



**Tuesday, October 20**  
**11:00 am–12:30 pm**

## **206 No Crystal Ball Needed: Change is Certain at OSHA**

**Cynthia Boeh**  
*Associate General Counsel*  
Dresser, Inc.

**Scott Clearwater**  
*Associate General Counsel Environmental Affairs*  
Hess Corporation

**Neil Wasser**  
*Managing Partner*  
Constangy, Brooks & Smith LLP

## Faculty Biographies

### **Cynthia Boeh**

Associate General Counsel  
Dresser, Inc.

### **Scott Clearwater**

Scott Clearwater is currently the associate general counsel, environmental affairs, for Hess Corporation. Mr. Clearwater handles a wide variety of environmental, health and safety issues for Hess's global marketing and refining and exploration and production operations. In that role, Mr. Clearwater assists clients on environmental health and safety auditing issues, process safety management, OSHA compliance, transactional issues, remediation, and environmental health and safety litigation.

Mr. Clearwater has previously worked as in-house counsel and EHS Director at Engelhard Corporation, in-house counsel at Mobil Oil Corporation, and as an associate at Winston & Strawn.

Mr. Clearwater has a bachelor's from the University of Rochester and a JD from The College of William & Mary.

### **Neil Wasser**

Neil H. Wasser is a managing partner and chairman of the executive committee of Constangy, Brooks & Smith, LLP, a law firm representing management, exclusively, in labor and employment matters since 1946. He is based out of the firm's Atlanta office, one of 19 offices across thirteen states. Mr. Wasser specializes in assisting companies with OSHA compliance obligations and establishing safety and health programs, and he is widely recognized as a top national speaker on safety and health topics.

He is a member of the Georgia Bar Association, Atlanta Bar Association, and the ABA and also serves on the Board of Directors at the Atlanta Humane Society.

Mr. Wasser earned his undergraduate degree from Tulane University of Louisiana and his JD from the University of Georgia.

### **Gregory Watchman**

Gregory R. Watchman is associate general counsel for employment law at Freddie Mac in Tyson's Corner, Virginia.

Previously, Mr. Watchman served as acting assistant secretary of labor and deputy assistant secretary of labor at the US Department of Labor, Occupational Safety and Health Administration. In addition, he served as labor counsel to the labor committees in

the US Senate and House of Representatives, working on a broad range of employment and labor law legislation, including the Civil Rights Act of 1991, the Family & Medical Leave Act of 1993, and the Older Workers Benefits Protection Act. Mr. Watchman also has experience counseling employers on employment law issues, with the national firms Paul Hastings and Morgan Lewis.

Mr. Watchman presently serves ACC as chair of the Employment & Labor Law Committee. Mr. Watchman is a past recipient of the ACC's Jonathan S. Silber Award as Outstanding Committee Member of the Year.

Mr. Watchman received his law degree from Cornell Law School and is a graduate of Williams College.



## New Players – What Are Their Plans?

- February 24, 2009 - Hilda Solis (D-CA) confirmed as the new Secretary of Labor.
- April 13, 2009 - Jordan Barab joined OSHA as Deputy Assistant Secretary and as Acting Assistant Secretary for OSHA.
- August 6, 2009 – President Obama nominated David Michaels to become the next head of OSHA.

Get to know your OSHA Area Office.

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## Anticipated Areas of Agency Focus

- Increased Agency Budget for More Compliance Officers/More Inspections.
- Greater Penalties for Non-Compliance.
- Enhancements to Enhanced Enforcement Program.
- Refocus on a Safety and Health Management Program Standard. Standards Development.
- Cooperative Programs – De-emphasized.
- VPP Scrutinized.
- OSHA Reform Legislation.

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## Penalties, Penalties, Penalties

- OSHA could take advantage of existing penalty provisions in the Act and raise penalties: Section 17 of the OSH Act:
  - “(a) Any employer who willfully or repeatedly violates . . . any standard . . . may be assessed a civil penalty of not more than \$70,000 . . . but not less than \$5,000 for each willful violation. (b) Any employer who has received a citation for a serious violation . . . of any standard . . . shall be assessed a civil penalty of up to \$7,000 for each such violation.”
- Proposed OSHA Reform Legislation would increase OSHA penalties. For example, the proposed legislation would raise the maximum penalty for willful and repeat violations from \$70,000 to \$120,000.
- Section 17 – unclassified violations.  
How effective are your Company’s internal complaint mechanisms?

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## Per Employee Violations

- Effective January 12, 2009, OSHA issued a “clarification” stating that the Agency’s “position is that a separate violation occurs for each employee who is not provided required PPE or training, and that a separate citation item and proposed penalty may be issued for each.”

Now is the time to review your Company’s training documentation and PPE.

Higher penalties will mean that fewer cases will be resolved at Informal Conferences.

