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**Strategies for Managing
Washington-Driven Change**

November 9, 2010

Presented by:

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ABOUT TODAY'S SPEAKER

FISHER & PHILLIPS LLP is one of the country's oldest and largest firms devoted exclusively to representing employers in labor, employment, civil rights, employee benefits and business immigration law. Our depth and breadth of experience in these niche areas are unsurpassed. Although it's Atlanta-based, Fisher & Phillips has 225 lawyers in 23 offices across the country.

The Firm's practice includes counseling and defending employers under all major federal and state labor, employment, and employee benefits laws and regulations including, among others: The Age Discrimination in Employment Act (ADEA); The Americans With Disabilities Act (ADA); The Civil Rights Acts of 1866, 1964 and 1991; The Consolidated Omnibus Reconciliation Act (COBRA); The Employee Polygraph Protection Act (EPPA); The Employee Retirement Income Security Act (ERISA); The Equal Pay Act (EPA); The Fair Credit Reporting Act (FCRA); The Fair Labor Standards Act (FLSA); The Family and Medical Leave Act (FMLA); The Immigration Reform and Control Act (IRCA); The National Labor Relations Act (NLRA); the Occupational Safety and Health Act (OSHA), and The Worker Adjustment and Retraining Notification Act (WARN), as these laws have been amended.

Our lawyers practice in federal and state courts throughout the United States. In addition to representing employers in litigation, we represent employers in federal, state and local administrative proceedings, mediation and arbitration, collective bargaining and administration of collective bargaining agreements, and in resolving threatened claims prior to the initiation of formal proceedings.


As a result of our representation of employers in litigation and formal claims proceedings, we have acquired considerable expertise in developing and implementing policies, practices, and procedures to help employers minimize or avoid the occurrence of employment-related claims, the risk of liability from such claims, or other forces that may interfere with employer rights.




Edwin G. Foulke, Jr is a partner with Fisher & Phillips LLP, a leading national labor and employment law firm. Mr. Foulke is co-chair of the firm's Workplace Safety and Catastrophe Management Practice Group in its Atlanta, Georgia office. Prior to joining Fisher & Phillips, Mr. Foulke was the Assistant Secretary of Labor for Occupational Safety and Health. Named by President George W. Bush to head OSHA, he served from April, 2006 to November 2008. During his tenure at OSHA, workplace injuries, illnesses and fatalities rates dropped to their lowest level in recorded history.

For approximately thirty (30) years, Mr. Foulke has worked in the labor and employment area, specializing in occupational safety and health issues, workplace violence risk assessment and prevention, whistleblower protection, and accident and fatality prevention. He also served on the Occupational Safety and Health Review Commission in Washington, DC, chairing the Commission from March 1990 to February, 1994.

Mr. Foulke, a native of Perkasié, PA, graduated from North Carolina State University with a BA degree in Political Science (with honors) in 1974. He earned his law degree from Loyola University – New Orleans in 1978 and a Master of Law (Labor) degree from Georgetown University Law School in 1993.



Construction Safety Summit


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Avoid this . . .



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... and this!



But you don't want this approach either!




Safety And Health In The 21st Century

Having great safety and health is important because ...

- 1) it is morally the right thing.
- 2) it allows your employees to go home each night safely to their family and loved ones.
- 3) it keeps you from having to do the worst job any person would possibly have to do.
- 4) it is the law.
- 5) it is essential for a company to be profitable and competitive in today's marketplace.



SAFETY, HEALTH AND OSHA IN 2010 AND BEYOND




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“If your attack is going too well,
you’re walking into an ambush.”

~ U.S. Army Infantry Journal



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WHAT'S CHANGING?

Almost everything . . .

- New administration and direction
- New legislation
- New enforcement focus
- Major new directives not requiring rulemaking
- New penalty directives
- Less cooperation
- More rulemaking




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THE ADMINISTRATION'S OWN DESCRIPTION OF ITS FOCUS

Secretary of Labor Hilda Solis:
 "Let me be clear, the Labor Department is back in the enforcement business."
April 28, 2009 "Workers Memorial Day" Speech

Assistant Secretary of Labor David Michaels:
 "There is a new sheriff in town . . . this is not an abstract wish . . . it is a stern description of how OSHA is now working . . . and I take this phrase seriously."
March 10, 2010, ABA




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THE PROOF IS IN THE PENALTIES

