

Morgan Lewis

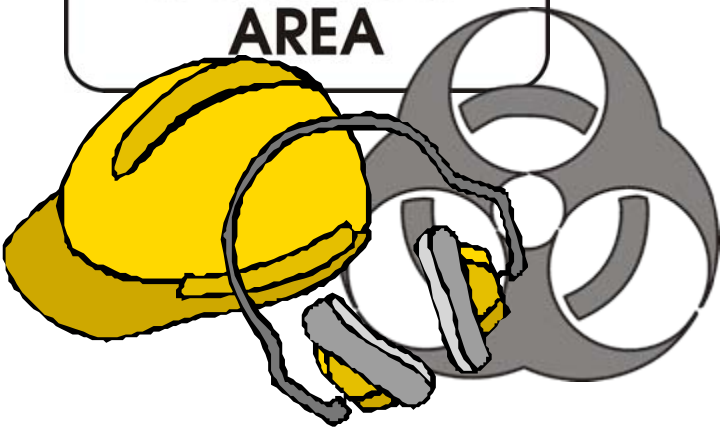


National
Grain and Feed
Association

Welcoming *National Grain and Feed Association (NGFA) Grain Engulfment Update*

*OSHA Enforcement Outlook and Bin-Entry
Accident Prevention*

September 14, 2010



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Presenter:
Jonathan L. Snare, Morgan Lewis
Wayne Bauer, Star of the West Milling Co.

Overview

- **The New OSHA: Change is Already in Place**
 - Leadership
- **Enforcement: What to Expect in 2010 and Beyond**
 - Enforcement Agenda and Activities
- **OSHA Enforcement Update-Grain Handling Industry**
- **New OSHA/Old OSHA**
- **Practical Solutions to Mitigate Risk**
- **Questions and Answers**

The New OSHA: Change Is Already in Place

A New Sheriff in Town...

- And they mean business...
 - Consider a November 2009 OSHA citation for combustible materials near a flammable storage tank. Sounds serious, right?

Or is it just a few leaves...?



A New Sheriff in Town...

- OSHA citation against retailer (Home Goods) on January 14, 2010 – no injury or fatalities; citation for blocked exit, lack of access to a fire extinguisher, and workers not trained to use fire extinguisher
- Penalty: \$233,500

UNITED STATES
DEPARTMENT OF LABOR
Occupational Safety & Health Administration

OSHA Home

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OSHA Regional News Release

U.S. Office of Occupational Safety and Health
Region 2
9-1559
Thurs., J
Contact:
Phone: 6

US Lab

WESTBU

alleged violations of workplace safety standards. The retailer faces a total of \$233,500 in proposed fines, chiefly for exit access, fire and crushing hazards at its Commack, N.Y., store.

Responding to an employee complaint, OSHA found exit routes obstructed by stock and equipment, an exit route too narrow for passage, stacked material that prevented employees from identifying the nearest exit, blocked access to fire extinguishers, workers not trained in fire extinguisher use and boxes stored in unstable 8-foot high tiers.

OSHA had cited Home Goods in 2006 and 2007 for similar conditions at the company's Mount Olive, N.J., and Somers, N.Y., locations. As a result of these recurring conditions, OSHA issued the company five repeat citations, with \$200,000 in proposed fines, for the hazards at the Commack store.

"It's been 99 years since the fire at The Triangle Shirtwaist Co. in New York City took the lives of nearly 150 workers and almost 19 years since two workers were killed when they were unable to exit the McCrory's store in Huntington Station, N.Y., during a fire," said Assistant Secretary of Labor for OSHA Dr. David Michaels. "Blocked fire exits can be deadly. It is that simple."

The New OSHA: *Leadership*



Dr. David Michaels, OSHA Chief, confirmed December 2009

Previous posts include:

- Research epidemiologist and interim Chair of the Department of Environmental and Occupational Health at the George Washington University School of Public Health
 - Directed The Project on Scientific Knowledge and Public Policy (SKAPP), bringing together an interdisciplinary group of scientists to examine the use and misuse of science in two forums in which public policy is shaped: the courts and the regulatory arena.
- Department of Energy's Assistant Secretary for Environment, Safety and Health from 1998 through January 2001 in the Clinton Administration
 - Coordinated an initiative to compensate workers who were exposed to radiation, beryllium, and other hazards at nuclear facilities and developed lung disease and cancer as a result.

Publications include:

- *Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health* (Oxford University Press, 2008), detailing "how the tobacco industry's duplicitous tactics spawned a multimillion dollar industry that is dismantling public health safeguards."
- *Selected science: An industry campaign to undermine an OSHA hexavalent chromium standard*, Environmental Health: A Global Access Science Source 2006, detailing how the chromium industry allegedly used product defense consultants to conduct post hoc analyses of a publicly funded study to challenge scientific results viewed unfavorably by the industry.

The New OSHA: *Leadership*



“One could write a book about the hazards that OSHA has failed to regulate adequately.”

Dr. David Michaels, testimony before the Senate Health, Education, Labor and Pension Committee, 2007

Areas of Focus Include:

- Comprehensive Workplace Safety and Health Program standard, under which every employer would be required to develop and follow a hazard reduction plan for all hazards on its jobsite by assessing each hazard (both “real and potential”) and developing abatements for each such hazard
- Comprehensive standard to cover the many hazardous chemicals that OSHA does not currently address (including requiring OSHA to adopt by rulemaking threshold limit values (TLVs) for hazardous substances as determined by ACGIH)
- Changing the recordkeeping rules and taking a critical look at the recording of ergonomic injuries and pursuing more ergonomics enforcement activity
- Greater utilization of the General Duty Clause to address workplace hazards
- New regulation and enforcement with respect to the hazards of beryllium, hexavalent chromium, silica, and diacetyl

The New OSHA: *Leadership*



- Deputy Assistant Secretary (DAS) for OSHA Jordan Barab
 - DAS Barab served as the Acting Assistant Secretary for OSHA from April 2009 through December 2009.
 - DAS Barab previously served as a Special Assistant in OSHA at the end of the Clinton Administration. His DOL biography notes that he “helped the Agency to promulgate the ergonomics workplace safety and health standard that was repealed by Congress in March 2001.”
 - Worked for the House Education and Labor Committee as Senior Labor Policy Advisor for health and safety from 2002 to 2007.
 - Also previously served on the U.S. Chemical Safety and Hazard Investigation Board, was a Health and Safety Specialist for the AFL-CIO, and directed the health and safety program for the American Federation of State, County and Municipal Employees for more than 15 years.
 - DAS Barab is expected to play a significant role in the OSHA enforcement program.

The New OSHA: *Leadership*



- Richard Fairfax has been appointed as the Deputy Assistant Secretary for OSHA as of April 5, 2010. This is the senior career position in the agency.
 - Prior to this appointment, Fairfax was the head of OSHA’s enforcement directorate and is well respected both within and outside of the agency.
 - Fairfax has been with OSHA since 1978, and he is a certified industrial hygienist.
 - Tom Galassi will replace Fairfax as the head of OSHA’s enforcement directorate on an interim basis. (Galassi served as Fairfax’s deputy in that directorate before he was appointed to lead another agency directorate.)