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## Enhancements to Enhanced Enforcement Program

- March 31, 2009 - Inspector General's Report on EEP: "For 97 percent of sampled EEP qualifying cases, OSHA did not comply with EEP requirements for at least one of the following: designating EEP cases, inspections of related worksites, enhanced follow-up inspections, and enhanced settlement provisions."
- Severe Violators Inspection Program (SVIP) to replace the EEP.

Expect more follow-up inspections, more inspections of other establishments of an identified company, and additional enhanced settlement agreement provisions.

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## Site Specific Targeting – July 20, 2009 Program

- OSHA's primary inspection program for non-construction employers with over 40 employees. 2009 Program is based on the **2007** injury and illness data that was collected by the **2008** Data Initiative.
- Primary Inspection List
  - Manufacturing Establishments with a DART rate at or above 8.0, or a DAFWII case rate at or above 6.0 (approximately 3,100 sites).
  - Non-manufacturing Establishments with a DART rate at or above 15.0, or a DAFWII case rate at or above 13.0 (approximately 500 sites).
  - Nursing and Personal Care Facilities with a DART rate at or above 17.0, or a DAFWII case rate at or above 14.0 (approximately 300 sites). Inspections will focus specifically on ergonomic stressors; exposure to blood and other potentially infectious materials; exposure to tuberculosis; and slips, trips, and falls (approximately 300 sites).
- What About 2008 OSHA Data Survey Non-Responders? A random sample of such establishments will be added to the Inspection List.

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## Site Specific Targeting – Practice Pointers

Determine your rates and prepare.

Consider internal/external audits.

- Attorney-client privilege issues.
- The importance of audit closure.
- What To Do If OSHA Knocks.

Know the most frequently cited standards for your SIC. Take advantage of the OSHA website: <http://www.osha.gov/pls/imis/citedstandard.html>

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## Most Frequently Cited General Industry Standards – Oct. 07- Sept. 08

All Industry		Steel Works, Blast Furnaces (3312)	
1910.1200	Haz Com	1910.147	LOTO
1910.147	LOTO / Energy Control Program	1910.179	Overhead and Gantry Cranes
1910.134	Respiratory Protection	1910.23	Guarding Floor and Wall Openings/Holes
1910.305	Electrical Wiring Methods	1910.219	Mechanical Power Transmission Apparatus
1910.178	Powered Industrial Trucks	1910.1025	Lead

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## OSHA's Current National Emphasis Programs

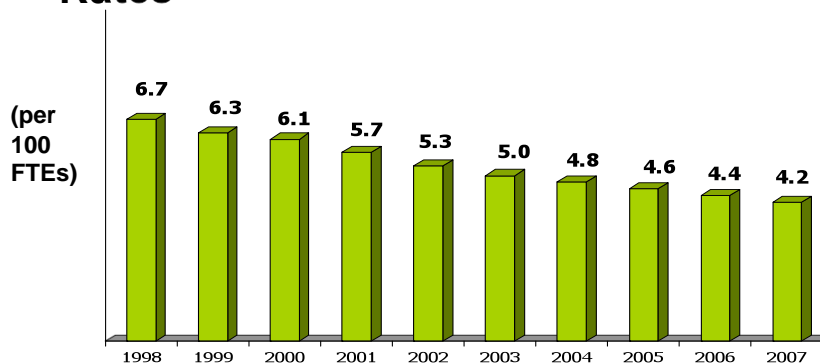
- Shipbuilding
- Amputations
- Lead
- Crystalline Silica
- Combustible Dust
- Petroleum Refinery Process Safety
- Trenching and Evacuation
- Microwave Processing Plants

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## The 10 Year Trend of Injury and Illness Rates



Each year, these rates reflect the lowest levels since the BLS began reporting data. (Issued Oct. 23, 2008.)

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## Focus and Attention On Recordkeeping

- In June, 2008, the former chief of OSHA's recordkeeping division testified before the House Education and Labor Committee that, "I contend that the current OSHA Injury and Illness information is inaccurate, due in part to wide scale underreporting by employers and OSHA's willingness to accept these falsified numbers."
- There are ongoing Congressional and media questions about injury and illness rates.

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## Announced National Emphasis on Recordkeeping

- March 11, 2009 – President Obama signed the Omnibus Appropriations Act: The Congressional explanatory statement provided: "OSHA should use \$1 million of the funds provided . . . for a recordkeeping enforcement initiative on injury and illness reporting, addressing the apparent lack of completeness of the OSHA Log of work-related injuries and illnesses."
- OSHA has stated that it will begin a national emphasis program on recordkeeping in 2009 – focusing on 2007 and 2008 records – e.g., medical files, workers' comp forms, audiograms, absentee reports, incentive programs.

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## Recordkeeping NEP Practice Pointers

There will be more recordkeeping inspections in the coming years.

