

The Occupational Safety and Health Administration (OSHA) is using every tool at its disposal to ensure that employers are in compliance with applicable standards and rules. It is pushing forward with new rules, enforcement initiatives, interpretive letters, and media initiatives. Employers must keep abreast of this activity, increasing their vigilance and addressing safety and health issues relevant to their worksites.

OSHA Developments

What Happened to Plan/Prevent/Protect?

It has been almost two years since Department of Labor Secretary of Labor Hilda Solis enthusiastically announced the DOL's "Plan/Prevent/Protect" compliance strategy, a key component of its *Good Jobs for Everyone* vision. The goal of Plan/Prevent/Protect is to "ensure employers and other regulated entities are in full compliance with the law every day, not just when Department inspectors come calling." OSHA has been a significant component of the initiative. Two years later, it is useful to look back on the progress OSHA has made.

A centerpiece of Plan/Prevent/Protect is a rule-making announced by OSHA to require employers to implement an Injury and Illness Prevention Program (IIPP). This would have employers search for and address workplace safety and health hazards at their places of business. The following elements are typical of IIPPs:

- Management Leadership
- Employee Participation
- Risk Identification and Prioritization
- Hazard Control
- Education and Training
- Evaluation and Continuous Improvement

A mandatory federal IIPP rule likely would resemble ones implemented by several states, most notably California (see http://www.dir.ca.gov/dosh/dosh_publications/iipp.html).

OSHA's IIPP initiative was announced with great fanfare, but it has stalled within the agency. For more than a year, OSHA has been saying it would initiate the necessary Small Business

Regulatory Enforcement Fairness Act (SBREFA) process for the rule. It has yet to do so. Not only is it unclear when OSHA will release an initial regulatory approach to the IIPP rule, but a proposed rule (and, thus, a final rule) probably is several years away.

Meanwhile, OSHA has been busy with other regulatory priorities that affect employers. In particular, it has published a final rule bringing its Hazard Communication standard into accord with the Globally Harmonized System of Classification and Labeling of Chemicals (GHS) (see the related article in this issue).

OSHA, like other DOL agencies, also is continuing to maintain historically high enforcement levels. The agency is bringing significant cases and, as a result of its enhanced administrative penalties memorandum, employers are seeing higher proposed penalties. From a conceptual standpoint, OSHA's enforcement efforts serve the Plan/Prevent/Protect strategy's goal of forcing employers to "find and fix" issues at the workplace on their own, without "prompting" from the Department.

Employers cannot afford to relax their safety and health programs, regardless of the status of Plan/Prevent/Protect, IIPP or any other OSHA rulemaking. Employers should consider the following actions to ensure compliance:

- Review worksites for uncontrolled hazards;
- Examine recordkeeping logs and other incident reports for areas of concern;
- Engage employees and front-line supervisors in hazard identification and control; and
- Control and review annually the effectiveness of safety and health efforts.

Inside:

OSHA Announces Outreach Campaigns2

OSHA Finalizes Major Changes to its Hazard Communication Standard2

Focus on Nursing and Residential Care Facilities.....3

OSHA Issues Memorandum on Safety Incentive Programs.....4

OSHA Expert Mike Taylor Joins Jackson Lewis4

About the Workplace Safety Compliance Practice Area5

OSHA Announces Outreach Campaigns

OSHA has announced two new “initiatives” aimed at improving compliance in traditional “summer-time” areas of concern for the agency: heat illness and falls.

Heat Illness

OSHA's latest campaign is intended to raise the awareness among workers and employers about the hazards of working outdoors in hot weather. It has created a webpage (www.osha.gov/SLTC/heatillness/index.html) devoted exclusively to work-related heat illness. While OSHA does not have a standard dealing directly with heat stress, it could utilize the General Duty Clause of the Occupational Safety and Health Act of 1970 to cite

employers for failing to take adequate steps to protect employees from heat illness. Employers should review their policies and practices to ensure they have plans to deal with heat stress at their worksites.

Preventing Falls in Construction

OSHA also has launched a webpage (www.osha.gov/stopfalls/index.html) devoted to preventing falls in the construction industry. OSHA provides educational and other materials to employers on preventing falls in construction, training employees, and planning jobs safely. Fall hazards also are a major focus of enforcement in the construction industry. Construction employers must ensure full compliance with OSHA's standards.

OSHA Finalizes Major Changes to its Hazard Communication Standard

In one of its most significant rulemaking efforts in over a decade, OSHA has finalized a rule revising its hazard communication standard to align it with the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals (GHS). The rule will affect more than five million business establishments across the country. Because of its broad applicability, all employers should familiarize themselves with the rule's requirements and assess their workplaces to ensure full compliance by the agency's deadlines.

Current Hazard Communication Standard

OSHA's current hazard communication standard (29 CFR 1910.1200) is the most significant “right-to-know” rule in the country regarding hazardous chemicals in the workplace. It requires chemical manufacturers to evaluate the chemicals they produce and determine if they are hazardous. It also requires them and distributors to inform downstream employers and employees of the chemicals' hazards through various communication means, such as labels and “Material Safety Data Sheets” (MSDSs). Employers with hazardous chemicals in their workplaces must have a hazard communication program and train employees on the hazards of the chemicals present.

