

# OSHA Gets Serious

## Failure to Comply Will Cost You

by Vince Politte

After every Presidential election there is widespread speculation over potential changes to policies and procedures, and how the incoming administration will influence the course of normal business. I have been involved with safety for many years and cannot remember when such drastic changes have occurred over such a short period of time. Today's Occupational Safety and Health Administration (OSHA) has been transformed from what I believe was a user-friendly system, truly focused on helping businesses achieve goals, back to the "black hat inspection force" of years past.

Widespread change at OSHA was expected with the new administration and these changes are beginning to take shape. The following 5 items lead the list of changes:

1. **Larger monetary penalties for violations:** These are included in a measure called the Protecting America's Workers Act, which was easily passed through Congress.<sup>1</sup>
2. **More aggressive enforcement:** The new Secretary of Labor, Hilda Solis, has pledged to "put enforcement back into the Department of Labor" – including more OSHA inspections. Additionally, OSHA's aggressive National Emphasis Programs are ramping up in various industries, including refineries, chemical companies, general manufacturing, construction and any industry involving combustible dust. Employers will see a shift away from the cooperative policy of the recent past to a more aggressive, citation/violation-based approach.
3. **More inspectors:** OSHA will probably increase its enforcement staff to support its emphasis on high-risk industries such as construction and heavy manufacturing.
4. **More attention to recordkeeping:** OSHA has increased its focus on this regulation because it believes that many employers have been inaccurately reporting injuries and illnesses for some time.
5. **More liability for actions of subcontractors:** New this year is enhanced OSHA liability for employers on multi-employer worksites. In the case of *Solis v. Summit*

*Contractors*, the 8th U.S. Circuit Court of Appeals ruled that OSHA can increase its citation/violation authority over owners and controlling employers for the safety actions of subcontractors.<sup>2</sup>

Within months after President Obama took office, OSHA began to issue substantial fines, the likes of which haven't been seen in years. The following list, accessed from [www.safetynewsalert.com](http://www.safetynewsalert.com), highlights the 10 most significant OSHA fines during 2009 and the consequences they will have on businesses:

1. **OSHA issues largest fine ever.** \$87.4 million to an oil refinery. This action demonstrates OSHA's intent to check up on companies once serious safety violations have been identified. The agency evaluated the company's progress after a 2005 fire and explosion that killed 15 people and injured 170 more at its Texas City, Texas refinery. OSHA issued 270 "notifications of failure to abate" and identified 439 new willful violations at the plant.
2. **Two executives face prison time and huge fines in deaths of 5 workers.** Two executives with a Colorado company each face 2½ years in prison and a fine up to \$1.25 million if convicted. On October 2, 2007, vapor from a solvent ignited inside a tunnel at a hydroelectric plant in Colorado. Workers survived the blast but were overcome by smoke and fumes and died of asphyxiation. OSHA says it will work more closely with the Justice Department in cases like these to bring criminal charges against executives that could include prison time as penalties.
3. **OSHA begins using new per-employee citations, issuing \$1.2 million in fines.** A St. Louis, Missouri company received 21 egregious willful citations for hazardous chemical handling. Each citation was on a per-instance basis. Even during this period of difficult economic recovery, OSHA doesn't hesitate to use per-instance, per-employee fines to hike total fine amounts. This wasn't the only instance in which OSHA used per-instance citations in 2009.



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4. **Company receives a \$1.14 million fine following employee complaint.** Deaths and injuries are not the only incidents producing large fines. OSHA began a December 2008 inspection at a company in Whitehall, Wisconsin in response to an employee complaint. Willful citations were issued for the employer's failure to comply with OSHA's confined space and lock out/tag out regulations. OSHA is undoubtedly taking employee complaints seriously.
5. **After 2 similar incidents, owner and manager go to jail.** A roofing company in Santa Rosa, California pleaded no contest to failing to protect employees from a hazard. On May 11, 2006, an employee backed into an unguarded skylight and fell 21 feet to his death. Four months later, another employee suffered major head trauma when he fell 19 feet from an unprotected skylight. The owner was sentenced to 9 months in jail and fined \$248,000. A supervisor pleaded no contest to a misdemeanor violation and was sentenced to 30 days in jail.
6. **OSHA fines Wal-Mart \$7,000 for worker trampling incident.** A Wal-Mart worker was trampled to death by a crowd of 2,000 shoppers on the day after Thanksgiving in 2008. OSHA said Wal-Mart should have recognized that its employees were exposed to being crushed by the crowd based on previous experience. Wal-Mart fought the fine. OSHA used the General Duty Clause (GDC) to issue the fine and has said it will use the GDC in similar situations where safety was compromised but a specific regulation wasn't violated.
7. **Company faces \$1.09 million OSHA fine for 202 willful violations.** OSHA didn't really need permission to start issuing per-instance fines, but it got the go-ahead in the form of a decision from the Occupational Safety and Health Review Commission (OSHRC). The appeals panel ruled OSHA properly cited a Pennsylvania painting company on a per-employee basis for violations of the lead-in-construction regulations, in connection with a project near Pittsburgh. OSHA monitored six employees for lead exposure. Based on that data, OSHA issued violations for all employees who would have been exposed to the same hazards.
8. **OSHA and companies agree to implement safety and health improvements above those required by regulations.** An Excavating Contractor of Bloomer, Wisconsin agreed to make numerous changes in its work processes in exchange for the lowering of fines from almost \$900,000 to \$470,000. The company is required to hire a full-time safety director, develop and implement site-specific safety and health plans for all major projects, identify all job sites to OSHA before work begins for the



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next three years, reduce the salary of job superintendents and project managers who fail to comply with OSHA requirements and retain a third-party safety consultant.