The New OSHA: *Leadership*



Office of the Solicitor

- M. Patricia Smith

- Smith was confirmed by the Senate as Solicitor of Labor on February 4, 2010 and started performing her duties as Solicitor on March 1, 2010.
- Smith testified at her Senate confirmation hearing in May 2009 that the Solicitor's Office will provide "full backing" to DOL enforcement agencies, and she will focus on "proactive enforcement."
- Smith was the Commissioner of the New York State DOL (large agency with 3,700 employees in 80 offices; budget of \$4 billion).
- Smith previously worked in the New York Attorney General's office for 20 years, the last eight years as chief of the AG's Labor Bureau.
- "New York Wage Watch" initiative
 - *Initiative to work with unions and community groups to monitor and raise awareness of employers who commit "wage theft" (failure to pay wages or overtime, tip stealing, etc.).*
 - *Trade associations expressed concern with this effort to "sanction" community groups and unions to enforce New York labor laws ("an unprecedented and unwarranted intrusion on New York's employer community").*
 - *Confirmation was delayed because of this controversy.*

The New OSHA: *PAWA Provisions Included in the Miner Safety and Health Act of 2010 (H.R. 5663)*

- Protecting America's Workers Act of 2009 (PAWA):
 - If passed, PAWA would dramatically amend the OSH Act, and represent the first major legislative change to the law in 40 years, since the OSH Act's enactment in 1970.
- The latest version of PAWA includes:
 - Expansion of Whistleblower Protections
 - Victims' Rights
 - Abatement of Hazards Pending Contest
 - Enhanced Civil Penalties
 - Enhanced Criminal Penalties
 - Prejudgment Interest

Enforcement: What to Expect in 2010 and Beyond

Citation and Enforcement: *FY 2010 Enforcement Overview*

- On April 28, 2010 Richard Fairfax stated that OSHA is on pace to exceed enforcement performance on a wide range of measures in FY 2010 as compared to prior years
- OSHA has already performed 21,522 inspections, on target to exceed the 39,004 inspections conducted in FY 2009
- OSHA has already issued 75 significant enforcement citations (more than \$100,000 in penalties) and is on track to issue 150 significant enforcement citations for FY 2010
- OSHA has already issued nine egregious cases (instance-by-instance violations) as compared to four egregious cases for FY 2009

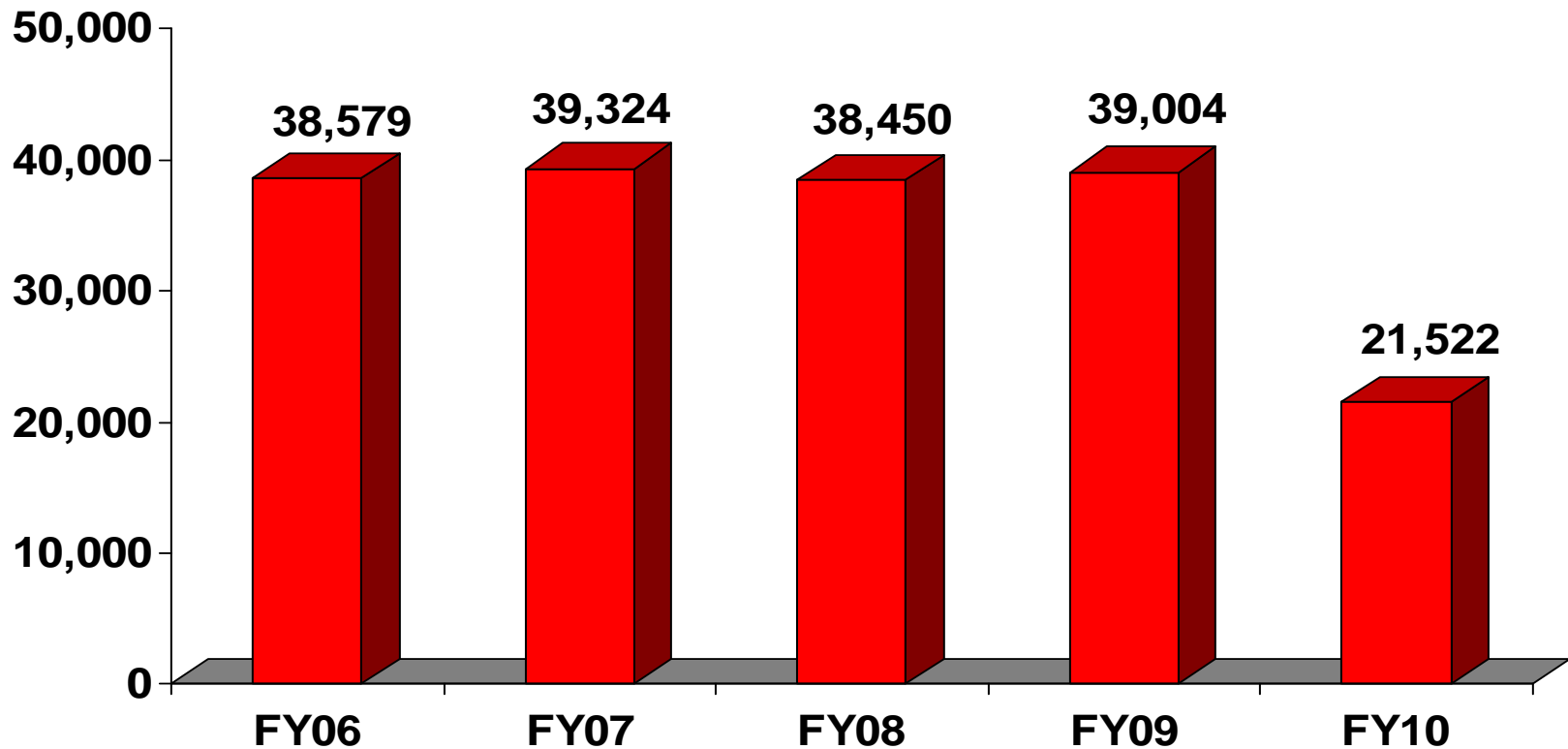
FY 2010

Top 10 Most Cited Standards

- 1) Scaffolding**
- 2) Fall Protection**
- 3) Hazard Communication**
- 4) Respiratory Protection**
- 5) Ladders**
- 6) Lockout/Tagout**
- 7) Electrical, Wiring Methods**
- 8) Powered Industrial Trucks**
- 9) Electrical, General Requirements**
- 10) Process Safety Management**