1. BP Products North America, Inc. (TX) - \$87 million
2. CES Environmental Services, Inc. (TX) – \$1.4 million
3. Cambridge Contracting, Inc. (NY) - \$484,000 – Nov.
4. U.S. Minerals (IN) - \$466,400
5. Endres Processing Ohio, LLC (OH) - \$473,000
6. Mar-Jac Poultry, Inc. (GA) - \$379,800
7. Sims Bark Co & Sims Stone Co. (GA & AL) – \$576,000
8. Tempel Grain Elevators, LLC (CO) - \$\$1.59 million
9. Excelsior Brass Works (PA) - \$550,400
10. Cranesville Aggregate Co. (NY) - \$509,000
11. Loren Cook Co. (MO) - \$511,000
12. Goodman Mfg. Co. (TX) - \$1.215 million
13. C.A. Franc (PA) - \$539,000 and criminal referral
14. A-1 Excavating (W) - \$861,000




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14. Whitesell Corp. (AL) - \$3,071 million
15. All-Feed Processing & Packaging, Inc. (IL) - \$518,520
16. A-1 Excavating (WI) - \$861,000
17. Cambria Contracting, Inc. (NY) - \$484,000
18. E. N. Range, Inc. (FL) - \$2.099 million
19. New Place Carpentry (CT) - \$308,500
20. Cooperative Plus (WI) - \$721,000
21. Heberle Disposal Service, Inc. (NY) - \$304,200
22. Cranesville Aggregate Co. (NY) - \$509,000 – Nov.
23. New Jersey Transit (NJ) - \$500,000 – April
24. BP-Husky Refinery (OH) - \$3,042 million
25. South Dakota Wheat Growers ((SD) - \$1.6 million



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OSHA And The Congress

Robert C. Byrd Mine & Workplace Safety & Health Act

- Takes provision from Protecting America's Workers Act
- Adds enhanced whistleblower protections
 - Expands areas of prohibited retaliation
 - Extends statute of limitations to 180 days
 - Sets time limits for investigation – 90 days from filing complaint
- Provides for hearing and appeal
- Settlement – public policy considerations
- Personal right of action – U.S. District Court
- Relief



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OSHA And The Congress

Robert C. Byrd Mine & Workplace Safety & Health Act

- Victims rights
- Abatement during contest
- Civil penalties increase
- Criminal penalties increase



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OSHA In The Obama Administration

	<u>FY 2008</u>	<u>FY 2009</u>	<u>FY 2010</u>
Funding	\$494,641,000	\$513,042,000	\$563,620,000
FTE	2,097	2,147	2,328

	<u>FY 2011 (Proposed)</u>
Funding	\$573,096,000
FTE	2,368



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OSHA In The Obama Administration



- More inspections
- More citations and increased penalties
- Review of Field Office Manual and "OSHA Listens"
- Less OSHA informal complaints
- Less willingness to negotiate as to penalties, classification, abatement methods or vacation of citation
- More difficulty in obtaining settlements and, as a result, more contests
- More national, regional and local emphasis inspection programs

I.e. – Process Safety Management Refineries & Chemical Plants, Cranes and Derricks, Recordkeeping, Trenching, Chromium VI (Hexavalent Chromium)



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OSHA In The Obama Administration

- Attempted dilution or elimination of unpreventable employee misconduct defense
- More focus on possible criminal referrals or collaboration with EPA and other agencies
- Greater use of incident-by-incident (egregious) citation approach
- Increased scrutiny of employer injury and illness recordkeeping and reporting.



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OSHA In The Obama Administration

- Increased scrutiny of employers' recordkeeping safety program focusing on reward for low injury and illness rates and less credit to employers with low rates
- Increase in ergonomic general duty citations until new ergo standard completed
- Movement away from OSHA compliance assistance which will impact VPP, alliances and partnerships



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OSHA In The Obama Administration

- Strong increase in focus on investigation and encouragement of whistleblower claims
- Increased use of OSHA in union organizing drives and contract negotiations
- New administrative penalty policy
- Increase in the use of the Severe Violators Enforcement Program (SVEP)



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OSHA In The Obama Administration

New administrative penalty policy

- Memorandum to all Regional Administrators and State Designees
- Start date: All inspections starting on October 1, 2010
- Change in OSHA inspection history reduction
- Change in repeat violations scope
- Severe Violators Enforcement Program – high gravity, serious violation no longer grouped



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OSHA In The Obama Administration

New administrative penalty policy (cont'd)

- Increase proposed minimum penalties
- Administrative modification to penalty calculation policy
- State plan implications
- Conclusion: anticipated that average penalty for serious violation to increase from \$1,000 to an average of \$3,000 - \$4,000




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Severe Violators Enforcement Program

- The following circumstances will be reviewed as a possible SVEP case:
 - Fatality or catastrophe situation
 - Industry operations or processes that expose employees to the most severe occupational hazards and those identified as “High-Emphasis Hazards”
 - Exposing employees to hazards related to the potential release of a highly hazardous chemical
 - All egregious enforcement actions.