9. **A work uniform company agrees to pay \$3 million in fines and to comply with other conditions. In some cases, it hasn't been an either/or situation between fines and strict safety improvements.** After a worker fell onto an unguarded conveyor and was dragged into a 300-degree industrial dryer and died, a company agreed to pay a large fine and to retain a team of independent experts to develop permanent fixes and review interim controls. They also agreed to hire additional safety staff, conduct more frequent internal safety inspections and establish new systems to examine employee complaints.

10. *A construction company agrees to pay \$750,000 in fines and cut the pay of unsafe supervisors.* A concrete firm from New York City agreed to reduce the salaries of senior job superintendents who failed to comply with job safety practices. It also agreed to hire a full-time corporate safety director, develop a new corporate safety plan and provide OSHA with information on major projects and access to all job sites for the next 4 years.<sup>3</sup>

### Fix up or pay up

Companies can expect severe financial consequences if they fail to correct problems recognized by OSHA during inspections. They can be hit with six-figure fines that may make them think twice about ignoring an OSHA inspector's citations.

A prime example of this growing, tough-love mentality spreading through OSHA occurred in Phoenix City, Alabama. OSHA cited a lumber company with \$293,700 in penalties for 36 safety and health violations. The bulk of the fines (\$202,500) were a result of the company's failure to correct 5 violations that had been identified during a prior inspection. Those citations included failure to obtain audiograms for employees vulnerable to noise hazards, failure to implement specific lock out/tag out procedures and insufficient machine guards.

The other \$91,200 in fines included citations for poor housekeeping of combustible dust, lack of safety signs and incorrect use of electrical and forklift equipment.

### Small businesses can't hide

Small businesses will not be able to fly under OSHA's radar. This past year, a business with only 50 employees was given a substantial fine by OSHA for recurring violations that were cited after a re-inspection.

In 2005, a manufacturing company in Montgomeryville, Pennsylvania, was inspected. After a follow-up visit recently completed by OSHA, citations were given for 1 serious, 4 repeat and 5 willful violations. As a result, this business was hit with a crippling \$140,760 fine.

Willful violations constituted \$99,000 of the total fines and were the result of the company's failure to provide employees with a complete hearing conservation program. Repeat

violations accounted for the other \$40,160 in fines and were the result of various infractions, including the company's failure to properly record employee injuries and illnesses, an electrical hazard and failure to guard the point of operation on rivet machines.

### Things to come from OSHA

Labor Secretary Solis recently commented that the nation's budget certainly reflects this administration's unwavering commitment to strict enforcement. She further remarked that, with the largest fine in OSHA's history and the onslaught of more extreme cases, a clear message is being sent – situations that compromise the health and safety of workers will not be tolerated.

New and innovative enforcement initiatives are expected to take shape within the next year. The 2010 fiscal year budget funded 100 new OSHA inspectors and the 2011 budget proposes to hire even more. In addition, the administration plans to shift current inspectors into enforcement positions. These changes will allow OSHA to conduct more targeted inspections, as well as focus on national and local emphasis programs.

### Getting ready for a tougher enforcement environment

It is important to prepare for this new level of OSHA enforcement to avoid costly penalties, but more importantly, to ensure the welfare and safety of employees. Safety and health programs need to be effective and enforced at all levels within the workplace. Conducting mock OSHA inspections can be an effective way to review hazard assessments, training and required documentation, safe job procedures, operator certifications, recordkeeping and required safety and health program implementation.

Third-party professionals are available to provide unbiased feedback critiquing a company's safety and health programs. SilverStone Group's risk management professionals can help prepare your organization for a safety inspection and offer proprietary tools that access OSHA regulations. Current clients should contact your account manager for more information. Non-clients may contact us as indicated below.

<sup>1</sup> "The New Sheriff: Handling OSHA Inspections During the Obama Years Training Seminar," TrainUp.com, accessed March 2010, "[www.trainup.com/TheNewSheriffHandlingOSHAInspectionsDuringTheObamaYears109926.htm](http://www.trainup.com/TheNewSheriffHandlingOSHAInspectionsDuringTheObamaYears109926.htm)

<sup>2</sup> "What's Ahead Under Obama's OSHA," by Jim Stanley, FDR Safety, accessed March 2010 at [www.fdrsafety.com/what%E2%80%99s-ahead-under-obama%E2%80%99s-osh/](http://www.fdrsafety.com/what%E2%80%99s-ahead-under-obama%E2%80%99s-osh/)

<sup>3</sup> "Top 10 OSHA fines of 2009," by Fred Hosier, Safety News Alert, accessed March 2010 at [www.safetynewsalert.com/top-10-osh-fines-of-2009/](http://www.safetynewsalert.com/top-10-osh-fines-of-2009/)