

# Food Marketing Institute

## What to Expect from OSHA in 2016

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PRESENTED BY

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# Agenda

- Enterprise-Wide Abatement – One Step Closer to Reality
- Enforcement Weighting System – How Does it Work?
- OSHA Pushing Ergonomic Hazard Prevention
- New Reporting Rule
- OSHA Rulemaking Update
  - Proposed Electronic Reporting Rule
  - Walking/Working Surfaces Rule in Limbo
- OSHA Enforces Agenda on Whistleblower Retaliation
- Higher Penalties in 2016



# Enterprise-Wide Abatement

- 12/7/15 - ALJ permits OSHA to seek relief requiring corporate-wide abatement at all locations. *Secretary of Labor v. Central Transport, LLC*
- Similar request denied in 2013 by another ALJ. *Secretary of Labor v. Delta Elevator Service Corp.*
- No established OSHRC legal precedent
  - To this point, OSHA achieved this relief only in *voluntary* settlement agreements



# What Happened?

- Employer received several citations, including four willfuls citing 1910.178(p)(1)
  - Since 2006, employer had prior citations under same standard at several other locations
- In light of this “pattern”, OSHA files complaint seeking enterprise-wide abatement at all employer locations, even those not inspected
- Employer files motion to strike enterprise-wide relief
- ALJ denies the employer’s motion



# Enterprise-Wide Abatement

- OSHA's argument is based on liberal reading of Sect. 10(c) of the OSH Act:

The Review Commission is authorized to “issue an order … affirming, modifying or vacating the Secretary’s citation or proposed penalty or directing ***other appropriate relief*** .....



# What Does This Mean?

- Don't panic just yet
  - OSHA still must demonstrate relief is warranted at trial
  - Not legal precedent - just persuasive
- BUT...
  - Encourages OSHA to pursue similar claims of relief in future complaints
  - Possible blank check to inspect other worksites without probable cause?



# **“Enforcement Weighting” System – Quality not Quantity**

- Oct 2015 – OSHA announces new metric for measuring inspections
- Inspections no longer count as one unit
- Now measured by “enforcement units (EUs)”, depending on complexity, time and resources



# **“Enforcement Weighting” System – Quality not Quantity**

- Inspections now worth anywhere from 1 EU (routine) to 9 EU (complex)
- Complex inspections can include musculoskeletal disorders, chemical exposures, workplace violence, and process safety management violations



# EU Table

- Significant cases (\$100,000 + in penalties) – 8 EUs
- PSM Inspections – 7 EUs
- Ergonomic Hazards – 5 EUs
- Heat Hazard – 4 EUs
- Workplace Violence – 3 EUs
- Fatality/Catastrophe – 3 EUs
- Combustible Dust – 2 EUs



# Why the Change?

- Dr. David Michaels: All inspections aren't equal
- Ensures appropriate amount of resources of efficiently dedicated to each inspection
- Takes pressure off CSHOs to do more inspections



# What Does This Mean for Employers?

- Employer can now gauge the scope of OSHA's inspections
- Extra efforts to prepare for "complex" inspections
- New system may discourage inspections for minor incidents/violations
- Minor issues may lead to significant inspections



# **OSHA Pushes Ergonomic Hazard Prevention**

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# Background

- Musculoskeletal Disorders (MSDs)
  - Heavy lifting
  - Bending
  - Repeated tasks
  - Pushing/pulling heavy loads
- 2000 Rulemaking – repealed 4 months later
- OSHA maintains MSDs are most frequently reported causes of lost or restricted time
- General duty clause



