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NMSA News Bulletin . . . 12/10/2009

- **[Next MACOSH Meeting Scheduled](#)**—OSHA has scheduled the next meeting of the MACOSH for January 19-20, 2010. The meeting will be held at the U.S. Department of Labor building in Washington, DC. The Longshore and Shipyard workgroups will meet on January 19, 2010 from 9 AM until 5 PM, and the Committee will meet on January 20, 2010 from 9 AM until 5 PM. The Longshore workgroup discussion is expected to cover the issues of welding guidance, safety zone guidance, speed limits in marine terminals, and container repair safety guidance. If any NMSA members expect to attend, please contact Chuck Carroll at carroll@nmsa.us.
- **[GAO Report on OSHA's Records Audit Process](#)**—In mid-November, the GAO released a report on the workplace injury & illness data audits performed by the Occupational Safety & Health Administration (OSHA). The report is generally critical of the way OSHA performs audits of the data, and how it does, or does not, verify the collected data.

The GAO criticizes OSHA for not regularly interviewing workers in order to verify employer-reported data. GAO is also critical of the long lag time—often up to two years—between the filing of injury & illness reports and the actual audit of the report. This lag time contributes to the lack of worker interviews to verify the reports because, frequently, an injured worker is no longer with the company or, alternatively, cannot remember the particulars of a reported injury or illness. OSHA is also criticized in the report for excluding eight high hazard industries, a result of OSHA's use of the Standard Industrial Classification (SIC) system rather than the North American Industry Classification System (NAICS) used by the Bureau of Labor Statistics.

The GAO asserts that both workers and employers have disincentives to accurately reporting illnesses & injury statistics. On the worker side, GAO says that workers fear job loss or other disciplinary action, that they fear that they might be required to undergo mandatory drug testing, and that employer safety incentive programs that reward workers might also be a disincentive to reporting illnesses or injuries. An OSHA official told the GAO that under the recently announced National Emphasis Program, "OSHA will explore the possible impact that incentive programs have on workers' decisions to report injuries and illnesses."

On the employer side, GAO cites increased worker compensation costs and the fact that high injury and illness rates might jeopardize an employer's ability to compete for contracts. GAO also says that "businesses



sometimes hire independent contractors to avoid the requirement to record workers' injuries and illnesses because they are not required to record them for self-employed individuals." The GAO report also states that OSHA inspectors and stakeholders believe that there is a "lack of understanding of OSHA's recordkeeping requirements" by individuals who record injuries and illnesses.

GAO's recommendations to improve OSHA's injury and illness records audits include:

- requiring inspectors to interview workers during audits;
- minimizing the amount of time between record filing and audits;
- updating the list of high hazard industries; and,
- increasing employer training to insure proper recordkeeping.

OSHA has agreed with the GAO recommendations, and intends to implement all of the above recommendations. OSHA notes that updating the list of high hazard industries by switching from the SIC system to the NAICS system will require a rulemaking. In a press release, Acting Assistant Secretary for OSHA Jordan Barab said the "agency will move swiftly to implement the recommendations." ***Labor Secretary Hilda Solis stated that "many of the problems identified in the report are quite alarming, and OSHA will be taking strong enforcement action where we find underreporting."***

In light of the GAO report and September's announcement from OSHA regarding the National Emphasis Program (NEP) (see October NMSA Bulletin), Carol Lambos, Esq., of the Lambos Firm in New York City, suggests that employers gain a complete understanding of the consequences of OSHA's NEP and that employers "better [be] compliant than sorry." Ms. Lambos notes that a NEP is "generally a one-year program that targets a specific area of compliance. The program will focus on high-hazard industries where there may be underreporting of injuries and illnesses." It is likely that "OSHA will be looking at low-reporting facilities in high-risk workplaces," and that you should anticipate "that such audits will be conducted at marine-cargo-handling facilities in the near future."

Ms. Lambos recommends that employers visit the [OSHA website](#) for help with compliance with recordkeeping requirements and to obtain information about "what to expect in the event of a record keeping audit." Downloading the OSHA Compliance Directive from the website would be a good first step, and remember that you "cannot be cited for over-reporting but will most certainly be cited for under-reporting." Also, "be aware that OSHA will look for gray-area situations that are likely to involve illnesses or chronic conditions as reporting injuries is generally more clear cut."

Finally, Ms. Lambos offers the following suggestions:

- Make sure you are thoroughly familiar with OSHA Forms 300, 300A, and 301;
- Record workplace injuries in a timely manner;
- Know whose injuries you are responsible for reporting;
- Utilize medical information to assist in making a decision whether or not to report;
- If you choose not to report, be sure to have appropriate back-up information;
- Remember that work-related illnesses and chronic conditions can also be reportable;
- A case is considered work-related if an event or exposure in the work environment either caused or contributed to the condition;
- A case is presumed work-related only if an event or exposure in a work environment is a discernable cause of the injury;
- A worker's pre-existing injury or illness can become work-related if it is aggravated by a workplace event or exposure;
- Know the difference between a new versus a continuing case; and,



- Accurately record days an employee is unable to work—not just the days that the employee misses work.

NMSA suggests that its members inform their constituent MTOs of the NEP implementation and the recommendations listed above so they can take appropriate action. Thanks to Ms. Lambos for providing this information.

• **Labor Secretary Discussed DOL Regulatory Agenda on December 7**—At 10 AM EST on December 7th, DOL released its regulatory agenda on the [DOL website](#). Web chats were also held this week by the heads of OSHA, Office of Labor-Management Standards, the Wage & Hour Division, the Employment and Training Administration, MSHA, Office of Federal Contract Compliance Programs, and the Employee Benefits Security Administration. The DOL’s complete regulatory agenda was published in the December 7, 2009 [Federal Register](#), and is also available on the [DOL website](#). Videos of the web discussions are also available at the [DOL regulatory website](#).

• **OSHA Assistant Secretary Nomination Approved by Senate**—Dr. David Michaels’ nomination was approved by the Senate on December 3, 2009 after approval by the Senate Health, Education, Labor and Pensions (HELP) Committee on November 18, 2009.

Notes on the Legislative Front:

• **OSHA Reform Legislation (H.R. 2067)**—One of the current provisions of the “Protecting America’s Workers Act” would permit criminal penalties to be levied in cases of willful safety violations. The legislation allows “any responsible corporate officer” to be prosecuted under this criminal penalty provision. Because the definition of “responsible corporate officer” is ambiguous, Rep. Lynn Woolsey’s (D-CA) staff on the House Education and Labor Subcommittee on Workforce Protections is trying to find a way to tighten up the language to limit the number of “corporate officers” who might be affected. The unions, obviously, want the broadest definition possible.

• **Federal OSHA Jurisdiction Possible Even if State Has its Own Program**—Rep. Dina Titus (D-NV) is looking at the possibility of introducing legislation that would allow the federal OSHA to have concurrent jurisdiction over workplace safety and health issues even if a state has its own, approved-by-OSHA, workplace safety and health program. The issue of state OSHA programs arose after a House Education & Labor Committee hearing critical of the state of Nevada’s OSHA program. Acting Assistant Secretary of Labor Jordan Barab stated at that hearing that OSHA is currently reviewing all state OSHA programs with an eye to making recommendations to improve programs that OSHA feels don’t pass muster.

Happy Holidays from the NMSA Staff!

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