

OSHA in President Obama's Second Term

LABOR & EMPLOYMENT
LAW

FROM A DIFFERENT
ANGLE

The Association of Union Constructors
2013 Leadership Conference
Ritz Carlton Lodge
May 8, 2013 – Greensboro, GA

Presented By:

David E. Jones, Esq.

Ogletree Deakins – Atlanta, Georgia

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Overview



- Today's OSHA
- Tough Enforcement Stance
- Severe Violator Enforcement Program
- Benefits of Sustained Compliance



DOL Philosophy

“Let me be clear: the Department of Labor is back in the enforcement business. It’s time for a new direction in the Department. As long as I am the Secretary, the Department will go after anyone who . . . puts workers at risk.”

Former Secretary of Labor Hilda Solis



Thomas Perez, Secretary of Labor Designate

- Head, Department of Justice Civil Rights Division
- April 18, 2013 Senate Committee Confirmation Hearing
- One of top priorities – ensuring a safe work environment

David Michaels, Ph.D.

Assistant Secretary for OSH



- Epidemiologist, Dept. of Environmental and Occupational Health at George Washington University
- Former Dept. Asst. Sec. for ESH in Clinton Admin. Energy Dept.
- Author of book – *Doubt is Their Product: How Industry's Assault on Science Threatens Your Health*

Jordan Barab

Deputy Asst. Sec. for OSH (Political)



- Primary architect of OSHA enforcement crackdown
- Former Senior Labor Policy Advisor to House Education and Labor Committee
- Former AFSCME S&H Director

Debbie Berkowitz

Chief of Staff for OSHA



- Right hand to OSHA administrator
- Former UFCW H&S Director
- Proponent of ergonomics regulation of meatpacking industry
- Gave carpal tunnel a public face

Richard Fairfax

Deputy Asst. Sec. for OSH (Career)



- Long-time OSHA executive; survived many changes in Administrations
- Former OSHA Director of Enforcement
- CIH; started in field
- Recently retired

Enforcement Stance

- “Tough enforcement” – easier politically than issuing standards; also makes it harder for Congress to cut OSHA’s budget
- More “willful” citations
- More “significant” cases
- Hard-hitting press releases

Regulation By Shaming

- Branding cited employers as “bad actors” in press releases to prompt compliance
- In the past, press releases were only issued for violations totaling \$100,000 or more – the threshold is now \$45,000
- Press releases can have big impact



Penalty Philosophy

“For many employers, investing in job safety happens only when they have adequate incentives to comply with OSHA’s requirements . . . Higher penalties and more aggressive, targeted enforcement will provide a greater deterrent . . .”

Dr. David Michaels
OSHA Administrator

Enforcement Initiatives

- Penalty system changes
- Doubled average final penalties for serious violations
- Special emphasis programs
- Corporate-wide settlements
- Severe Violator Enforcement Program