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Severe Violators Enforcement Program

- The SVEP also includes the following action elements for employers who meet the SVEP criteria:
 - Enhanced follow-up inspections
 - Nationwide referrals, which will include State Plan states
 - Increased company awareness, which will include issuing news releases
 - Enhanced settlement provisions
 - Increased use of Federal court enforcement action (contempt of court) under Sec. 11(b) of the OSH Act




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OSHA In The Obama Administration

Increased rulemaking/regulations – 2010 Spring Agenda, 29 Items

1. Cranes and derricks – final rule 7/10
2. Global harmonization of chemicals – comment period ends 6/10
3. Combustible dust – initiate SBREFA 4/11
4. Walking and working surfaces – second NPRM 5/10
5. Electrical/PPE – final rule 2/11
6. Silica and beryllium – NPRM 2/11; complete peer review 11/10
7. Confined spaces in construction – analyze comments 10/10
8. Hexavalent chromium – final rule 6/10
9. Working conditions/shipyards – final rule 11/10
10. Recordkeeping (exempt industries SIC) – NPRM 11/10
11. Recordkeeping – MSDs – final action 7/10
12. Injury and illness prevention program – stakeholder meeting 6/10



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GUIDELINES FOR RESPONDING TO LEGAL CHANGES

- Many labor & employment law changes are related.
- Regulators, unions, and plaintiff counsel will increasing focus on multiple exposure areas.
- Determine the underlying processes and procedures affected and address those.
- Use safety/OSHA compliance as your “driver.”



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OVERALL STRATEGY

- Consider other HR and legal areas each time you address safety, such as ADA, FMLA, wage-hour or labor.
- Use self-audits, and teach every supervisor the concept of “self-auditing” their own area.
- All safety efforts require self-inspections, procedures/job safety analysis, employee training, and supervisory oversight – apply this framework to other challenges.
- Use supervisor safety training to develop broad management, labor, and HR skills.



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1. DETERMINE YOUR VULNERABILITY UNDER OSHA'S NEW PRIORITIES

- First determine which OSHA safety and health standards are applicable to your operation
- Find your NAICS or SIC classification, which may determine which of OSHA's 140+ emphasis efforts affect you, and comply with the requirements of those national and local emphasis programs
- Ensure that your facility is prepared to handle an OSHA inspection and your managers know their legal rights



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2. AUDIT YOUR COMPANY'S OSHA RECORDKEEPING

- Recordkeeping is one of the cornerstones of your safety program and a driver of OSHA's new enforcement efforts
- OSHA National Emphasis Program (NEP) of Recordkeeping Audits
- OSHA has instructed compliance officers to carefully review the OSHA 300 logs when conducting inspections
- Audit and correct last five years of logs, looking at insurance and other records, as OSHA might do, and also look for "patterns" of injuries –OSHA will also!



3. AUDIT YOUR WORKPLACE FOR ROUTINE VIOLATIONS

- OSHA is looking for the "low-hanging fruit" or more common safety and health violations such as:
 - Blocked exits and electric panels
 - Improper materials handling and racks
 - Personal protective equipment violations
 - Recordkeeping errors
 - Housekeeping problems
- Routine violations are challenging to prevent and may result in multiple repeat citations for employers with many locations




3. AUDIT YOUR WORKPLACE FOR ROUTINE VIOLATIONS

- OSHA's focus on routine items and use of its "egregious" policy is generating six- and seven-figure penalties
- Proposed penalty calculation is intended to raise average penalty 300%
- Multi-location employers especially at risk



4. REVIEW ABATEMENT OF ALL PAST OSHA CITATIONS


- Prepare for OSHA's proposed change to consider past citations for last five (5) years, not current three (3) years, in issuing "repeat" citations
- OSHA may cite for "failure to abate" if past abatements of items that are again out of compliance cannot be documented

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5. PREPARE FOR OSHA'S REVISED APPROACH TO ERGONOMICS ENFORCEMENT


- OSHA has proposed adding musculoskeletal disorders (MSDs) to 300 logs which, as broadly defined, may include 75% of workplace injuries
- OSHA current utilizes General Duty clause to issue ergonomic citations and intends to more widely use General Duty citations
- OSHA may use recordkeeping audits or comprehensive safety program demands to address MSDs.

