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Solutions at Work[®]

**Effectively Handling An
Enforcement-Driven OSHA
While Achieving Operational
Excellence and Profitability
Through Safety**

2014 Indiana Safety and Health Conference & Expo

February 20, 2014

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ABOUT FISHER & PHILLIPS

FISHER & PHILLIPS LLP is one of the country's oldest and largest firms devoted exclusively to representing employers in labor, employment, civil rights, employee benefits and business immigration law. Our depth and breadth of experience in these niche areas are unsurpassed. Although it's Atlanta-based, Fisher & Phillips has more than 280 lawyers in 31 offices across the country and bar admissions in 41 states and Washington, DC.

The Firm's practice includes counseling and defending employers under all major federal and state labor, employment, and employee benefits laws and regulations including, among others: The Age Discrimination in Employment Act (ADEA); The Americans With Disabilities Act (ADA); The Civil Rights Acts of 1866, 1964 and 1991; The Consolidated Omnibus Reconciliation Act (COBRA); The Employee Polygraph Protection Act (EPPA); The Employee Retirement Income Security Act (ERISA); The Equal Pay Act (EPA); The Fair Credit Reporting Act (FCRA); The Fair Labor Standards Act (FLSA); The Family and Medical Leave Act (FMLA); The Immigration Reform and Control Act (IRCA); The National Labor Relations Act (NLRA); the Occupational Safety and Health Act (OSHA), and The Worker Adjustment and Retraining Notification Act (WARN), as these laws have been amended.

Our lawyers practice in federal and state courts throughout the United States. In addition to representing employers in litigation, we represent employers in federal, state and local administrative proceedings, mediation and arbitration, collective bargaining and administration of collective bargaining agreements, and in resolving threatened claims prior to the initiation of formal proceedings.

As a result of our representation of employers in litigation and formal claims proceedings, we have acquired considerable expertise in developing and implementing policies, practices, and procedures to help employers minimize or avoid the occurrence of employment-related claims, the risk of liability from such claims, or other forces that may interfere with employer rights.

ABOUT TODAY'S SPEAKER



Edwin G. Foulke, Jr is a partner with Fisher & Phillips LLP, a leading national labor and employment law firm. Mr. Foulke is co-chair of the firm's Workplace Safety and Catastrophe Management Practice Group in its Atlanta, Georgia office. Prior to joining Fisher & Phillips, he was the Assistant Secretary of Labor for Occupational Safety and Health. Named by President George W. Bush to head OSHA, he served from April, 2006 to November 2008. During his tenure at OSHA, workplace injuries, illnesses and fatalities rates dropped to their lowest level in recorded history.

His practice includes workplace safety compliance and strategic safety planning, whistleblower compliance and litigation involving the 22 whistleblower statutes handled by OSHA, defense of employers in responding to workplace health and safety cases including OSHA citations and providing advice and assistance to employers in responding to workplace fatalities and catastrophic accidents and in legislative and regulatory matters. Mr. Foulke has represented employers in thousands of OSHA inspections and OSHA citation contests.

For approximately thirty (30) years, Mr. Foulke has worked in the labor and employment area, specializing in occupational safety and health issues. In 2010, 2011 and again in 2012-13 he was named as one of the "50 Most Influential EHS Leaders" by *EHS Today* magazine, as well as being named one of the "50 Most Influential EHS Leaders" in the United States by *Occupational Hazards* magazine in 2008. Mr. Foulke is recognized as one of the nation's leading authorities on occupational safety and health issues and one of the top speakers and writers in this area.

INDIANA CHAMBER
 2014 Indiana Safety and Health Conference & Expo

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THANK YOU FOR YOUR COMMITMENT TO SAFETY



"Winning is not a sometime thing, it is an all-time thing." ~ Vince Lombardi

So Is Safety!

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YOUR SAFETY PROGRAM NEEDS TO AVOID THIS...



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... AND THIS!



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BUT YOU DON'T WANT THIS APPROACH EITHER!



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EVERYONE MAKES MISTAKES

"The greatest mistake is to imagine that we never err."