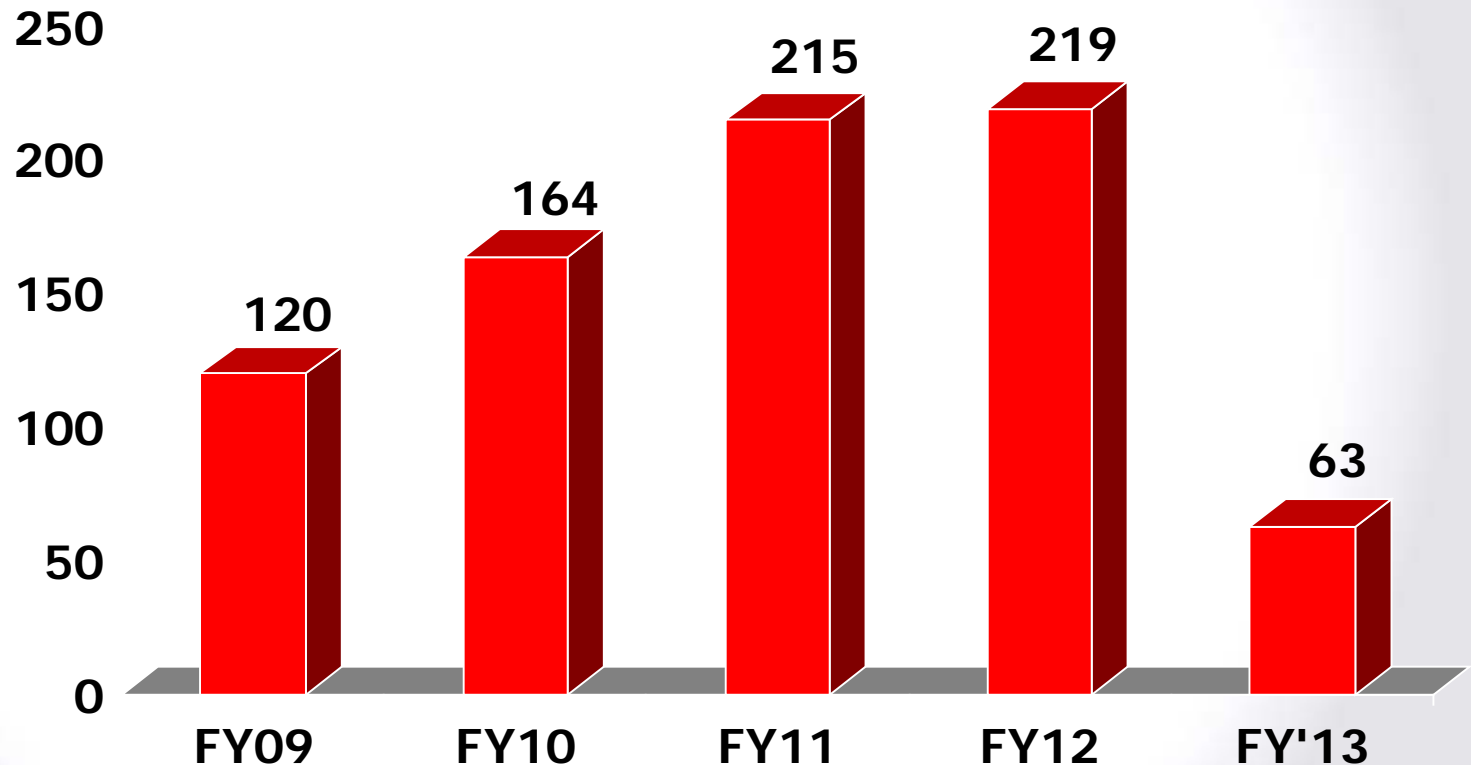
Significant OSHA Cases

- Proposed penalties > \$100,000
- Important statistic for OSHA
- Financial concern for employers

