

New OSHA 'Takes Aim' On Business

By James A. Lastowka

WASHINGTON—The Obama administration's "new OSHA" has a simple message for U.S. industry. This message has been delivered loud and clear by both Secretary of Labor Hilda Solis and Acting Assistant Secretary for Occupational Safety and Health Jordan Barab. Their message is, "There is a new sheriff in town."

We all know what sheriffs do; they aggressively enforce the law. That is exactly what the new Occupational Safety & Health Administration intends to do.

Barack Obama was elected president with the strong backing of organized labor. In return, new AFL-CIO President Richard Trumka and other union officials have emphatically promised that organized labor will hold the Obama administration's feet to the fire to make sure the pro-labor commitments made during his campaign are delivered.

One of those commitments was a quick reversal of what the Obama campaign and its union supporters claimed was eight years of the Bush-era OSHA "selling out to big business" to the detriment of worker safety and health. They allege this was accomplished through an agenda of lax enforcement, cozy partnerships, and the cessation of any meaningful standard-setting activities. Through its OSHA appointments, the Obama administration has established that it will, in fact, be delivering on its commitments to labor.

New Leadership Team

The leadership team appointed to head the new OSHA leaves no doubt about what the tone will be.

Labor Secretary Solis is a former member

of Congress from California. Before being elected to Congress, Solis served in the California Assembly, became the first Latino elected to the California Senate, and worked in the Carter administration's Office of Hispanic Affairs. Her official biography explains that her priorities in Congress included "expanding access to health-care, protecting the environment, and improving the lives of working families." She received a John F. Kennedy Profile in Courage Award for her "pioneering work on environmental justice issues."

In a June speech at the American Society of Safety Engineers' annual conference, Solis said, "There is a new sheriff in town. Make no mistake, the Department of Labor is back in the enforcement business. We are very serious."

To demonstrate this, one of Solis' first steps was to order an enforcement blitz by OSHA "SWAT" teams at construction sites across Texas to combat what she said was the state's "dubious distinction of having the most worker fatalities in the nation." Solis also announced that the Department of Labor's budget request included funding for up to 130 new inspector positions.

It was reported that "organized labor was nothing short of giddy" when President Obama decided to make (Deputy Assistant Secretary of Labor) Jordan Barab the temporary head, and permanent number two official at OSHA. Barab previously served as special assistant to the head of OSHA in the Clinton administration, and helped promulgate the controversial ergonomics workplace safety and health standard that was issued by OSHA, but subsequently repealed by Congress.

Prior to his appointment as deputy as-

sistant secretary for OSHA, Barab was senior labor policy adviser for health and safety for the House Education and Labor Committee, and before that he worked for the U.S. Chemical Safety and Hazard Investigation Board. Barab was a health and safety specialist for the AFL-CIO from 2001 to 2002, and directed the safety and health program for the American Federation of State, County and Municipal Employees (AFSCME) from 1982 to 1998.

In a speech at an AFSCME convention, he remarked, "I always tell people that I still bleed AFSCME green."

In another speech, he told attendees, "You are not alone. We have your back and your fight is our fight. There is a new sheriff in town."

OSHA Staff

On July 28, President Obama nominated David Michaels to be the head of OSHA, subject to Senate confirmation. Michaels is an epidemiologist and a research professor at the Department of Environmental and Occupational Health at the George Washington University School of Public Health and Health Services. Michaels wrote *Doubt is Their Product: How Industry's Assault on Science Threatens Your Health*.

In the Clinton administration, Michaels served as assistant secretary of energy for environment, safety and health. In that position, he was the chief architect of an initiative to compensate nuclear weapons workers for occupational illnesses resulting from exposure to radiation, beryllium and other hazards. Michaels' key goals likely will be to jump-start OSHA's standards-setting process with a particular focus on chemical exposure issues and ergonomics.

A *Washington Times* editorial charac-

terizes Michaels as a “virulently anti-business epidemiologist.” Given the new OSHA’s agenda and the OSHA-head nominee’s pointed criticisms of industry, his confirmation hearings could provide early proof of the heated battles that will be fought on the OSHA front during the Obama administration.

