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New Sheriff in Town

Get Ready for a More Aggressive OSHA

By JAMES A. LASTOWKA, ESQ.

Determining how your company measures up in key areas will put you in much better position to effectively anticipate, minimize and deal with the aggressive enforcement promised by the new OSHA.

The Obama administration's "new OSHA" has a simple message for industry, and it has been delivered loud and clear by Secretary of Labor Hilda Solis and Assistant Secretary for Occupational Safety and Health David Michaels, Ph.D. Their message: "There is a new Sheriff in town."

President Barack Obama was elected with the strong backing of organized labor. In return, the new president of the AFL-CIO, 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 that the pro-labor commitments made during his campaign are delivered.

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

OSHA's New Leadership

The tone of an agency is set at the top. The leadership team appointed to head the new OSHA leaves no doubt about what its tone will be. The new Secretary of Labor, Hilda Solis, is a former member of Congress from California.

In a June 2009 speech at the American So-

ciety of Safety Engineers' annual conference, Solis said: "There is a new Sheriff in town. ... Make no mistake about it, the Dept. of Labor is back in the enforcement business. We are serious, very serious."

To demonstrate this, one of her 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 U.S. Dept. of Labor's budget request includes funding for up to 130 new inspector positions.

New OSHA administrator Dr. Michaels is the author of the book "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 has vowed to "bring OSHA into the 21st century." On March 16, 2010, he testified forcefully before the House Subcommittee on Workforce Protections in support of proposed OSHA reform legislation, the Protecting America's Workers Act (PAWA). This legislation would substantially strengthen OSHA's enforcement tools across-the-board, and particularly criminal sanctions.

Michaels testified that "nothing focuses attention like the possibility of going to jail" and that "serious violations of the OSHA that result in death or serious bodily injury should be felonies like insider trading, tax crimes, customs violations and anti-trust violations." Michaels also testified that the government's burden of proof for criminal convictions un-

der the OSH Act should be lowered from "willful" to "knowing." As "knowledge" is a required element for all OSHA violations, PAWA would essentially criminalize any serious OSHA violation causing serious injury or death.

The Deputy Assistant Secretary is Jordan Barab. It was reported that "Organized labor was nothing short of giddy when President Barack Obama decided to make Jordan Barab the temporary head, and permanent No. 2 official" at OSHA. Barab previously served as special assistant to the head of OSHA in the Clinton administration and in that position helped spearhead the promulgation of the controversial ergonomics workplace safety and health standard that was issued by OSHA but subsequently repealed by Congress.

Top Priorities for the New OSHA

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

- Vigorous support for the PAWA. OSHA reform legislation includes substantial increases in penalties, both criminal and civil.
- Implementing a "Severe Violators Inspection Program" that focuses on large employers whose histories of OSHA 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.
- Working more closely with the U.S. Department of Justice to increase the number of criminal prosecutions for workplace fatalities, injuries and illnesses.
- Increasing the number of inspectors; the number of inspections conducted; the num-

- ber of citations issued, particularly for serious, repeat and willful violations; and the amount of penalties proposed for violations.
- Focusing on specific enforcement issues through National Emphasis Programs (NEPs), including continuing the NEPs for process safety management compliance at refineries and for combustible dust hazards, and 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."
 - Eliminating funding for Voluntary Protection Programs and moving VPP resources to OSHA's enforcement function.

How to Prepare for the New OSHA

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

Here is what must be done:

- Verify through compliance reviews that your OSHA-required safety and health programs are in place. Ensure that written programs, which may look good on paper and in binders, are in fact effectively implemented in your workplaces. Ensure that your OSHA-required injury and illness recordkeeping files are accurate and up-to-date.
- Do your own "wall-to-wall" inspection of your establishment before OSHA does one for you. Find and correct all obvious physical hazards that OSHA will eagerly latch onto as "gotcha" citation items. Look even harder for the not so obvious hazards that OSHA's trained enforcement eyes will be scouring your facility for. Don't limit your focus to safety issues. Make sure that employees are being protected from harmful chemical exposures by conducting industrial hygiene surveys to determine if additional engineering controls or personal protective equipment is required.

- Focus on your "key risks," meaning the specific risks at your workplace that are actually faced by your employees on a frequent basis and which present the most exposure to a risk of serious injuries or death. Focusing on your actual key risks in a consistent, demonstrable manner will go a long way towards minimizing your overall risk of a significant OSHA enforcement action.
- Taking the time now to determine how your company measures up in these key areas will put you in a much better position to effectively anticipate, minimize and deal with the aggressive enforcement promised by the new OSHA. **FSM**

Jim Lastowka is a partner in the Washington office of McDermott Will & Emery LLP, and is a member of the firm's OSHA, MSHA (Mine Safety and Health Administration) & Catastrophe Response Group. He has practiced exclusively in the field of occupational safety and health for 35 years, and is a recognized authority on OSHA law.