



Guilty Until Proven Innocent: Questions About OSHA's Enforcement Approach

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Innocent until proven guilty is a bedrock principle of our legal system, but when it comes to safety and health enforcement, OSHA's leadership has turned this principle on its head. Many of the agency's actions indicate its leaders are more comfortable with the idea that companies are guilty until they prove themselves innocent.

The indicators are everywhere:

- At the area office level, OSHA is conducting fewer intensive reviews of inspectors' case files and recommended violations to be sure the government's burden of proof has been met.
- The agency has made it tougher for companies to enter into the Voluntary Protection Programs, which encourage good employers to work hand in hand with their employees and the agency to build better and more effective safety and health programs. In many cases, it takes a year or more for employers to qualify for VPP.
- Dr. David Michaels, OSHA's leader, has given an unprecedented embrace to the tactic of "shaming" as an enforcement tool -- that is where the agency publishes a press release about the results of significant inspections in the hopes the bad publicity will incentivize other companies to come into compliance. However, OSHA never corrects or retracts a news release when violations are dropped or significantly modified.

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As a result, in my opinion, OSHA's credibility with employers is at its lowest point since the agency was founded. And, perhaps not surprisingly, in my opinion, the new approach has not improved worker safety, as can be confirmed by a look at the history of recordable rates for non-fatal injuries and illnesses in private industry. This rate showed annual declines every year from 1994 to 2009, when Michaels arrived. Injury and illnesses rates were essentially flat in 2010 compared with 2009 and 2011 compared with 2010.

To understand what is behind these results, I think it would be helpful to look at how OSHA's enforcement approach developed over the years. My most direct frame of reference is the 25 years I spent with OSHA from its beginnings to 1996, when I retired after spending two years as deputy assistant secretary of Labor for OSHA. I was previously regional administrator for the New York region for seven years.

OSHA's Enforcement History

In the early 1970s, the initial enforcement emphasis was on safety issues. In the middle 1970s, occupational health started to be emphasized. In the 1980s, the agency undertook a dual focus.

On the one hand, it made a conscious decision to focus enforcement on employers who needed the most attention. It was at this point that OSHA began publicizing significant inspections in hopes that the negative publicity would deter other serious violators. On the other hand, however, OSHA also began working with companies with good intentions on safety and health to help them get better.

That approach continued into the 1990s. The agency's leadership, of which I was a part, believed in firm but fair enforcement. A major difference between then and now was that we listened to employers and employees who were being inspected and took their positions and objections into account during the inspection and at the informal conference.

Another major difference was that we were committed to meeting our burden of proof. That meant conducting extensive internal reviews of inspectors' case files to be sure we really had the goods before moving forward.

Today, in my opinion, there are more errors by inspectors and area offices and less interest in doing the right thing. It is almost as if cited companies are guilty until proven innocent rather than the other way around, as it should be.

Yet, legally, nothing has changed. The burden of proof is still OSHA's, except in a small number of cases where the employer offers an affirmative defense, such as that it was infeasible to follow regulations or that following the regulations would have created a greater hazard. What has changed is the attitude of the agency's leadership.



The Current Situation

OSHA's new enforcement direction became very evident in 2009 when then-new Secretary of Labor Hilda Solis announced there was a "new sheriff in town." What followed were a series of clampdowns, some which had a "guilty until proven innocent" element.

Recordkeeping.

Under Michaels, the agency launched a National Emphasis Program on recordkeeping and said it viewed improved recordkeeping as a critical priority. In fact, at one point, Michaels' deputy assistant secretary, Jordan Barab, said half of the workplaces inspected under the National Emphasis Program for recordkeeping were underreporting injuries and illnesses.

Under the NEP pilot program, OSHA inspected about 350 workplaces suspected of providing inaccurate reports of workers' injuries and illnesses. The program was a re-launch of an earlier version that was halted because inspectors failed to find the underreported injuries and illnesses they were expecting. After all of the confusion surrounding the original pilot and its failure to find recordkeeping violations, I have substantial doubt that a new look at targeted companies could really find legitimate accidents and illnesses that were never reported.