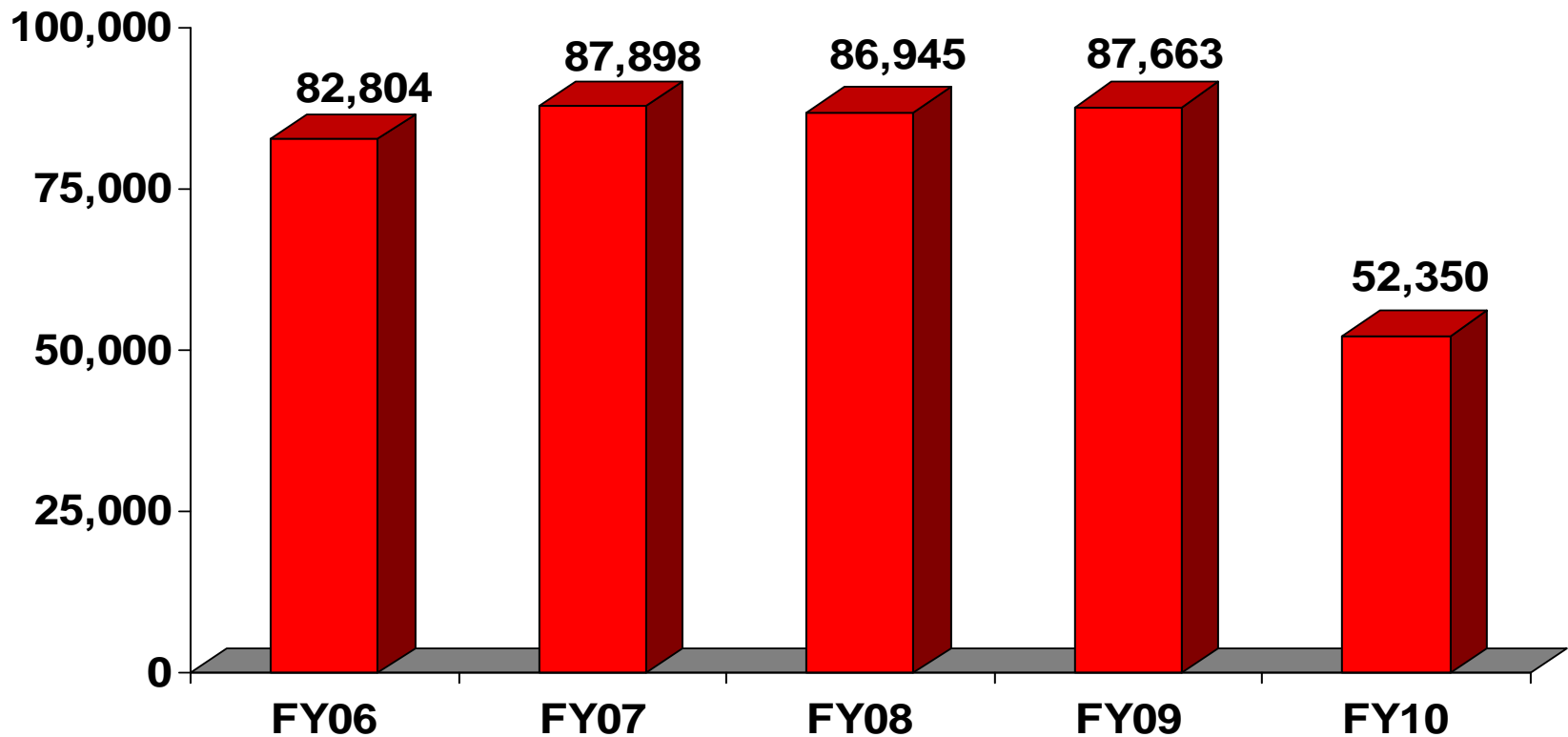
FY 2006 – FY 2010

Inspections Conducted



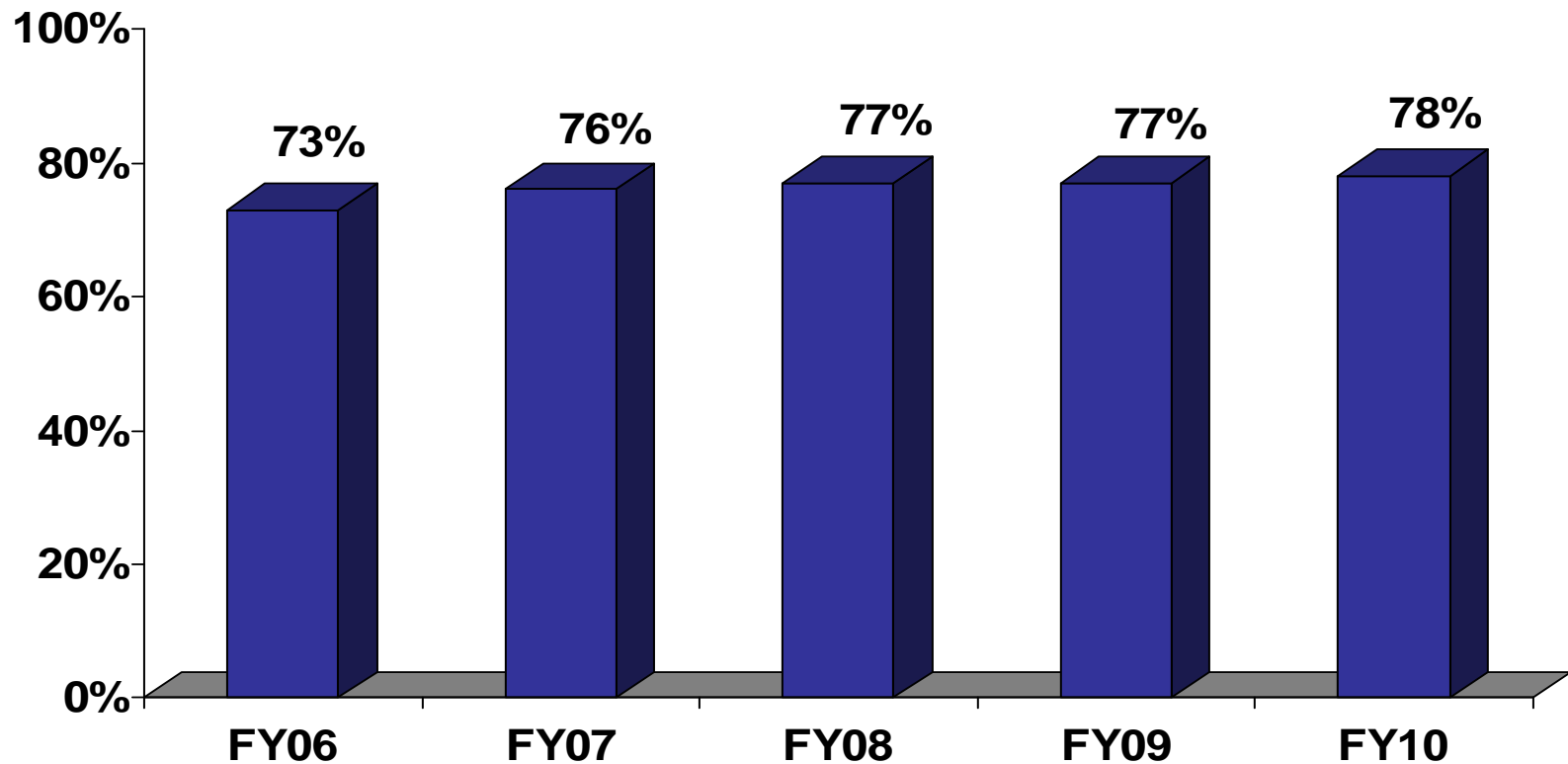
FY 2006 – FY 2010

Total Violations Issued



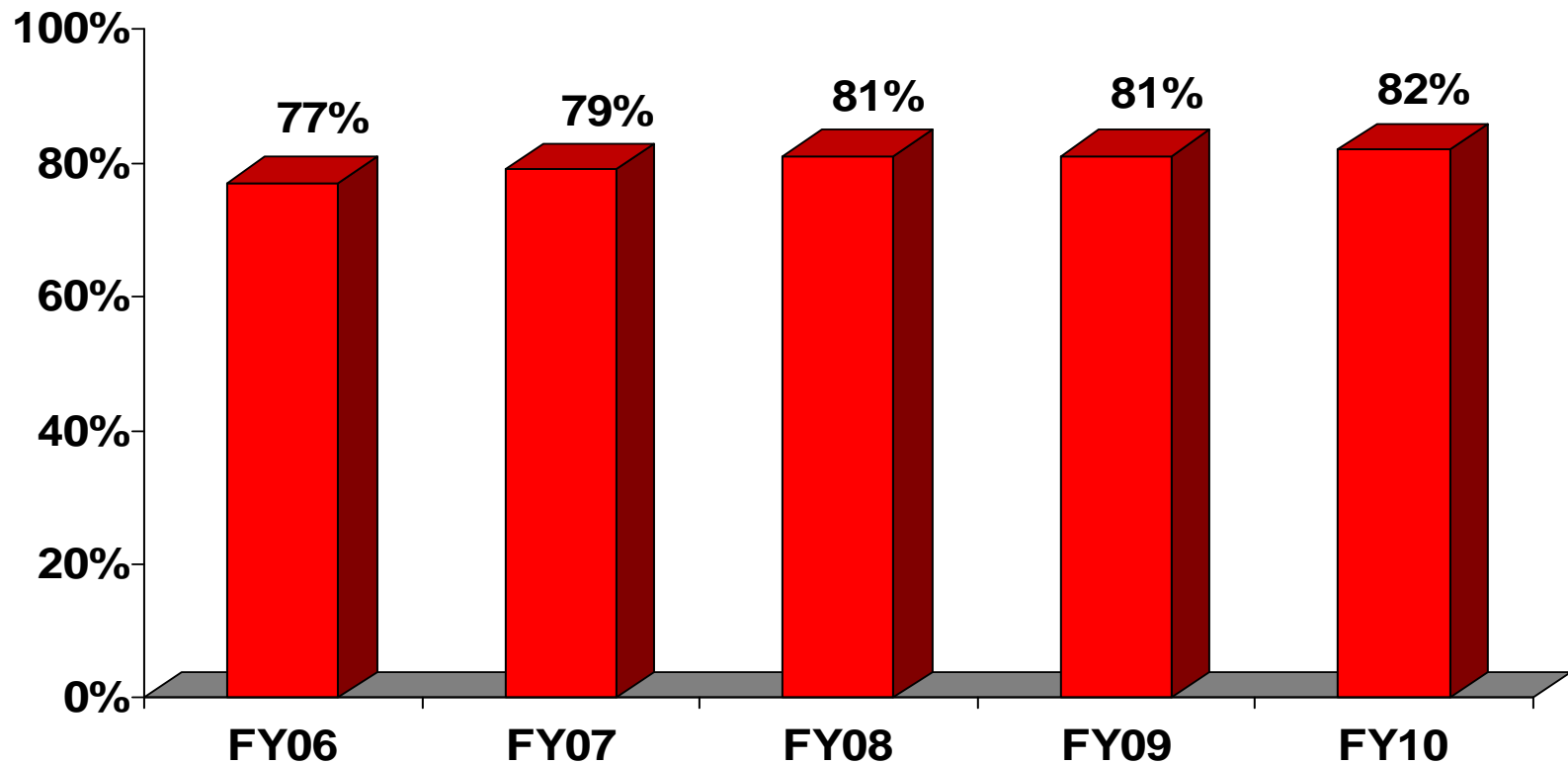
FY 2006 – FY 2010

% Total Violations Issued as Serious



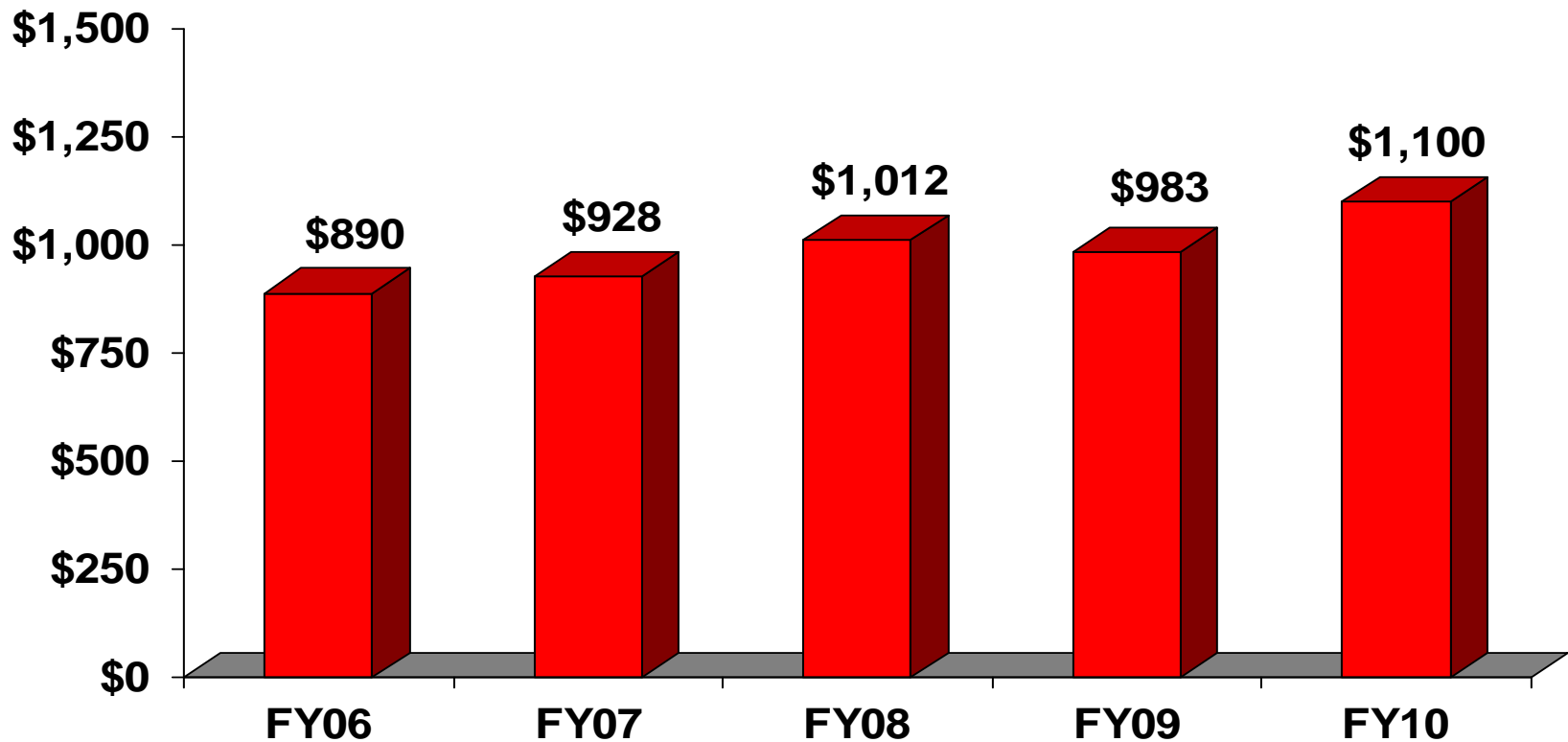
FY 2006 – FY 2010

% Total Violations Issued As Serious, Willful, and Repeat

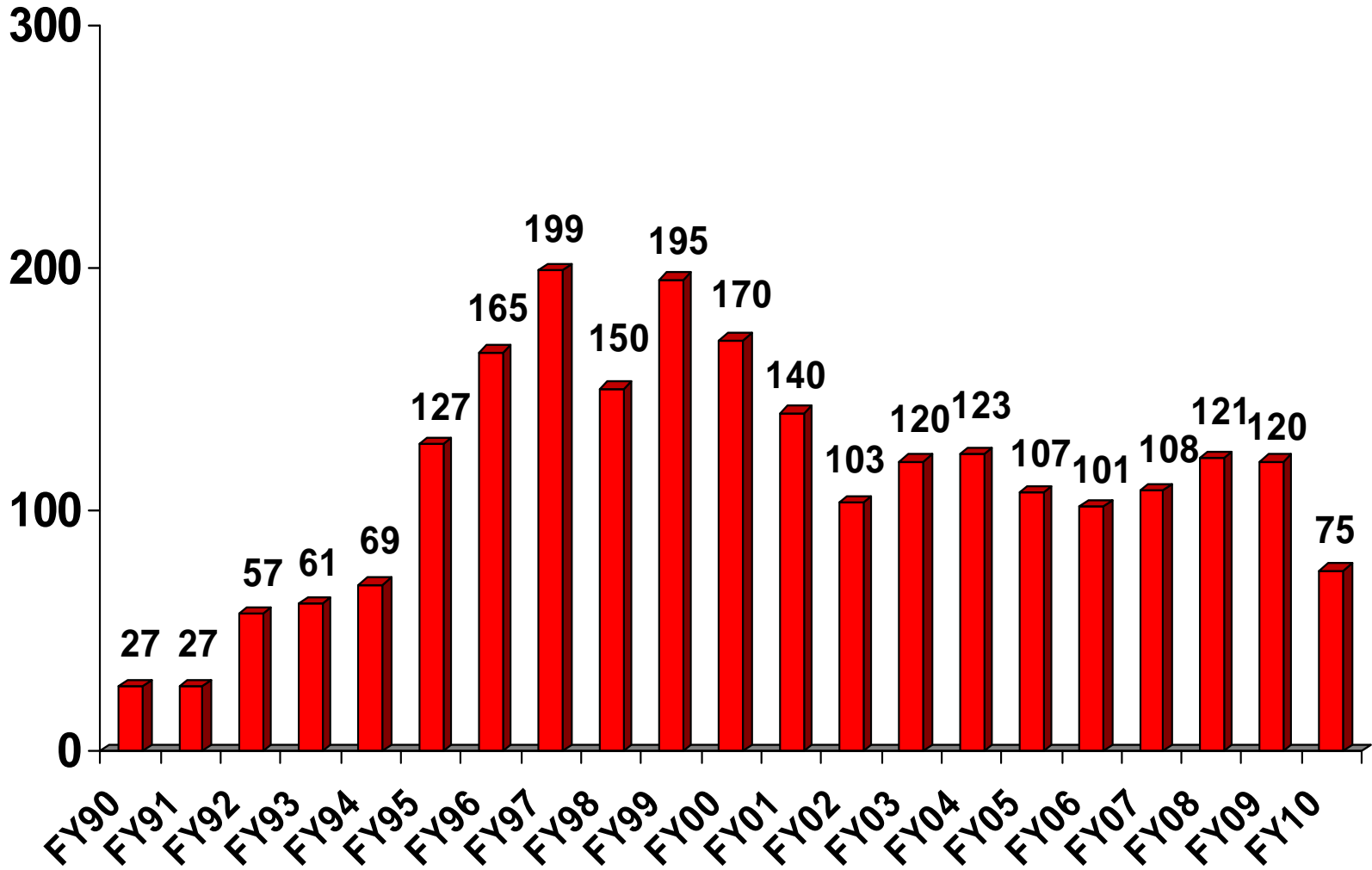


FY 2006 – FY 2010

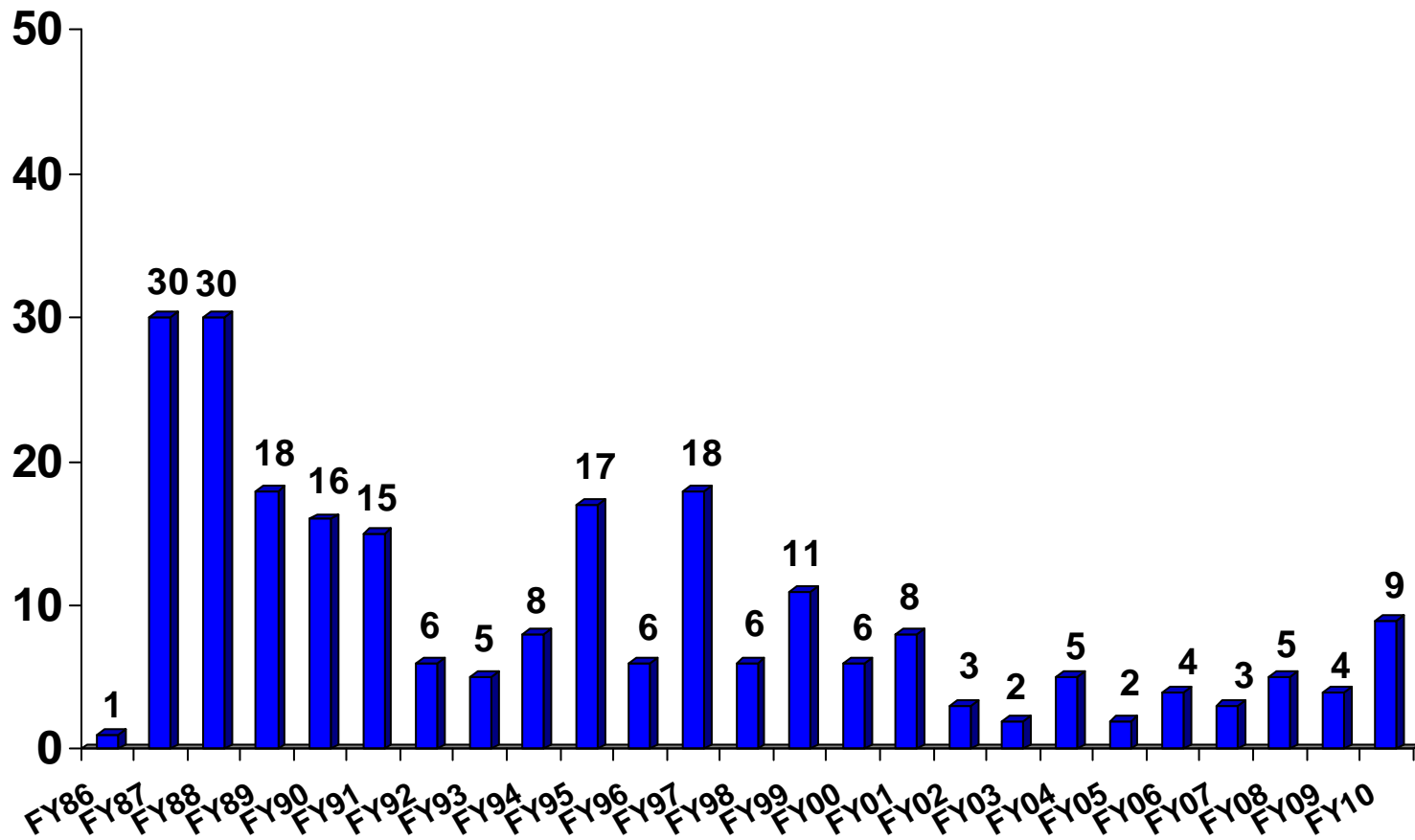
Average Penalty Per Serious Violation (Private Sector)



Significant Cases



Egregious Cases



Citation and Enforcement: *Recordkeeping Enforcement*

- OSHA launched its recordkeeping NEP on October 1, 2009, based on a belief that employers were underreporting injuries and illnesses. Under this NEP, OSHA proposed that it would:
 - Send inspectors to industries believed to be under-recording workplace injuries and illnesses.
 - Ascertain whether recent studies, which have ascertained an under-recording on OSHA 300 logs, are accurate and to correct any under-recorded or incorrectly recorded cases.
 - For sites with 100 or fewer employees, review 100% of the injury and illness records for 2007 and 2008.
 - The industries subject to this initial NEP include steel foundries, air transportation, concrete pipe manufacturing, rolling mill machinery, and equipment manufacturing.

Citation and Enforcement: *Recordkeeping Enforcement*

- OSHA announced on August 11, 2010 that the agency had “temporarily” halted this NEP to readjust the targeting criteria.
 - According to *BNA*, an industry source stated that OSHA did not find the large number of underreporting cases it expected; plus these recordkeeping inspections are very resource intensive.
