



OSHA Trends and Developments: One Year into the Trump Administration

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Schoonmaker has defended employers for almost 30 years in lawsuits, arbitrations, and administrative charges brought by employees and governmental agencies throughout the country. Described in the 2013 edition of Legal 500 as “one of the best and brightest lawyers anywhere” and by a contributor to the 2009 edition as “one of the most competent and capable trial lawyers I’ve ever encountered,” Schoonmaker has been certified by the Texas Board of Legal Specialization in labor and employment law since 1994, and is a member of the college of the state bar of Texas.

Today's Briefing

1. What's New in the Current Administration
2. OSHA Enforcement Trends
3. Ongoing OSHA Initiatives
4. Most Cited Regulations
5. Best Practices for Managing an OSHA Inspection
6. Aggressive Use of the General Duty Clause
7. Whistleblowers
8. Severe Violator Enforcement Program (SVEP)



What's New in the Current Administration

- OSHA Administrator David Michaels resigned on January 10, 2017.
 - Longest serving administrator in OSHA's history.
- Loren Sweatt has been the acting head of OSHA since July 24, 2017.
- Scott Mugno, VP of Safety at FedEx Ground, was nominated by the President on October 27, 2017.

Current Status of Mugno Nomination



- Current Status of Nomination
 - Nominated on October 27, 2017.
 - Senate hearing occurred on December 5, 2017.
 - Mr. Mugno was approved by the Senate Health, Education, Labor and Pensions (“HELP”) committee along party lines on December 13, 2017.
 - Senate failed to vote on the appointment before its term ended in December.
 - President resubmitted the nomination and Mugno was again approved by the HELP committee, on January 18, 2018.
 - Senate has yet to vote on his nomination.

The First Year of the Trump Administration



- Scott Mugno
 - OSHA subcommittee chairman for U.S. Chamber of Commerce.
 - Has worked at FedEx since August 1994, initially as a senior attorney.
 - From 2000 to December 2011, was managing director of corporate safety until promoted to Vice President.
 - Has previously advocated for the review and elimination of outdated safety regulations.
 - Anticipated that Mr. Mugno will be a strong supporter of the Administration's anti-regulatory stance on issues such as post-accident drug testing, incentive programs, and voluntary protection programs.

OSHA Enforcement Trends

- Significant enforcement continues under the Trump administration.
- Total number of safety inspectors has fallen about 4%.
- Number of OSHA inspections increased from 31,948 to 32,396.
 - First annual increase in five years.
- Total potential penalty has increased.
 - Serious / OTS / Posting Requirements / Failure to Abate: From \$12,675 to \$12,934.
 - Willful / Repeat: From \$126,749 to \$129,336.
- Average penalty per serious violation increased from \$3,415 to \$3,645.

Ongoing OSHA Initiatives

- Regulatory Freeze
 - Anticipated that few new safety and health standards will be developed under the Trump Administration.
- Press Releases
 - Less “regulation by shaming” that was developed under the previous administration.

Ongoing OSHA Initiatives



- Electronic Recordkeeping
 - Previously delayed by the Trump administration.
 - OSHA has issued a proposal to amend rule so employers do not have to submit Form 300 or 301 electronically.
 - OSHA recently issued statement saying employers in state-plan states must submit records, even if state has not adopted the federal rule.
- Injury and Illness Records
 - President Trump endorses a six month statute of limitations for recordkeeping.
 - May 2017: Congress introduced the Accurate Workplace Injury and Illnesses Restoration Act to reinstate the Volk's rule.

OSHA Liability

- Liability was expanded under “Multi-Employer Workplace Doctrine”
- Now, each Employer is potentially responsible for the safety and health of another Employer’s Employee, if the Employer:
 - Creates the hazard
 - Exposes an Employee to the Hazard
 - Is responsible to correct the hazard, or
 - Is the controlling Employer on the site
- Liability can involve citations (against Employer) and criminal prosecution (against Employer and Management Representatives)

Many Different Categories of Employers and Employees On-Site

- Owner
- General Contractor
- Subcontractors
- Leased/Borrowed Employees
- Temporary Employees
- Consultants

Key: OSHA is looking at the workplace as a whole – so should you.