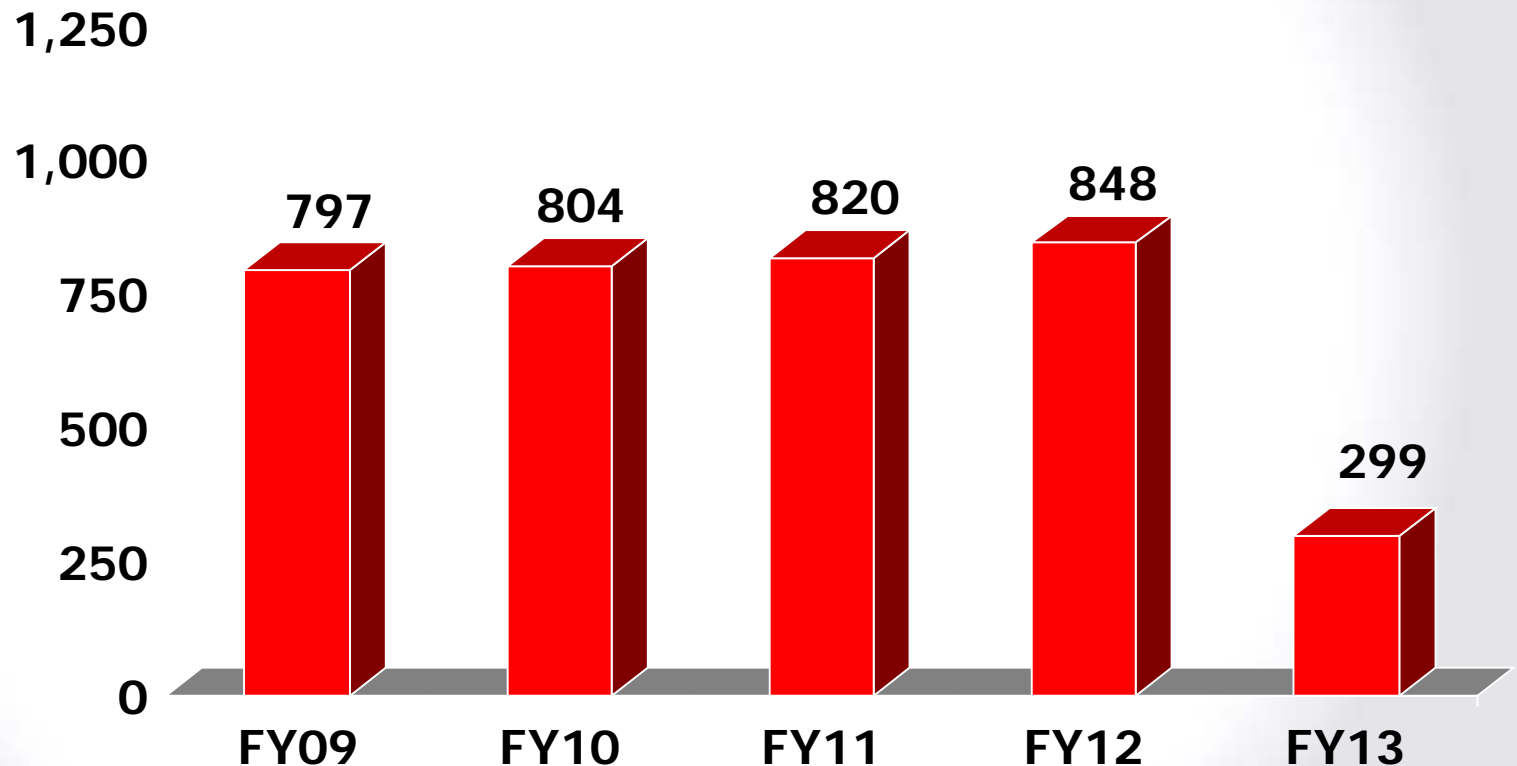


FY 2009 – FY 2013

Significant Cases



FY 2009 – FY 2013 Fatality Investigations



FY 2013 - Top 10 Most Cited Standards For General Industry

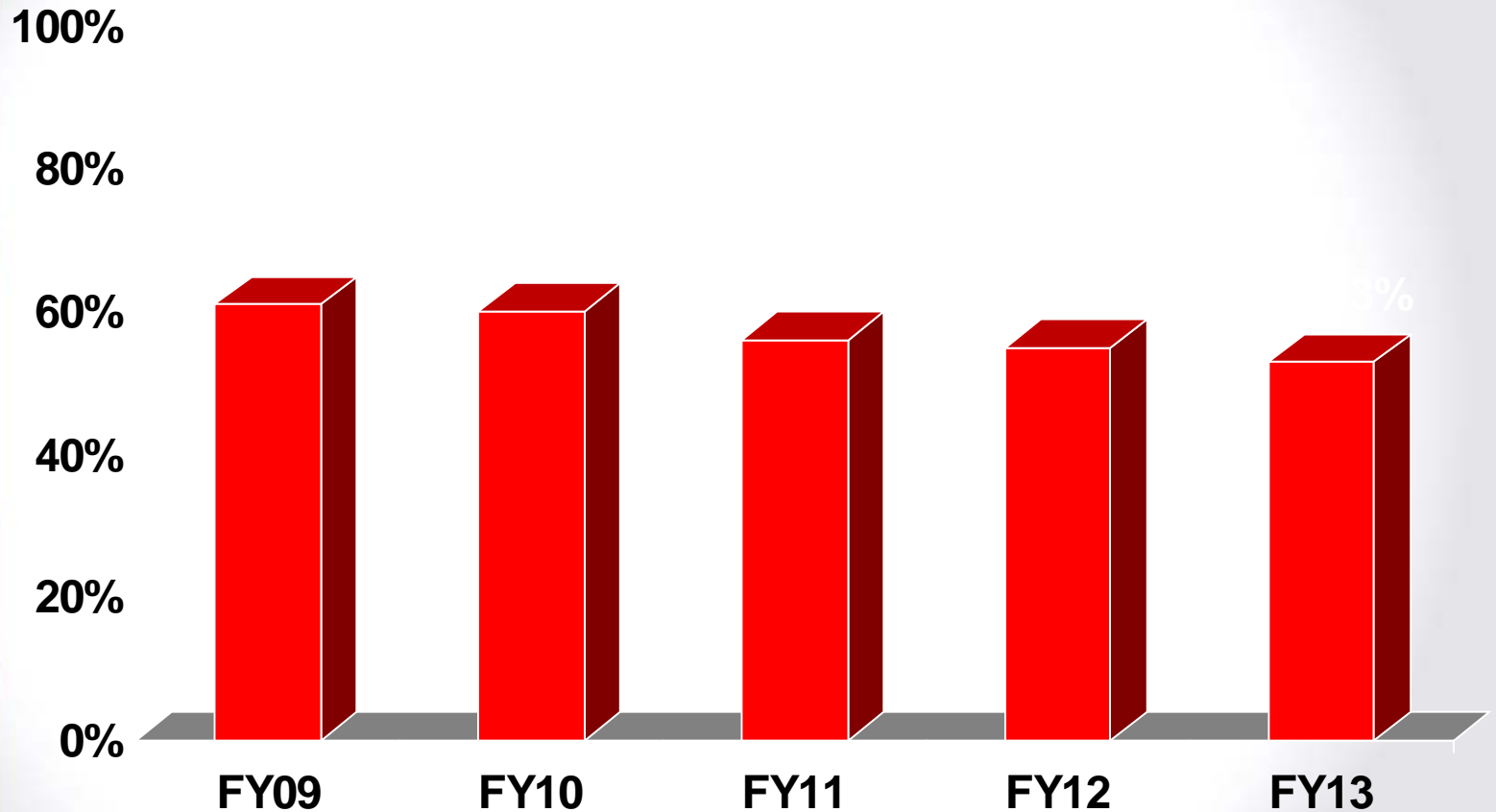
- Hazard Communication
- Electrical, Wiring Methods
- Lockout/Tagout
- Respiratory Protection
- Powered Industrial Trucks
- Machine Guarding
- Electrical, General Requirements
- Bloodborne Pathogens
- Personal Protective Equipment
- Guarding Floor & Wall Openings

