

The 2012 Presidential Election's Impact on OSHA And Workplace Safety and Health

**Edwin G. Foulke, Jr.
Partner
Fisher & Phillips LLP**

Overview

After the 2008 Presidential election and the institution of the Obama administration, there was a clear change in the direction that OSHA was taking. This direction was announced by then-Secretary Solis when she noted that there was a “new sheriff in town” and that enforcement would now be the watchword, particularly at OSHA. Clearly there was a new direction that involved an aggressive enforcement and inspection program as well as an increased emphasis on the regulatory agenda. OSHA focused on doing new directives not requiring rulemaking and instituted the use of direct final rule making which had not been utilized in the previous administration. Also there was a change in the penalty calculations and instructions from the national office which limited the ability of OSHA Area Office Directors to settle cases.

The change that has occurred as a result of the 2012 Presidential is that there will clearly be continuation of the aggressive enforcement. There has been an increase in the number of inspectors, and those inspectors as they become more seasoned will increase the number of OSHA inspections being conducted. In addition, there has been a clear focus on increasing the number of citations that are issued in each inspection and, at the same time, an increase in the penalty amounts for each citation. While starting after the 2008 election, the Severe Violators Program has now been greatly expanded and will play a greater role in the next four years of Obama's second term. OSHA and the Department of Labor have also indicated that they are going to make an expanded emphasis on rulemaking. It should be noted that for over one year OSHA did not issue a Reg Agenda as required. The most recent Reg Agenda now puts an enhanced emphasis on attempting to get a number of rulemakings completed within the next four years. Clearly the Injury and Illness Prevention Program (I2P2) is at the forefront of OSHA's regulatory agenda. Specifically, Assistant Secretary of Labor for OSHA Michaels has made it clear that this is their #1 reg priority. In addition, it is likely that you will see more directives as a way to bypass rulemaking in order to expedite implementation of policies that are considered important to the Obama administration.

It is clear that the increased emphasis on the whistleblower program and emphasis on encouraging employees to report alleged retaliation and discrimination to the whistleblower investigators will continue in the next four years of the Obama administration. The fact that the whistleblower program is now reports directly to the Assistant Secretary (no other program has

direct access) emphasizes the importance of whistleblower protection to this administration. In addition, there has clearly been an emphasis by the National Office to the State Plan States to push to find more “cause” determinations as part of their metrics on being “as effective.” In addition, there is continued emphasis on employee rights, and the number of publications that have been issued by OSHA emphasizing employees’ rights has been greatly enhanced. Finally, the potential elimination of OSHA’s Voluntary Protection Program (VPP) continued to be a desire of this administration, although there seems to be a lot of Congressional opposition to it. The fact that in the last year the number of VPP cites has decreased for the first time in the history of this program demonstrates the lack of focus on the program. It is anticipated that there will be a continued reduction in the number of companies and cites in the VPP program in the next four years.

Achieving Operational Excellence Through Safety

Every day, workplace injuries, illnesses and fatalities cause immeasurable pain and suffering to employees and their families as well as to the company itself. Recent estimates indicate that workplace injuries and illnesses cost American companies approximately \$200 billion per year in wasteful and often preventable expenses. Effective management of employee safety and health protection is a decisive factor in reducing the extent and severity of work-related injuries and illnesses. Effective management addresses all work-related hazards and potential hazards that could result from a change in work site conditions or practices.

Over the past several decades, American businesses have remained profitable and competitive in the local, national and global marketplace by focusing on cost reductions and improvements in productivity, efficiency and quality. Specifically, companies have utilized such business techniques as Six Sigma, Lean, Just In Time, Five S, and Quality Circles as tools to help their companies reduce costs and thus remain profitable and competitive. However, as the cost savings have been achieved in these areas over the years, the ability of companies to further reduce the cost from these areas is greatly diminished. As a result, companies in today’s marketplace need to look at what additional areas are in their business where cost savings can be achieved. The two major potential cost areas where savings can be achieved are in workers’ compensation and healthcare. Safety is the common denominator within these two areas where significant cost savings can still be achieved, thus allowing a company to remain profitable and competitive.

The only way a company can focus on reducing workers’ compensation and healthcare costs within its operation is through the development of an effective safety and health management system. The results of OSHA’s Voluntary Protection Program indicate that implementing an effective safety and health management system improves employee morale and productivity as well as significantly reducing workers’ compensation costs and other costs of work-related injuries and illnesses as well as healthcare costs. These findings show that the best safety and health programs involve every level of the organization, instilling a safety culture that reduces accidents for employees and improves the bottom line for the company. As a result, any company can achieve operational excellence through safety by utilizing an effective safety and health management system.

Development of an Effective Safety and Health Management System

Most experts agree that an effective occupational safety and health management program involves four elements. Those four elements are: (1) management commitment and all employee

involvement; (2) workplace analysis; (3) hazard prevention and control; and (4) safety and health training of all employees to eliminate or avoid hazards. As a general rule, an effective program will include provisions for systematic identification, evaluation and prevention or control of hazards. Also, the program will go beyond specific requirements of OSHA standards to address all safety and health hazards.

In looking at the first element of an effective safety and health system, it is clear that management commitment and all employee involvement are complementary. Management commitment provides the motivating force as well as the resources for organizing and controlling activities within the organization while all employee involvement ensures full buy-in of the entire facility.