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6. USE JOB SAFETY ANALYSIS TO FOCUS WORKPLACE SAFETY & HEALTH STRATEGY

- OSHA has proposed development of a Standard requiring a comprehensive safety management program
 - Would require employers to determine all hazards and develop procedures and training
 - Would cite employer for failure to do so
- Use your job safety analysis (JSA) to focus increased training, supervisor involvement and safety oversight

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7. MAKE SAFETY THE #1 GOAL FROM THE WORK FLOOR TO THE “C” SUITE

- Develop a comprehensive safety and health management system which includes management commitment and employee involvement
- An employer can genuinely change safety and health culture but the effort requires more than good intentions and a written plan
- Safety efforts tie in with maintaining company culture and harmonious labor relations.
- Under the PAW, executives will have a vested interest in safety.



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8. UTILIZE SAFETY AS A PROFIT CENTER

- A well-planned safety & health management program can:
 - Reduce workers’ comp claims
 - Become a “profit center” for the company
- Connect safety to quality
 - Combine with “green” and similar efforts as marketing tools
 - Increase employee involvement and satisfaction



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9. DEVELOP EMERGENCY ACTION PLANS TO DEAL WITH THE INEVITABLE

- Maintain emergency action/response plans focusing on natural disasters, pandemics, and man-made disasters, with enhanced emphasis on:
 - Evacuation plans
 - Exit and egress compliance
 - Training
- OSHA is especially emphasizing exit and evacuation planning in citations
- Plans should also consider “non-safety” issues, such as business continuation, management of leaves/benefits, remote work and wage-hour compliance



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10. PROTECT COMPANY'S WELLNESS PLAN FROM POTENTIAL LIABILITY

- A wellness plan offering more than just smoking cessation benefits is essential for dealing with an increasingly older and heavier workforce
- Wellness plans can be effectively and lawfully managed, even with new employment regulations including GINA and the ADAAA
- Make insurance culturally focused

11. UNDERSTAND IMPLICATIONS OF OSHA'S MULTI-EMPLOYER CITATION POLICY

- Recognize and respond to how contractors, customers, and vendors can expose you to OSHA violations or harm your employees, including employees working away from your site.

12. AVOID MEMBERSHIP IN OSHA'S SEVERE VIOLATORS ENFORCEMENT PROGRAM

- Consider how to avoid "membership" in the current EEP, the new SVEP and other programs which may target all or some of a company's facilities for increased inspections and scrutiny.

13. SOLVE OTHER PROBLEMS BY SOLVING SAFETY PROBLEMS

- Showing employees you care and involving them in safety management can prevent a multitude of legal problems.
- For example, surveys have shown that if safety is the primary issue in union organizing drives, the union success rate in those drives is approximately 68%, the highest for any issue.



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13. SOLVE OTHER PROBLEMS BY SOLVING SAFETY PROBLEMS

- Use necessary increased safety efforts to create a workplace in which employees do not experience issues which often spawn lawsuits, union organizing or conflict in an already unionized setting.
- Use training and audits to correct wide range of legal and HR vulnerability, including wage-hour and other problems. As an example, OSHA has budgeted money to train their compliance officers to determine if alleged independent contractors are, in fact, employees.
- The DOL's "Plan/Protect/Prevent" strategy is based on this approach.



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“A man who wants to lead an orchestra must turn his back on the crowd.”

~ Max Lucado



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“If I seem unduly clear to you,
you must have misunderstood what I said.

~ Alan Greenspan – Former Fed Chairman



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Final Questions?

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BE SAFE!



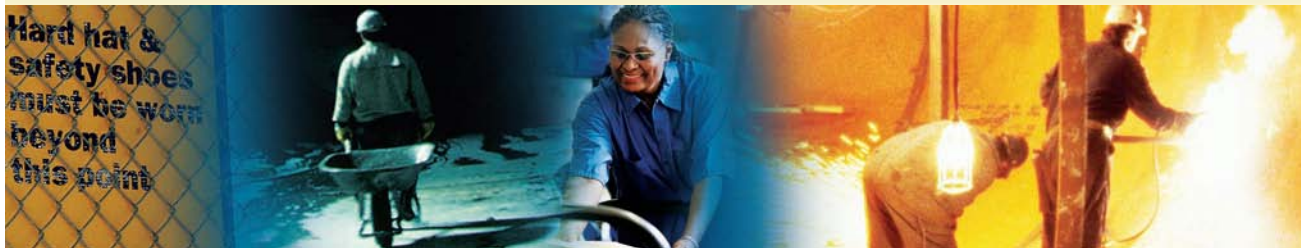
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Thirteen Strategies Every Employer Should Implement To Improve Safety, Reduce OSHA Penalty Exposure, And Improve Company Profits While Protecting Its Reputation/Brand