 - OSHA stated as of August 11, 2010 there were 76 closed inspections under this NEP; the agency found violations of recordkeeping requirements in 29 of these inspections. (the agency also found violations of other OSHA standards in 43 of these inspections)
 - OSHA stated “there is some underreporting,” but admitted this program is not the best use of OSHA’s resources.

Citation and Enforcement: *Recordkeeping Enforcement/Regulatory Agenda*

- Currently, OSHA only requires recording injuries on paper.
 - Spring 2010 agenda signals shift to a more modern, electronic system that will provide information to employers and workers that can be used in real time to investigate and prevent injuries (new item on OSHA regulatory agenda: “Modernizing OSHA’s reporting systems”). This proposed rule was published on May 5, 2010.
 - OSHA also proposing to revise the existing hospitalization and fatality reporting requirements to more efficiently target high-hazard employers.
 - OSHA held public meetings to discuss this proposal on May 25, 2010 (Washington, D.C) and June 3, 2010 (Chicago)
- In the spring 2010 DOL regulatory agenda, OSHA stated that it would publish a final rule in July 2010 to add a definition of work-related musculoskeletal disorder and a separate column on the 300 Log to track this class of injury/illness, but the publication of this final rule appears to have been delayed
- OSHA is planning to revise the list of industries that are partially exempt from the requirements to maintain a log of occupational injuries and illnesses, to reflect the North American Industry Classification System (NAICS) and more recent occupational injury and illness rates. This proposed rule is scheduled to be published in November 2010.
- Dr. Michaels on Workers Memorial Day (April 28, 2010): OSHA will begin to take a harder look at employers’ records—*“We’re going to be looking at the books, and they had better be accurate.”*

