OSHA Update
January 31, 2017

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What We’ll Cover Today

I. A Quick Word on OSHA Leadership
II. Penalties – Much Larger Penalties
III. Mitigating Risk
IV. OSHA Recordkeeping
V. Navigating OSHA’s New Reporting Requirements
VI. New Anti-Retaliation Rule
VII. Other Information
I. A QUICK WORD ON OSHA LEADERSHIP
OSHA Leadership

• December 2009 – David Michaels became the Assistant Secretary of Labor for OSHA. The longest serving head of OSHA.
  - David Michaels remained as head of OSHA through President Obama’s second term.
  - Author of *Doubt is Their Product: How Industry's Assault on Science Threatens Your Health*.
• Dr. Michaels departed OSHA on January 10, 2017, returning to teaching at George Washington University.
• OSHA Deputy Assistant Jordan Barab served as acting administrator until January 20, 2017.
• Deputy Assistant Secretary of Labor Dorothy Dougherty will serve as Acting Assisting Secretary.
The New Administration – Just Might:

• Reduce the OSHA Budget
• Move from a traditional enforcement focus to a focus on both enforcement and employer compliance assistance
• Place greater emphasis on Voluntary Protection Program, less on OSHA’s Severe Violator Program
• Put an end to “regulation by shaming”
• Engage in limited rulemaking
Walk-Around Inspections – OSHA Challenged

• In a 2013 OSHA Interpretation Letter, the Agency said that a union official could stand in as the employee representative during an OSHA inspection even where the facility has no collective bargaining agreement.

• September 2016, a complaint was filed by the National Federation of Independent Businesses in the federal District Court in the Northern District of Texas challenging this Interpretation.

• Interpretation or Rule Making?

• NOTE: A new OSHA administration might issue a different Interpretation.
II. PENALTIES – MUCH LARGER PENALTIES
New OSHA Penalties

• The Federal Civil Penalties Inflation Adjustment Act of 1990 exempted OSHA from having to periodically increase penalties to account for inflation.

• November 2, 2015 – Bipartisan Budget Act of 2015 - required OSHA to increase its maximum penalties for the first time since 1990.

• The 2015 legislation allowed OSHA to make a one-time catch up penalty increase to take effect no later than August 1, 2016.

• Going forward, OSHA penalties will be subject to annual inflation increases.
New OSHA Penalties (continued)

- OSHA’s new maximum fines apply to all citations issued after August 1, 2016.
- Penalty amounts adjusted for inflation as of Jan. 13, 2017:
  - Serious -- $7,000 → $12,675
  - Willful/Repeat -- $70,000 → $126,749
  - Failure to Abate -- $7,000 → $12,675
- Details on how OSHA inspectors will calculate fines under these new higher penalties can be found in the OSHA Field Operations Manual (CPL-02-00-160) issued 8/2/16.
III. MITIGATING RISK
Federal OSHA Inspections

FY09: 39,004
FY10: 40,993
FY11: 40,648
FY12: 40,961
FY13: 39,228
FY14: 36,163
FY15: 35,820
FY16: 31,948
Fewer Inspections

- OSHA’s budget during the Obama administration peaked in 2012 at $565.9M, funding 2,305 positions.
  - In 2016 – OSHA’s budget was $552.8M, funding 2,174 positions.
- 2016 saw 1,928 fewer construction inspections than 2015.
- In 2016, 74% of inspections found at least one violation.
  - In 2015 the rate was 69%.
- Note: OSHA issued citations for 58,549 violations in 2016, down 9% from 2015.
- In 2016, 2,183 inspection cases were appealed to the Review Commission; 19 more than in 2015.
OSHA’s New Enforcement Weighting System

- OSHA is moving away from metric of counting inspections. Trying to incentivize inspections that have the greatest impact.
- OSHA will break down each inspection into “enforcement units.” Examples:
  - Process Safety Management Inspections – 7 EUs
  - Combustible Dust Inspections – 2 EUs
  - Ergonomic Hazard Inspections – 5 EUs
  - Heat Hazard Inspections - 4 EUs
  - Workplace Violence Hazard Inspections – 3 EUs
  - Fatality/Catastrophe Inspections – 3 EUs
  - Significant Cases (i.e., cases with a $100,000+ fine) – 8 EUs
  - Rapid Response Investigations – 1/9 EU