Management must clearly develop and communicate its safety and health policies to all employees. Part of the management commitment is to demonstrate that commitment by instilling accountability for safety and health, obeying safety rules as well as conducting and reviewing accident investigations. Part of this management program involves conducting regular safety and health meetings involving employees, managers and supervisors. Furthermore, it must assign responsible persons to coordinate safety and health activities and, at the same time, integrate safety and health into business practices throughout the entire organization. Having safety as a performance metric for all managers and supervisors is also a strong demonstration of management commitment.

Employee involvement provides the means through which all employees develop and express their own commitment to safety and health protection. Management must encourage and provide the opportunity for all employees to get involved in the program in decisions that will affect their safety and health. This includes inspections or hazard analysis teams, developing or revising safe work rules, training new hires or coworkers and assisting in accident investigations. Also, management should, as part of the employee involvement, recognize employees for safe and healthy work practices. Finally, as part of the management commitment/employee involvement element, managers, supervisors and employees must be held accountable for meeting their responsibilities for a safe and healthy workplace.

The second element of an effective safety and health management system is work site analysis. Work site analysis involves a variety of work site examinations to identify not only existing safety and health hazards but also on-site conditions and operations where changes might occur to create additional safety and health hazards. Effective management and employees actively analyze the work areas and work sites to anticipate and prevent harmful safety and health hazards. In addition, management must reevaluate work place activities where changes in processes, materials, machinery, etc. have occurred and may have created new or different safety and health hazards.

As part of the work site analysis, the company should conduct comprehensive initial and annual audits involving safety and health. Such surveys could encompass conducting regular site inspections that may include daily work area inspection procedures as well as the use of checklists for reviewing safety and health issues throughout the site. Also, the employer should provide a reliable mechanism for employees to notify management about apparent hazards, conditions and to receive timely and appropriate responses without fear of reprisal. In addition, with the assistance of employees, management should analyze planned and new facilities,

processes, materials and equipment. Part of this program would be to perform job hazard analysis on each operation in the work site. Part of this work site analysis is the investigation of all accidents and near misses to determine their root causes. The employer should also analyze injury and illness trends by reviewing its OSHA 300 logs so that recurring injuries and illnesses can be identified and prevented.

Once the hazard analysis has been completed, which is an on-going process, then the employer can review those safety and health hazards identified and implement the third element of the effective safety and health management system, namely hazard prevention and control. This element is triggered by the determination that a hazard or potential hazard exists. Where feasible, the employer should try to prevent the hazard by implementing the necessary engineering or administrative control, including effective design of job or job site. Where the hazard cannot be eliminated, the employer must determine what processes or procedures must be implemented to control the hazard to prevent any unsafe or unhealthful exposure to employees. This can include the use of personal protective equipment. It is clear that the elimination or control of the unsafe or unhealthy conditions must be done in a timely manner to ensure the safety and health of the company employees.

The employer has many options as to procedures and methods that can be utilized to timely correct or control safety and health hazards. As noted above, such controls can include engineering techniques, where feasible and appropriate, and procedures for safe work which are understood and followed as a result of training, positive reinforcement and correction of unsafe performance as well as enforcement. The providing of and requirement to use personal protective equipment is also a way to control the safety and health hazard to the employee. In addition, the employer can utilize administrative controls such as job rotation as a method for correction or control of the identified safety and health hazards.

In determining how to prevent or control safety and health hazards at the work site, the employer should look to the best practices within the industry. Obviously, it is important to provide for the facility the necessary safety and health equipment as well as to provide for the maintenance of that equipment. Also, an emergency action plan should be implemented which would include, among other things, training for dealing with the emergencies as well as actual drills to ensure that the employees understand what to do if the emergency occurs. In addition, the employer should ensure that it has a first aid/medical program in place to deal with the type of safety or health issues that could occur in the facility. This would include having first aid on site as well as medical or emergency care available if required.

The final element of an effective safety and health management system is the training of employees on all safety and health issues to which they will be exposed. Specifically, this safety and health training will address the safety and health responsibilities of all personnel, whether they are management or hourly. Many experts in the field of safety and health agree that the most effective way to implement a safety and health-training program is to incorporate it into the training about operational requirements as well as other job practices.

As part of any training, the employees must understand the specific safety and health hazards to which they may be exposed and how to prevent harm to themselves as well as to coworkers. The facility's initial orientation training must be provided to all site and contract employees. Part of any safety and health training must address managers' and supervisors'

responsibilities as well as the employees' role in safety and health. Part of the training must focus on ensuring that supervisors carry out their safety and health responsibility, which may include (1) analyzing the work under their supervision to identify unrecognized potential safety and health hazards; (2) maintaining physical protections in the work areas; and (3) reinforcing employee training through continual performance feedback and, when needed, enforcement of all safety and health work practices. Finally, the specific safety and health training that will be needed will include hazard recognition, training required under OSHA safety and health standards, emergency response, accident investigation, and emergency drills.

Summary

By fully implementing the above-discussed four elements of an effective safety and health management system, the company places itself in the best position to derive the benefits from having such a management system in place. Those benefits, as noted above, include reducing work-related injuries and illnesses, improving morale and productivity, reducing workers' compensation costs, and being more profitable and competitive in the marketplace. By implementing these four elements of an effective safety and health management system, an employer can also keep jobs here in the United States. Clearly the tremendous cost savings that have been achieved by those companies implementing an effective safety and health management system, especially those in OSHA's Voluntary Protection Program, demonstrate how such a system allows the company to be profitable and competitive while, at the same time, allowing all of its employees to go home safe and sound to their families and loved ones each and every night.