~ Thomas Carlyle

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SAFETY AND HEALTH IN THE 21ST CENTURY

Having great safety and health is vital ...

- 1) it is morally the right thing.
- 2) it allows your employees to go home each night safely to their family and loved ones.
- 3) it keeps you from having to do the worst job any person would possibly have to do.
- 4) it is the law.
- 5) it is essential for a company to be profitable and competitive in today's marketplace.

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WHY YOU NEED AN EFFECTIVE SAFETY PROGRAM

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WHY BE CONCERNED?

- Continued aggressive enforcement – including more inspectors, higher penalties and nasty press releases – and more employers placed in the Severe Violators Enforcement Program
- Expanded emphasis on rulemaking
 - More direct final rules
- More directives bypassing rulemaking
- Increased focus on whistleblowers with push to find more "cause" determinations
- Potential elimination of Voluntary Protection Program (VPP)
- More emphasis on workers rights, including worker summits
- Local, state and national governments look at safety records – bar on submitting bids
- Private sector companies also looking at contractors, vendors and system safety record – may lose clients

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THE PROOF IS IN THE PENALTIES

1. BP Products North America, Inc. (TX) – \$87 million
2. Whitesell Corp. (AL) – \$3.07 million
3. BP-Husky Refinery (OH) – \$3.04 million
4. E. N. Range, Inc. (FL) – \$2.1 million
5. South Dakota Wheat Growers ((SD) – \$1.6 million
6. Tempel Grain Elevators, LLC (CO) – \$1.59 million
7. Republic Steel (OH) – \$1.14 million
8. CES Environmental Services, Inc. (TX) – \$1.4 million
9. AMD Industries, Inc. (IL) – \$1.247 million
10. Goodman Mfg. Co. (TX) – \$1.215 million
11. Piping Technology & Products, Inc. (TX) – \$1.013 million
12. PJ Trailers Mfg., Inc & Delco Trailers (TX) – \$949,800
13. Bostik, Inc. (MA) – \$917,000

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THE PROOF IS IN THE PENALTIES

14. A-1 Excavating (WI) – \$861,000
15. WRR Environmental Services (WI) – \$787,000
16. Cooperative Plus (WI) – \$721,000
17. Tribe Mediterranean Foods (MA) – \$702,300
18. Ball Aerosol and Specialty Container (OH) – \$589,000
19. Sims Bark Co & Sims Stone Co. (GA & AL) – \$576,000
20. Republic Engineered Products (OH) – \$563,000
21. Excelsior Brass Works (PA) – \$550,400
22. Dover Chemical Co. (OH) – \$545,000
23. C.A. Franc (PA) – \$539,000 and criminal referral
24. All-Feed Processing & Packaging, Inc. (IL) – \$518,520
25. Loren Cook Co. (MO) – \$511,000

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OSHA'S 10 LARGEST PROPOSED PENALTIES OF ALL TIME

1. BP Products, North America (10/29/09) – **\$81.34 million**
2. BP Products, North America (9/21/05) – **\$21.36 million**
3. O&G Industries, Keystone Construction and Maintenance and other companies (8/3/10) – **\$16.6 million**
4. IMC Fertilizer/Angus Chemical (10/31/91) – **\$11.55 million**
5. Imperial Sugar (7/25/08) – **\$8.78 million**
6. Samsung Guam, Inc. (9/21/95) – **\$8.26 million**
7. CITGO Petroleum (8/29/91) – **\$8.16 million**
8. Dayton Tire (4/18/94) – **\$7.49 million**
9. USX (U.S. Steel Corp.) (10/26/89 & 11/2/89) – **\$7.28 million**
10. Phillips 66/Fish Engineering (4/19/90) – **\$6.4 million**

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OSHA'S TOP 10 MOST CITED VIOLATIONS FISCAL YEAR 2013

1. Fall protection, general requirements (1926.501)
2. Hazard communication (1910.1200)
3. Scaffolding (1926.451)
4. Respiratory protection (1910.134)
5. Electrical – wiring method (1910.305)
6. Powered industrial trucks (1910.178)
7. Ladders (1926.1053)
8. Lockout/Tagout (1910.147)
9. Electrical – general requirements (1910.303)
10. Machine guarding (1910.212)

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DEVELOPING AN EFFECTIVE SAFETY PLAN

- Experience is not just the best teacher – it is the only teacher.
- Accident prevention is a product of learning.