**Most Frequently Cited Gen. Industry Standards – FY 2015**

<table>
<thead>
<tr>
<th>All Establishments</th>
<th>Meat Processing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910.1200</td>
<td>Haz Comm</td>
</tr>
<tr>
<td>1910.147</td>
<td>LOTO</td>
</tr>
<tr>
<td>1910.178</td>
<td>Powered Industrial Trucks</td>
</tr>
<tr>
<td>1910.305</td>
<td>Electrical Wiring Methods</td>
</tr>
<tr>
<td>1910.212</td>
<td>Machine Guarding</td>
</tr>
</tbody>
</table>
Practice Pointer

- Know the frequently cited Standards for your industry
Be Sensitive To:

• Blocked exits
• Unlabeled secondary containers
• Stacking issues
• Blocked electrical panels, missing “knockouts,” missing ground prongs
• Lack of appropriate PPE
• Forklift inspections, seat belts
Audience Participation Opportunity

Okay, so what the heck is a missing knockout, and what’s a missing ground prong?
FY 2009 – FY 2015
% Complaint Inspections

- FY09: 17%
- FY10: 20%
- FY11: 21%
- FY12: 23%
- FY13: 24%
- FY14: 26%
- FY15: 25%
Complaint-Based Inspections

• 25% of all OSHA inspections are complaint based.
• OSHA allows complaints to be filed on-line.
• The GAO determined that the OSHA inspection rate at establishments that experienced labor unrest was 6.5 times higher than at establishments that did not experience such unrest.


How comfortable are your employees in raising complaints internally?
How to File a Safety and Health Complaint

The Occupational Safety and Health Act of 1970 gives employees and their representatives the right to file a complaint and request an OSHA inspection of their workplace if they believe there is a serious hazard or their employer is not following OSHA standards. Workers do not have to know whether a specific OSHA standard has been violated in order to file a complaint.

Complaints from workers or their representatives are taken seriously by OSHA. OSHA will keep your information confidential.

**COMPLAINT FILING OPTIONS**

**Online** – Go to the Online Complaint Form

Written complaints that are signed by workers or their representative and submitted to an OSHA Area or Regional office are more likely to result in onsite OSHA inspections. Complaints received on line from workers in OSHA-approved state plan states will be forwarded to the appropriate state plan for response.

**Fax/Mail** - Download the OSHA complaint form* [En Espanol*] (or request a copy from your local OSHA Regional or Area Office).

Complete it and then fax or mail it back to your local OSHA Regional or Area Office. Written complaints that are signed by a worker or representative and submitted to the closest OSHA Area Office are more likely to result in onsite OSHA inspections. Please include your name, address and telephone number so we can contact you to follow up.

**Telephone** – your local OSHA Regional or Area Office.

OSHA staff can discuss your complaint and respond to any questions you have. If there is an emergency or the hazard is immediately life-threatening, call your local OSHA Regional or Area Office or 1-800-321-OSHA.

**RELATED INFORMATION**

- Learn more about your rights as a worker.
- You can file a whistleblower complaint if your employer has retaliated against you for exercising your rights as a worker.
## Willful and Repeat Violations

<table>
<thead>
<tr>
<th>YEAR</th>
<th>FY10</th>
<th>FY11</th>
<th>FY12</th>
<th>FY13</th>
<th>FY14</th>
<th>FY15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Willful</td>
<td>1,519</td>
<td>594</td>
<td>423</td>
<td>319</td>
<td>439</td>
<td>527</td>
</tr>
<tr>
<td>Repeat</td>
<td>2,758</td>
<td>3,229</td>
<td>3,034</td>
<td>3,139</td>
<td>2,966</td>
<td>3,088</td>
</tr>
</tbody>
</table>

**NOTE:** Willful/Repeat - $70,000 ➔ $126,749
Preventing Repeat Violations

• Repeat violation = when a new citation is issued to an employer who has been previously cited for a substantially similar condition within the last 5 years (was 3 years until April, 2010).
  - NOTE: This might change under a new administration.

• Repeat citation prevention:
  • Review past citations and ensure that all cited items have been abated and have remained abated.
    - Examine other equipment and other facilities.

