Regulatory Impact: How OSHA and MSHA’s Agenda May Impact You

Tina Stanczewski, Esq., MSP
Law Office of Adele L. Abrams, P.C.
tstanczewski@aabramslaw.com
Fall 2015 Professional Development Seminar

New Inspection Protocols
Tiered Inspection System

- 10/1/15 new guidelines announced for safety and health inspections to better allocate resources to focus on complex inspections
- Assigns point values to different types of inspections ranging from one (1) point to eight (8) points (Enforcement Units)
- Purpose: according to Dr. Michaels this will allow OSHA to target “more impactful inspections” instead of focusing on conducting a certain number of inspections.
- Goal: weighted system may improve OSHA’s ability to tackle both large and small inspections.
- Program has been piloted for the last two years

Tiered Inspection System

- Categories:
  - Routine inspection is one (1) point
  - Workplace violence inspection is three (3) points
  - Process safety management inspection is seven (7) points
- Watch for increased inspection concerning: musculoskeletal disorders, chemical exposures, workplace violence, and process safety management violations.
OSHA Injury & Reporting Requirements

As of January 1, 2015, all employers must report:
- All work-related fatalities within 8 hours.
- All work-related in-patient hospitalizations, all amputations and all losses of an eye within 24 hours.

Report by calling the free and confidential number at 1-800-321-OSHA (6742) or calling OSHA’s closest area office during normal business hours.

The final rule also updates the list of industries exempt from the requirement to routinely keep OSHA I/I records, due to relatively low occupational injury and illness rates.
- OSHA retained exemption for any employer with 10 or fewer employees, regardless of their industry classification, from the requirement to routinely keep records.

Maryland plans to adopt the federal regulation.
OSHA Injury and Illness Reporting

- Priority inspections for I/I reports will be given to Category 1 reports, such as:
  - Fatalities or at least 2 persons hospitalized;
  - Injury to worker under age 18;
  - Employers with known history of multiple injuries (same/similar events in past 12 mo);
  - Repeat offenders (those with history of egregious violations, willful and repeat violations, and failure to abate situations);
  - Employers in SVEP;
  - Those employers covered by National Emphasis Program;
- OSHA will also give priority to those workplaces with whistleblower complaints pending, and those involving temporary workers or health issues.

Proposed Rule: Obligation to Maintain Records

- July 2015 notice of proposed rule / comments due 10/28/15
- Clarifies duty to make and maintain accurate records of work-related injuries during the five year period
- Considers it an ongoing obligation that continues for as long as the employer must keep and make available records for the year in which the injury or illness occurred
- Take away: expands time in which employer may be cited (recordkeeping violations are “continuing violations,” unless the records violation is corrected, each violation “occurs” anew each day)
- May impose additional citations: each entry on the 300 log could be considered a separate violation (if annual review deemed inadequate)
Electronic Reporting Proposed Rule

- Improve Tracking of Workplace Injuries and Illnesses (1218-AC49) Final Rule Stage.
- With the Office of Management and Budget since 10/5/15. 90 day review period but often extended. Expect next year.
- "With the information acquired through this proposed rule, employers, employees, the government and researchers will have better access to data, resulting in improved programs to reduce workplace hazards and prevent injuries, illnesses and fatalities."
  — Dr. David Michaels Assistant Secretary of Labor for Occupational Safety and Health
- All employers with 250+ workers would have to submit I/I reports electronically on quarterly basis
- Employers between 20-250 workers in high hazard industries would have to submit annually
- Same information as on OSHA 300/301

Electronic Reporting

Dr. Michaels: With the information acquired through this proposed rule, employers, employees, the government and researchers will have better access to data, resulting in improved programs to reduce workplace hazards and prevent injuries, illnesses and fatalities.
Hazard Communication 1910.1200

- Final rule published on March 26, 2012
- Integrates components of the UN Global Harmonization Standard (GHS) into HazCom to make chemical identification universal
- Rule modified MSDS requirements, labeling, classifications, and required retraining of all employees.
- Changes included hazard classification, labeling, Safety Data Sheets, & training
- All workers should have been trained by DECEMBER 1, 2013