"We can't solve problems by using the same kind of thinking we used when we created them."

~ Albert Einstein

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ACHIEVING OPERATIONAL EXCELLENCE AND PROFITABILITY THROUGH SAFETY

Element of an effective safety and health management system

1. Strong management commitment
2. All employee involvement/engagement
3. Worksite analysis – root cause analysis
4. Hazard prevention and control
5. Training for employees, supervisors and managers

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MANAGEMENT/LEADERSHIP COMMITMENT TO SAFETY

- Safety mission, vision and values
- Demonstrated commitment to safety as core value
- Defined goals and objectives
- Consistent policies and procedures
- Improvement at all levels
- Worksite monitoring of compliance enforcement
- Safety performance metrics and accountability for all management
- Company's operational definition of employee involvement in safety
- What level of accident/injury is acceptable to Company management?

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SAFETY CHARACTER

- Character is doing things right when no one is looking.
- What type of safety character do you have?
 - Full-time
 - Part-time
- When convenient

"Be more concerned with your character than your reputation because your character is what you really are while your reputation is merely what others think you are."

~ John Wooden

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SAFETY MISSION, VISION & VALUES

Mission: To ensure a safe worksite for all employees, vendors, suppliers and guests

Vision: That all employees return home safe every day to their families and loved ones.

Values: Safety is a core value of the company.

Make sure that other company values do not conflict with the safety values. Establish a shared vision among management and employees of safety and health goals and objectives being integrated with production.

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DEMONSTRATED COMMITMENT TO SAFETY – YOUR SAFETY MENTALITY

- Personal commitment demonstrated at all levels, starting at the top – commitment must be visible
- Safety mentality
 - How do you respond to situations?
 - Take responsibility
 - Make excuses
- Take actions to show commitment
 - Allocate personnel
 - Allocate resources
 - Provided training
- Ensure mission, vision and values are not just words
- Motivate employees toward safety goals
- Reward safe actions

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DEFINED GOALS & OBJECTIVES

- Goal: zero injuries, illnesses and fatalities
- Objectives define path to achieving goal
- All management and employees have a role in the objectives
- Objectives help define the company's expectations for all employees
- Safety cannot be the absence of failure (i.e., injury) – you may just be lucky
- Communicate expectations
- Safety discipline – drive to achieve safety goals – where do you place your emphasis?

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SAFETY PERFORMANCE METRICS FOR ALL MANAGEMENT

- All management must have clearly-articulated safety performance metrics which connects to the company's safety goals and objectives
- Assess performance on regular basis
- Provide feedback in "real time"
- Do not ignore small problems that will grow into large problems – do it right the first time.

"If you don't have time to do it right, when will you have time to do it over?"
~ John Wooden

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EMPOWERMENT AT ALL LEVELS

- Motivational programs to encourage employee recommendations/safety improvements
- Safety Committees and safety survey
- Engaging employees by personal involvement
- Management and employee "stop work" authority
- Management and employees involved in accident investigation
- Trust

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EMPOWERMENT – CHECK TO SEE:

- Are employees using safe work procedures?
- Do employees assist in developing safe work procedures?
- Do employees suggest changes to safe work procedures?
- Do employees report or correct hazards they find?
- Do employees feel safe at work?

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WORK SITE MONITORING & COMPLIANCE ENFORCEMENT

- Hazard identification and job analysis
- Leading v. lagging indicators
- Use of in-house v. third-party audits
- Compliance requirements communicated – time limits to report all injuries, significant incidents, first aid and/or near misses
- Discipline for safety violations – clear rules and disciplinary procedure
- Quantifiable measurements to verify safety results.