Further, OSHA's recordkeeping requirements pose an unnecessary burden on companies, which have to devote many, many hours to comply. One reason OSHA offers for recordkeeping requirements is that the data help employers identify where they are having safety and health problems, but most companies know where their accidents and illnesses are occurring anyway. The second reason OSHA points to is that the resulting records help OSHA target high-risk employers for inspection, but OSHA could determine that in other ways. If the agency is so critical of employers for underreporting, why would it use this same information to target high-risk employers?

While I am not advocating that OSHA do away with recordkeeping, it could reduce the complexity of what is required without damaging safety or health.

The "shaming penalty."

Michaels has said he views shaming news releases as a cost-effective way to increase enforcement without hiring additional inspectors.

The problem is that the press releases are issued when OSHA alleges violations and proposes fines against a company, not when the cases are resolved. In my opinion, after the news release is issued the company is viewed by its industry peers as being in violation of OSHA regulations. So a company's reputation can be hurt, and is hurt in many instances, over allegations of violations that are unproven.

This is OSHA's standard operating procedure. You will be hard pressed to find an updated press release on its website. Don't get me wrong: Companies that endanger worker health and safety ought to be cited, but it's time for OSHA to start playing fair and update news releases with final orders of the Occupational Safety and Health Review Commission.

I should note that when I was at OSHA, we also issued press releases about major cases that were never updated. That was also wrong -- although the tactic now has been greatly expanded with many more press releases issued involving less-significant cases.

Severe Violator Enforcement Program.

The Severe Violator program, of course, imposes mandatory re-inspections on companies found to "willfully and repeatedly endanger workers by exposing them to serious hazards." It also subjects companies to inspections at their other locations around the country and effectively imposes a "shaming penalty" by placing the companies on a public list of severe violators.

Under the guidelines, a company placed on the list of Severe Violators stays on it for three years after final disposition of the citation, and OSHA continues to monitor the company's safety performance over that period. If performance is not satisfactory, the company remains on the list for three more years. The three-year stay on the list continues, no matter if the company has abated all of the problems found in the original citation or taken other steps to improve its safety program.



For construction companies, this can effectively amount to something close to a "death penalty." A general contractor or project owner, for example, is highly unlikely to do business with a company on the Severe Violator list.

More That OSHA Could Do

There are two other issues that are longstanding problems that could greatly improve enforcement if solved. The current leadership, like past administrations, has done little or nothing about them.

- Inconsistency in enforcement. I continually hear about this from multi-site employers. Company practices that are found in compliance by an OSHA inspector in one location are written up as violations in others. Practices that pass muster in one state plan are written up by state plan inspectors in other states or by federal inspectors in other jurisdictions. This leaves employers confused about how to implement their safety programs. In my opinion, workers are put in significant danger when the rules are unclear.
- Outdated standards. Employers are also left confused by another OSHA failure: not revising outdated standards. Many of OSHA's standards date from the early 1970s when the agency was founded. Read them today, and they talk about equipment that is no longer used and procedures that are no longer relevant. That leaves employers and employees confused about what to do. That confusion leads to safety practices that are not in the best interests of workers. In my opinion, with an updated set of standards, employers would better know what to do, safety practices would improve, and injuries and illnesses would drop.

Here are a couple of examples:

- Fall protection standards in general industry have not been revised for decades. As a result, they don't even mention the use of safety harnesses and lanyards, common protective equipment used regularly in general industry. Nor do they address walking/working elevated surfaces that are not floors, platforms, or runways, again something common in industry.
- Standards for overhead traveling cranes don't take into account any technological advances since the 1960s, of which there have been many. When OSHA put overhead traveling crane regulations in place in the early 1970s, they were based on standards adopted years before by ANSI/ASME.

The Bottom Line

I am far from advocating weak enforcement. Violators who endanger workers need to be cited by OSHA, and corrective action needs to be implemented. But the current OSHA is aiming at the wrong target. The agency's purpose is to protect workers and improve safety and health. Enforcement is just one tool to be used in meeting that goal -- not an end in itself as the current administration appears to believe. Nor is it helpful to assume that enforcement targets are guilty until proven innocent.

Sophisticated managers in all industries are clear on their goals and identify the strategies and tactics that best help meet them. By that measure, the agency's current leaders have failed.

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