



## Labor and Employment Corner

by Pedro P. Forment

# What Can We Expect from OSHA in the Next Four Years?

### With President Barack Obama's re-election and

Dr. David Michaels remaining head of the Occupational Safety and Health Administration (OSHA) for a second term, there is much speculation as to what we can expect from OSHA during the next four years. Dr. Michaels is the first assistant secretary of labor for OSHA who has stayed on a second term and this may only be an indication that he believes he has much unfinished business to tackle. While congressional gridlock hampered OSHA's ability to push forth an aggressive regulatory agenda in 2012, OSHA remains committed to key regulatory concerns which may finally happen in the next four years. OSHA's focus on enforcement—which mostly only depends on internal resources and agency will—has been its way of compensating for Congress' inability to get much done.

During President Obama's first term there were minimal regulatory changes and each the product of efforts which had their start long before President Obama took office. At the close of President Obama's first term, OSHA managed only three significant regulatory changes: (1) in August 2010, OSHA issued a final rule for cranes and derricks in construction (29 C.F.R. 1926.1400) which was the culmination of efforts started in 2003 aimed at updating the 1971 rule; (2) in May 2011, OSHA issued the final rule for general working conditions in shipyard employment—the final rule realized efforts which began in 1988, more than two decades earlier; and (3) in March 2012, OSHA issued the final hazard communication standard (29 C.F.R. 1910.1200), aligning OSHA's hazard communication standard with that of the U.N. Globally Harmonized System for Classification and Labeling of Chemicals—a culmination of efforts started five years earlier, in 2006.

### So What Can We Expect From OSHA During President Obama's Second Term?

#### *Possible Consolidation of Regions and Elimination of Initiatives/Offices*

A significant proposal in the fiscal year (FY) 2013 budget is the consolidation of OSHA regional offices. This consolidation is expected to yield a savings of \$1.3 million, as well as the elimination of three full-time positions. The proposal would combine Regions 1 and 2 (Boston and New York); Regions 7 and 8 (Kansas

City and Denver); and Regions 9 and 10 (San Francisco and Seattle). The FY 2013 budget also calls for the elimination of the OSHA Data Initiative (started in 1995 to collect injury/illness data for approximately 80,000 private-sector establishments in selected high-hazard industries) and the Office of International Affairs; these cuts are expected to result in a combined savings of \$3.2 million.

#### *Continued Focus on Enforcement*

OSHA is expected to keep enforcement front and center. As he did during his first four years, Dr. Michaels will continue to use emphasis programs within certain targeted industries as a way to get employers to comply. As part of its enforcement tool kit, OSHA will likely continue to effectively use the press as a way of pointing the finger at serious offenders while sending a message to those who doubt OSHA's resolve to enforce workplace safety and health regulations. We are likely to see an increase in inspections, a continued fine-tuning of penalty calculations resulting in higher penalties and a reluctance to substantially reduce penalties during informal settlement conferences.

#### *Continued Emphasis on Whistleblower Enforcement*

OSHA has sent a message to employees and employers alike by committing substantial resources to support individuals reporting workplace safety and health concerns. Currently responsible for enforcing 21 whistleblower statutes, OSHA's proposed FY 2013 budget allocates an additional \$5 million over last year's OSHA funding specifically for its whistleblower programs. Additionally, on Dec. 12, 2012, Secretary of Labor Hilda Solis announced the appointment of the 12 voting members and 3 ad hoc members of the newly formed Whistleblower Protection Advisory Committee. The committee is charged with providing advice, consult with and make recommendations on ways to improve OSHA's whistleblower protection programs. The committee's membership is comprised of individuals representing the public, management, labor, OSHA state plans, as well as federal agencies.

