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The Washington Scene: OSH Legislative and Regulatory Highlights, and Current Issues

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Topics for Discussion

- OSHA's Priorities and Key Strategies
- OSHA and VPP
- High Profile Enforcement and Rulemaking Activities
- Report on "OSHA Reform" Legislation – Status and Content
- Mercer ORC Networks Activities of Note

OSHA's Priorities

- From a speech by Assistant Secretary for Occupational Safety and Health David Michaels at the VPPPA Annual National Conference, August 23, 2010:
 - Strong, science-based standards and guidance
 - Targeted enforcement to pursue workplaces where workers are most urgently in need of protection, and
 - Giving workers a stronger voice in their safety and health

With so many workers at risk every day, this Administration has chosen to focus our attention, our resources, and our resolve on developing and strongly enforcing OSHA standards—to send the strongest message possible to outlaw employers.

OSHA's Key Strategies

- Deterrence is the primary objective of OSHA enforcement efforts
 - Targeting high-risk workplaces
 - Exposing employers violating OSHA standards to a harsh, public spotlight
 - Strengthening penalties.
- Increasing workers' awareness of their rights and how to exercise these rights, and by strengthening whistleblower protections.
- Refocusing and strengthening compliance assistance programs:
 - On-site Consultation Program
 - Susan Harwood training grants
 - More and better compliance materials tailored to workers, especially those with limited English literacy
 - Ensuring that cooperative programs achieve their fundamental objective -- protecting the safety and health of workers.

OSHA's Key Strategies (cont'd)

- Injury and illness prevention programs that can help change the culture of workplaces
- Agency collaborations -- with EPA, NIEHS, NIOSH, the Coast Guard and MSHA
- Strengthening OSHA's use of science -- by working closely with NIOSH to more quickly incorporate scientific advances into regulatory and compliance assistance activities.
- Strengthening State OSHA plans to ensure that they are at least as effective as states covered by Federal OSHA.

OSHA's Key Strategies (cont'd)

- Conducting OSHA's work with "transparency, openness, integrity and humility"
 - "OSHA Listens" forum in March to receive comments from employers, workers, safety and health professionals and families of workers killed on the job
 - Interactive Web chats to discuss the Department of Labor's strategic plan and regulatory agenda for OSHA
 - Providing online searchable statistics on worksite exposure measurements and other data
- Finally, OSHA is moving to modernize workplace injury and illness tracking by focusing on accurate recordkeeping

OSHA Still Supports Compliance Assistance and Voluntary Programs

- *OSHA has been increasing compliance assistance over the last year*
 - *90% is Federally funded in all states*
 - *Specific focus:*
 - *Developing and distributing more information and training grants to help workers understand and exercise their workplace rights, and to give workers a greater voice in their workplaces.*
- Voluntary Protection Program - VPP
- Partnerships
- Alliances

OSHA and VPP

OSHA Assistant Secretary Michaels Supports VPP:

- *Wants VPP to remain the model program for preventing worker injuries and illnesses.*
- *Wants to preserve the existence of VPP*
- *Has moved to ensure the integrity of VPP*
 - *Has initiated a review of VPP implementation by Regions and National Office to ensure consistent, high-quality administration and conformance with the VPP*
- ***However....federal funding will be eliminated and alternative forms of non-governmental funding sought***
 - *OSHA is faced with tight budgets, limited staff, and government-wide calls to cut programs and expenses*



OSHA Enforcement: Top 10 Most Cited Standards in FY 2010

- 1) *Scaffolding*
- 2) *Fall Protection*
- 3) *Hazard Communication*
- 4) *Respiratory Protection*
- 5) *Ladders*
- 6) *Lockout/Tagout*
- 7) *Electrical, Wiring Methods*
- 8) *Powered Industrial Trucks*
- 9) *Electrical, General Requirements*
- 10) *Machine Guarding*



OSHA Enforcement Priorities

- 11 National Emphasis Programs (NEPs) in Place:
 - Amputations
 - Combustible Dusts
 - Crystalline silica
 - Diacetyl
 - Hexavalent chromium
 - Lead
 - PSM - Oil refineries
 - PSM - Chemical Plants
 - Recordkeeping
 - Ship breaking
 - Trenching/excavations



Recordkeeping NEP Status and Clarification

- Record Keeping NEP launched last fall
- Focused on under-reporting and non-reporting
- Also looking at programs or policies discouraging workers from reporting
 - In particular, concerned about incentive programs that might discourage reporting
- Now looking at changing the criteria for these inspections
 - RK Task group established
- NOTE!
 - OSHA is not discontinuing this NEP, but simply re-examining how it targets the recordkeeping NEP inspections
 - Considering focusing more on the steel and heavy manufacturing sectors (previously the recordkeeping NEP was cross-sector with emphasis on low rate facilities in high rate industries)