- Assess the accuracy of your OSHA 300 Logs - compare them to workers' compensation records, any other treatment Logs (medical records, absentee logs, etc).
- Determine recordkeeper training / knowledge.
- Assess the impact of incentive programs on recordkeeping and policies that discourage reporting.
- Ensure that OSHA 301 forms (or comparable workers' comp forms) are maintained.
- Hearing Loss.
- Take advantage of the recordkeeping materials (training programs, interpretations, etc.), on the OSHA website.

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## VPP Scrutiny

- VPP has grown steadily since its inception in 1982. The number worksites in the program has more than doubled from 1,039 sites in 2003 to 2,174 sites in 2008.
- The Government Accountability Office found, in May, 2009:
  - OSHA lacked sufficient internal controls to ensure consistent compliance by the regions in on-site reviews and monitoring injury and illness rates so that only qualified worksites participate in the program.
  - Some sites had safety and health violations related to fatalities, including one site with seven serious violations. As a result, some sites that no longer met the definition of an exemplary worksite remained in the VPP.

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## Protecting America's Workers Act – Introduced in the House on April 23, 2009

- Makes felony charges available for willful violations of OSHA that result in a worker's death (up to 10 years in jail) or serious bodily injury (up to 5 years in jail).
- Updates OSHA penalties for willful and repeat violations raising the maximum penalty from \$70,000 to \$120,000.
- Updates OSHA civil penalties and sets a minimum penalty of \$50,000 and a maximum penalty of \$250,000 for a worker's death caused by a willful violation. (Current max. is \$70,000).
- Allows employees to object to OSHA's withdrawal or modification of a citation, and to contest OSHA's failure to issue a citation or the classification of a citation.
- Prohibits OSHA from designating a citation as an "unclassified citation."

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## OSHA's May 11, 2009 Regulatory Agenda

### Pre-Rule Stage

Crystalline Silica
Beryllium
Methylene Chloride
Diacetyl and Food Flavorings Containing Diacetyl

### Proposed Rule Stage

Confined Spaces in Construction
Electric Power Transmission / Distribution and Protective Equipment
Cranes and Derricks in Construction

April 29, 2009 – OSHA announced that it will issue an ANPR on combustible dust.

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## Ergonomics

- The 2001 Ergonomics Standard, issued during the Clinton Administration, was rescinded by the Congressional Review Act of 1996. Once a rule is rejected under the Congressional Review Act, the Agency cannot re-propose a substantially similar version of the same rule.
- Expect debate and litigation over the definition of “substantially similar.”
- NOTE: The vote in 2001 is the only time that the Congressional Review Act has been invoked.

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## Safety and Health Management Programs

- An important issue for the new administration.
- OSHA issued Voluntary Safety and Health Program Management Guidelines in 1989. Elements.
  - Management commitment and employee involvement.
  - Worksite analysis – to identify existing hazards and conditions which might change and create hazards.
  - Hazard prevention and controls.
  - Safety and health training.

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## Hazard Communication – Global Harmonization

- In 2003, the UN adopted the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). GHS is a system for standardizing the classification and labeling of chemicals. Countries are now adopting the GHS into their national regulatory systems.
- OSHA submitted a Notice of Proposed Rulemaking to adopt GHS to OMB for review and comment.
- If adopted, OSHA's Hazard Communication Standard would be revised to reflect the GHS approach to:
  - defining the health and environmental effects of chemicals;
  - a universal classification process for chemicals based on defined hazard criteria;
  - communication of hazard information and protective measures on labels and Safety Data Sheets.

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## Multi-Employer Citation Policy

- DOL v. Summit Contractors – A 2007 decision by the OSHRC.
- Summit was cited when several employees of one of its subs were working on a scaffold without fall protection. The scaffolds were under the control of the sub and only endangered the sub's employees. Summit argued that it could not be cited simply because as the GC, it was the "controlling employer." The OSHRC agreed.
- **2/26/09, the 8<sup>th</sup> Circuit reversed.** Held that the GC could be cited if they "have the ability to prevent or abate hazardous conditions created by subcontractors through the reasonable exercise of supervisory authority regardless of whether the general contractor created the hazard. . ." or had any of its employees exposed.
- The 8<sup>th</sup> Circuit acknowledged: this "places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite."

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## Safety Bonuses

- Employers who pay non-exempt employees a safety bonus during a designated period must factor the bonus amount into the regular rate of pay for overtime pay calculations for that period.
- This is for non-discretionary safety bonuses paid to non-exempt employees who meet specific requirements set by the employer.
  - See Wage Hour Opinion letter, FLSA 2009-21, 1/16/09.