FY 2013 - Top 10 Most Cited Standards For Construction Industry

- Fall Protection
- Scaffolding
- Ladders
- Fall Protection, Training Requirements
- Hazard Communication
- Head Protection
- Eye & Face Protection
- Excavation Requirements
- Aerial Lifts
- Safety & Health Provisions

FY 2009 – FY 2013

% Construction Inspections





FY 2013 – Top Standards With The Most Willful Violations Cited

- Fall protection
- Excavation
- General Duty Clause
- Machine guarding

Hot Issues

- General Duty Clause
- Multi-employer worksites
- Workplace violence
- Health hazards
- Heat campaign
- Fall protection campaign
- Customer service



April 5, 2013 OSHA Letter of Interpretation

- Non-union workers can select anyone as their rep. during OSHA inspections
- Response to request of USWA for interpretation of 29 C.F.R. 1903.8(c)
- Original intent to permit participation of third-party subject matter experts, *e.g.*, industrial hygienists
- OSHA inspector makes “final” decision on request for representative

Severe Violator Enforcement Program (SVEP)



- New category of major OSHA enforcement actions
- “Heightened focus on indifferent employers”
- OSHA places “severe violators” in SVEP
- State plans must adopt SVEP or equivalent

Consequences of SVEP

- High gravity serious items not normally grouped
- Implementation of interim abatement controls
- Enhanced settlement provisions



Enhanced Settlement Provisions

- Non-regulatory safety enhancements
- Retain consultant to audit affirmed violations
- Provide OSHA 10- or 30-hour safety training course
- Add various items to forms used in conducting audits
- Deploy internal audit teams on quarterly basis for two years

Consequences of SVEP, cont.

- Mandatory follow-up inspections of cited workplaces
- Regional and nationwide inspections of related workplaces
- OSHA Regional Administrators determine patterns of non-compliance
- OSHA Directorate of Enforcement serves as central coordinator for nationwide referrals

SVEP Admission Criteria

- 1 or more willful, repeated, or failure to abate citations
- Based on serious violation
- Related to death or 3 or more hospitalizations
- 20% of SVEP cases



SVEP Admission Criteria, cont.

- 2 or more willful, repeated, or FTAs
- Based on high-gravity serious violations
- Related to high-emphasis hazard
- 70% of SVEP cases



High-Emphasis Hazards

- Falls
- National Emphasis Programs
 - Crystalline silica
 - Amputations
 - Combustible dust
 - Hexavalent chromium
 - Lead
 - Excavation/trenching
 - Ship breaking
 - Primary metals
 - PSM-covered chemical facilities



SVEP Admission Criteria, cont.

- 3 or more willful, repeated, or FTAs
- Based on high-gravity serious violations
- Due to potential release of PSM highly hazardous chemical
- Section 1910.119 Appendix A
- All egregious enforcement actions (10%)



Exit from SVEP

- Minimum time served - 3 years
- All affirmed violations abated
- All final penalties paid
- All settlement provisions satisfied

Exit from SVEP, cont.



- No further serious citations
- At original and related workplaces
- Receiving inspections

Exit from SVEP, cont.

- Failure to meet above requirements
- After 3 years in SVEP
- Results in employer remaining in SVEP
- For another 3 years



SVEP Facts

- 300+ cases as of January 2013
- OSHA has notified or copied 51 corporate HQs on citations
- Size range of SVEP employers
 - 165 (35%) with 1-25 workers
 - 61 (20%) with 26-100 workers
 - 30 (10%) with 101-250 workers
 - 53 (17%) with 251 or > workers

Benefits of Sustained Compliance

- Reduce injuries and illnesses
- Control workers' comp costs
- Avoid lawsuits
- Avoid adverse publicity



Benefits of Compliance, cont.

- Enhance employee and community relations
- Avoid OSHA inspections
- Reduce potential for civil and criminal penalties
- Avoid “significant” cases
- Avoid placement in SVEP

Enhancing Workplace Safety and Health





Advisory Committee on Construction Safety and Health (ACCSH)

- Established under Construction Safety Act of 1973
- Advises Asst. Sec. for OSH on construction standards and policy
- 15 members representing employers, employees, state agencies, public and NIOSH
- Chair – Peter Stafford, Building & Constr. Trades Dept., AFL-CIO



Concluding Remarks