OSHA's Views on Incentive Programs

- Disapproves of incentive programs based primarily on injury and illness numbers
- Believes these often have the effect of discouraging workers from reporting an injury or illness
- OSHA says: *“We cannot tolerate programs that provide this kind of negative reinforcement and this type of program would keep a company out of the VPP until the program or practice is corrected.”*
- Examples:
 - Offering a pizza party or allowing workers to enter a raffle for a new truck as a reward for not reporting a workplace injury or illness
 - Offering managers large bonuses for driving down their DART rate

OSHA Examples of Good Incentive Programs

- Good incentive programs feature positive reinforcement when:
 - workers are demonstrating safe work practices
 - workers take active measures such as reporting
 - close calls
 - abating hazards
 - using their stop-work authority to prevent a workplace tragedy

An incentive program that encourages or rewards workers for reporting hazards or near misses, or for participating in health and safety training or on a health and safety committee are incentives that we can get behind.

Other Potential Enforcement Activities

- NEP to focus on new additional “butter” flavorings
- Isocyanates NEP to replace the draft asthmagens NEP
- Updating the TB Compliance Directive and the Blood-borne Pathogens Compliance Directive
- Evaluating the Amputations NEP
- Possible Cranes and Derricks NEP
 - Developing the compliance directive
 - Developing compliance officer training
- Ergonomics -- Procedures for Ergonomic related inspections under review
- Nursing Home NEP

Key Enforcement Activities

- Refinery NEP
 - Only in Region VI
 - Looking into follow-up inspections
 - Looking at a new NEP on refineries
 - *OSHA still finding the same problems that were found at the start of the NEP!*
- Chemical Plant NEP
 - Just extended the pilot
 - Finding same problems as in the Refinery NEP
 - Process hazard analysis
 - Management of change
 - Safety-instrumented systems
 - Training

Severe Violator Enforcement Program (SVEP)

- Looking for systemic problems within companies
- In effect
- Too early to report findings
- A web page is under development

Corporate-wide Settlement Agreements

- Tied into the SVEP
- Looking for systemic patterns of violations
- OSHA can now approach employers to enter into a corporate agreement

- New Terminology: “Enterprise Settlement Agreements”

OSHA Increasing Penalties!

- Administratively increasing penalties
- Maximum penalties in current OSH Act remain in effect, but... adjustments are changing
- Piloting the I.T. System in three Area Offices
- Roll out in September

High-Profile Rulemaking Activities

- New Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) Proposed Rule
 - Proposed Rule issued May 24 (75 FR 28861)
 - First NPRM published 4/10/90 (!)
- Comments were due August 23
- Intended to “help prevent an estimated annual 20 workplace fatalities and more than 3,500 [lost workday] injuries”
- Essentially a “modernization” effort



High-Profile Rulemaking Activities (cont'd)

- Injury and Illness Prevention Program (I2P2)
- PELs
- Combustible Dust
- Addition of MSD Column to OSHA Log – [Imminent?](#)
- Silica – [NPRM February 2011?](#)
- Updating the Hazard Communication Standard to be consistent with the Globally Harmonized System for Classification and Labeling of Chemicals (GHS) – [Final Rule Spring 2011?](#)
- Infectious Diseases – [Request for Information, May 6, 2010](#)
- Cranes and Derricks in Construction – [Final Rule published August 9, 2010](#)



High-Profile Rulemaking Activities (cont'd)

- SIPs IV – Construction
- Beryllium
- Confined Space in Construction
- Looking at a standard related to the Kleen Energy explosion

Status Report on “OSHA Reform” Legislation

- A Quick Re-Cap
 - Protecting America’s Workers (PAW) Act, H.R.2067 – 4/23/09
 - PAW Act Discussion Draft – 3/9/10
 - Miner Safety and Health Act, H.R.5663 – 7/1/10
 - Robert C. Byrd Miner Safety and Health Act – 7/21/10



Focus Now Moved from PAW Act to Robert C. Byrd Miner Safety and Health Act

- Miner Safety & Health Act, HR 5663 – introduced 7/1/10
- House Education & Labor Hearing – 7/13/10
- House Education & Labor Mark-up – 7/21/10
- Amendment in the nature of a substitute (Byrd Miner Act), passed by 30-17 vote
- Placed on House Calendar 7/29/10
- Full House vote anticipated in Fall
- 55 House co-sponsors
- Senate introduced S.3671 – 7/29/10



What's In the Byrd Miner Act?