Citation and Enforcement: *Repeat Violations*

- Currently, to establish a Repeat violation under section 17(a) of the OSH Act, OSHA must prove that:
 - The cited employer is the same one that was cited previously;
 - The previously cited employer was cited at least once before (and within three years of the time that the previous violation became a final order);
 - The earlier citation became a final order of the Occupational Safety and Health Review Commission; and
 - The earlier citation was for a substantially similar violation.
- Repeat citations are very costly to employers—up to five times the penalty of the first-offense citation.
 - 3 repeat citations (or 3 Willful and Repeat violations in combination) will place the employer in the Severe Violators Enforcement Program (SVEP).
- Anticipate a broadening of OSHA’s willingness and ability to cite Repeat violations:
 - Broadening the scope of what is defined as a “Repeat” offense under section 17(a).
 - Citations for a single employer across multiple facilities may support “Repeat”

Citation and Enforcement: *Repeat Violations*

- OSHA is expanding Repeat citation enforcement with respect to performance standards such as Process Safety Management Standards.
 - Many PSM citations have been “repeats” based on various PSM performance standards.
 - BUT compliance varies widely for some PSM performance standards, so query whether “substantially similar” requirement can be met in these circumstances?
- Defending repeat citations:
 - Don’t forget substantive defenses to the underlying cited violation
 - Evaluate whether the prior violation could have given notice for the circumstances in the repeat citation
 - Consider rewriting the violation to reduce its use as a repeat predicate going forward.

