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Goodbye Carrot, Hello Stick: OSHA to Continue Aggressive Enforcement in 2013

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INTRODUCTION

Occupational safety and health concerns are not limited to the construction and general industries anymore. Over the past four years, OSHA has become increasingly aggressive in its enforcement practices in every employment sector, rejecting collaborative efforts with employers, such as partnerships, to enhance workplace safety in favor of enforcement with higher citation classifications and enhanced penalties. With the reelection of President Obama and the understanding that Dr. David Michaels, Assistant Secretary of Labor, will remain the head of the OSHA for another four years, employers across the board can expect the agency to continue its aggressive enforcement tactics in 2013 and beyond.

ENHANCED CLASSIFICATIONS AND PENALTIES BECOMING THE NORM

Frequently, OSHA classifies alleged violations of its standards as either “Serious,” meaning it believes there is a substantial likelihood of serious injury or death as a result of the violation, or “Other than Serious,” meaning that, although a violation, OSHA does not consider it

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likely to result in serious injury. However, OSHA's findings that a violation is "Serious," which comes attached to a steeper monetary penalty, has been on a steady upward trajectory over the last four years. Moreover, between 2010 and 2011, the last year for which penalty information is available, the per-citation penalty for Serious classifications more than *doubled*. Between issuing more citations as Serious and increasing the penalties for Serious citations, an employer could easily find itself facing monetary liability well into six figures, without any accident or employee injury in the workplace.

Further, OSHA has become more aggressive in placing employers into the Severe Violators Enforcement Program, or SVEP. SVEP was created as a means of focusing on and heavily penalizing employers whom the agency believes have shown indifference to their safety and health obligations by issuing in repeat or willful violations. An employer in the SVEP can expect increased and more comprehensive inspections - often enterprise-wide - and substantial penalty and other abatement enhancements if violations are found. Between July 2011 and July 2012, the number of employers placed on SVEP doubled, and OSHA has showed no signs of reducing the pace.

OSHA'S 2013 AGENDA

Employers in general industry can expect OSHA to continue to focus on certain favored projects, including:

- **Whistleblowers.** OSHA has primary investigatory responsibilities for twenty-two different whistleblower statutes, from Sarbanes-Oxley to the Federal Aviation Act to the Affordable Care Act. The number of whistleblower claims and cause findings rose dramatically in 2012 and are expected to continue in 2013;
- **Workplace Violence.** While this hazard has attracted its attention for several years, OSHA has been particularly focused on the retail industry to ensure employers have policies in place and have properly trained their employees to recognize escalating situations and to seek assistance;

- Ergonomics. OSHA is focused, using its General Duty Clause, on industry-specific and task-specific guidelines to reduce and prevent workplace musculoskeletal disorders that are commonly the result of repetitive, forceful, or prolonged exertions of the hands or the frequent or heavy lifting, pushing, pulling, or carrying of heavy objects; and
- Recordkeeping. OSHA has also toughened up on its recordkeeping requirements including OSHA Logs, written compliance programs and certifications. Although typically classified as “Other than Serious” violations, OSHA has been increasing the instances in which it has found recordkeeping violations to be “Repeated” or “Willful,” which carry with them a potential 10x penalty enhancement.

HOW TO PREPARE FOR THE COMING STORM

OSHA’s aggressive enforcement agenda shows no sign of slowing down. Employers should therefore revisit their safety policies and procedures and make sure that they are comprehensive, that employees have been properly trained, and that the policies are being enforced and discipline for infractions documented. This type of basic blocking and tackling will greatly reduce an employer’s exposure. Given OSHA’s current enforcement agenda, employers should in particular ensure:

- A stand-alone Workplace Violence Prevention Policy is in place that advises employees that any type of violence or threatening behavior will not be tolerated; lays out the procedure employees should follow to report potential instances of workplace violence; and directs employees to seek assistance in any situation where they feel unsafe;
- A Whistleblower and Anti-Retaliation policy that directs employees to report workplace concerns to a particular person or department, and a procedure for documenting and investigating any complaint, including the responsibility for following-up with the complaining employee to let him or her know the situation has been addressed;
- Job Hazard Analysis, based on review of the OSHA Logs and worker’s compensation data, that reviews work tasks to identify repetitive or cumulative trauma stressors and identifies any reasonable means to reduce repetitive stress have been considered and implemented; and
- Confirming the required compliance records are up to date, particularly if the employer has been cited by OSHA in the past for incomplete or missing compliance documents. OSHA requires some records, such as medical and employee exposure records, to be maintained for as long as thirty years after an

employee's separation, and employers should have a proper records retention policy in place.

Employers can and should take preemptive action to make sure their workplace is inspection-ready. With these recommendations, these liabilities can be reduced in 2013 and beyond.