

# NATIONAL MARITIME SAFETY ASSOCIATION, INC.

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*Dedicated to Maritime Safety & Health*

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## NMSA News Bulletin . . . 05/10/2010

### **REGISTRATION OPEN**

### **2010 NMSA ANNUAL MEETING**

**June 23-25, 2010**

**Windsor Court Hotel**

**New Orleans, LA**

### Tentative Schedule

Wed., June 23	All Day TC Meeting Afternoon Board Meeting Evening Reception - World War II Museum
Thur., June 24	All Day General Meeting Evening Reception/Dinner
Fri., June 25	Morning General Meeting

*See attached Registration Form.*

## IN THE COURTS

- **D.C. Circuit Court Upholds OSHA's Regulation on 'Per Employee' Penalties**—On April 16, 2010, the U.S. Court of Appeals for the D.C. Circuit upheld OSHA's regulation, saying that it does, in fact, have "the authority to impose separate penalties for each employee."

You may remember several years ago an OSHRC decision that OSHA could not issue per employee citations. In its decision, OSHRC stated that, although OSHA had the ability to construct its regulations to include per employee or per violation citations, it had not done so. Subsequently, OSHA did add language to its regulations stating it had the authority to issue per employee and per violation citations.

After establishing this authority through regulation (in the PPE rule), OSHA was sued when the National Association of Home Builders (NAHB), the U.S. Chamber of Commerce, and the National Association of Manufacturers (NAM) challenged its authority to issue separate per employee penalties. This court decision upholds the OSHA 'per employee' penalties, and means that, if an employer receives one citation, and has two hundred employees covered under the citation, the penalty could be magnified two hundred times!

**MEMBERS** Pacific Maritime Association · New York Shipping Association · Boston Shipping Association · United States Maritime Alliance  
Hampton Roads Shipping Association · Mobile Steamship Association · South Carolina Stevedores Association · West Gulf Maritime Association  
Georgia Stevedore Association · Southeast Florida Employers Port Association · Midgulf Association of Stevedores · Steamship Trade Association of Baltimore  
Ports of the Delaware River Marine Trade Association · British Columbia Maritime Employers Association · Maritime Employers Association (Montreal)



## OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION UPDATES

Obviously, the OSHA staff has been working overtime cranking out new proposals at a breathtaking pace! Notably, some of the regulatory proposals announced over the past week or so are provisions that have previously been introduced as legislation over the past several Congresses, but which have been blocked in the Congress from being enacted. **It is now evident that the labor unions will increasingly be attempting to push through these failed legislative efforts as regulations.** We can only expect more of this to occur through the Labor Department and, additionally, through independent agencies such as the National Labor Relations Board.

- **OSHA Penalty “Enhancements”**—In March testimony before the House Education & Labor Subcommittee on Workforce Protections, and again during an OSHA web chat in April, OSHA Assistant Secretary David Michaels stated that OSHA was planning to “implement long-overdue internal changes in our penalty proposal policies.”

In an interesting coincidence, given the D.C. Circuit Court decision noted above, the changes Dr. Michaels suggested have now been implemented administratively through a [memorandum to OSHA regional administrators](#). OSHA notes that “the penalty increases will increase the overall dollar amount of all penalties.” Examples of the increases include: employers cited by OSHA for “high gravity, willful, repeat, of failure-to-abate violations” will receive a 10% increase in their penalty if they have been cited for similar violations in the previous five years; area offices agreeing to expedited settlements will be limited to 30% reductions in penalties; gravity-based penalties will be adopted; and, if there are high gravity serious violations identified in the severe violator enforcement program (SVEP—see below), the violations may be cited separately and each violation may have its own proposed penalty.

The memo notes the “enhancements” will become effective “in the next several months.” Please note that these penalty increases could also be affected by the ‘per employee’ penalty.

- **[Severe Violator Enforcement Program \(SVEP\)](#)**—OSHA comments that the new SVEP has been devised to “focus OSHA enforcement resources on recalcitrant employers.” Employers who have committed willful, repeated, or failure-to-abate violations in circumstances where there has been a fatality or catastrophe, “in operations that expose employees to the most severe occupational hazards” (which includes fall hazards under marine terminal and longshore standards), where employees are exposed to the release of a highly hazardous chemical, and “all egregious enforcement actions.” Severe violators are those employers found to be “recalcitrant or indifferent to [their] obligations under the OSH Act.”

The SVEP will lead to “enhanced” and mandatory follow-up inspections and to inspections of an employer’s other worksites. Citations and notifications of penalties will be sent to corporate headquarters under the SVEP, as well as to employee representatives (unions), and **OSHA may decide that safety and health problems may need to be taken up to the corporate level** (sound like a preparation for citing corporate officers for safety negligence?).