Citation and Enforcement: *SVEP Program*

- OSHA's Enhanced Enforcement Program (EEP) program was created to focus resources on "those employers who are indifferent to their obligations under the OSH Act."
 - But in April 2009 congressional hearings, OSHA agreed that the EEP was not working as intended and needed to be improved to target "truly bad actors," such as those with Willful or Repeat violations and/or those linked to workplace fatalities.
- Severe Violators Enforcement Program (SVEP) designed by an OSHA Task Force to replace the EEP.
 - OSHA released relatively little detail about the SVEP – at least until this spring, when OSHA leaked a 27-page draft SVEP Directive to state plan officials for their review.
 - OSHA finalized the SVEP directive on April 22, 2010, and it went into effect on June 18, 2010.

Citation and Enforcement: *SVEP Program*

- According to the Directive, OSHA will consider any inspection that meets one or more of the following criteria as a candidate for the SVEP:
 - Fatality/Catastrophic Criteria. A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated citations or failure to abate notices based on a serious violation related to the death of an employee or three or more hospitalizations. Violations under this section do not need to be classified as “High Emphasis Hazards.”
 - NonFatality/NonCatastrophic High Emphasis Hazards. An inspection that finds two or more willful or repeated violations or failure to abate notices based on high-gravity, serious violations due to a High Emphasis Hazard.
 - A “High Emphasis Hazard” is one based on a fall or a specific NEP identified in the draft, and thus includes (1) fall hazards under general industry, construction, shipyard, marine terminal and longshoring standards; (2) amputation hazards; (3) combustible dust hazards; (4) crystalline silica hazards; (5) lead hazards (based on sampling); (6) excavation and trenching hazards; and (7) ship-breaking hazards.
 - NonFatality/NonCatastrophic Hazards Due to the Potential Release of a Highly Hazardous Chemical – Process Safety Management (PSM). An inspection that finds three or more willful or repeated violations or failure to abate notices based on high-gravity, serious violations related to petroleum refinery hazards, i.e., hazards covered by the petroleum refinery PSM NEP and hazards associated with the potential release of highly hazardous chemicals, as defined by the PSM Covered Chemical Facilities NEP.
 - Egregious Violations. All “egregious” enforcement actions (cases where OSHA has alleged instance-by-instance violation of a particular standard) will be considered SVEP cases.

Citation and Enforcement: *Consequences of Placement into SVEP Program*

- Enhanced, Broad Follow-Up Inspections.
 - Follow-up inspections of the cited workplace will be conducted after the citation becomes a final order, even if abatement verification has been received.
 - In other words, these follow-up inspections are not limited in scope to whether the identified hazard has been abated, but will also include an assessment of whether the employer is engaging in similar violations.
- Nationwide Inspections.
 - Where the agency has reason to believe that a citation is part of a broader pattern of noncompliance, OSHA will conduct inspections at related worksites of that employer. This means, for example, that a Pennsylvania facility that is cited for a particular violation can trigger an investigation of a Texas-based worksite of that same employer.
 - According to the SVEP, the scope of the related inspection “will depend upon the evidence gathered in the original SVEP inspection.”

Citation and Enforcement: *Consequences of Placement into SVEP Program*

- Specifically, OSHA will be looking for evidence of broader noncompliance patterns in its initial investigations—and may issue document requests or subpoenas to gather evidence to determine whether related investigations are warranted.
- OSHA also will identify potential locations to state plan states, and will accept referrals from state plan states.
- Increased Awareness of OSHA Enforcement.
 - The agency will pursue higher-profile enforcement, ensuring, for example, that company headquarters are notified of site-specific issues. OSHA will also issue press releases upon the issuance of citations.
- Enforcement Under Section 11(b).
 - OSHA will strongly consider SVEP cases for federal court enforcement orders under Section 11(b) of the OSH Act.

Citation and Enforcement: *Consequences of Placement into SVEP Program*

- Enhanced Settlement Provisions. OSHA will press SVEP participants to accept the following in settlement negotiations:
 - the hiring of an independent safety consultant to work through compliance issues;
 - applying settlement agreements companywide in accordance with OSHA's 1991 Guidelines for Administration of Corporate-Wide Settlement Agreements;
 - imposing interim abatement controls where full abatement may take time;
 - imposing weekly or other enhanced reporting measures to report current or future jobsites for a certain time period;
 - requiring employers to report work-related injuries and illnesses on a quarterly basis and consent to inspections based on that data; and
 - requiring employers to report for a specified time period any serious injury or illness requiring medical attention, and to consent to inspections based on that data.

Citation and Enforcement: *SVEP Program*—Unanswered Questions

- Unanswered Questions and Implications
 - It is not clear how an employer will be removed from the program.
 - *Will an employer be released from the SVEP if OSHA conducts a follow-up inspection of the originally cited worksite and does not find any similar level of violations? Or is there something more an employer would need to do, such as comply with some or all of the enhanced settlement provisions described above?*
 - It is not clear whether OSHA will face challenges from employers for probable cause if the agency attempts to conduct inspections of other worksites based upon a citation satisfying one of the criteria set forth in the Directive, even though the citation is not yet a final order of the OSHRC.
 - *Under well-developed caselaw, OSHA is required to target its enforcement based upon neutral criteria, and the SVEP's targeting system, currently based upon unadjudicated citations, potentially creates a number of constitutional and legal issues for the agency.*
 - It is unclear how the contest rate of OSHA citations will be impacted if the agency closes the door to potential settlements of willful violations and other citations using the Section 17 “unclassified” approach.

Citation and Enforcement: *Penalty Enhancement*

- On April 22, 2010, OSHA announced it is revising OSHA penalties as calculated in the agency's Field Operations Manual (FOM), effective over the "next several months"
- Dr. Michaels signed the memorandum titled "Administrative Enhancements to OSHA's Penalty Policies," to OSHA Regional Administrators. In the memorandum, Dr. Michaels stated that OSHA's "penalties are too low to have an adequate deterrent effect"
- The changes include:
 - Lengthening the time frame for considering an employer's history of serious, Willful, Repeat, or failure to abate violations from three years to five.
 - Lower the reduction levels provided to employers based on size, e.g., no size reduction will be allowed for employers with more than 251 workers, according to the memo.
 - Any employer who has been cited for any high-gravity serious, Willful, Repeat or failure to abate violation within the past five years will receive a 10 percent increase on the current citation (conversely, if no violations during that period, employer will receive a 10 percent reduction)

Citation and Enforcement: *Penalty Enhancement*

- Minimum penalties for serious violations will be increased to \$500.00
- Reduction of OSHA Area Directors' discretion for potential penalty reductions they can offer without obtaining approval from OSHA Regional Office
- The 10 percent reduction for employers participating in a strategic partnership will be eliminated
- Raise the way in which final penalties are calculated, applying final penalties serially, starting with the gravity-based penalty and deducting the history, good-faith, size, and quick-fix reductions in turn
- Raise gravity-based penalties from a range of \$1,500 to \$7,000 to a range of \$3,000 to \$7,000
- Dr. Michaels stated in the OSHA press release announcing these changes: "OSHA inspections and penalties must be large enough to discourage employers from cutting corners or underfunding safety programs to save a few dollars."