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LEADING INDICATORS – CHECK TO SEE:

- How are hazards identified and remediated?
- Are near misses and first aids tracked?
 - Root cause analysis for all injuries and near misses
- Do employees use job safety analyses properly?
- Are PMs performed when due?
- Are audits conducted? How often? How many recommendations closed out?
- Safety observations/interactions
- Who is involved in accident and near miss investigations?
- How often are policies and procedures audited against reality?
- Do you have a management of change process?
- What do you measure?
- What gets rewarded?

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LEADING INDICATORS – CHECK TO SEE:

- Pre-job safety meetings
- Job specific safety requirement for vendors and contractors
- Track safety performance of contractors and vendors
- Duty pre-work safety meeting/toolbox talks
- Safety suggestions
- Good housekeeping
- Job and site specific training
- Safety committee review, reports, and corrective action

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LEADING INDICATORS – CHECK TO SEE:

- Discipline for safety violations
- Retraining of safety violators
- OSH plans and objectives set and achieved
- Planned risk assessments vs. completed
- Effectiveness of safety training
- PPE inspection schedule

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CONSISTENT POLICIES & PROCEDURES

- Make sure that company policies and procedures do not conflict with the company's safety mission, vision and values.
- Integrate safety into all aspects of the company's general management programs and processes
- Use common language for both the safety and management policies and procedures
- Standardize measurement processes

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TRAINING FOR EMPLOYEES, SUPERVISORS AND MANAGERS

- Consistent and continuous education process
- Understandable training
- Must reflect policies and procedures
- Retraining and review
- Stop telling employees not to have an accident – instead, tell them how not to have an accident
- Watch out for complacency or just silly mistakes

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CHECK YOUR TRAINING

- How often do you train?
- Who conducts training?
- Where, when and how do you train?
- What do you train your employees on?
- How do you follow up to ensure that training worked?
- Does your training discuss problems/injuries that occurred in the past?

REMEMBER: "There is nothing so easy to learn from as experience and nothing so hard to apply."

- Josh Billings

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IDENTIFY THE "Fs"

How many "Fs" did you see?

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KEEP YOUR PROGRAM FRESH

- Assign employees to review policies and procedures
- Ask for feedback regularly
- Take action when necessary
- Close the communications loop
- Keeping your workplace safe requires continuous improvement
- Cannot stop learning
- Must have strategic and operational safety plans to be successful

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SO, WHAT'S NEXT?

- Your workforce is changing – are you prepared?
- Are your employees taking safety home with them?
- Are you enabling employee wellness?
- The current and coming changes to your workforce will dramatically impact your company's profitability and competitiveness.

WARNING: Individuals do not act until there is an urgency to do so!

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THE AGING WORKFORCE

- Between 1977 and 2007 the employment of persons 65 and older increased 101% compared to only a 59% increase in the total workforce
- Men over 65 increased 75% - women over 65 increased 147%
- Employees age 75+ represented only 0.8% of the workforce in 2007, but this number increased 172% between 1977 and 2007

Source: Bureau of Labor Statistics

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THE AGING WORKFORCE

- Number of older employees on full-time schedule nearly doubled between 1995 and 2007
- Employees ages 55 to 64 expected to increase by over 36% from 2006 to 2016
- Employees age 65+ predicted to rise by more than 80%


Source: Bureau of Labor Statistics

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THE FUTURE WORKFORCE

- Obesity rates have tripled in the past 30 years.
- On average, 8-18 year olds devote 7.5 hours to using entertainment media (TV, computers, video games, cell phone & more) in a typical day
- Only 1/3 of high school students get recommended levels of physical activity
- 50-55% of U.S. teenagers are either obese or overweight




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THE FUTURE WORKFORCE

- 35% of college students are overweight
- Over 50% of teenagers who are overweight will continue to be overweight as adults
- Over 65% of adult Americans are either overweight or obese
- A CDC study found that obesity causes approximately 300,000 excess death each year




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THE OBESITY PROBLEM

- Number of Americans considered obese growing by approximately 7% per year
- The CDC identified obesity as having roughly the same association with chronic health conditions as 20 years of aging
- Surgeon General reports approximately 9% of natural health care expenditures are directly related to obesity and physical inactivity.



