient” -- more clearly understood
- “Formal admission to the in-patient service of a hospital or clinic for care or treatment”
- Does not include admission for observation or testing
- OSHA recognizes confusion re: the term “admission” (means different things different to different groups (insurers, hospitals, patients, etc.)
After reporting an incident to OSHA local offices triage the incident based on the following:
- Severity of the accident
- Employer's enforcement history; and
- Other factors such as the age or employment status of the injured worker.

Then follow-up with a letter requesting the following:
- Incident Report
- Documented findings and corrective actions
- Posting of the OSHA letter where it can be seen by employees; and
- Return of signed form agreeing to posting of letter.

All reports and forms need to be returned to OSHA within one business week.
Report a Fatality or Severe Injury

- All employers are required to notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation, or loss of an eye.
- A fatality must be reported within 8 hours.
- An in-patient hospitalization, amputation, or eye loss must be reported within 24 hours.

To Make a Report

- Call the nearest OSHA office.
- Call the OSHA 24-hour hotline at 1-800-321-6742 (OSHA).
- Report online

Be prepared to supply: Business name; names of employees affected; location and time of the incident, brief description of the incident; contact person and phone number.

Frequently Asked Questions

- Who is required to report?
- If the area office is closed, may I report the incident by leaving a message on an answering machine or sending an email?
- How does OSHA define "in-patient hospitalization"?
Serious Event Reporting Online Form

Information about the location where the incident occurred

*Name of Location (or Description)

Street Address 1

Street Address 2

City

*State

*County

*Zip

GPS Coordinates

Information about the incident

*Date incident occurred

*Time incident occurred
Impact of New Reporting Requirements

- Sharp increase in reports to OSHA
- More reports = More Inspections/Citations
- Expand OSHA’s public shaming campaign
Combustible Dust
Combustible Dust Standard

• OSHA will promulgate a Combustible Dust Standard in “several years” – *WSJ*, April 10, 2014

• OSHA changed combustible dust from the pre-rule stage to a long term action in late 2011 - then added it back in 12/21/2012 Regulatory Agenda (Pre rule stage – SBREFA review now in Aug. 2016). Possible reasons:
  o Final version of NFPA 652
  o United Nations Globally Harmonized Standard sub-committee efforts to define combustible dust

• Combustible dust remains the most common and expensive 5(a)(1) citation
OSHA’s Acknowledges Complexity of Combustible Dust Rule

- Wide variety of materials, processes and equipment
- Difficulty in truly defining combustible dust
- Retrofitting facilities
- Additional performance based consensus standards e.g. NFPA
Combustible Dust issue is similar to the “whack a mole” game...the issue just keeps popping up in other places.

OSHA is using multiple avenues to address the hazard:
• Advanced Notice of Proposed Rulemaking
• Housekeeping Section of Proposed Walking and Working Surface proposed rule
• “Hazard, Other than Chemical” Category in Globally Harmonized Standard for Labeling Amendment to Hazard Communication Standard
• NFPA’s New Standard Covering the Fundamentals of Combustible Dust
• UN GHS Sub-committee
• EPA Risk Management Program
EPA Risk Management Program

- EPA is contemplating major revisions to its Risk Management Program (RMP), such as expanding the number of sources under the program. Revisions are based on 2013 incident in West, Texas.
- RMP was created in 1990 to address catastrophic chemical/gas emissions similar to Bhopal, India in 1984.
- EPA is now asking if there is any reason why combustible dusts, such as agricultural dusts (e.g., grain dust, pesticide dust, etc.), should not be added to the list of covered chemicals.
Food Safety and Modernization Act (FSMA)
Food Safety Modernization Act of 2011

- Signed into law on Jan. 4, 2011
- **Greatly** expands FDA’s authority to regulate the U.S. food supply
  - Mandates that FDA create a **new prevention-based regulatory system** to ensure the safety of food/feed products
  - Requires FDA to develop and issue more than 50 regulations and/or guidance documents
Facility Registration is required with FDA every two years during last calendar quarter of even numbered years.

FDA granted expanded authority to administratively detain food/feed products.

FDA granted authority to issue mandatory recall notices to facilities.

FDA granted expanded authority to access food-records.
• FSMA mandated that FDA **inspect all** food/grain/feed facilities
  • Initial inspections within 5 years (high-risk), 7 years (low-risk)
  • Subsequent inspections every 3 years (high-risk) to 5 years (low-risk)
<table>
<thead>
<tr>
<th>Subject of Rule</th>
<th>Date for Issuing Final Rule</th>
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</thead>
<tbody>
<tr>
<td>Current Good Manufacturing Practice (CGMPs) and Preventive Controls – Human Food and Animal Feed</td>
<td>Aug. 30, 2015 (Sept. 17, 2015)</td>
</tr>
<tr>
<td>Foreign Supplier Verification Programs</td>
<td>Oct. 31, 2015 (Nov. 27, 2015)</td>
</tr>
<tr>
<td>Sanitary Transportation of Food/Feed</td>
<td>March 31, 2016</td>
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Impact of FSMA Rulemakings

- Human Food and Animal Food CGMPs and Preventive Controls
  - Facilities “solely engaged” in storing grain and oilseeds are exempt
- Foreign Supplier Verification Programs
  - Applies to **importers** of grains and oils - *could include a grain elevator*
- Sanitary Transportation of Food
  - Will apply to grain elevators
Thank You

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