Timetable

<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 - December 1, 2015</td>
<td>Compliance with all modified provisions of this final rule, except: The Distributor shall not ship containers labeled by the chemical manufacturer or importer unless it is a GHS label</td>
<td>Chemical manufacturers, importers, distributors and employers</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. ENFORCEMENT STARTS</td>
<td>Employers</td>
</tr>
<tr>
<td>Transition Period to the effective completion dates noted above</td>
<td>May comply with either 29 CFR 1910.1200 (the final standard), or the current standard, or both</td>
<td>Chemical manufacturers, importers, distributors, and employers</td>
</tr>
</tbody>
</table>
U.N. 30th Session Dec. 2015

- UN Sub-Committee of Experts on the Globally Harmonized System of Classification and Labelling of Chemicals (UNSCGHS)
- OSHA and other interested government agencies will meet to discuss revisions and further guidelines for GHS.
- Public meeting held 11/12/15
- OSHA workgroup reviewing several “informal paper” that will be presented at the meeting

Informal Papers OSHA Will Comment

- ST/SG/AC/10.C.4/2015/12 - C.3/2015/49 (France) Round robin testing program – Test O:2 Test for oxidizing liquids and Test O.3 Test for oxidizing solids
Informal Papers OSHA Will Comment

- ST/SG/AC/10.C.4/2015/13 (Netherlands and United Kingdom) Use of non-animal testing methods for the classification of health hazards
- ST/SG/AC/10.C.4/2015/14 (CEFIC) Labelling of small packaging
- ST/SG/AC/10.C.4/2015/15 (Sweden) Amendment of precautionary statement P280 for hearing or ear protection
- ST/SG/AC/10.C.4/2015/16 - C.3/2015/57 (DGAC) GHS labels in transport on outer packaging not subject to TDG regulations

Revised Instruction from OSHA

- Effective July 9, 2015 OSHA issued CPL 02-02-979
- Provides guidance for inspectors on enforcement during transition period.
- Applies to:
  - all industries regulated by OSHA
  - state plan states are expected to have equivalent, or more stringent, requirements in place
  - does not affect community right-to-know laws, or the environmental and transportation provisions on SDSs – all of which are outside of OSHA jurisdiction.
- Manufacturer/importer requirements for revised labels and SDSs took effect on June 1, 2015. Since manufacturers dependent on others downstream, enforcement delayed if good faith, “reasonably diligent” effort to obtain the information needed
Revised Instruction from OSHA

- Enforcement Guidance
  - Assess accuracy and adequacy of the information on labels and SDSs
  - Has manufacturer’s hazard classification procedures and calculations been reviewed
  - Has all scientific literature been considered? If a study is not considered because it does not support their conclusions (only including negative findings for toxicity when positive studies are present)
- Multi-employer worksites Responsibilities:
  - Employers with workers present and those who expose employees of other employers,
  - Include methods used in HCS program to provide other employers with on-site access to SDSs
  - Covers each hazardous chemical to which other employers’ workers may be exposed. The host employer must ensure that there are no barriers to employees’ access to HCS information (such as storage in a locked room) and that everyone knows how to access the documents.

Revised Instruction from OSHA

- If companies are in compliance with the minimum requirements of HCS 2012, then no citations will be issued; if not, citations may be issued as appropriate;
- If an inspector observes a label or SDS that have precautionary statements, hazard statements, or pictograms that appear different from what HCS 2012 requires, then they must determine “if the information contradicts or casts doubt on OSHA required information”;
- Precautionary statements, hazard statements that are incorporated from the GHS must be changed to mandatory language (“should” gets changed to “shall”);
- In issuing citations, the inspector must take photos or video of the chemicals in question and get copies of the “inadequate” SDSs;
- OSHA will document the chemical name and hazardous ingredients, frequency and duration of use, number of exposed employees, and the health and physical hazards (to aid in supporting a “serious” citation classification, or egregious enforcement, where a separate penalty is issued per affected worker);
- Repeat violations can be issued for HCS 2012 citations where the predicate citation was issued under the old version, and since the paragraph numbers may have changed, inspectors are advised to explain this in their field notes; and,
- Existing labels that have been removed or defaced but are not “immediately marked” with the required information will trigger citations.
Regulatory Agenda