1. **Determine Your Vulnerability Under OSHA's New Priorities:** First determine which OSHA safety and health standards are applicable to your operation. Then, find your SIC classification, which may determine which of OSHA's 140+ emphasis efforts affect you, and comply with the requirements of those national and local emphasis programs. Finally, ensure that your facility is prepared to handle an OSHA inspection and that your managers know their legal rights during and after an inspection.
2. **Audit Your Company's OSHA Recordkeeping, Especially Form 300 Injury & Illness Logs:** Recordkeeping is one of the cornerstones of your safety program and a driver of OSHA's new enforcement efforts. In addition to its National Emphasis Program (NEP) on Recordkeeping Audits, OSHA has instructed its compliance officers to more fully review every Company's OSHA 300 Logs when conducting any inspection. An employer can expect a full-blown OSHA safety or recordkeeping audit if there are deficiencies in the logs. Audit and correct your last five years of logs, looking at insurance, first aid and other records, as OSHA might do, and look for "patterns" of injuries – which OSHA will also do!
3. **Audit Your Workplace For Routine Violations:** OSHA is looking for the "low-hanging fruit" or more-common safety and health violations, such as: blocked exits and electric panels; improper materials handling and racks; personal protective equipment violations; recordkeeping errors; housekeeping problems; etc. These routine violations are challenging to prevent. In the case of an employer with many locations, past violations will result in repeat citations. OSHA's focus on such routine items, as well as use of its "egregious" policy, is generating six- and seven-figure penalties. OSHA's proposed penalty calculation guidance is intended to raise the average penalty approximately 300%, and does not count the effects of the *Protecting American Workers Act*, if passed. Multi-location employers are especially at risk, and only improved and consistently enforced safety rules, self-audits, and supervisor accountability will reduce exposure.
4. **Review Abatement Of All Past OSHA Citations:** Prepare for OSHA's proposed change to consider past citations for the *last five (5)* years, not the current three (3) years, in issuing "repeat" citations. Also, OSHA may cite for "failure-to-abate" if you cannot document past abatements of items again out of compliance.
5. **Prepare For OSHA's Revised Approach To Ergonomics Enforcement:** OSHA will require an additional column to 300 Logs specifically for musculoskeletal disorders (MSD's), which as broadly defined may include 75% of your workplace injuries. OSHA is currently utilizing the General Duty clause to issue ergonomic citations and has announced its intention to more widely use these General Duty citations. The addition of a new column for musculoskeletal disorders may be used by OSHA to develop data to move forward with a possible ergonomics standard as well as additional ergonomic enforcement efforts and to highlight your facility's ergonomic problem areas.