Many Different Categories of Employers and Employees On-Site

Critical Issues:

- Contractual relationship – must define responsibility for safety and health compliance, employee training, personal protective equipment.
- Exercise of control over “means and methods” of performing work by independent contractor employees or temporary employees if staffing service has on-site supervision
- Imminent Danger – Host employer must stop work immediately if employee in imminent danger of injury.

Aggressive Enforcement

- Use of interpreters
- Emphasis on repeat citations
- Cautionary tale:
 - Use of knowledge of previous inspection to justify willful citation
- Requests for Root Cause analysis and company insurance audits
- Severe Violator Enforcement Program
- Revised Penalty Policy
- Non-English speaking employees
- Recordkeeping/Ergonomics/Dust/Live Electrical Work
- Issuance of Revised Recordkeeping Rules
- Fall Protection – Walking/Working Surfaces

OSHA Liability

- Employer has to ensure that its employees are protected against:
 - Hazards Identified in Specific Regulations
(29 CFR 1926, e.g. falls, electrical, lead, silica, etc.) (Construction Industry)
(29 CFR 1910, e.g. forklifts, confined space, noise, etc.) (General Industry)
 - **General Duty Clause** -- employers are required to provide their employees with a place of employment that “is free from recognizable hazards that are causing or likely to cause death or serious harm to employees.”
 - Elements of General Duty Clause Violation
 - (1) Hazard that Could Cause Death or Serious Physical Harm
 - (2) Recognized by Employer or Recognized in the Industry
 - (3) Feasible Means of Abatement

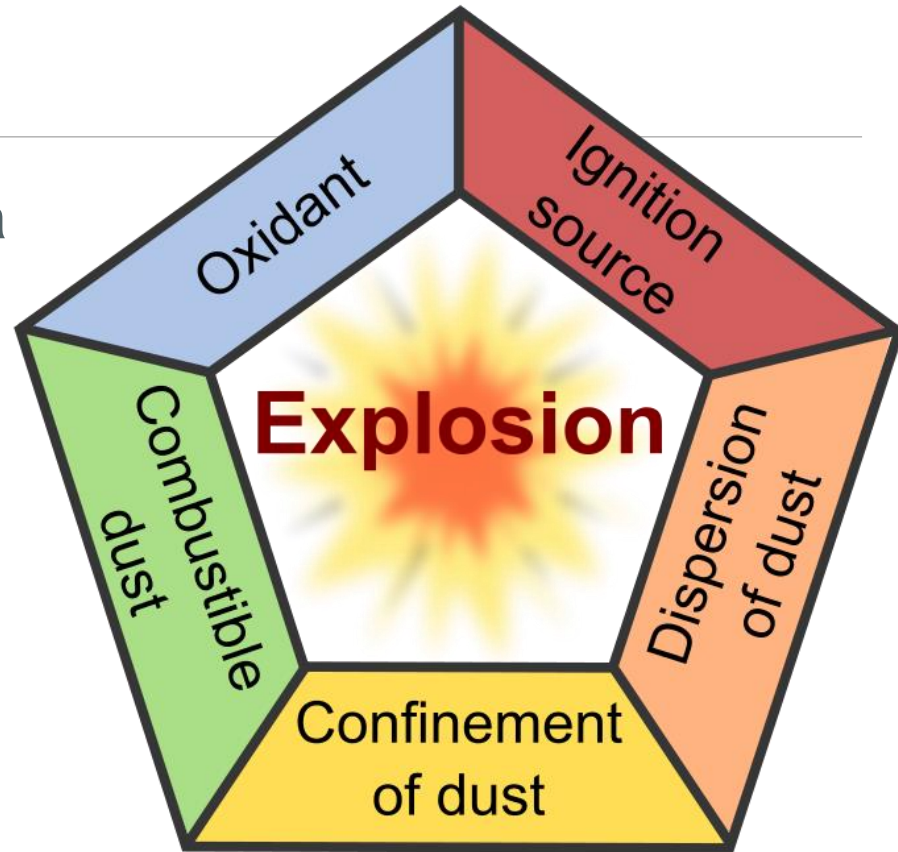
Aggressive Enforcement

- Enhanced Use of General Duty Clause
 - Combustible Dust
 - Ergonomics
 - Workplace Violence
 - Heat Illness
 - Arc Flash / Blast