Since OSHA developed its hazard communication standard almost 30 years ago, a number of other countries have passed “right-to-know” laws that perform the same function, but contain different requirements. As a result, chemical manufacturers who ship their products internationally must navigate differing and complex hazard communication laws.

To reconcile the differences, the GHS was developed under the auspices of the United Nations. It attempts to

standardize the classification of hazardous chemicals and the communication of hazards. Once adopted globally, the GHS is expected to improve trade across countries because chemical manufacturers, in particular, will be able to determine more easily the hazards of their products and communicate those hazards to downstream users through standardized means.

To accomplish this, however, countries must adopt the GHS as their own law. This has proven difficult in some instances. OSHA's final rule represents the culmination of years of work by the agency to conform OSHA's rules with those used elsewhere across the globe.

Summary of Final Rule

The final rule makes three significant changes in the current hazard communication standard. The first two affect chemical manufacturers directly. The third, impacts any employer in the country using hazardous chemicals in the workplace.

1. Hazard Classification

The rule changes the means by which chemical manufacturers determine whether, and to what extent, a chemical is hazardous. OSHA's current hazard communication standard requires manufacturers to consider as hazardous any chemical used in the workplace for which there is statistically significant evidence, based on at least one study conducted in accordance with established scientific principles, that acute or chronic health effects may occur in exposed employees. Under the existing standard, a health hazard includes chemicals that are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, and sensitizers, among others.

The new rule standardizes the classification process used by manufacturers. Manufacturers would classify any health or physical hazards of the chemical and determine the “category” of each class. The rule then requires manufacturers to place the chemical into further sub-categories.

2. Provision of Labels and Safety Data Sheets

Once a manufacturer classifies a hazardous chemical, it must communicate that information to downstream users. The rule would standardize the labels and Safety Data Sheets (replacing current MSDSs) used to convey this information. OSHA believes these changes would

allow employers and employees to understand better the important information conveyed on the SDSs.

3. Training

Largely as a result of the first two changes, OSHA’s final rule requires employers to train employees on the new hazard classifications, labels, and SDSs. Thus, every employer in the country that has a hazard communication program must retrain its employees in the new system.

OSHA’s compliance schedule for manufacturers and employers:

Deadline for Full Compliance	Requirement(s)
December 1, 2013	Train employees on the new label elements and SDS format.
June 1, 2015	Full compliance with all provisions of the final rule, except that (1) distributors have until December 1, 2015, to ship containers without compliant labels, and (2) employers have until June 1, 2016, to update alternative workplace labeling and hazard communication programs and perform training to account for newly identified physical or health hazards.

Focus on Nursing and Residential Care Facilities

OSHA has announced a National Emphasis Program (NEP) to encourage compliance with safety and health standards at nursing and residential care facilities through programmed inspections. The NEP is in effect until April 5, 2015.

All nursing and residential care facilities in NAICS codes 623110, 623210, and 623311 (formerly SIC codes 8051-Residential Care Facilities, 8052-Intermediate Care Facilities, and 8059-Nursing and Residential Care Facilities, Not Elsewhere Classified) with a DART rate of over 10.0 may be targeted under the NEP. The program will not focus on residential mental health and substance abuse facilities or assisted living facilities without on-site nursing care operations. All State-plan states must adopt the NEP or an equivalent program.

The NEP provides detailed guidance to compliance officers on conducting OSHA inspections under the program. In general, compliance officers are directed to focus on the following areas: ergonomics; slips, trips, and falls; bloodborne pathogens; tuberculosis; and workplace violence. Other issues such as methicillin-resistant staphylococcus aureus (MRSA) and Hazard Communication also may be examined.

Nursing and residential care employers should ensure they are in compliance with applicable OSHA standards

and that their facilities are prepared for an inspection. Employers should:

- Review the NEP thoroughly to understand what OSHA will examine during an inspection.
- Calculate their DART rates (days away, restricted work activity, and job transfer) to determine if they may be on the NEP targeted inspection list.
- Review company policies and procedures addressing ergonomics and bloodborne pathogens, and other subjects identified in the NEP.
- Communicate to facilities about the NEP and its contents. Ensure each facility’s written plans and programs (bloodborne pathogens and hazard communication, especially) are complete, up-to-date, accessible and being followed.
- Ensure each facility has documented the steps taken to address musculoskeletal disorders (MSDs) in the workplace and has identified a person who understands these measures and can explain them to an OSHA compliance officer.
- Develop a protocol for facilities to follow if an OSHA inspector arrives unannounced; train managers and supervisors, and receptionists on that protocol.

OSHA Issues Memorandum on Safety Incentive Programs

In a memorandum to Regional Administrators and Whistleblower Program Managers, OSHA Deputy Assistant Secretary Richard Fairfax has provided guidance on employer practices that OSHA believes can discourage employee reports of injuries and violate section 11(c) of the Occupational Safety and Health Act of 1970 (OSH Act), or other whistleblower statutes.