6. **Use Job Safety Analysis (JSA) And Related Efforts To Focus Your Overall Workplace Safety And Health Strategy:** OSHA has proposed development of a standard requiring a comprehensive safety management program. This standard would require employers to determine all hazards, and (even if there is not an applicable OSHA standard) to develop procedures and training – and OSHA would cite employers for failure to do so. Use JSA development to increase focus on your training, supervisor involvement, and safety oversight.
7. **Turning Good Intentions Into A Workable Plan To Make Safety The #1 Goal From The Work Floor To The “C” Suite:** By developing a comprehensive safety and health management system which includes management commitment and all employee involvement, a company can genuinely change its safety and health culture; however, this effort requires more than a written plan.
8. **In Lean Times Utilize Safety As A Profit Center For Your Company:** Beyond reducing workers’ comp claims, a comprehensive safety and health management programs can become a “profit center” for a company, allowing it to be more competitive in the local, national or global marketplace. Connect safety to productivity and quality; use it along with “green” and similar efforts as a marketing tool, and as a way to increase employee involvement and satisfaction.
9. **Develop Your Company’s Emergency Action And Related Plans To Deal With The Inevitable:** Companies must maintain emergency action or emergency response plans which focus on natural disasters, including pandemics and Katrina-like events, as well as man-made disasters. These plans should tie in with an enhanced emphasis on evacuation plans, exit and egress compliance, training, and EAP/ERP and related plans. 2009’s pandemic planning showed many gaps in employers’ planning. OSHA is especially inspecting exit and evacuation planning for citations. Your plans should consider “non-safety” issues, such as business continuation, management of leaves and benefits, remote work and wage-hour compliance, etc.
10. **Improve Your Company’s Wellness Plan And Protect It From Potential Liability:** A Wellness Plan offering more than just smoking cessation benefits is essential for dealing with an increasingly older and heavier workforce. Although new employment regulations including GINA and the ADA have increased the pitfalls associated with wellness programs, they can be effectively and lawfully managed.
11. **Understand The Implications Of OSHA’s Multi-Employer Citation Policy:** Recognize and respond to how contractors, customers, and vendors can expose you to OSHA violations or harm your employees, including employees working away from your site.
12. **Avoid Membership In OSHA’s Severe Violators Enforcement Program (SVEP) And Similar Efforts:** Consider how to avoid “membership” in the current EEP, the new SVEP, and other enforcement programs which may target all or some of a company’s facilities for increased inspections and scrutiny.
13. **Solve Other Problems By Solving Safety Problems:** Showing employees you care, and involving them in safety management, can prevent a multitude of legal problems. As an example, surveys have shown that, if safety is the primary issue in union organizing drives, the union success rate in those drives is approximately 67%, the highest for any issue. Not surprisingly, safety may be a very public and embarrassing issue during labor disputes. Use increased safety efforts to create a workplace where employees do not experience the issues which often spawn lawsuits, union organizing, or conflict in an already unionized setting. Use training and audits to correct a wide range of legal and HR vulnerability, including wage-hour and other problems. As an example, money has been budgeted to train OSHA compliance officers to determine if alleged independent contractors are, in fact, employees.

Fisher & Phillips is ready to assist you in implementing each of these action plan items to improve your safety program, to increase your productivity and quality while at the same time protecting your Company’s brand/reputation as well as assisting you to effectively deal with an enforcement-focused OSHA.

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LEGAL ALERT

OSHA Issues Memorandum Announcing “Administrative Enhancements” to OSHA’s Penalty Policies to Dramatically Increase Employers’ Fines

On September 29, 2010, the Occupational Safety and Health Administration (OSHA) took the next step in its 22-month effort to increase penalties and more vigorously enforce the OSH Act. OSHA head Dr. David Michaels sent to all of OSHA’s Regional Administrators and the State Plan Administrators a memorandum outlining the deployment of the new Administrative Penalty. Effective October 1, 2010, all OSHA Area offices are directed to utilize the new penalty policy and the associated calculation system.

Inspections opened prior to October 1 that reveal violations will lead to citations and penalties under the old penalty policy. However, employers can expect to see an informal influence from the new policy as they have witnessed in many recent citations. This “interim penalty policy” will remain in effect until OSHA is able to incorporate these changes into its Field Operations Manual. This comes on the heels of the Department of Labor Inspector General’s report critical of the way OSHA handles penalty reductions in settlement negotiations. On a practical level, employers can expect to find that Area Offices have less discretion with regard to issuing citations and penalties, and will be less able and more reluctant to make reductions at Informal Conferences.

Under the new policy, the time period for considering an employer’s past history of OSHA violations for purposes of determining a “repeat” violation and for determining penalty increases and reductions is expanded from three to five years. An employer who has been inspected by OSHA within the last five years and has no serious, willful, repeat or failure-to-abate violations will receive a 10% reduction in its penalty. However, where an employer has been cited by OSHA for a high-gravity, serious, willful, repeat or failure-to-abate violation within the previous five years, OSHA will increase penalties by 10% up to the statutory maximum. Those employers who have not been inspected or who have received a citation for serious violations that were not high-gravity will not receive either a reduction or an increase based on past inspection history.

The new policy also notes that, at the discretion of the Area Director, high-gravity, serious violations relating to Standards that have been identified under OSHA’s new Severe Violators Enforcement



Program (“SVEP”) will no longer need to be grouped or combined but can be cited as separate violations with their own individual penalties. The new penalty policy also requires the Area Director to consider the adequacy of the proposed penalty when dealing with individual violations for hazards identified under the SVEP, and the Area Director is given the authority to limit adjustments for good-faith, history or size of the employer when the Area Director considers it necessary to achieve the “appropriate deterrent effect” by increasing the penalty.