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## Guns at Work – Armed and Dangerous

- In *Hansen v. Am. Online Inc.*, 96 P.3d 950 (Utah 2004), the Utah Supreme Court upheld an employer's right to terminate employees who had violated its "no guns allowed" policy.
- Following the Utah case, some states began passing legislation allowing residents of the state who lawfully possess a concealed weapon to store it in a locked vehicle in the parking lot of their employers.
  - Georgia, Florida, Oklahoma, Arizona, Kansas, Kentucky, Louisiana, Minnesota, and Mississippi have passed guns at work laws.
- **But Note:** Section 5(a)(1) of the OSH Act requires employers to furnish workplaces that “are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

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## Guns at Work – Part 2

- Oklahoma passed a law imposing criminal penalties on employers who refused to allow employees to store guns in their locked vehicles in company parking lots.
- In 2007, a district court overturned the law finding that it was preempted by OSHA and violated the General Duty Clause which requires employers to protect against “recognized hazards.”
- **On 2/19/09, the 10<sup>th</sup> Circuit reversed** and upheld the state’s right to exercise “broad authority regarding individual rights under the 2<sup>nd</sup> amendment to the U.S. Constitution.”
- Regarding preemption, the Court found that OSHA had expressly declined to promulgate a standard banning firearms in the workplace.
  - See *ConocoPhillips v. Henry*, 10th Circuit Court of Appeals, February 18, 2009 <http://www.ca10.uscourts.gov/opinions/07/07-5166.pdf>

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## Concluding Thoughts

- Prepare now for your next OSHA inspection. What To Do If OSHA Knocks.
- Consider the effectiveness of your Company’s internal complaint mechanisms.
- Safety audits – internal / external - determine whether such audits should be conducted at the request of counsel.
- Review OSHA recordkeeping practices and the process by which close cases are determined.
- Consider additional and / or refresher safety training for supervisory and non-supervisory employees.
- Ensure that PPE is up to date.
- Enforce your company’s safety rules.

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## Supplemental Links

- Acting Assistant Secretary Jordan Barab's April 30, 2009 Presentation Regarding OSHA's Enhanced Enforcement Program to the U.S. House of Representatives Subcommittee on Workforce Protections.
  - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=TESTIMONIES&p\\_id=1004](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=1004)
- VPP Scrutinized – GAO report: **OSHA's Voluntary Protection Programs: Improved Oversight and Controls Would Better Ensure Program Quality** May 20, 2009.
  - <http://www.gao.gov/products/GAO-09-395>
- Congressional Hearing – Are OSHA's Penalties Adequate to Deter Health and Safety Violations? April 28, 2009
  - <http://edlabor.house.gov/hearings/2009/04/are-oshas-penalties-adequate-t.shtml>
- Instance by Instance Penalties for PPE and for Training – December 12, 2008
  - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=FEDERAL\\_REGISTER&p\\_id=21370](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=21370)

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## Supplemental Links - Continued

- March 31, 2009 Inspector General Report - EMPLOYERS WITH REPORTED FATALITIES WERE NOT ALWAYS PROPERLY IDENTIFIED AND INSPECTED UNDER OSHA'S ENHANCED ENFORCEMENT PROGRAM
  - [www.oig.dol.gov/public/reports/oa/2009/02-09-203-10-105.pdf](http://www.oig.dol.gov/public/reports/oa/2009/02-09-203-10-105.pdf)
- OSHA's 2009 Site Specific Targeting Program
  - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=4002](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4002)
- OSHA's May 11, 2009 Regulatory Agenda
  - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=FEDERAL\\_REGISTER&p\\_id=21559](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=21559)
- OSHA issued Voluntary Safety and Health Management Program Guidelines in 1989.
  - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=12909&p\\_table=FEDERAL\\_REGISTER](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=12909&p_table=FEDERAL_REGISTER)
- Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee
  - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=FEDERAL\\_REGISTER&p\\_id=21370](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=21370)

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## Supplemental Links - Continued

- OSHA's National Emphasis Programs
  - Shipbuilding
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=3224&p\\_table=DIRECTIVES](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=3224&p_table=DIRECTIVES)
  - Amputations
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=3469&p\\_table=DIRECTIVES](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=3469&p_table=DIRECTIVES)
  - Lead
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=4031](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4031)
  - Crystalline Silica
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=3790](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3790)
  - Combustible Dust
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=3830](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3830)
  - Petroleum Refinery Process Safety
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=3589](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3589)
  - Trenching and Evacuation
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=1653&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1653&p_text_version=FALSE)
  - Microwave Processing Plants
    - [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=1653&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1653&p_text_version=FALSE)

## Supplemental Links - Continued

- Testimony of Bob Whitmore Before the Committee on Education and Labor House of Representatives Hearing on "Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses." June 19, 2008.
  - <http://edlabor.house.gov/testimony/2008-06-19-BobWhitmore.pdf>
- Committee Report on Underreporting of Workplace Injuries and Illnesses.
  - <http://edlabor.house.gov/publications/20080619WorkplaceInjuriesReport.pdf>
- OSHA Website – Recordkeeping Materials and Guidance
  - <http://www.osha.gov/recordkeeping/index.html>
- DOL v. Summit Contractors, 2/26/09 (8th Cir.)
  - <http://docs.google.com/gview?a=v&q=cache:9D15YW34XigJ:caselaw.findlaw.com/data2/circs/8th/072191p.pdf+summit+contractors+8th+circuit&hl=en&gl=us>