# Ergonomics Still High Priority for OSHA

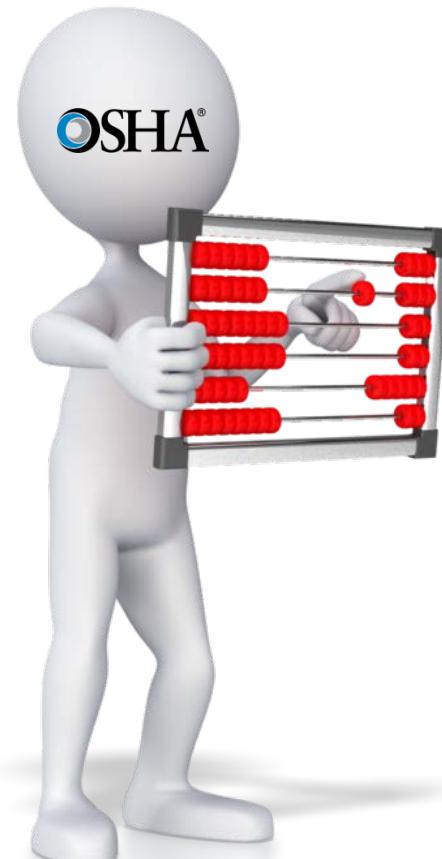
- OSHA's new enforcement weighting system
  - Inspections involving ergonomic hazards worth 5 EUs
- 2013 Updated "Prevention of Musculoskeletal Injuries in Poultry Processing"
- 10/26/15 Regional Emphasis Program for Poultry Processing Plants
  - AL, FL, GA, MS
  - Inspectors directed to "evaluate the employer's policies, procedures, and work practices to determine if they effectively eliminate and control ergonomic risk factors"



# Enforcing Ergonomics Through Settlement

- 7/20/15 – Grocery store chain
  - Cited for ergonomic hazards under GDC
  - OSHA settlement agreement requires employer retain an ergonomics expert for recommendations
- 8/25/15 – Twin Towers
  - Nursing care facility cited for ergonomic hazards under GDC
  - OSHA settlement agreement – employer must retain a specialized safety consultant with ergonomics expertise to recommend improvements

# Recordkeeping



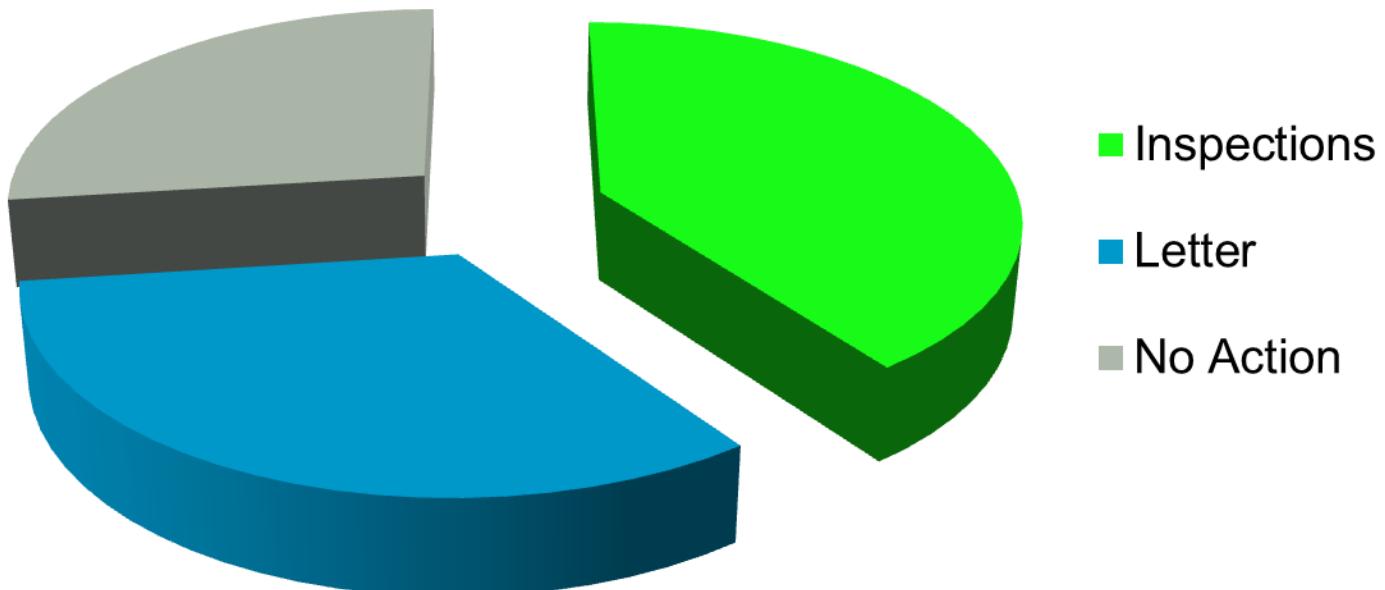
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# Reporting – Effective 1/1/2015

- Must now be reported to OSHA within 24 hours
  - Hospitalization of one or more employees
  - Amputations
  - Loss of an eye or eyes
- Must be reported to OSHA within 8 hours
  - Fatalities

# What Is OSHA Doing With The Information?





# What Is OSHA Doing With The Information?

- OSHA conducting more inspections
  - Severity/type of injury is a factor
  - Function of how busy the Area Office is?
- More interaction between facility/site managers and OSHA – is management trained and ready?
- Easier for OSHA to track kinds of incidents employers are having – will this lead to more willful violations?