#### *Using Investigators From Other Agencies to Keep Eye on Workplace Safety and Health*

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Given the realities of budgetary belt tightening, OSHA is seeking creative ways to expand its enforcement capabilities without necessarily increasing its personnel. In June 2011, OSHA and the U.S. Food and Drug Administration (FDA) signed a Memorandum of Understanding (MOU) whereby the agencies agreed to share information. Specifically, when the FDA conducts onsite inspections of work sites for purposes of determining compliance with FDA regulations, OSHA is requesting that FDA inspectors also remain mindful of potential workplace safety and health concerns and report these to OSHA when necessary or prudent. A similar relationship has been forged with the Wage and Hour Division of the U.S. Department of Labor. While OSHA and the Wage and Hour Division have had an MOU in place since 1990, during President Obama's Administration, OSHA has highlighted the importance of interagency cooperation as an effective enforcement tool and has reaffirmed its commitment to the goals of the cooperative relationship between the agencies. By potentially having investigators from other agencies keeping an eye out for workplace safety and health compliance concerns, OSHA opens itself to external resources as a way to increase its presence in a greater number of workplaces. The trend toward interagency sharing of information is likely to continue and be expanded.

#### *Use of Web Training, Apps and Other Innovations*

It is expected that OSHA will continue to develop its educational programs and web-based informational tools. These efforts were seen in 2012, with OSHA's attempt to fill the gap created by the lack of an OSHA standard for dealing with heat stress. As a way to get around the regulatory deficiency, OSHA launched a nationwide campaign geared at raising the awareness of workers and employers about the hazards of working outdoors in hot weather. OSHA created a webpage for the purpose of educating on this issue and underscored that the absence of a standard on heat stress did not preclude OSHA from citing an employer under the General Duty Clause for failing to take adequate steps to protect employees from a recognized hazard-heat illness. OSHA has launched a similar national education campaign to prevent falls in the construction industry. OSHA's website provides educational materials on how to prevent falls, how to train employees on fall protection and how to create safe job plans. On Jan. 10, 2013, OSHA announced the winners of its Worker Safety and Health App Challenge. The challenge had entrants submit tools (designed for Internet browsers, smartphones, feature phones, and social media platforms, or as native Windows or Macintosh applications) that were designed to teach workplace hazard prevention and recognition as well as informing individuals about their workplace rights. OSHA awarded \$30,000 between four entrants. During the next four years, we are likely to see more of the same type of innovations geared to reaching greater number of employees.

#### *Stricter Recordkeeping/Reporting Obligation*

During this second term we may see OSHA make changes in



recordkeeping/reporting requirements. OSHA has already proposed requiring employers to report workplace amputations within 24 hours and is pushing to have all in-patient hospitalizations reported within eight hours regardless of number of employees affected. Current recordkeeping rules do not require the reporting of a single amputation. Moreover, existing rules only require reporting hospitalizations in the event of a "catastrophe" which is defined as the in-patient hospitalizations of three or more employees. OSHA will continue to require the reporting of all fatalities within eight hours. These changes are in line with the rules adopted by many states which take a stricter approach to reporting amputations and in-patient hospitalizations. It is likely that these changes may become rule during President Obama's second term.

#### *Injury and Illness Prevention Program Rule*

One of the key regulatory changes Dr. Michaels has been focused on is OSHA's Injury and Illness Prevention Program (IIPP). This rule is a regulatory priority that has been under development for almost three years. There has been some recent speculation that OSHA will soon be ready to begin the Small Business Regulatory Enforcement Fairness Act process for the rule. This is the process by which OSHA solicits input from small business entities about how the rule may affect their operations. The challenge for OSHA is to create a rule that would have applicability to employers of all sizes and within all industries—not an easy task. We, however, may find that in the next four years, Dr. Michaels will push to complete this bit of unfinished business.