Request For Information on PELs

- 10/10/14 request issued to examine OSHA’s current PELs for modification to be more efficient and up to date
- Purpose to open dialogue with stakeholders to revise PELs and prevent occupational illness from chemical exposures
- Comments closed 10/9/15
- Items to consider: 1) there are no PELs for some chemicals (such as 1-Bromopropane (1-BP), a chemical commonly used as a solvent in auto body shops and electronics manufacturing, 2) PELs are not consistent with current scientific data, 3) PELs are minimum compliance efforts
- Information that was requested: possible new approaches for streamlining risk assessment and feasibility analyses; alternative and additional new approaches for managing chemical exposures, including hazard banding, task-based approaches, and informed substitution.
Beryllium Rulemaking

- Dramatically lower workplace exposure to beryllium, a widely used material that can cause devastating lung diseases.
- Apply to an estimated 35,000 workers covered by the U.S. Department of Labor’s Occupational Safety and Health Administration.
- Currently, OSHA’s eight-hour permissible exposure limit for beryllium is 2.0 micrograms per cubic meter of air. That standard was originally established in 1948 by the Atomic Energy Commission and adopted by OSHA in 1971.
- OSHA’s proposed standard would reduce the eight-hour permissible exposure limit to 0.2 micrograms per cubic meter. The proposed rule would also require additional protections, including personal protective equipment, medical exams, other medical surveillance and training.
- Prevent almost 100 deaths and 50 serious illnesses each year.
- 5 issue of the Federal Register. Members of the public may read the proposal and submit written comments here. Comments must be submitted by Nov. 5, 2015.

Combustible Dust Docket OSHA-2009-0023

- History:
  - Advance notice of rulemaking in 2009 (78 FR 54334, October 21, 2009.),
  - Stakeholder meetings in 2010
  - U.S. Chemical Safety Board (CSB) completed a study of combustible dust hazards in late 2006, which identified 281 combustible dust incidents between 1980 and 2005 that killed 119 workers and injured another 718.
  - July 31, 2005, OSHA published the Safety and Health Information Bulletin, "Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions."
  - Implemented a Combustible Dust National Emphasis Program (NEP) on March 11, 2008 (CPL 03-00-008 )
  - SBREFA panel to convene in 2016
  - Relates to combustible dust in the workplace and its related hazards
  - Term "combustible dust" includes all combustible particulate solids of any size, shape, or chemical composition that could present a fire or deflagration hazard when suspended in air or other oxidizing medium
  - Problem: acts as fuel for fires and explosions in food, chemical, paper, pharmaceutical, and metal processing industries
Combustible Dust

- May 22, 2015 enforcement guidance issued for emphasis program
- Inspectors should consider the bulk density of the dust before issuing violation of the housekeeping standard (29 CFR § 1910.22) or the materials handling and storage standard (29 CFR § 1910.176).
- For tissue paper dust, fabric fibers, and other low-density dusts (i.e., less than 75 lb/ft³), inspectors should collect samples for laboratory analysis of bulk density, if the accumulation level is greater than ¼-inch extending over 5 percent of the floor area of a room or building, or 1000 ft², whichever is less.

Process Safety Management

- Dec. 9, 2013 OSHA issued Request for Information on Changes to Standard
- Purpose is to prevent catastrophic releases of hazardous chemicals and to minimize the consequences of any release
- July 2015 convened SBREFA panel
- Both EPA and OSHA regulate. Both can conduct separate inspections for same issues
- In 1990, under Clean Air Act Amendments Congress directs OSHA and EPA to develop rules for Process Safety
- 1992 OSHA promulgates the Process Safety Management Standard
- 1996 EPA promulgates the Risk Management Program Rule
Oil & Gas Well Drilling Exemption

- Currently exempted under paragraph (a)(2)(ii) of Sec. 1910.119 because OSHA had begun a separate rulemaking for oil and gas well drilling and servicing operations (48 FR 57202)
- This rule never became effective
- Traditionally PSM is for chemical plant management of hazardous chemicals
- With West Texas Fertilizer Explosion there is heightened scrutiny concerning chemicals
- No concrete support for any of the changes to be made