OCTOBER 20, 2009

## MEMORANDUM

**RE: Site-Specific Targeting Plan**

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### OSHA's 2009 Site-Specific Targeting Plan

On July 20, 2009, OSHA announced its new Site-Specific Targeting (SST) Plan for General Industry worksites with 40 or more employees. The SST Plan is OSHA's primary tool for targeting employers with high numbers of serious injuries and illnesses for on-site inspections. This Plan does not apply to Construction worksites or to states with their own state OSHA agency. The 2009 SST Plan is based on employers' OSHA 300 Logs and the OSHA 300A Annual Summary information for calendar year 2007.

This year, for the first time, the SST Plan will have different selection criteria for inclusion on the targeted inspection lists depending on whether an establishment is (1) a manufacturing facility, (2) a non-manufacturing facility, or (3) a nursing or personal care facility.

The **Primary Inspection** lists are based on the following Days Away, Restricted, or Transferred (DART) or Days Away from Work Injury and Illness (DAFWII) rates:

(1) Manufacturing Facilities

DART rate at or above 8.0  
or  
DAFWII rate at or above 6.0

(2) Non-Manufacturing Facilities

DART rate at or above 15.0  
or  
DAFWII rate at or above 13.0

(3) Nursing or Personal Care Facilities (SIC Code 805)

DART rate at or above 17.0  
or

DAFWII rate at or above 14.0

In addition, a random sampling of establishments that failed to provide rate information when asked to do so by OSHA in 2008 will be inspected as part of the 2009 SST inspections.

The **Secondary Inspection** lists are based on the following rates:

(1) Manufacturing Facilities

DART rate  $\geq 6.0$  but  $< 8.0$

or

DAFWII rate  $\geq 4.0$  but  $< 6.0$

(2) Non-Manufacturing Facilities

DART rate  $\geq 6.0$  but  $< 15.0$

or

DAFWII rate  $\geq 4.0$  but  $< 13.0$

(3) Nursing or Personal Care Facilities

DART rate  $\geq 15.0 < 17.0$

or

DAFWII rate  $\geq 11.0$  but  $< 14.0$

It is anticipated that all establishments on an Area Office's Primary Inspection List will be inspected unless:

1. Within 36 months of the creation of the current inspection cycle, an establishment received a comprehensive *safety* inspection (counting from the opening conference date), or a Nursing or Personal Care Facility had an inspection that focused on ergonomic stressors relating to resident handling, exposure to bloodborne pathogens or tuberculosis, and slips, trips, and falls.
2. Approved participants in the Voluntary Protection Programs (VPP) will be deleted from the inspection list.
3. An establishment in the OSHA Consultative Safety and Health Achievement Recognition Program (SHARP) may be deleted from the inspection list for a period of time established by the On-Site Consultation Project and approved by the Regional Administrator.
4. An establishment that is participating in an OSHA Strategic Partnership may be deleted.

Inspections conducted under the 2009 SST Plan will be comprehensive safety inspections. Health inspections under this Plan will be conducted only if a Compliance Officer makes a referral or an Area Director makes such a recommendation based on the prior inspection history of the employer. Nursing and Personal Care facilities will have focused inspections as described in indented paragraph No. 1 above.

The 2009 SST Plan is a 51-page document that can be accessed at:

[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=4002](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4002)

If you have any questions, email us: Bill Principe at [bprincipe@constangy.com](mailto:bprincipe@constangy.com), David Smith at [dsmith@constangy.com](mailto:dsmith@constangy.com), Carla Gunnin Stone at [cstone@constangy.com](mailto:cstone@constangy.com), Pat Tyson at [ptyson@constangy.com](mailto:ptyson@constangy.com), or Neil Wasser at [nwasser@constangy.com](mailto:nwasser@constangy.com). You may also call us at 404-525-8622.

*Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by publications such as Chambers USA, Super Lawyers, and Top One Hundred Labor Attorneys in the United States. More than 100 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Georgia, Florida, South Carolina, North Carolina, Tennessee, Alabama, Virginia, Massachusetts, Missouri, Illinois, Wisconsin, Texas and California. For more information, visit [www.constangy.com](http://www.constangy.com).*

NHW/jec

OCTOBER 20, 2009

## MEMORANDUM

**RE: OSHA Inspection Procedures**

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### **Specific Procedures for an OSHA Inspection**

**1. Purpose**

To establish uniform procedures to coordinate management involvement at every location in the event of an OSHA inspection.