Other procedural changes which may affect penalty amounts include the use of a gravity-based penalty determination where the penalties will be between \$3,000 and \$7,000. With respect to employer size, employers with 251 or more employees would not receive any penalty reduction for size. The memorandum also notes that the good-faith procedures in OSHA’s Field Office Manual were being retained. However, employers must have a safety and health program in place in order to get any good-faith reduction, and no good-faith reduction would be allowed in cases involving high-gravity, serious, willful, repeat or failure-to-abate violations. The 15% “quick fix”

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reduction under the old policy allowing for an abatement incentive program to encourage employers to immediately abate hazards during inspection was retained. However, the 10% penalty reduction for employers with a strategic partnership agreement with OSHA has been eliminated.

Next to the increase in the period-for-repeat calculation, the provision which will have the greatest impact on employers is that section modifying the current penalty calculation policy. Under the old policy, all of the penalty reductions for history, good-faith, “quick fix,” and size were added together and the total percentage was applied to the gravity-based penalty to arrive at the proposed penalty. Under the new penalty policy, the penalty adjustment factors will be applied “serially” in the order of history, good-faith, “quick fix,” and size. The example included in the memorandum showed that using the “serial” versus the sum calculation will automatically result in a higher penalty against an employer.

What about the State-OSHA Plans?

The memorandum noted that OSHA had communicated with the State Plan states regarding its expectations and the legal requirement to be “as least as effective” as Federal OSHA in penalty calculation policies. The State Plan OSHAs, through their Association, have objected to being required to utilize OSHA’s new penalty policy. The memorandum states that there will be further discussion with the state plans on this issue. However, a number of State Plans have also indicated that they will follow the policy. OSHA has also made it clear, by its September release

of harsh evaluations of State Plan agencies and its recent opening of additional offices in State Plan states, that it intends that these agencies increasingly follow its lead.

The Assistant Secretary’s memorandum concludes by noting that the changes in the new penalty policy increase the average penalty for a serious violation from approximately \$1,000 to an average of \$3,000 to \$4,000. The Memorandum does not belabor that the cumulative impact of these changes in calculation formulas, coupled with the longer Repeat period and a greater willingness to use Willful citations will exponentially increase many penalties.

What should employers do?

1. Carefully audit your safety and health management program and make improvements discussed in our other Alerts and presentations.
2. Review your current procedure for handling OSHA and other government inspections to recognize new enforcement strategies.
3. Prepare for more difficult negotiations after receipt of citations and be willing to contest and try citations when you have a reasonable case.

For more information visit our website at www.laborlawyers.com or contact your regular Fisher & Phillips attorney, or any of the lawyers in our [Workplace Safety and Catastrophe Management Practice Group](#).

This Legal Alert provided general information only. It is not intended to be, and should not be construed as, legal advice concerning any particular fact situation.

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OSHA Inspection Checklist

A. Prior to Inspection

- Display the official OSHA poster where notices to employees are customarily posted.
- Obtain upper management commitment to workplace safety and display commitment statement.
- Conduct internal or external safety audit and hazard assessment of the facility to spot and correct apparent safety and health hazards. It is important that hazards identified are addressed or corrected in a timely manner.
- Ensure that a management official has been assigned responsibility for safety and health compliance and for dealing with employees, OSHA, and other individuals on the subject of workplace safety and health.
- Determine which OSHA standards and regulations apply to the facility and ensure that all required written programs, plans, training and recordkeeping are complete and updated on an annual basis. Insure that the facility's personal protective equipment hazard assessment has been completed.
- Train designated management personnel on how to properly handle and respond to an OSHA inspection, as well as approaches by law enforcement officials, building or fire inspectors, and inspectors from other safety regulators.
- Determine the company policy on requiring OSHA to have a warrant prior to allowing an inspection to be conducted.
- Foster employee participation in safety and health management and instill commitment in employees to safe work practices.
- Establish a crisis management team to deal with catastrophic occurrences, fatalities, and OSHA-related publicity.



- Ensure that injuries and illnesses are properly recorded and supporting documentation is available.
- Ensure that Hazard Communication Plan, MSDS's, and related materials are available.
- Notify OSHA within eight (8) hours if a fatality occurs or more than three (3) employees are hospitalized for the same incident. Where fatality or hospitalization occurs, consult with the company's OSHA counsel to determine what investigation should be conducted and what accident reports need to be prepared.
- Provide appropriate equipment, i.e. camera, video, monitoring, etc., for conducting OSHA inspections.
- Review previous OSHA citations and ensure abatement has been completed and hazards cited have not reoccurred.
- Ensure coordination between all employers on a multi-employer site.