# Tips For Employers

- OSHA sending requests for additional information in lieu of inspecting
- Recommendations
  - Do not provide OSHA with root cause analysis
  - Do not complete “non-mandatory” OSHA form
  - Provide OSHA with brief description of the accident
- Provide enough information to satisfy OSHA, but not so much that they want to inspect



# Improve Tracking of Workplace Injuries and Illnesses

OSHA's Form 300 (Rev. 01/2004)

**Log of Work-Related Injuries and Illnesses**

Note: This form is for use in OSHA documents, press releases, and other publications. It is not intended for use in the OSHA program.

This form is used to record every work-related death and record every work-related injury, illness, or medical treatment required that are. You must also record any medical treatment that is more professional. You must also record work-related injuries and illnesses although not required. You must use this form for a single case. If you need to, this form can be copied or altered recorded on this form. If you're not sure whether it is necessary, or

Identify the person		Describe the case	
1. Name	2. Employee's name	3. Date of injury or illness	4. Where the case occurred (e.g., Building #1, Room #100)
2. Job title	3. Job title	4. Date of exposure (e.g., 1/1/04)	5. Description of exposure (e.g., Contact with)
3. Date of birth	4. Date of birth	5. Date of report (e.g., 1/1/04)	6. Description of report (e.g., Injury report)
4. Social Security number	5. Social Security number	6. Date of report (e.g., 1/1/04)	7. Description of report (e.g., Injury report)

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# Current Regulation

- Submit 300 logs, 300A, 301 reports to OSHA when requested



# Proposed Regulation

- Employers with 250+
  - Quarterly – 300 & 301s
  - Annual - 300A
- Employers with 20+ in certain industries
  - Annual – 300A





### *e. Publication of Electronic Data*

OSHA intends to make the data it collects public. The publication of specific data elements will in part be restricted by provisions under the Freedom of Information Act (FOIA) and the Privacy Act, as well as specific provisions within Part 1904. OSHA may make the following data from the various forms (Docket exhibit OSHA-2013-0023-0001) available in a searchable online database:



# Publication Of Electronic Data

- **Form 300A:** In its entirety
- **300 Log:** In its entirety except employee names
- **Form 301:** All information on the right-hand side



# What Will The Public Do With The Information?

- **Unions:** Use to organize and in bargaining
  - “We represent the NJ plant and its rates are far below the TX plant we are trying to organize – you should vote us in”
  - “Based on rates at various plants, more emphasis on safety is required at certain plants”
- **Plaintiffs attorneys:** Use to establish gross negligence to overcome workers’ compensation bar



# What Will OSHA Do With The Information?

- Prioritize to perform more inspections at worksites with high incident rates or certain types of injuries
- Establish willful violation based on reports of similar accidents occurring at multiple locations



# Current Retaliation Protection

- Section 11(c) of the Act
- Recordkeeping Regulation
  - Record injury or illness in 7 days
  - Employee must be able to report an injury or illness promptly



# Retaliation Protection Under Consideration

- Inform employees of right to report injury or illness
- Establish easy system for employees to report injury and illnesses
- Prohibition against disciplining employees for reporting injuries or illnesses



# Implications

- OSHA would not be required to rely on employee to file whistleblower complaint
- Additional time to pursue employers for alleged retaliation (6 months v. 30 days)
- Abatement of the violation could include reinstatement and back pay
- Biggest issue: OSHA second-guessing disciplinary actions taken



# When?

- Projected issuance date of 9/15 has passed
- OSHA released Regulatory Agenda on 11/20/15
- New estimated release date: March 2016
- Will it get done?
  - Time is running out and OSHA still needs to publish final rule on Silica...