**2. Presentation of Credentials and Opening Conference**

- a. When an individual arrives at a facility and presents credentials as an OSHA Compliance Safety and Health Officer, the Company guard or receptionist should direct or escort the Compliance Officer to an appropriate waiting area. The Compliance Officer should be treated courteously at all times. First impressions by the Compliance Officer often dictate the course of the inspection and the characterization of the citations, if any, that result.
- b. The guard or receptionist should immediately contact the Facility Manager and Safety Manager and notify them of the presence of the Compliance Officer at the facility.
- c. The Facility Manager or Safety Manager should then advise the Corporate Safety Department and the General Counsel's Office that there is an OSHA Compliance Officer at the facility. Under no circumstances should the Compliance Officer be kept waiting more than a brief period of time while these persons are being notified.
- d. The Compliance Officer should then be invited to the Facility Manager's office, or another suitable meeting room, to meet with the Facility Manager and the Safety Manager. If the Compliance Officer does not do so on his own, the Facility Manager or Safety Manager should request that the Compliance Officer present his or her credentials. If there is any question about the Compliance

Officer's credentials, the Facility Manager may wish to contact the OSHA Area Office for verification.

### 3. Opening Conference

a. After the presentation of credentials to the Facility Manager, but before an inspection is actually conducted, the Compliance Officer will conduct an informal opening conference. During the opening conference, the Compliance Officer should explain whether the inspection is being conducted:

- (1) pursuant to a general administrative enforcement plan;
- (2) in response to a specific safety and/or health complaint by an employee or representative of employees (*e.g.*, labor organization);
- (3) in response to a specific referral by a non-employee (*e.g.*, an official of another government agency, a member of the media, etc.);
- (4) in response to a fatality or serious accident; or
- (5) to investigate an employee complaint of employer retaliation against employees for their involvement in safety and health-related activities protected by law (*e.g.*, complaining to company management, OSHA or other government agencies about safety and/or health concerns, refusing to be exposed to an imminent danger of death or serious injury, etc.). OSHA normally begins its investigation of such complaints by providing the employer written notice of the retaliation allegations and requesting that the employer submit a position statement in response. Any on-site visits by OSHA investigators are normally scheduled with employers in advance and usually occur after OSHA has reviewed the employer's position statement. If the OSHA officer has arrived without prior notice to conduct a retaliation investigation, the Facility Manager should consult with the Corporate Safety Director and/or the Director of Human Resources and the General Counsel's Office before allowing the on-site investigation to begin.

The opening conference normally will be held jointly with both the employer and, if the employees are represented, an employee representative in attendance. If employees are not represented, the Compliance Officer will typically conduct the inspection without an employee representative.

b. Generally, the Compliance Officer will explain the purpose of the visit and will outline the scope of the inspection, including the scope of the physical inspection of the facility, the records to be reviewed, and whether management and/or private employee interviews will be conducted.

c. The Compliance Officer will also indicate during the opening conference whether the inspection will be primarily safety oriented or health oriented. If it is primarily a health inspection, the Compliance Officer will probably be an

industrial hygienist, who will likely seek to review the facility's exposure monitoring records and will typically conduct some form of sampling of workplace environmental conditions. To the extent that it is practical and feasible to do so, it is beneficial in such a situation for the facility to take samples alongside the OSHA industrial hygienist. This ensures that the employer is not unjustly cited because of erroneous laboratory analysis or results that are not representative of actual conditions.

- d. If the proposed inspection is in response to a specific complaint or referral, the Company should seek to limit the scope of the inspection to the cited condition identified in the complaint/referral. Although the identity of the complainant employee is confidential, the Compliance Officer will provide an expurgated copy of the complaint, upon request. The Compliance Officer, however, may decline to provide a copy of a referral.
- e. Even if the inspection starts out being limited to the scope of the complaint/referral, it can be broadened if the Compliance Officer sees or hears about any other hazardous conditions during the course of the inspection.
- f. At the beginning of the opening conference, the Facility Manager should identify the company representatives present at the opening conference and offer a brief explanation of why each individual has been asked to attend. Generally, the Compliance Officer will inquire about the Company's safety program. It is essential that those in attendance at the conference have a working knowledge of the facility's safety and health procedures. Specifically, all attendees should have an appreciation of the written programs in effect, how safety and health training programs are implemented, and an understanding of how accidents at the facility are investigated.
- g. If the Company has trade secrets that might be revealed during the inspection, these areas should be identified at the opening conference. Any information obtained by the Compliance Officer in these designated areas will be labeled "confidential-trade secret" and cannot be disclosed outside the proceedings to which the information is relevant.

#### **4. Warrant Requirement**

Although the U.S. Supreme Court has held that OSHA must obtain a warrant to gain entry to the premises of a company to conduct a general inspection when the employer does not consent to the inspection, it is not difficult to obtain such a warrant. From a practical standpoint, unless there is a known condition that the employer can correct while OSHA is applying for the warrant, consent should be given. While this advice is given as a general proposition, there may well be particular circumstances that would justify requiring OSHA to get a warrant. The decision whether to require OSHA to obtain a search warrant depends on the specific situation presented at the time the

Compliance Officer appears at the facility to conduct an inspection. If you think the particular circumstances presented may justify requiring OSHA to obtain a warrant or if you have any questions, contact the Corporate Safety Department and/or the General Counsel's Office for guidance. As a general rule, consideration should be given to requiring a warrant when the Compliance Officer indicates during the opening conference that, although the inspection is complaint/referral-based, he intends to expand the scope of the inspection beyond the areas identified in the complaint/referral.