Compliance – 14 Requirements

- Planning: synthesize all safety programs into one system
- Hazard Analysis: operator should identify and control potential hazards prior to work
- Documentation: current written procedures may need revising to include specific details
- Training: specific training requirements for all workers including contractors
- Contractor Safety: operator/host employer must comply with specific requirements for contractors
- Mechanical Integrity: may need to maintain mechanical integrity programs for every piece of critical equipment
- Management of Change: policies and procedures required for changes to plan
- Incident Investigation: examines more than root cause and includes near misses
- Audits: strict auditing policy required (possibly by 3rd parties)
- Record Keeping: several record keeping requirements for policies, procedures, training, audits . . .
Anhydrous Ammonia

- July 22, 2015 OSHA issued memo that it would change policy exempting retailers of anhydrous ammonia to comply with same regulation as manufacturers and distributors
- Affects an estimated 283 facilities
- Opponents argue that it would force farmers to travel farther to obtain fertilizer
- Exemption would still apply to businesses with North American Industry Classification System codes of 44 and 45

Confined Space Rule
Confined Space Rule

- May 4, 2015 final rule on confined space standard for construction released
- Took effect on August 3, 2015 (DELAYED UNTIL OCTOBER 2, 2015)
- Codified at 29 CFR Part 1926.1200 through 1213
- Similar to general industry standard

What is a Confined Space

- Manholes, crawl spaces, and tanks
- Anywhere not designed for continuous occupancy or difficult to exit in the event of an emergency.
- Contain dangerous atmospheres (including gases, chemicals, carbon monoxide or oxygen depletion
- Bins, boilers, pits, manholes, tanks, incinerators, scrubbers, HVAC ducts, concrete pier columns, transformer vaults, water mains, precast concrete and other pre-formed units, drilled shafts, enclosed beams, vessels, digesters, lift stations, cesspools, silos, air receivers, turbines, bag houses and mixers/reactors.
- Does not apply to excavations covered under Subpart P, to diving construction activities under Subpart Y, or to underground construction covered by Subpart S
Permit Required When

- **Contains or has the potential to contain a hazardous atmosphere;**
  - “hazardous atmosphere” is any flammable gas, vapor or mist that exceeds 20 percent of its lower flammability limit (LFL), airborne combustible dust that meets or exceeds its LFL, oxygen content below 19.5 percent or above 23.5 percent, an atmosphere that contains air contaminants or toxics that could result in employee exposure in excess of its dose or permissible exposure limit, or any atmosphere that is “immediately dangerous to life or health.”

- **Contains a material that has the potential for engulfing an entrant;**

- **Internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor that slopes downward and tapers to a smaller cross-section; or**

- **Contains any other recognized serious safety or health hazard**

Requires Employers to Plan Ahead

- **First, conduct pre-entry planning which includes**
  - evaluation of the space
  - identification of means of entry and exit
  - proper ventilation methods
  - elimination or control of all potential hazards in the space

- **Second, atmospheric testing occurs:**
  - all hazards must be continuously monitored,

- **Third, rescue procedures must be established (along with necessary equipment)**

- **Fourth, if air is unsafe, protections must be provided**

- **Fifth, there must be a written program for PRCS**
Diesel Exhaust

- DPM is soot particles from the exhaust
- June 2012, the International Agency for Research on Cancer classified diesel exhaust as a known human carcinogen (lung cancer)
- MSHA is requesting information on approaches that would improve control of DPM and diesel exhaust. RFI Due December 2015
- Current guidelines:
  - Personal exposure can’t exceed 160 micrograms per cubic meter (μg/m3) of total carbon (TC) as an 8-hour time-weighted average
  - Feasible engineering and administrative controls required to reduce exposure to or below the permissible exposure limit (PEL)
  - Respiratory protection must be used to supplement feasible engineering and administrative controls if such controls do not reduce a miner’s exposure to the PEL, the engineering or administrative controls are infeasible, or the engineering and administrative controls fail to produce a significant reduction in DPM exposure
  - When respiratory protection is required, an air-purifying respirator equipped with a filter that meets one of the following: certified by NIOSH under 30 CFR Part 11 as a high-efficiency particulate air (HEPA) filter; under 42 CFR Part 84 as 99.97% efficient; or certified by NIOSH for DPM
  - Prohibits rotation of miners to comply with PEL
  - Must evaluate miner’s medical ability to wear a respirator and transfer rights for miners unable to wear respirators
Workplace Examinations