The SVEP is expected to become effective in the next 45 days.

- **OSHA Injury & Illness Prevention Program: New Regulation Forthcoming**—Adding to an already crowded agenda, in [testimony](#) before the Senate Health, Education, Labor, and Pensions Committee at the end of April, OSHA Assistant Secretary David Michaels remarked that the Labor Department’s Spring Regulatory Agenda includes a new enforcement strategy for OSHA. The [new OSHA standard](#), still being



developed and not included in the *Federal Register* listing of DOL's regulatory agenda published on April 26, 2010, would require employers to "implement an Injury and Illness Prevention Program tailored to the actual hazards in that employer's workplace." Essentially, employers would be required to put together a plan that would enable them to find and remediate hazards without an OSHA inspection taking place. DOL says that this plan would require management commitment from **senior corporate managers**, employee "engagement" in the program, and a hazard recognition program to recognize, evaluate, and control workplace hazards. The program may include requirements that would allow employees to monitor the implementation of the program and "provisions to prevent employers from not covering workers by misclassifying them as independent contractors."

In its *Federal Register* (FR) notice on May 4, 2010, OSHA announced that it will begin its rulemaking with a [series of stakeholder meetings](#). The first meeting will be held on June 3, 2010 in Brunswick, New Jersey, and meetings will also be held on June 10 in Dallas, TX and on June 29 in Washington, DC. Registration for the meetings must be confirmed by May 20, May 27, and June 15, respectively. Only about 50 persons will be permitted to participate in each eight hour meeting, but some members of the general public will be permitted to attend on a first-come, first-served basis, depending on space availability. In addition, OSHA will be confirming participants "to ensure a fair representation of interests and to facilitate gathering diverse viewpoints." (See FR notice for more information on attendance.) The meetings will be group discussions, and no formal presentations will be allowed.

The FR notice states that OSHA wants to "develop a rule that will help employers reduce workplace injuries and illnesses through a systematic process that proactively addresses workplace safety and health hazards." It also notes that a previous attempt to promulgate a similar rule was removed from OSHA's regulatory agenda in 2002. Please note that maritime employers would be subject to this rule.

NOTE: NMSA staff is attempting to make certain that these meetings are monitored by local industry safety experts with the intent, after discussions within the NMSA Board and the TC, of determining what position, if any, the industry should take on this issue.

- **Modernization of OSHA's Injury & Illness Data Collection Process**—In yet another FR notice, this one published on May 5, 2010, OSHA has announced that it will hold [stakeholder meetings](#) to determine how to modernize its data collection system, whether the data should be connected to other data published by the DOL (e.g., workers' compensation claims) and how best to increase the ability of the general public to access this data. The FR notice lists a series of 15 questions that DOL would like to have answered to assist it in its deliberations.

The stakeholder meetings will be held in Washington, DC on May 25, 2010 and in Chicago, IL on June 3. There will be two four hour meetings at each location, limited to 25 participants. Members of the general public will be admitted on a space available basis. DOL is also accepting written comments, which must be submitted by June 18, 2010.

## **IN THE CONGRESS**

- **House Continues Hearings on OSHA "Reform" Bill (H.R. 2067)**—Rep. Lynn Woolsey (D-CA), Chairman of the House Education & Labor Committee's Subcommittee on Workforce Protections, held hearings on April 28, 2010 on the whistleblower provisions of her OSHA bill, H.R. 2067, the "Protecting America's Workers Act" (PAWA). Deputy Assistant Secretary for OSHA Jordan Barab [testified](#) for the



Administration in favor of the legislation. In fact, he suggested several areas that the Administration would like strengthened, such as providing for the assessment of civil penalties up to \$100,000 per violation of whistleblower provisions and the reinstatement of the whistleblower in the company until the case has been decided. Mr. Barab also commented that, on the issue of victim's rights, OSHA is looking at administrative changes to allow victims and their families to participate in OSHA's enforcement efforts.

Significantly, all the amendments proposed by Rep. Woolsey, noted in last month's newsletter, were included in a discussion draft of the PAWA legislation, making a bad bill even worse. The legislation now has 77 co-sponsors.

In a statement at the end of April, Secretary of Labor Hilda Solis reiterated her support for the PAWA legislation and urged its quick passage stating, "Drastic changes are clearly needed...fines and penalties are simply too low, whistleblowers are not adequately protected and almost nine million public employees still lack the right to a safe workplace."

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