1. Mining safety and health provisions
2. Occupational safety and health provisions (Title VII):

Similar to PAW Act Provisions

- Enhanced Protections from Retaliation
- Victim's Rights
- Abatement Provisions
- Enhanced Civil Penalties
- Enhanced Criminal Penalties

New

- Revision to NIOSH Health Hazard Evaluations Section
- Titus Bill (State Plan Oversight)



Enhanced Protections from Retaliation

- Right to refuse work expanded
- More time to file claims
- More levels of review and appeal
- More relief available to employee



Enhanced Protections from Retaliation

- Prohibits discrimination against employees who refuse to work if there is a “reasonable apprehension that the work would result in serious injury to, or serious impairment of the health of, the employee or other employees.”
- Current law, employee may refuse to work when faced with an imminent danger of death or serious injury.



Enhanced Protections

- Extends time to file complaint to 180 days after the alleged violation or the date on which the employee knows or should have known about the alleged violation.
- Current law, employee has 30 days to file complaint following alleged violation.



Enhanced Protections

Under current law:

- Secretary has 90 days to investigate
- If investigation finds merit in complaint, referred to Solicitor's office; if no merit, complaint dismissed
- If a violation found, a determination letter issued to employer – requiring employer to:
 - Pay back wages
 - Reinstatement employee
 - Reimburse for attorney fees and costs
 - Take other steps to provide necessary relief



Enhanced Protections

Byrd Miner Act:

- Will add more levels of review / more relief
- Complaint to Secretary (if prima facie case)
 - Secretary investigates and issues decision within 90 days
 - If finds reasonable cause to believe violation occurred, Secretary shall issue a preliminary order.
- Preliminary Order consisting of :
 - Injunctive Relief
 - Compensatory & Exemplary (Punitive) Damages:
 - Correct violation
 - Reinstate employee with back pay and all conditions of prior employment
 - Expunge all warnings, reprimands, etc. from paper or electronic records or databases
 - Pay attorneys fees and costs



Enhanced Protections

Hearing:

- 30 days to object to Secretary's findings & request a hearing (but still must reinstate)
- Hearing shall be conducted "expeditiously" before ALJ (who has subpoena power)
- ALJ has 90 days to issue decision from date of request
- If violation found, ALJ can order relief.



Enhanced Protections

Review Board:

- Within 30 days of ALJ decision, may appeal to “review board”
- Within 90 days of appeal, Secretary shall issue final decision
- Complainant can bring to the US district court *de novo* action if inaction (90 days) by ALJ or review board
- Appeal to U.S. Court of Appeals within 60 days of final decision



Victims' Rights

The Byrd Miner Act:

- Would create rights for victims and their representatives
- Is based on PAW Act & Discussion Draft with 2 new sections added
- Nothing comparable in current law



Victims' Rights

During an OSHA inspection or investigation, victims (or representatives of victims) will have the right to:

- Meet with the Secretary prior to the Secretary's decision to issue a citation or take no action;
- Receive a copy of the citation at the same time as the employer;
- Be informed of any notice of contest or addition of parties;
- Be provided notification of the date and time of any proceedings, service of pleadings and an explanation of rights.



Victims' Rights

Modification & Contest of Citation:

- Before entering into an agreement to withdraw or modify a citation, the Secretary shall notify a victim or representative of the victim and provide them with an opportunity to appear and make a statement before the parties conducting the settlement negotiations.



Victims' Rights

Rights Before Commission:

- To be notified of time and date of proceeding;
- To receive pleadings and decisions
- To appear and make a statement



Victims' Rights



- The Commission “shall”... “in rendering any decision, provide due consideration to any statement or information provided by any victim before the Commission.”
- House Report 111-579 - Part 1: “Under Section 702, a family member would be provided the opportunity to appear and make a statement before the Review Commission, but would not be conferred formal ‘party status.’...It is the intent that such statement or information should be provided the same weight as provided to a party that was granted permission to participate as an *amicus curae*.”



Victims' Rights



- The Secretary shall designate at least 1 employee at each OSHA area office to serve as a “family liaison.”



Abatement Required During Contest

- Under current law, a notice of contest automatically stays the time set for abatement in the citation until the citation becomes a final order.
- Under PAW Act, the time for abatement, for a serious, willful or repeat violation, ran from the receipt of citation; filing a notice of contest would not stay time for abatement.