Finally, Deborah Berkowitz has been named chief of staff at OSHA. Berkowitz is the former health and safety director at the United Food and Commercial Workers Union, and she was very active for the union during OSHA’s first round of ergonomics cases in the meatpacking industry in the 1980s, and again during the Clinton administration’s ergonomics rule making.

Top Priorities

The top priority of the new OSHA can be summarized in two words: strong enforcement. This will be accomplished in several ways.

The Obama OSHA intends to implement a “severe violators inspection program” that focuses on large employers whose histories of violations demonstrate, in OSHA’s view, that they do not take their compliance obligations seriously and need to be targeted for very aggressive enforcement in order to get the message.

OSHA will work more closely with the Department of Justice to increase the number of criminal prosecutions for workplace fatalities, injuries and illnesses. The agency also can be expected to support legislative reform efforts that include substantial increases in penalties, both criminal and civil.

OSHA can be expected to increase the number of inspectors, the number of inspections it conducts, the number of citations it issues—particularly for serious, repeat and willful violations—and to increase the amount of penalties proposed for violations. This more aggressive enforcement approach was signaled by OSHA’s June 22 proposal for \$1.1 million in penalties against a company for combustible dust and other alleged safety violations.

The new OSHA will focus on specific enforcement issues through national emphasis programs (NEPs), including:

- Continuing NEPs for process safety management compliance (PSM) at refineries and for combustible dust hazards;
- Rolling out the NEP for PSM compliance at chemical facilities;
- Establishing an NEP for auditing compliance with OSHA’s injury and illness recordkeeping requirements, which the new OSHA believes is a seriously flawed system as a result of what it believes is widespread “cheating;” and
- Decreasing what it believes was the Bush administration’s over-reliance on partnerships, alliances and company participation in voluntary protection programs.

Preparing For OSHA

Given that the direction of the Obama administration OSHA is so clear, companies have all the warning they need as well as an opportunity to ensure that their OSHA-compliance houses are in order before OSHA arrives at their doorsteps.

Among the things companies need to do is establish catastrophe response and management plans. Workplace catastrophes present extremely large risks on a number of fronts. The way in which a business manages those risks following a workplace catastrophe in both the short and long terms is key to minimizing potentially substantial liabilities. Companies need comprehensive, well-thought-out plans to manage any situation, including the multiagency investigations that will follow. Companies must be able to trigger and effectively implement their plans on a moment’s notice.

Businesses must verify through compliance reviews that their OSHA-required safety and health programs are in place. They need to ensure that written programs, which may look good on paper and in binders, are in fact effectively implemented in the workplace. They also must ensure that OSHA-required injury and illness records are accurate and up-to-date. The new OSHA will focus on looking behind the scenes and talking to employees to get the “real story” about their employers’ safety and health efforts.

Companies need to focus on their “key risks,” meaning the specific risks at their facilities that actually are faced by their

employees on a frequent basis, and that present the most exposure to a risk of serious injury or death. Focusing on its actual key risks in a consistent, demonstrable manner will go a long way toward minimizing a business’s overall risk of a significant OSHA enforcement action.

It is important for companies to ensure that their safety and health programs demonstrate “top down” as well as “bottom up” commitments to worker safety and health. Without the demonstrated interest and commitment of company executives as well as front-line workers, the results of a company’s safety and health efforts will not be maximized.

Businesses should have plans to manage OSHA inspections in careful, thought-out manners so as to minimize the possibility that a significant enforcement action will result. They also should properly analyze every OSHA citation issued to determine not only its validity, but also its potential effect on the company’s overall violation history and its other impacts. Because of the potential negative impacts of OSHA citations, decisions about whether to appeal or accept citations will be increasingly important.

Taking the time now to determine how it measures up in these key areas will put a business in a much better position to effectively anticipate, minimize and deal with the aggressive enforcement promised by the new OSHA. □

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