#### *Rule on Crystalline Silica*

It is expected that during President Obama's second term, OSHA will develop a comprehensive regulatory framework to deal with occupational exposure to crystalline silica. Crystalline silica (a mineral found in soil) is commonly found in sand, rock, concrete, mortar, block, and stone. Therefore, employees working in construction, foundries, glass manufacturing, and sand blasting have a particular risk of exposure to silica. Inhaling silica is known to cause silicosis (fluid buildup and scarring of lung tissue which may

render the lungs unable to function); silicosis is particularly troubling because there are no known cures and exposure is known to cause lung cancer, respiratory diseases (chronic obstructive pulmonary disease, including, bronchitis and emphysema), and a host of other diseases, including kidney and immune system diseases. OSHA's silica standards are widely regarded as obsolete; having different permissible exposure levels (PEL) for silica in general industry and construction. Adding to this confusion, the method used by OSHA to measure exposure to silica in construction has been rendered obsolete. Since February 2011, the draft silica rule has been under review by the Office of Management and Budget (OMB). If the draft rule becomes final, the rule would: (1) lower the permissible exposure limit for silica exposure; (2) implement extensive "housekeeping" requirements (including prohibiting dry sweeping); (3) require exposure monitoring and establish regulated areas; and (4) require medical surveillance.

#### *A More Robust Confined Spaces Rule for Construction*

OSHA's general industry standard for confined spaces is more robust than the current confined spaces standard applicable to construction. There are those who believe that employees in the construction industry are not adequately protected when performing work in or around confined spaces because of the regulatory deficiencies in the construction standard. These concerns culminated in the Confined Spaces in Construction standard which was first proposed in 2007; it is expected that during President Obama's second term the administration may be able to issue a final rule which provides the construction industry the same level

of protection from confined space hazards that exists in general industry.

#### *Power Transmissions*

The current standard for electric power, transmission and distribution for construction dates back to 1971. The passing of 40 years has rendered the standard obsolete. A revised rule has been under works for years and in 2012 the final rule was submitted to the OMB for review. The goal in some respects is to make the construction standard more in line with the general industry standard when performing similar work. There is some belief that in the next four years the rule for electric power, transmission, and distribution for construction may finally be adopted.

As we ask ourselves what we can expect from OSHA in the next four years, there is a long list of unfinished business, which may provide for a very active next couple of years. ☉

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## **CORPORATE TYPE** continued from page 13

to having a lawyer-director who may be keenly sensitive to legal, regulatory, and reputation risk issues are self-evident. However, there is also significant research and increasing public scrutiny regarding corporations implementing governance best practices. In other words, boards may wish to avail themselves of the clear-cut and statistically significant risk mitigation benefits of lawyer-directors, while giving thoughtful consideration to controversial structural factors that can be more prevalent for boards with lawyer-directors, such as classified boards, limits on shareholders' voting rights to amend the bylaws, supermajority requirements for mergers and charter amendments, poison pills, and golden parachutes.<sup>6</sup> Corporate boards should have members with diverse skillsets and professional backgrounds, and any stigma attached to lawyers as directors appears to have dissipated for good reason. ☉

#### **Endnotes**

<sup>1</sup>Litov, Lubomir P., Sepe, Simone M. and Whitehead, Charles K., *Lawyers and Fools: Lawyer-Directors in Public Corporations* (Feb. 15, 2013) available at [ssrn.com/abstract=2218855](http://ssrn.com/abstract=2218855) or [dx.doi.org/10.2139/ssrn.2218855](http://dx.doi.org/10.2139/ssrn.2218855), hereinafter referenced as the Cornell Lawyer-Director Study.

<sup>2</sup>*Id.*, see footnote 111 discussing the examination of S&P Composite 1500 companies, excluding financial services companies.

<sup>3</sup>*Blakely v. Lisac*, 357 F. Supp. 255, 266 (D. Or. 1972), stat-

ing that an attorney also acting as a director knew or should have known about fraud and was held to a higher standard of care.

<sup>4</sup>American Bar Association Model Rules of Professional Conduct, Rule 1.7, Comment 35

<sup>5</sup>Freivogel, William, *An Ethics Primer for Business Lawyers*, June 2009, available at [apps.americanbar.org/buslaw/newsletter/0085/materials/ethics.pdf](http://apps.americanbar.org/buslaw/newsletter/0085/materials/ethics.pdf).

<sup>6</sup>Cornell Lawyer-Director Study at 35.