Abatement During Contest

- Under PAW Act Discussion Draft, for serious, willful or repeated violations, employer could petition for a stay of abatement from the Review Commission.
- To succeed, employer must demonstrate:
 1. A substantial likelihood of success on its contest of the violation;
 2. Will suffer irreparable harm absent a stay; and
 3. That a stay will not adversely affect worker safety and health.



Abatement During Contest



- **Under Byrd Miner Act**, employer can petition for a stay of abatement from the Review Commission on the reasonableness of the time set for abatement and the existence of the alleged violation.
- To succeed, employer must now demonstrate:
 - A substantial likelihood of success on its contest of the violation;
 - That a stay will not adversely affect worker safety and health.



Abatement During Contest

The Commission shall develop rules of procedure and at a minimum shall provide:

- Expedited hearing before ALJ within 15 days after motion for stay filed;
- Appeal ALJ decision to Commission, its decision whether to grant review rendered within 10 days;
- Commission decision rendered within 30 days.
- If no quorum at Commission, decision of ALJ becomes final order.



Enhanced Civil Penalties

- Willful and repeat violations increase from a maximum of \$70,000 to a maximum of \$120,000, minimum of \$8000 up from \$5000
- If a willful or repeat causes the death of an employee, the maximum penalty is \$250,000 and the minimum is \$50,000 (\$25,000)
- Serious violations increase from a maximum of \$7000 to a maximum of \$12,000
- If a serious violation causes an employee death, the maximum penalty is \$50,000 and the minimum is \$20,000 (\$10,000)
- CPI adjustments to penalty maximums every 4 years



Enhanced Civil Penalties



Repeat Violation Determination

- “In determining whether a violation is repeated, the Secretary shall consider the employer’s history of violations under this Act and under State occupational safety and health plans established under Section 18.”
- Current Law: OSHA cannot cite an employer for a repeat violation if original violation occurred in a state plan state.



Criminal Provisions

Current law makes it a crime for an employer to “willfully” violate a standard or regulation where that violation caused the death of an employee;

- up to six months in jail and
- \$500,000 fine (corporation)



Criminal Provisions



- **Miner Act** (like PAW Act Discussion Draft) makes it a crime for an “employer” to “knowingly” violate a standard or regulation where that violation “caused or **contributed** to” the death of any employee; up to 10 years in jail and \$500,000 fine; up to 20 years in jail for second offense.
- **Byrd Miner Act** adds new word to criminal sections – kept “knowingly” but added “caused or **significantly** contributed to the death....”



Criminal Provisions

Under Byrd Miner Act (like PAW Act Discussion Draft)
“employer” defined as **“any officer or director”**

House Report 111-579 - Part 1: “The Committee intends this provision to criminalize only action or inaction by corporate officers or senior managers when they:

- 1) Know that the conduct is occurring,
- 2) Have the authority and ability to correct, or cause the correction of, the act or condition, and
- 3) Fail to exercise their authority to take appropriate action to prevent the action or correct the act or condition.

“The Committee also subscribes to the position, articulated in related case law, that the failure of the corporate official to have actual knowledge of the violative act or condition will not act as a barrier to criminal liability where there is evidence that the official knowingly shielded himself or herself from information necessary to gain requisite knowledge – in other words, was **‘willfully blind’** to a violative act or condition.”



Criminal Provisions



- **Miner Act** (like PAW Act Discussion Draft) makes it a crime for an employer to “knowingly” violate a standard or regulation where that violation “caused or contributed to serious bodily harm to any employee.”
 - Up to 5 years in jail and/or \$250,000 fine; up to 10 years in jail for second offense.
- **Byrd Miner Act** again inserts the new word – “caused or **significantly** contributed to serious bodily harm” to an employee.



Criminal Provisions

“Serious Bodily Harm” Definitions:

1. The PAW Act Definition

- Injury that results in: **“a substantial risk of death; protracted and obvious physical disfigurement; or protracted loss or impairment, of the function of a bodily member, organ, or mental faculty.”**

2. The PAW Act Discussion Draft Definition

- **“any circumstance, deficiency or shortfall that could result in an injury or illness including, risk of death, unconsciousness, physical disfigurement, or loss or impairment (whether permanent or temporary) of the function of a bodily member, organ, or mental facility.”**



Criminal Provisions

3. The Miner Act & Byrd Miner Act Definition:

–“**Serious bodily harm**” means “bodily injury or illness that involves –

- A. A substantial risk of death;
- B. Protracted unconsciousness;
- C. Protracted and obvious physical disfigurement; or
- D. Protracted loss or impairment, either temporary or permanent, of the function of a bodily member, organ, or mental faculty.”