Citation and Enforcement: *Rise of National Emphasis Programs*

- FY 2008 & 2009 Programs Continuing in 2010
 - Site-Specific Targeting
 - Petroleum Refinery PSM
 - Combustible Dust
 - Trenching
 - Amputations
 - Silica
 - Lead
- New Programs for FY 2010
 - Injury and Illness Recordkeeping
 - Chemical Plant PSM
 - Hexavalent Chromium
 - Flavoring Manufacturers (diacetyl and substitutes)

Citation and Enforcement: *Local Emphasis Programs*

- Local Emphasis Programs (LEPs) are enforcement strategies designed and implemented at the regional office and/or area office levels.
- The emphasis programs may be implemented by a single area office, or at the regional level (Regional Emphasis Programs) and applied to all of the area offices within the region.

Examples:

- Fabricated Metal Products
- Ambulance Services
- Bloodborne Pathogens
- Follow-up Inspections
- Never Before Inspected High Hazard Manufacturing
- Noise Exposure
- Powered Industrial Trucks
- Fire Safety
- Casinos and/or Casino Hotels at Native American Reservations or American Trust Lands
- Native Healthcare Facilities

Citation and Enforcement: *Local Emphasis Programs*

- Several area offices have initiated a LEP covering grain handling facilities, or will be doing so by October 1, 2010, including:
 - Region V (Minnesota, Michigan, Illinois, Indiana and Ohio), Region VII (Nebraska, Kansas, Missouri and Iowa);
 - Region VIII (Montana, North Dakota, South Dakota, Colorado and Utah). Region VII currently has a grain-handling facility emphasis program that covers each area office.
- Under a LEP, OSHA compliance safety and health officers are required to conduct inspections of grain elevators that are under federal OSHA jurisdiction. During those inspections, OSHA does not focus on any particular hazard, such as combustible dust or potential engulfment hazards.
- There is not a specific number of grain handling facilities targeted for inspection. The emphasis program lasts for one fiscal year before being considered for renewal.

OSHA Enforcement Update—Grain Handling Industry

Enforcement: Grain Handling Industry

- Grain Handling Facilities Standard--29 CFR Section 1910.272
- OSHA Enforcement Directive CPL 02-01-004 (November 8, 1996) Inspection of Grain Handling Facilities
- OSHA Fact Sheet--Worker Entry into Grain Storage Bins
- For more information see OSHA Safety and Health Topics on Grain Handling

Enforcement: Grain Handling Industry

- OSHA letter to Grain Handling Employers on August 4, 2010 warning of enforcement consequences for failure to follow OSHA's Grain Handling Standard
- OSHA sent letter to almost 3,300 employers in this industry; letter was triggered by citation issued against Cooperative Plus Inc. for \$721,000 in response to a near fatality from engulfment in a soybean storage bin as well as several other recent incidents

OSHA Occupational Safety and Health Home Workers Publications

"OSHA will not tolerate non-compliance with the Grain Handling Facilities standard."

U.S. Department of Labor

Assistant Secretary for Occupational Safety and Health Washington, D.C. 20210



August 4, 2010

Dear Grain Storage

"OSHA has investigated several cases involving worker entry into grain storage bins where we have found that the employer was aware of the hazards and of OSHA's standards, but failed to train or protect the workers entering the bin."

Last week, two teenagers (ages 14 and 19) were killed in a tragic incident involving a grain elevator in Illinois. Both young workers suffocated after being engulfed in a grain bin they had entered to help clear. A third young worker was pulled out of the storage bin alive, and was hospitalized after being trapped for 12 hours.

Unfortunately, this was not a rare occurrence. Researchers at Purdue University documented 38 grain entrapments in 2009 alone. OSHA has found that grain entrapments generally occur because of employer negligence, non-compliance with OSHA standards, and/or poor safety and health practices.

I am writing to you today because it is your responsibility to prevent your workers from dying in grain storage facilities. All employers, and especially those in high hazard industries such as the grain industry, must recognize as well as prevent workplace hazards. As an employer, you must be vigilant and always follow the long established, common sense safety practices that will prevent these tragedies. A copy of OSHA's Grain Handling Facilities standard, 29 CFR 1910.272, is enclosed for your reference. This standard contains the rules that must be followed. States that operate their own occupational safety and health programs under plans approved by Federal OSHA enforce comparable standards but may have different or additional requirements. A list of State plans is available at <http://www.osha.gov/dccsp/osp/index.html>.

"OSHA has aggressively pursued these cases and we will continue to use our enforcement authority to the fullest extent possible."

2. Prohibit walking down grain and similar practices where an employee walks on grain to make it flow.
3. Provide all employees a body harness with a lifeline, or a boatswain's chair, and ensure that it is secured prior to the employee entering the bin.
4. Provide an observer stationed outside the bin or silo being entered by an employee. Ensure the observer is equipped to provide assistance and that their only task is to continuously track the employee in the bin.
5. Prohibit workers from entry into bins or silos underneath a bridging condition, or where a build-up of grain products on the sides could fall and bury them.
6. Test the air within a bin or silo prior to entry for the presence of combustible and toxic gases, and to determine if there is sufficient oxygen.
7. Ensure a permit is issued for each instance a worker enters a bin or silo, certifying that the precautions listed above have been implemented.

As an employer of workers facing these hazards, you have the legal obligation to protect and train your workers. OSHA will not tolerate non-compliance with the Grain Handling Facilities standard. OSHA has investigated several cases involving worker entry into grain storage bins where we have found that the employer was aware of the hazards and of OSHA's standards, but failed to train or protect the workers entering the bin. OSHA has aggressively pursued these cases and we will continue to use our enforcement authority to the fullest extent possible.

"If any employee dies in a grain storage facility, in addition to any civil penalties proposed, OSHA will consider referring the incident to the Department of Justice for criminal prosecution...."

... was ultimately rescued after a four hour ordeal.

If any employee dies in a grain storage facility, in addition to any civil penalties proposed, OSHA will consider referring the incident to the Department of Justice for criminal prosecution pursuant to the criminal provisions of the Occupational Safety and Health Act of 1970.

I am calling on you today to prevent these needless deaths. OSHA State Consultation Programs are available to assist you in complying with OSHA standards. If you have further questions, please contact your local OSHA Area or State Plan Office or your [State Consultation Program](#). More information is available at www.osha.gov.

Sincerely,

David Michaels, PhD, MPH

Enclosure

Enforcement: Grain Handling Industry

- In this letter, OSHA notes that employers must take the following steps with employees engaged in grain handling activities and/or entering grain storage bins:
 - Turn off and lock out all powered equipment associated with the bin, including augers used to help move the grain, so that the grain is not being emptied or moving out or into the bin. Be careful not to stand on grain as grain acts like 'quicksand' and can bury an employee; do not move grain out of a bin as this could create a suction that could kill the employee
 - Prohibit walking down grain and/or similar practices where an employee walks on grain to make it flow
 - Provide all employees with a body harness and a lifeline, or a boatswains chair, and ensure that it is secured prior to the employee entering the bin.

Enforcement: Grain Handling Industry

- Provide an observer stationed outside the bin or silo being entered by an employee. Ensure the observer is equipped to provide assistance and that their only task is to continuously track the employee in the bin.
- Prohibit workers from entry into bins or silos underneath a bridging condition, or where a build-up of grain products on the sides could fall and bury them.
- Test the air within a bin or silo prior to entry for the presence of combustible and toxic gases, and to determine if there is sufficient oxygen.
- Ensure a permit is issued for each instance a worker enters a bin or silo, certifying that the precautions above have been implemented.