NOTE: *There is no statutory limitation on the length of time that a citation may serve as the basis for a Repeat. Hackensack Steel Corp., OSHA Rev. Comm., 2003.*
Safety and Health Audit Management

• Define Scope
  - Commitment to Closure
• Internal v. External
  - Attorney-Client Privilege
• Reports
  - Format Can Help with Closure – Photos, Forms
• Audit Closure
  - Documented
  - Timely
  - Verified

• OSHA policy on voluntary self-audits
IV. OSHA RECORDKEEPING
OSHA Recordkeeping – Injury and Illness Rates

(Per 100 FTEs)

1999: 6.3
2001: 6.1
2003: 5.7
2005: 5.3
2007: 5.0
2009: 4.8
2011: 4.6
2013: 4.4
2015: 4.2

2009: 3.9
2011: 3.6
2013: 3.5
2015: 3.4

2009: 3.3
2011: 3.2
2015: 3.0
OSHA Recordkeeping

• Annually Audit OSHA Logs.

• OSHA 300A Summary of Injuries and Illnesses Form
  - “I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete.” Post Logs from February 1 through April 30.

• October 19, 2015, OSHA Interpretation Letter
  - Employee cuts finger and is getting a Band-Aid® from co-worker. Co-worker sees small amount of blood and faints. Must record loss of consciousness.

• March 21, 2016, OSHA Interpretation Letter
  - Post-accident drug test indicates injured employee (hand caught between two objects) was intoxicated. The case is work-related. Drinking alcohol does not qualify as self-medication for a “non-work-related condition of alcoholism.”

• September 9, 2016, OSHA Interpretation Letter
  - Exercise that is part of safe work practices commonly recommended for anyone engaged in certain tasks – not considered medical treatment. If exercise is recommended to an employee after the employee exhibits symptoms of a work-related injury, the exercise is considered medical treatment.
V. NAVIGATING OSHA’S NEW REPORTING REQUIREMENTS
New Reporting Requirements

• **Old Rule:** 8 hours to report all work-related fatalities and in-patient hospitalizations of 3 or more employees.

• **New Rules:** Employers must report:
  » All work-related fatalities (**8 hours to report**)
  » All work-related in-patient hospitalizations of one or more employees for “care or treatment”
  » All work-related amputations
  » All work-related losses of an eye

• **Note:** These new rules went into effect in Jan. 2015.
New Reporting Requirements (continued)

• **NOTE:** The new rules apply to any in-patient hospitalization, amputation, or eye loss that occurs within 24 hours of a work-related incident, and to any fatality that occurs within 30 days of a work-related incident.
New Reporting Requirements (continued)

- **Amputations:** 1904.39(b)(11): “... the traumatic loss of a limb or other external body part ... that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached. Amputations do not include avulsions, enucleations, deglovings, scalpings, severed ears, or broken or chipped teeth.”

  - **NOTE:** 11/12/15, OSHA Interpretation Letter – work-related chipped teeth are recordable but are only reportable if they result in in-patient hospitalization. They are not “amputations.”
New Reporting Requirements (continued)

• **Loss of Eye:** The “physical removal of the eye, including enucleation and evisceration,” are reportable as loss of an eye. The “loss of sight without the removal of the eye is not reportable.” If, however, the employee is hospitalized for the loss of sight, it is reportable.
New Reporting Requirements (continued)

- OSHA expects the reporting rule to significantly increase its workload. The Agency received 10,388 employer notifications during the first full year of reporting (2015).
- OSHA responded to 1/3 of the reports with an investigation and responded to 2/3 of the reports by requesting a Rapid Response Investigation.
- December 24, 2015 – OSHA activated its web page that allows employers to report injuries and fatalities online.
- Employers may still use the OSHA 1-800 number to report, or may call the closest Area Office.
Penalties for Late Reporting

- March 4, 2016 - OSHA Guidance memo – increased the proposed fine for employers that fail to timely notify OSHA upon learning about a reportable incident from $1,000 to $5,000.

- **NOTE:** Area Directors retain the discretion to raise the fine to $7,000 to achieve the “necessary deterrent effect.”

- In 2015, OSHA issued 627 citations involving reporting violations.

- In 2016, OSHA issued 810 other-than-serious violations for employers not following the reporting rule.
Rapid Response Investigations

• In Rapid Response Investigations, OSHA asks employers to investigate the reported incident and provide a report describing how the incident occurred and the abatement measures.