Criminal Provisions



Advance Notice:

- Current Law: If give advanced notice of inspection, receive fine and 6 months imprisonment. Strict liability statute, no bad intent required.
- PAW Act: Same as current law, but increased fine and not more than 2 years in prison.
- Byrd Miner Act: “[A]ny person that knowingly gives, causes to give, or attempts to give or cause to give, advance notice of any inspection conducted under this Act with the intention of impeding, interfering with, or adversely affecting the results of such inspection.” Fine or imprisonment of not more than 5 years.



Pre-final Order Interest

- “Pre-final order interest on penalties shall begin to accrue on the date the party contests a citation issued under the Act and shall end upon the issuance of the final order.”
- Current Law: If employer contests a citation, no interest accruing on penalty amount.



Health Hazard Evaluations



Added to Byrd Miner Act:

- “The Secretary shall determine following a written request by any employer, authorized representative of current **or former** employees, **physician, other federal agency, or state or local health department**,...whether any substance normally found in the place of employment has potentially toxic effects ...**or whether any physical agents, equipment, or working condition found or used has potentially hazard effects**; and shall submit such determination both to employers and affected employees as soon as possible.”



State Plan Oversight



Added to Byrd Miner Act:

Ensuring Worker Safety Act (HR 4864)

1. Establishes process for review of state plans by OSHA, and authority to compel remedy without beginning process for withdrawing approval;
2. Would give federal OSHA concurrent enforcement authority;
3. GAO study authorized every 5 years to examine effectiveness of state plans.



Why Now?



29 workers die



11 workers die



The Timing is Right for House Passage

Mercer ORC Networks Position Statement

“HR 5663, like its predecessors, would do little to modernize the basic framework of the OSH Act to meet the safety and health challenges of the 21st Century workplace and workforce. In addition, ideally, ORC *would have liked to have seen Congress go beyond focusing primarily on the enforcement-related provisions of the Act and also seek to provide OSHA with additional incentives, tools and resources to assist the vast majority of employers that are earnestly interested in protecting their workers but that may lack the capacity and competencies to do so effectively.*”

Mercer ORC Networks Position Statement (cont'd)

“However, despite the limited focus and scope of HR 5663, ORC has concluded that with a few modifications suggested below, the proposed amendments to the OSH Act have the potential to afford improved protections to at least those workers facing the most challenging workplace conditions in situations where their employers may be resistant to providing the most essential protections and meeting even the most basic compliance obligations.

There are, unfortunately, still too many employers that do not sufficiently appreciate the legal necessity, the moral obligation or the business benefits of assuring a safe and healthful workplace – for those businesses, strong enforcement and assurances of worker rights may be necessary to incentivize compliance.”

Byrd Miner Act--Next Steps

- The Byrd Miner Act adopts key ORC recommendations of the Position Statement
 - Substantially reduces the burden of getting a stay of abatement during contest of a citation
 - Limits the potential for criminal liability to a “significant” contribution to death or bodily injury
 - Significantly limits the types of injuries and illnesses subject to criminal prosecution
 - The Committee Report provides limits on when an officer or director may be subject to criminal liability

Mercer ORC Networks Activities of Note

- Three Task Force Activities offer opportunities for member participation and input:
 1. Fatality and Serious Injury Task Force
 - Priorities:
 - Error minimization
 - Risk tolerance
 - Behavior
 - Risk recognition
 - Minimizing consequences
 - Hierarchy of controls
 - Layers of defense
 - Understanding behavior

Mercer ORC Networks Activities of Note

2. EHS Metrics Task Force

- Objectives:

- More useful leading indicators concerning the recognition and management of risk
- Metrics to assess and drive key elements of a S&H management system
- A more effective approach to trailing (outcome) metrics that can be applied on a global basis

Mercer ORC Networks Activities of Note

3. Sustainability Task Force

▫ Key Initial Actions:

- Develop common definitions for Corporate Social Responsibility/Sustainable Development (CSR/SD)
- Identify and share good practices in SHE integration with CSR/SD
- Identify specific integration points of SHE with CSR/SD
 - Compile “how tos” to accomplish the integration, especially for S&H linkage with CSR/SD
 - Compile/develop metrics of successful and effective S&H linkage with CSR
 - Leverage/link with ASSE Task Group
 - Leverage/link with ORC Alternative Metrics Task Force
- Develop a clearinghouse to share compiled good practices

Questions or Comments?

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