Combustible Dust

- Fine Particles in Confined Area
- Rapid Combustion / Deflagration Hazard
- Risk in Many Industries
- Hazard Assessment
- Dust Control, Ignition Control
- 2017 Federal OSHA Statistics
 - 476 Inspections
 - 319 Citations
- <https://www.osha.gov/dsg/combustibledust/guidance.html>



Ergonomics

- Exposure to Musculoskeletal Disorders (MSDs) Due to Risk Factors:
 - lifting heavy items
 - bending
 - reaching overhead
 - pushing and pulling heavy loads
 - awkward body postures
 - performing the same or similar tasks repetitively
- MSDs accounted for 33% of all worker injury and illness cases
- Means of Abatement
 - Engineering Solutions
 - Training
 - Stretching
 - Acclimatization
 - Breaks
 - Encourage Reporting

Heat Illness

- Exposure to Extreme Heat or Humidity
- Dozens of Cases of Heat Illness Each Year
- Means of Abatement
 - Water, Rest, Shade
 - Acclimatization
 - Breaks
 - Emergency Preparedness
 - Monitoring
- 2017 Federal OSHA Statistics
 - 11 Citations
 - 55 Hazard Alert Letters



<https://www.osha.gov/heat/>

Workplace Violence

- Defining Workplace Violence

“Violence” means the attempted, threatened, or actual conduct that causes and/or is likely to cause injury, including any threatening statement or behavior which gives an employee reasonable cause to believe that he/she or another worker is at risk of injury.



Defining Workplace Violence

- Type I Individual with no connection to workplace commits a crime.
- Type II A violent act by a customer / client directed at an employee at the workplace.
- Type III A violent act by a current/former employee directed at another employee.
- Type IV A violent act at the workplace by another person who has a relationship with an employee.

OSHA Enforcement of Workplace Violence

- Management Commitment and Employee Involvement
- Worksite Analysis
- Hazard Prevention and Control
- Safety and Health Training
- 2017 Federal OSHA Statistics
 - 6 Citations
 - 66 Hazard Alert Letters



Elements of an Effective Anti-Violence Policy

- Clear Statement of Policy
 - “Zero tolerance”
 - Definition of prohibited acts or threats (include bullying)
 - Examples of prohibited acts or threats
 - Responsibility to report acts or threats
 - Encouragement of EAP use
- Identification of Response Team (Security, HR, Legal, Management, Psych Consultant)

Reducing Risk



- **Assessment of Hazards**
 - What and where are my injuries?
 - Injury/illness data, workers' comp records.
 - Audits—Privilege is Key!
 - Where are the complaints?
 - Internal reporting, unions, safety committees.
- **Low Hanging Fruit**
 - Most frequently cited hazards.
- **Effective Inspection Management**

Top 10 Most Frequently Cited Standards – FY 2017

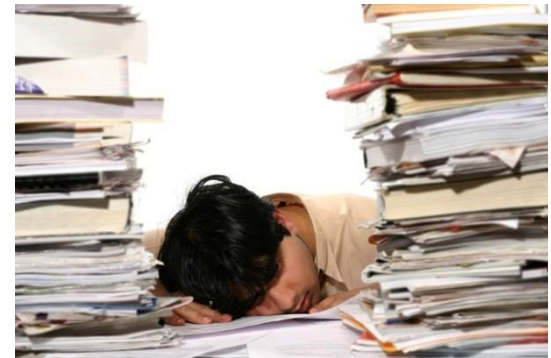
OSHA's 2017 Top 10 Most Frequently Cited Violations



OSHA Recordkeeping

Scope of Documents for Recordkeeping Inspection

- OSHA Forms 300, 300A and 301
- Medical records
- Worker's compensation records
- Insurance records
- Payroll/absentee records
- Company safety incident reports
- Company first aid logs
- Alternate duty rosters
- Disciplinary records relating to injuries and illness