Enforcement: Grain Handling Industry

- Labor Department/OSHA Press Release issued on August 4, 2010 in connection with the letter sent to all employers in grain handling industry and the citation against Cooperative Plus Inc.
- Secretary of Labor Hilda L. Solis: "*Disregarding well-recognized standards places workers in this industry [grain handling] in serious danger and will not be tolerated.*"
- OSHA Assistant Secretary David Michaels: "*We are putting these employers on notice*" with this August 4, 2010 letter. "*OSHA will use the full extent of the law to ensure that any employer who violates these standards is held accountable for its lack of concern for worker safety.*"
- In this press release, the Labor Department noted that despite "*clear OSHA standards*" for grain handling, employers "*continue to put workers at risk of death by requiring them to enter grain storage bins without proper protection.*" Examples of this include not only the citation against Cooperative Plus but also citation against a grain elevator in Illinois in which two teenage workers were killed and another worker was hospitalized after being trapped for 12 hours trying to rescue the others; citation of \$1.6 million against the South Dakota Wheat Growers Association for employee fatality at a wheat handling facility.

Enforcement: Grain Handling Industry

- In the August 4, letter, OSHA also cited the following as a recent example of these types of incidents involving grain elevator operators:
 - Citation issued on November 23, 2009 against Tempel Grain Elevators LLP of Wiley, Colorado in the amount of \$1.6 million for the fatality of a teenage employee at their facility in Haswell, Colorado after being engulfed in a grain storage bin. This citation included a number of willful violations for: (1) not providing an emergency action plan prior to entering grain bins; (2) failing to train workers in safe bin entry; (3) a lack of grain engulfment protection; (4) failure to shut off and lock out equipment while employees were working inside bins; (5) lack of rescue equipment; and (6) allowing hazardous accumulations of grain dust that could contribute to fire and explosion.

Enforcement: Grain Handling Industry

- OSHA Citations against Cooperative Plus Inc.
 - OSHA citation issued on August 4, 2010 for \$721,000 where employee was trapped for four hours in soybean storage bin and was nearly engulfed; employee was ultimately rescued
 - *OSHA issued 10 willful violations including two per-instance (egregious policy) for (1) failure to provide workers entering grain storage bins with body harnesses and lifelines, and to provide observer while other worker entered bin; (2) failure to ensure safe procedures were implemented for entry into bins; (3) failure to prohibit workers from walking on the grain inside the bin; (4) failure to provide rescue equipment for workers entering the bins and to implement an emergency action plan*

Enforcement: Grain Handling Industry

- OSHA inspected other Cooperative Plus Inc. facilities and issued a citation on August 17, 2010 for violations at sites in Whitewater and Genoa City, Wisconsin in the total amount of \$374,500
 - OSHA Assistant Secretary David Michaels: "*This continued non-compliance with long established safety standards for working in grain handling operations by Cooperative Plus Inc shows a complete disregard for worker safety.*"
 - OSHA issued 3 willful violations at the Whitewater facility for (1) failure to test the atmosphere before entry and to have an employee entering wear a safety harness and lifeline; (2) failure to post an employee to observe an entry; (3) failure to turn off and lock power to the auger before workers entered the grain bin.
 - OSHA issued 1 willful at the Genoa City facility for failure to turn off and shut off power to the auger before workers entered the grain storage bins
 - OSHA also issued 7 serious violations

Enforcement: Grain Handling Industry

- OSHA Citation against South Dakota Wheat Growers Association
- OSHA issued citation for \$1.6 million against the South Dakota Wheat Growers Association in Aberdeen, South Dakota for the fatality of employee who was engulfed at a grain storage bin at McLaughlin, S.D. facility
 - Secretary of Labor Hilda Solis: "*The South Dakota Wheat Growers Association ignored long-established standards addressing safety in grain handling operations. The company's intentional disregard for its safety and health responsibilities put its workers at risk, and more egregiously, led to an unnecessary loss of life. Worker safety must be a top priority.*"
 - OSHA issued 23 willful violations including (1) failure to prohibit workers from walking on top of clumped grain; (2) failure to prohibit entry into bins where buildup of grain existed; (3) failure to shut off and lock out equipment to prevent grain moving through bin while workers were inside; (4) failure to equip workers with grain engulfment protection; (5) failure to provide observers who could provide assistance; (6) failure to train workers; (7) failure to issue permits to control entry into grain bins; (8) failure to test the atmosphere of the bins; (9) failure to have the necessary rescue equipment and to implement an emergency action plan prior to entry.

The New OSHA: *An Overview*

Old OSHA	New OSHA
Stable budgets.	Increased funding for CSHOs and attorneys in the Solicitor's Office.
Focus on corporate-wide issues and worst offenders.	Significantly increased attention to worst offenders and corporate-wide issues.
Focus on non-regulatory methods to improve worker safety such as guidance documents, SHIBs, etc.	Standard setting is a top priority, including numerous health standards and other controversial areas, such as safety and health programs.
Scale back on recordkeeping requirements.	Enhance recordkeeping and use enforcement tools to ensure accuracy of data.
Predictable penalties.	Higher penalties across the board; greater emphasis on criminal prosecutions.

The New OSHA: *An Overview*

Old OSHA	New OSHA
Reported injuries at a record low because of OSHA's efforts.	Reported injuries at a record low because of widespread under-reporting.
Expanded on compliance assistance and cooperative programs to bring down fatality, injury, and illness rates.	Cooperative programs curtailed in favor of more resources focused on enforcement and citation programs.
Limited use of general duty clause citations for ergonomics, workplace violence.	Increased use of general duty clause for ergonomics, workplace violence, and numerous other areas.
Willingness to settle cases with citations "unclassified."	Limited use of "unclassified" citations as a settlement tool.
Enhanced Enforcement Program.	Severe Violators Enforcement Program.

Practical Suggestions

Practical Suggestions

- Know the National, Regional, and Local Emphasis Programs applicable to your facilities. Review compliance with those priorities in mind.
- Ensure that injury and illness recordkeeping data is reported accurately.
 - Regular and random privileged audits conducted by inside or outside counsel can identify any errors in OSHA 300 Logs and recordkeeping program. Corrections that are made before OSHA inspection are permissible and in keeping with abatement principles embodied in the OSH Act.
 - Ensure that recordkeeping personnel are trained and familiar with current requirements.
 - Evaluate safety incentive programs to ensure they do not “discourage” reporting
- Audits should be considered for specific issues, particularly for employers subject to Local and National Emphasis Programs and those with extensive citation histories.
 - Audits may be used defensively to demonstrate employer’s good-faith efforts to address safety and health issues and obviate Willful violations.
 - Failure to act on recommendations found in audits can be used to demonstrate knowledge and possible “reckless disregard” or “plain indifference” to requirements.

Practical Suggestions

- Think beyond a single facility.
 - Be aware of OSHA's focus on recordkeeping at multiple facility locations, which may trigger multiple citations.
 - Be aware of citations at other locations as they may be the predicate for repeat violations.
 - Be aware of incidents and near misses at other locations as they may be the predicate for a willful violation.
- Carefully evaluate the implications of any abatement.
 - Do not agree to a method of abatement without evaluating what future compliance issues for the facility it may raise.
 - Do not agree to a method of abatement without consideration of whether other locations are able or willing to conform.
 - If drafting a specific method of abatement in a settlement agreement, be sure to provide for the ability to change the method in the future.
- Follow-up inspections from OSHA to verify abatement should be anticipated.

Practical Suggestions

- In the event of an inspection, know the company's rights and responsibilities.
 - Prepare an inspection protocol designating responsible company personnel familiar with OSHA inspections and facility compliance.
- Exercise care in negotiating settlement of any OSHA citations in order to minimize Repeat, Willful and SVEP consequences. In negotiating settlements with OSHA:
 - Consider rewriting citations to be so fact specific as to reduce their use as a repeat predicate.
- Be more open to contests if OSHA or the Solicitor does not give you the settlement you need or want. The risks to the company of not contesting may now be far greater than challenging OSHA on issues arising from its new agenda.