The memorandum states definitively, “[R]eporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c).” It also lists the following “most common” potentially discriminatory policies:

- Taking disciplinary action against employees who are injured on the job, regardless of the circumstances surrounding the injury. “[A]n employer’s policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury.”
- Taking disciplinary action against employees who report an injury or illness and the stated reason is that the employees have violated an employer rule about

the time or manner for reporting injuries and illnesses. “OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, however, such procedures must be reasonable and may not unduly burden the employee’s right and ability to report.”

- Taking disciplinary action against employees who are injured on the job because they violated a safety rule, when the rule violation is simply a pretext for discrimination.
- Establishing incentive programs that may discourage reporting of injuries. “For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time.”

Employers should make any needed adjustments to their policies.

OSHA Expert Mike Taylor Joins Jackson Lewis

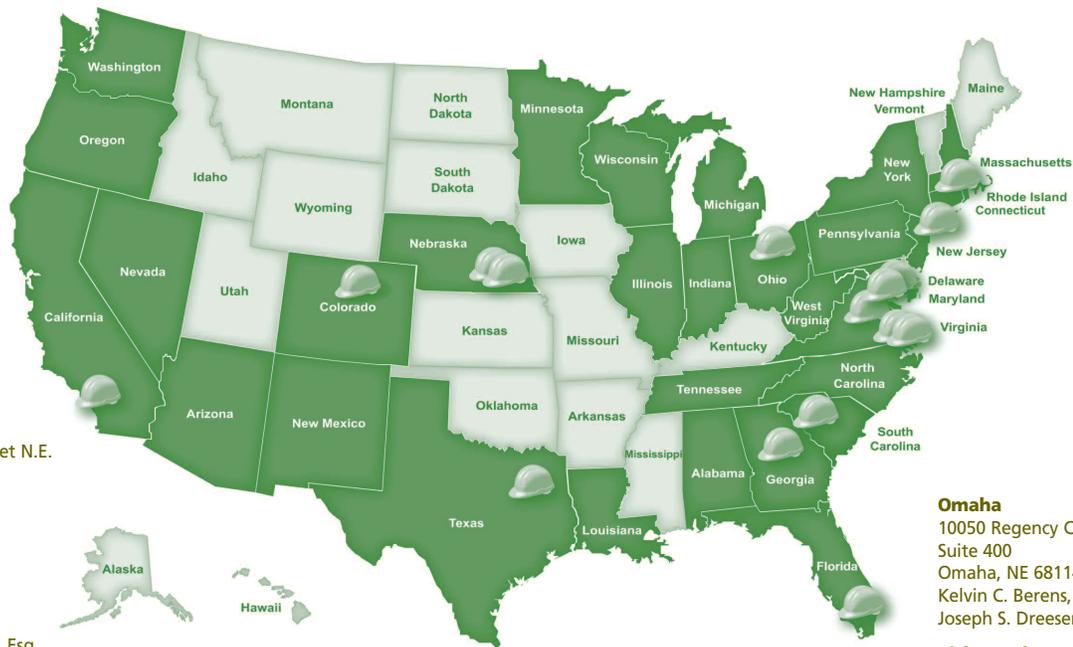
Jackson Lewis is pleased that **Michael T. Taylor** has joined the firm’s Washington D.C. Region office as Partner. Mr. Taylor brings more than 10 years of experience in the labor and employment field, with a particular emphasis on occupational safety and health law. Mr. Taylor has represented employers and trade associations in a wide range of industries, including health care, chemical petrochemical, oil and gas, electric utility, manufacturing, construction, and food services.

“Mike’s sharp understanding of the impact of occupational safety and health law issues on clients’ business operations and risks will greatly benefit our office, the firm and our clients,” said **Bradford T. Hammock**, Partner heading the firm’s Workplace Safety Compliance Practice. “We are excited to have him on board, and confident that his experience will be an immediate asset to employers,” Mr. Hammock said.

Mr. Taylor, who previously served as Acting General Counsel of the federal Occupational Safety and Health Review Commission, has litigated more than 50 cases involving workplace safety and health fatalities and has represented clients in some of the most significant catastrophes in the last decade. He founded and coordinates “The OSHA Forum” for in-house attorneys, safety professionals, and health professionals at more than 50 trade associations. Held quarterly, the Forum is designed to enable trade associations to stay abreast of key OSHA-related issues across the country and inform their members regarding these emerging trends. Mr. Taylor can be reached at Michael.Taylor@jacksonlewis.com.

About the Workplace Safety Compliance Practice Area

Jackson Lewis' Workplace Safety Compliance practice, led by former Department of Labor OSHA attorney, Brad Hammock, provides comprehensive legal services to employers seeking to comply with federal and state OSHA rules, defend against OSHA enforcement actions, and participate in OSHA rulemaking proceedings. With experienced OSHA attorneys located strategically throughout the nation, Jackson Lewis is uniquely positioned to serve all of an employer's workplace safety needs:



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