- Request for information on the examination of working places
- Linked to recent fatalities: are examiners competent
- Information should discuss: (1) persons conducting the examination, (2) the quality of the examination, and (3) the recordkeeping provision, among other provisions
- RFI began 9/15
Silica

- Metal and nonmetal mining industry standard is based on the 1973 American Conference of Governmental Industrial Hygienists (ACGIH)
- Threshold Limit Values formula: $10 \text{ mg/m}^3$ divided by the percentage of quartz plus 2
- Overexposure to crystalline silica can result in some miners developing silicosis,
- The formula is designed to limit exposures to $0.1 \text{ mg/m}^3$ (100 $\mu\text{g/m}^3$) of silica
- National Institute for Occupational Safety and Health (NIOSH) recommends a 50 $\mu\text{g/m}^3$ exposure limit for respirable crystalline silica.
- Possible notice of rulemaking 4/16

MSHA Rules to Live By Calculator

New calculator tool will compare each mine to the national average of RTLB citations earned per quarter (for underground) or per two quarters for surface mines.

If a mine receives less than three RTLB citations, it will not be scored against national average.

How will this be used?

- MSHA places responsibility on operator to monitor RTLB rates versus national average.
- MSHA will use this rate to target inspections, and if needed, conduct spot inspections for “problem areas.”
Proposed Rule for Penalty Assessment (30 C.F.R 100.3)

- Proposed rule to change MSHA citation format and how penalties are assessed – *MSHA anticipates final release in December 2015*
- MSHA will be limiting Negligence from 5 to 3 categories: New definitions.
  - No Negligence
  - Negligent
  - Reckless Disregard
- MSHA will be limiting Gravity from 5 to 3 categories: New definitions.
  - Unlikely
  - Reasonably Likely
  - Occurred
- Increased weight to total negligence and violation history factors, while reducing the weight for mine size and gravity.
- MSHA trying to limit power of judges to change penalties

MSHA Proposed Rule for Penalty Assessment (30 C.F.R 100.3)

MSHA proposed 20% additional penalty reduction if operators DO NOT contest!

MSHA recalculating total penalty points from 208 possible point to 100 points.

This will greatly increase penalties on mines with more than 10 inspection days per year!

Penalties have been predicted to increase between 300% and 1000% in certain situations.

This is not final yet, MSHA is still reviewing comments from industry.
Other Items to Watch

Temporary Worker Initiative

- DOL has made safety of contingent workers a focus of enforcement activity for both safety/health reasons and also compliance with FLSA and other labor laws
  - Wage/hour and ERISA issues
  - Affordable Care Act
  - Attempts to evade scope of Title VII, ADA, ADEA, EPA, etc.
  - IRS can prosecute failure to pay employer’s contribution to taxes and improper classification as “W-9” worker (agency relationship must be examined)
- OSHA established special webpage concerning temporary workers: https://www.osha.gov/temp_workers/index.html
- NACOSH also has temporary worker task group to make recommendations to OSHA and NIOSH (e.g., research)
Federal Civil Penalties Inflation Adjustment Act of 2015

- OSHA maximum penalties set in 1990 with serious being $1000 to $7000 and willful being $10,000 to $70,000
- MSHA and EPA already covered for inflation increases under 1996 law but OSHA was exempted
- In 2016 OSHA fines will be adjusted for inflation to the max for serious being around $12,500 and max for willful being $125,000
- Applies to all penalty amounts set by statute

Questions?

Tina Stanczewski, Esq., MSP
Law Office of Adele L. Abrams, P.C.
tstanczewski@aabramslaw.com
301-595-3520