Revised Recordkeeping Rule

- Rule will potentially impact employer policies relating to:
 - requirement to timely report injuries or illnesses to employer
 - incentive program metric based on recordable injury or illness (DART rate)
 - post-accident mandatory drug testing

Employee Literacy Challenges

- OSHA inspections revealing increasing lack of Employee Literacy
- Employees don't "understand" training
- English Speaking employees are unable to read safety and health programs
- OSHA challenges the particular language in safety programs
- Employers are rewriting safety programs to level of fourth grade educational comprehension
- Employers utilize more visual aids such as pictograms

Native Language Requirements

All training must be given in a language that the employee understands

- Certain OSHA regulations require “training”, others require Employer to prove training was “effective” or “understood”
- OSHA will look at how employer provides work instructions to employees and whether it is different than safety training (e.g. safety training in English but supervisor gives work instructions in Spanish).
- OSHA will interview employees to determine whether they understand English only training (e.g. if employee cannot speak English but all training documents are English only, you have a problem).
- Employers must determine whether employees are literate
- Bilingual trainers and documentation may be required to prove training was compliant.

Revised Penalty Structure

- OSHA penalties increased to Consumer Price Index (CPI)

	<u>Prior Maximum</u>	<u>January 1, 2017</u>
• Other Than Serious	\$7,000	\$12,934
• Serious	\$7,000	\$12,934
• Willful	\$70,000	\$129,336
• Repeat	\$70,000	\$129,336
• Failure to Abate	N/A	\$12,934 per day

- Will be revised every following year

Criminal Law Liability

OSHA

- Potential liability if:
 - Fatality
 - Violation of specific regulation
 - Violation was willful, and
 - Violation caused fatality
- Penalty
 - 6 months imprisonment, and/or
 - \$500,000 fine per fatality for employer
 - \$250,000 fine per fatality for individual

NOTE: No Miranda Warnings Necessary

Criminal Law Liability

OSHA – Additional Potential Criminal Liability

- Obstruction of justice for interfering with inspection
- Falsification of records
- Lying to federal inspector

STATE LAW

- Murder
- Manslaughter
- Reckless Endangerment
- Battery

Liability for Employer and Manager

Top 10 Most Frequently Cited Standards – FY 2017

1. Fall protection, construction (over 6,800 cited)
2. Hazard communication standard, general industry (over 4,600 cited)
3. Scaffolding, general requirements, construction (over 3,600 cited)
4. Respiratory protection, general industry (over 3,300 cited)
5. Control of hazardous energy, general industry (over 3,100 cited)
6. Ladders, construction (over 2,500 cited)
7. Powered industrial trucks, general industry (over 2,300 cited)
8. Machinery and machine guarding, general industry (over 2,100 cited)
9. Fall protection, training requirements, construction (over 1,700 cited)
10. Electrical, wiring methods, components and equipment, general industry (over 1,500 cited)

Inspection Management

- The most effective defenses are developed Before and During an OSHA inspection, not after the inspection.
- When OSHA Arrives:
 - Politely receive the compliance officer.
 - Show the compliance officer to conference room/empty office.
 - Immediately notify the point person.
 - Point person takes control of the inspection, is responsible for all communications with the compliance officer, and shadows the compliance officer throughout the inspection.
 - First impression is important.

Inspection Management

- Inspection Focus
 - Determine why OSHA is inspecting
 - Types of inspections:
 - (1) Fatality/catastrophe/serious injury
 - (2) Employee complaint
 - (3) Programmed
 - National/Local Emphasis Program
 - Wall-to-wall inspection



Inspection Management

- Plain View Doctrine
 - Compliance officer can issue citations for any violations in “plain view.”
 - If the compliance officer doesn’t see it, they can’t cite you for it.
- Admissions
 - Never admit to a violation (“I’ll check into that”).
 - Never admit you don’t have something (“Let me get back to you on that”).
- Immediately Correct Unsafe Conditions Identified by The Compliance Officer Without Admitting That The Condition Constitutes a Violation
 - May avoid the citation.
 - May lessen the classification or penalty of a citation.