# Proposed Subpart D





# Proposed Subpart D – Brief Review

- Employers may choose fall protection for unprotected sides:
  - Guardrail system
  - Designated area
  - Safety net system
  - Travel restraint system
  - Personal fall arrest system
- Exception for working side of some platforms where guardrails not feasible



# Proposed Subpart D – Brief Review

- Employers may also choose fall protection for floor holes:
  - Covers
  - Guardrail system
  - Travel restraint system
  - Personal fall protection system



# Where Are We Now?

- Last time: OSHA had submitted its proposed rule to the White House for OMB Review
  - OMB reviews proposed agency regulations and analyzes their cost and benefits
  - Typically one of final steps before final rule published
- Expected in August 2015



# Subpart D Rule in Limbo

- Now: 12/21/15 – OSHA suddenly withdraws rule from OMB review
- Possible Explanation: Silica and Electronic Recordkeeping are administration priorities and time is running out
- OSHA says committed to finalizing rule during term...



# **OSHA Wages Aggressive Agenda Against Whistleblower Retaliation Across Multiple Fronts**

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# Whistleblower Retaliation

- Section 11(c) of the OSH Act – employers cannot discriminate against employees for exercising any right under OSH Act
  - Includes reporting injuries. 29 C.F.R. 1904.36
- 2012 Fairfax Memo warns against:
  - Disciplining injured employees
  - Safety rule violations as pretext
  - Unreasonable injury reporting rules
  - Safety incentive programs



# Enforcing OSHA's Agenda: Settlement Agreements

- 12/31/12 – *Exel Inc.*
- Employer required to eliminate all incentive programs based on injury/illness rates
- Employer required to engage “compensation and benefits expert to evaluate safety incentive programs...”



# Enforcing OSHA's Agenda: The Courts

- 2/17/16 – OSHA files whistleblower complaint alleging that employer retaliated against two employees for not timely reporting recordable injuries
  - Rule - Injuries must be “immediately” reported
  - Employees waited a few days to report
- OSHA seeks to make reporting window at least 7 days



# Implications

- Undermines safety culture
- Defeats purpose of injury reporting rule
- Reflects starting presumption of retaliation



# Enforcing OSHA's Agenda: Rulemaking

- Current rulemaking on electronic submission of injury/illness data
- Supplemental whistleblower provisions added:
  - Inform employees of right to report injury or illness
  - Establish easy system for employees to report injury and illnesses
  - Prohibition against disciplining employees for reporting injuries or illnesses



# What Can Employers Do?

- Fight presumption of retaliation
  - Heavy documentation to support just discipline
- Audit incentive programs to ensure they are behavioral-based, not rate-based
  - I.e., rewards are not tied to injury/illness rates
- Ensure safety rules are not vaguely worded
- Ensure equivalent discipline is issued with or without injury

# October Surprise: Higher Penalties





# Penalty Increase

- Bipartisan Budget Act of 2015 signed on November 2 orders OSHA to increase in penalty for the first time since 1990
- Initial catch-up adjustment to penalties based on percentage difference between consumer price index (CPI) in October 2015 and October 1990
- July 1, 2016: OSHA must publish interim final rule
- August 1, 2016: New penalties must go into effect



# Penalty Increase – Initial Adjustment

Approximately 78% increase

- **Other-than-serious:** Maximum \$12,746 (currently \$7,000)
- **Serious:** Maximum \$12,746 (currently \$7,000)
- **Repeat:** Maximum \$124,765 (currently \$70,000)
- **Willful:**
  - Minimum: \$8,912 (currently \$5,000)
  - Maximum: \$124,765 (currently \$70,000)
- **Failure to Abate:** \$12,476 per day (currently \$7,000)

Figures are approximate; October 2015 CPI not complete



# Penalty Increase – Initial Adjustment

- OSHA may seek to impose smaller initial penalties if it concludes through notice-and-comment rulemaking that penalties will have a “negative economic impact” or impose “social costs” that outweigh the benefit of increasing penalties
- Not likely to happen under current administration given its “regulation by shaming” tactics that include high penalties and negative press releases



# Penalty Increase – Annual Adjustment

- Beginning in 2017, no later than January 15 of each year OSHA must adjust penalties every year using the CPI
- Penalties will increase annually with inflation

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