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OBESITY AND ADVERSE HEALTH EFFECTS

- Type-2 diabetes
- Hypertension
- Sleep apnea
- Heart failure
- High cholesterol
- Kidney failure
- Degenerative joint disease & arthritis
- Gallstones & gall bladder disease
- Birth defects
- Miscarriages
- Stress incontinence
- Fatty liver disease
- Cancer in both men & women
- Premature death
- Lung & breathing problems (asthma)
- Acid reflux
- Deep vein thrombosis
- Erectile dysfunction
- Ovarian cysts
- Faster aging
- Live 13 years less on average

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WHAT IS THE SOLUTION?

- Integrate safety with health into all aspects of management and operations
- Sincere and continuous commitment to safety and health
- Address problems head on
- Wellness programs

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WELLNESS PROGRAM ELEMENTS

- Review of company's health insurance program
- Case management
- Disease management
- Incentives and pay for performance
- Communications
- Benchmarking and analytical review
- Legal compliance

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Final Questions?



"Judge a man by his questions, rather than his answers."

~ Voltaire

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BE SAFE!



REMEMBER: Bad decisions make good stories and usually
the evening news.

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LEGAL ALERT

OSHA Proposes Publishing Worker Injury Data

OSHA has announced a proposed rule which will require establishments with 20 or more employees in certain industries with high injury and illness rates, to electronically submit their summary of work-related injuries and illnesses to OSHA every year. The change may affect between 450,000 and 1,500,000 sites. The first proposed new requirement is for establishments with more than 250 employees (and who are already required to keep records) to electronically submit the records on a quarterly basis to OSHA.

Currently, OSHA requires approximately 80,000 employers per year to submit data as part of its OSHA Data Initiative. OSHA uses its data to target certain industries or establishments for inspections and other initiatives. The Bureau of Labor Statistics surveys another 250,000 sites.

One can see many ways in which OSHA could use this data for more effective targeting. The biggest concern seems to be how others would use this data, which OSHA would make accessible to the public. On first blush, one could argue that there is no downside to sharing individual employers' injury-and-illness summaries. If properly handled, no "identifiable" embarrassing individual employee information would be available. But when the full implications of this proposal are considered, there appears to be the possibility of abuse.

Regulation By Shame?

OSHA press releases emphasize that the data collection would allow OSHA to better target inspection efforts and would even highlight employers with especially strong commitments to safety. But since a November 2010 conference where Dr. David Michaels, Assistant Secretary, OSHA, stated that, "*we will continue to practice regulation by shaming*," this Administration has championed such an approach. The Administration also gutted OSHA consultation efforts and has shown little interest in OSHA's showcase cooperative effort, the Voluntary Protection Program (VPP).

It seems unlikely that a significant reason for the initiative is to highlight good employer performance. At least, that's not how the Administration has worked so far. Dr. Michaels and his leaders would probably readily admit their interest in highlighting employers with higher numbers. But who determines which numbers suggest bad behavior? And what about factors beyond the safety culture? Of course, one workplace injury is one too many incidents, but how will these numbers be interpreted and used by others?



Potential For Misuse

Some also question the extent to which this expansion is driven at the request of unions and other third parties who want access to the data in order to attack specific employers. As an example, consider the 10-year campaign against Hyatt by the union, UNITE-HERE. UNITE-HERE created its "Hyatt Hurts" campaign arguably in order to compel Hyatt to recognize the union at nonunion facilities or to give in to collective-bargaining demands at other sites. The union focused on injuries associated with housekeepers, and was involved in studies which purported to show that the hospitality industry, and Hyatt in particular, required housekeepers to change too many beds per shift, which contributed to ergonomic injuries. The union was then involved in persuading OSHA to investigate dozens of alleged instances of ergonomic violations throughout the country. Dr. Michaels actually took the extraordinary step of writing a highly publicized Hazard Alert letter to Hyatt criticizing their practices. The campaign finally cooled, in part, after the union shifted its attention to opposing the nomination of Hyatt principal and former Obama fundraiser, Penny Pritzker for Secretary of Commerce.

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