Inspection Management

- Employee Interviews
 - Non-Management Interviews
 - Explain employee rights
 - Conduct your own investigation
 - Management Interview
 - Right to counsel
 - Binding admissions
 - Avoid the “casual” interview
 - Remember: Everything is on the record. Do not engage in idle conversation concerning safety issues.



Inspection Management

- Document Control Is Important
 - No Such Thing As A “Safety Program”
 - Ask the compliance officer which specific program they are looking for.
 - Only provide OSHA with documents that are within the scope of the inspection.
 - OSHA can issue citations for violations relating to any document the employer gives to them.
 - General rule of thumb: less is more.

OSHA Complaints

- OSHA Complaints can originate with:
 - Employee
 - Public
 - Another Agency (Referral)
 - Competitor?
- Can result in:
 - Letter seeking response
 - Seek guidance
 - Inspection
 - If OSHA perceives a danger

Whistleblowers – Overview

- Increase in Whistleblowers
 - Media has turned Whistleblowers into “heroes”
 - Increased visibility on OSHA site
 - What about the future?
- Fed-OSHA administers 22 statutes with Whistleblower provisions:
 - 11(c), STAA, AIR21, CERCLA, SOX, etc.
- States have their own Whistleblower provisions:
 - Michigan, California, etc.
 - Must provide “equivalent protection”



Whistleblowers – What is Required

- Focus on OSH Act Section 11(c):
 - “No person shall discharge or in any manner discriminate against any employee because the employee has”:
 - Filed a complaint;
 - Instituted or caused to be instituted any proceeding;
 - Testified or is about to testify in any proceeding; or
 - Exercised on their own behalf or on behalf of others any right afforded by the Act.

Whistleblowers – What is Required (cont'd)

- Protected activity (previous slide) +
- Employer knowledge +
- Adverse action +
- Causal nexus
 - Reasonable cause – (highest bar) – 11(c), AHERA, ISCA
 - “but for”
 - Motivating factor (middle bar) – 8 statutes
 - typically the environmental statutes
 - Contributing factor (lowest bar) – 13 statutes
- Defenses
 - Would have reached the same decision regardless

Whistleblowers – Legitimate Issues

– Moral of the story:

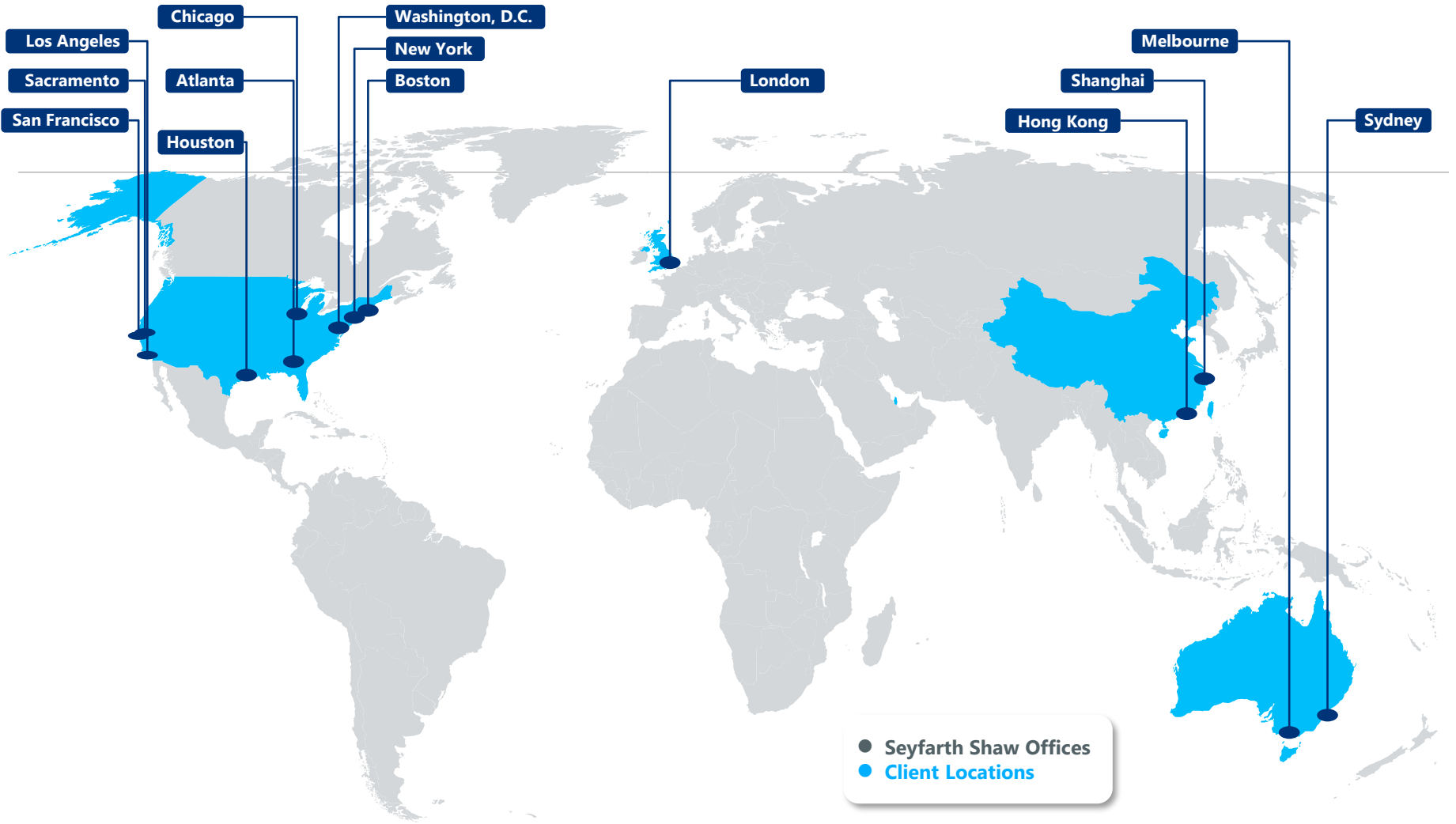
- Clear anti-retaliation policy is key
 - OSHA Poster: “It’s the Law” is not enough anymore
 - Notify employees that they will not be retaliated against for reporting injuries/illnesses or other protected activities
- Good documentation of decision to take action
 - Ongoing issues with employee
 - Specific incident
 - Violation of specific policy

Whistleblower – Investigations

- OSHA 11(c) investigator will send letter:
 - Requesting response
 - Documentation
- Investigator may conduct employee/management interviews
- Investigator will issue decision
 - Merit (ALJ)
 - OSHA can request back pay and reinstatement
 - Some statutes allow for attorney's fees and punitive damages
 - No-Merit
- Employee has a right to appeals
 - Specific time frame depending on statute

Severe Violator Enforcement Program (SVEP)

- Multiple “high-gravity” Repeat or Willful violations
 - High-emphasis hazards (lockout/tagout, machine guarding)
 - Fatality
- Result:
 - Name listed on OSHA website & news release
 - Coordinated inspections at similar facilities around country
 - Enhanced settlement
 - Mandatory follow-up inspection
 - In program for 3-years +
- Questionable from Due Process standpoint



● Seyfarth Shaw Offices
 ● Client Locations

United States	Connecticut	Iowa	Minnesota	New Jersey	Oregon	Utah	Australia	Netherlands
Alabama	Florida	Kansas	Mississippi	New Mexico	Pennsylvania	Vermont	Bahrain	Saudi Arabia
Alaska	Georgia	Kentucky	Missouri	New York	Rhode Island	Virginia	Belgium	United Kingdom
Arizona	Hawaii	Louisiana	Montana	North Carolina	South Carolina	Washington	Canada	
Arkansas	Idaho	Maryland	Nebraska	North Dakota	South Dakota	West Virginia	Germany	
California	Illinois	Massachusetts	Nevada	Ohio	Tennessee	Wisconsin	Greece	
Colorado	Indiana	Michigan	New Hampshire	Oklahoma	Texas	Wyoming	Korea	



Thank You

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