B. Conducting the Inspection

1. Initial Contact and Opening Conference

- Refer the OSHA compliance officer arriving on the premises to the company's designated safety officer.
- No employees, other than the facility manager and /or the designated management safety officer, should communicate with the OSHA compliance officer prior to the opening conference.
- The safety officer should review the compliance officer's credentials as well as obtain his or her business card with an address and phone number to ensure that the compliance officer is on an official inspection.
- Determine from the compliance officer the purpose, scope, and the circumstances of the visit to the facility. If the inspection is based on a complaint, obtain a copy of the complaint.
- Determine if the compliance officer has a warrant to conduct the inspection. If yes, find out the scope of the warrant.
- Notify the company's OSHA counsel. This should be done prior to the opening conference in order to receive any instructions or to raise some defense or objection.
- Notify the designated employees' representative (if applicable) of OSHA's presence.



- Have an opening conference with the OSHA compliance officer to establish:
 - the focus areas of the inspection;
 - the scope and route of the walk-around inspection;
 - the designated trade-secret areas or processes;
 - the procedure for conducting employee interviews and producing documents;
 - the schedule of interviews;
 - the documents for review by OSHA;
 - the procedure for requesting copies of any employee complaints; and
 - the facility's rules and procedures OSHA will be expected to follow.
- Conduct all necessary safety and health advising/training of OSHA compliance officers prior to access to restricted areas. Ensure that the OSHA compliance officer wears all necessary personal protective equipment and follow all company safety and health policies.

2. Walk-Around Inspection

- A designated safety officer or manager should stay with each OSHA compliance officer at all times during the inspection except during hourly employee interviews.
- The designated safety officer should take detailed notes, including date(s) of inspection, areas inspected, items discussed and employees interviewed.
- If compliance officer deviates from area(s) covered by complaint then company safety officer should inquire as for the reason for the deviation.
- When appropriate, photographs should be taken of areas inspected by the OSHA compliance officer as well as all items photographed by the compliance officer. Video also should be utilized, if used by the compliance officer.
- The designated safety officer should immediately have corrected any alleged violations identified by the compliance officer to the extent possible, but should not acknowledge that a citation is appropriate.



- No management or supervisory employee should give information or make statements to the compliance officer without approval from the designated safety officer or the company's OSHA counsel.
- All work rules and safety procedures should be enforced and applicable to the compliance officer and walk-around team during the inspection.
- The compliance officer should be asked to put all requests for company information and/or documents in writing.
- The company's OSHA counsel should review all requests for documents and information as well as all information and documents provided.
- Document all samples or monitoring test taken by the OSHA compliance officer and request copies of all sampling and monitoring results as well as all photographs and videos taken. The company should request the OSHA compliance officer to schedule sampling and monitoring at a time when the company can conduct its own sampling and monitoring.
- Request copies of all OSHA sample and monitoring reports from the compliance officer.

3. Closing Conference

- Primarily listen to the Compliance Officer's proposal, and do not argue or debate the initial proposed findings.
- Remind the compliance officer of the scope of the inspection as stated in the opening conference.
- If directed by OSHA counsel, provide additional information and documentation relevant and supportive of the company's position as well as any information which shows abatement of any alleged violation.
- Obtain from the OSHA compliance officer an acknowledgment of receipt of the documents provided.
- Take detailed notes on the alleged hazards identified and the problem areas indicated by the compliance officer along with the applicable standards and suggested abatement procedures.
- Provide the OSHA compliance officer with the name, title, full address, and phone and fax numbers of the person to whom all OSHA correspondence should be directed.



C. After the Inspection

- Try to obtain all sample and monitoring reports from OSHA.
- Review all areas noted by the compliance officer and make appropriate abatement.
- Provide the company's OSHA counsel with copies of all of the documents provided to OSHA and all of the notes, photographs, videos, etc., taken during the inspection.
- The company's OSHA counsel should make a written request to OSHA to ensure that all trade secrets and proprietary information disclosed during the inspection are kept confidential.
- If facility is issued citations by OSHA, the following should be done:
 - Post the citation (with penalty amounts deleted -Note: in state plan states need to check rule on posting requirements) in the area where employee notices normally are posted.
 - Immediately notify the company's OSHA counsel about the citation and send a copy of the citation to them.
 - With the advice of counsel, schedule an informal conference with OSHA.
 - Post Notice to Employees of informal hearing.
 - Where an agreement cannot be obtained quickly, employer must file a Notice of Contest within fifteen (15) working days of the employer's receipt of citations. Some state plan states maintain different procedures. An employer who misses a contest deadlines cannot typically get an extension or overcome the default.



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