If the Compliance Officer presents an inspection warrant upon his arrival at the facility, photocopy the warrant and any supporting documentation and contact the Corporate Safety Department and/or General Counsel's Office for guidance. The warrant should include the exact facility and entity to be inspected as well as the scope of the inspection.

## 5. Walkaround Inspection

- a. Both the Occupational Safety and Health Act and OSHA's regulations provide that a representative of the employer shall be given the opportunity to accompany the Compliance Officer during the inspection. The Facility Manager and/or such persons as the Facility Manager shall designate should accompany the Compliance Officer during the inspection. Depending on the scope of the inspection, a maintenance person (preferably a manager) should be asked to join the designated management representative in order to correct on the spot any minor repair or housekeeping items noted by the Compliance Officer. Regardless of the inspection's scope, at least two Company representatives should accompany the Compliance Officer at all times. The Company representatives should be professional and cordial to the Compliance Officer throughout the inspection.
- b. The Company's walkaround representatives should take notes during the inspection, documenting everything about which the Compliance Officer is concerned, including pertinent statements made during the inspection. The walkaround representatives should take the same photographs or measurements that the Compliance Officer takes during the inspection as well as identifying what was measured, the method of measurement, how many samples or measurements were taken, and the duration of the samples and measurements. To be prepared for an OSHA inspection, the Company should have a videotape camera and a still camera with an adequate supply of videotape and film ready for immediate use.
- c. During the course of the inspection, the Compliance Officer may conduct private interviews with as many employees as is deemed necessary. The Company representative should make available a place for the Compliance Officer to conduct the interviews. If management employees are to be interviewed, the Company has a right to have a Company representative present during such interviews. A Compliance Officer cannot audiotape or videotape the interviews



unless the employee being interviewed consents. Similarly, there is no legal obligation for an employee to sign a written statement prepared by a Compliance Officer.

- d. The Compliance Officer may also inspect records required to be maintained under the Occupational Safety and Health Act. The Compliance Officer will typically request that the Company produce its OSHA 300 Log and OSHA Form 301s (or their equivalent), its written Hazard Communication Program, the written Lockout/Tagout Program, exposure monitoring data, and documentation of the training required by various OSHA standards. Except for compliance audit reports, all of the records should be made available to the Compliance Officer upon request. Do not refer to plant audits, and if asked for audit reports, contact the Corporate Safety Department or the General Counsel's Office before providing them for review or copying. The facility should keep a list of all records shown to OSHA during the inspection, specifying which records were copied.
- e. During the walkaround inspection, Company representatives and the Compliance Officer will use the following personal protective safety equipment as necessary -  
- hearing protection, safety glasses or goggles, hard hat, respirator.
- f. In the event that violations such as blocked aisles, unsafe floor surfaces, hazardous projections, or other such deficiencies are pointed out by the Compliance Officer, the Company representatives (preferably including a maintenance manager) should take immediate action to correct the violations where immediate correction can be easily accomplished and where such action is appropriate.

## 6. Closing Conference

- a. After the inspection is concluded, the Compliance Officer will hold a closing conference with the Company during which any safety or health violations that have been observed will be reviewed. Generally, the Compliance Officer will identify the standards that have been violated. The Compliance Officer typically will not reveal, however, which of these items, if any, will result in the issuance of citations or penalties. Statements made at the conference do not bar the Compliance Officer from subsequently issuing a citation for a violation that the Officer did not specifically raise at the closing conference. Statements made by Company representatives during the closing conference may affect the decision whether to issue a citation, the characterization of the citation, as well as the extent of the proposed penalty. It is, therefore, important to maintain a professional and courteous demeanor throughout the closing conference, even if there is strong disagreement with the Compliance Officer's findings and conclusions.

- b. It is sometimes helpful to abate non-controversial violations immediately (during the inspection, if possible) as a demonstration of good faith. Caution should be used in estimating the time necessary to correct more complex violations because the Company's estimate is likely to become the abatement date required in the citation.
- c. The Company representatives in attendance should not admit to any violations, and should not offer any suggestions about how long it would take to complete abatement. If absolutely forced to give an estimate, it should be remembered that OSHA may later require the Company to adhere to that time estimate.
- d. The Facility Manager should promptly advise the Corporate Safety Department and General Counsel's Office about the matters discussed during the closing conference.

## 7. **Post-Inspection Procedures**

Immediately after the Compliance Officer leaves the plant site, the Facility Manager should meet with all appropriate management representatives concerned with the inspection to discuss both the OSHA inspection and the Compliance Officer's observations and findings. The Facility Manager is responsible for formulating a plan to respond to the Compliance Officer's observations and findings.

## 8. **The Decision Whether To Contest The Citation**

Upon receipt of a citation, the Company has fifteen (15) working days within which to notify OSHA in writing that it wishes to contest the citation and/or proposed notification of penalty. If the Company does not agree with the citation, OSHA encourages employers to ask for an informal conference, usually with the OSHA Area Director, during this fifteen (15) working day period. This is almost always a good idea. It provides an opportunity for further discussion with the Compliance Officer and his or her supervisor, and the amount of penalty is often reduced as a result of these informal conferences. It is important to remember that the informal conference does not extend the fifteen (15) working day requirement for the filing of a written notice of contest.

If the outcome of the informal conference is not satisfactory, the Company may still want to contest the citation. The Company can contest all or any part of the alleged violations (including their characterization as willful, repeat, serious, or other-than-serious), the proposed assessment of penalties, the proposed abatement periods, or the entire citation. If a notice of contest is filed contesting an alleged violation, then as long as the allegedly violative condition is under contest, there is no duty to correct the condition. If the citation and/or penalty is not contested within fifteen (15) working days from receipt, the citation and assessment become a final order of the Occupational Safety and Health Review Commission which cannot later be reviewed by any court or agency.

Although sometimes there is no question that a hazardous condition exists and that it can be corrected without the expenditure of substantial sums of money, the Company should be aware that once a citation becomes a final order, it may be used as the basis for a repeat or willful violation. Thus, in determining the cost of whether or not to contest a citation, the implications of being cited for a repeat violation sometime in the future also should be considered.

NHW/jec

OCTOBER 20, 2009

## MEMORANDUM

**RE: National Emphasis Program on Recordkeeping**

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### **OSHA to Begin National Emphasis Program on Recordkeeping**

Starting next month, OSHA will begin its new National Emphasis Program (NEP) on injury and illness recordkeeping with recordkeeping inspections being conducted at employers' establishments with low incidence rates in historically high rate industries, as well as inspections of a sample of construction firms. The NEP was developed after last year's Congressional hearings on the perceived problem of injury and illness underreporting, and is consistent with Secretary of Labor Hilda Solis' more enforcement-oriented approach to occupational safety and health. The inspections will be conducted over the next twelve months, and it is anticipated that the NEP will be expanded after the initial data is analyzed. Although the NEP is limited to states under federal OSHA's jurisdiction, state plan OSHA programs are encouraged to conduct their own recordkeeping enforcement initiatives.

The inspections will include a review of medical files for both occupational and non-occupational cases for 2007 and 2008, including 301 forms, Workers' Compensation forms, absentee reports, and audiograms, for a selected sample of employees. Compliance Officers will also interview employees and members of management to determine both whether the employer has an effective system in place for reporting injuries and whether incentive programs discourage employees from reporting new cases. Facility recordkeepers will be questioned to determine their level of training and knowledge of the recordkeeping regulations, and health care providers will be asked whether the employer has tried to influence the treatments provided and the recordability of cases. In addition, a limited walk-around inspection of the employer's facility will be conducted to determine if the hazards in the facility are consistent with the injuries and illnesses on the 300 Log, and citations may be issued for any violations that are observed.

To prepare for these inspections, we recommend that employers (1) review the cases that occurred in 2007 and 2008 to determine the accuracy of their OSHA 300 Logs and make sure there is an OSHA 301 or its equivalent for every recordable case; (2) ensure that their recordkeepers have been properly trained; (3) review the effectiveness of both the system for reporting injuries and illnesses and the routing of pertinent medical information from internal and external health care providers to the recordkeeper, and (4) if there is a safety incentive

program, evaluate whether the safety incentives improperly discourage the reporting of work-related injuries or illnesses.

If you have any questions about OSHA recordkeeping interpretations, audits, or training, email us: Bill Principe at [bprincipe@constangy.com](mailto:bprincipe@constangy.com), David Smith at [dsmith@constangy.com](mailto:dsmith@constangy.com), Carla Gunnin Stone at [cstone@constangy.com](mailto:cstone@constangy.com), Pat Tyson at [ptyson@constangy.com](mailto:ptyson@constangy.com), or Neil Wasser at [nwasser@constangy.com](mailto:nwasser@constangy.com). You may also call us at 404-525-8622.

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## ACC Extras

Supplemental resources available on [www.acc.com](http://www.acc.com)

OSHA Regulations

Article. May 2009

<http://www.acc.com/legalresources/resource.cfm?show=255316>

Understanding and Surviving OSHA.

Program Material. October 2008

<http://www.acc.com/legalresources/resource.cfm?show=143866>

Understanding and Surviving OSHA

Quick Reference. October 2008

<http://www.acc.com/legalresources/resource.cfm?show=240832>

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.