• OSHA may also conduct monitoring inspections of employers who wrote letters to OSHA outlining corrective action. (Rapid Response Investigation)
“Safe Harbor”

• March 4, 2016 - Year One of OSHA’s Severe Injury Reporting Program: An Impact Evaluation, by David Michaels. OSHA says that it will not use an employer’s investigation report as a roadmap to establish violations.

• CAVEAT: OSHA will not use the employer’s internal investigation to cite a condition(s) provided that “employees are not exposed to a serious hazard and the employer is taking diligent steps to correct the condition.
New Electronic Reporting Rules

- Establishments with 250 or more employees must electronically submit (OSHA Form 300A, OSHA Form 300 Log, OSHA Form 301) to OSHA.
  - Establishments with 20-249 employees in designated industries.

- Time line:
  - July 1, 2017: An electronic copy of the 2016 300A Summary
  - July 1, 2018: Electronic copies of 300A Summary; OSHA 300 Log; and OSHA 301 Forms
  - Beginning March 2, 2019, and thereafter: All forms.
    - See, §1904.41 Electronic submission of injury and illness records to OSHA.

OSHA Recordkeeping – 5 Year Rule


• **Background**: In 2012 a Federal Appeals court ruled that the statute of limitations for issuing recordkeeping violations is six months following the occurrence of a violation – OSHA argued that it was 5 years. *Volks v. Sec’y of Labor,* (D.C. Cir. 2012).

• **Changes**: The new rule revises 1904.29(b)(3) of the OSHA Recordkeeping regulation to say that the obligation to record cases is a continuing obligation that continues through the 5 year retention period of 1904.33.
VI. NEW ANTI-RETAIATION RULE
Discrimination/Anti-Retaliation Rule

• §1904.35(b)(1) Employee Involvement
  - (i) You must establish a *reasonable* procedure for employees to report work-related injuries and illnesses. A procedure is not *reasonable* if it would deter or discourage a *reasonable* employee from accurately reporting a workplace injury or illness;
  - (ii) You must inform each employee of your procedure;
  - (iii) You must inform each employee of:
    - (A) The right to report work-related injuries and illnesses; and
    - (B) The prohibition against discharging or in any manner discriminating against employees based on reporting; and
  - (iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.

• See, Oct. 19, 2016 Memorandum of Interpretation from OSHA Deputy Assistant Secretary.
  - https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

• NOTE: A new OSHA administration might issue a different interpretation.
Discipline for Untimely Reporting

• July 15, 2016 - U.S. Steel entered settlement with OSHA – agreed to amend its injury reporting policy: “An employee who is at work when s/he becomes aware of an injury or illness must report it as soon as reasonably possible, but in no event later than leaving the plant or 8 hours after becoming aware of the injury or illness, whichever is earlier...”

- See,
Discipline as a Result of Injuries

• Do not:
  - Have a policy that disciplines all employees who are injured at work regardless of fault;
  - Discipline only employees who report an injury for violation of safety rules;
    • Employers should monitor for compliance with safety rules absent injuries.
  - Utilize vague rules that will be perceived as a pretext for unlawful discrimination (e.g., bee sting is reported – discipline for “failure to work carefully”).

• See, https://www.osha.gov/recordkeeping/modernization_guidance.html
Post Accident Drug Testing

• Post accident drug tests okay if there is a reasonable possibility that employee drug use could have contributed to the injury. See, https://www.osha.gov/recordkeeping/modernization_guidance.html

• OSHA Guidance (released Dec. 15, 2016):
  - Drug test after reporting CTS or bee sting – NO.
  - Drug test after employee was injured upon inadvertently driving forklift into stationary equipment. YES.
  - Post accident drug tests of all injured employees in order to get a premium reduction under state DFWA programs (or because private insurance carrier provides discounted rates). YES.

• NOTE: A new OSHA administration might issue a different interpretation.
Incentive Programs

• OSHA Guidance: [https://www.osha.gov/recordkeeping/modernization_guidance.html](https://www.osha.gov/recordkeeping/modernization_guidance.html)

• Employers must not use incentive programs to penalize employees for reporting work-related injuries and illnesses.
  - Cancelling a “substantial cash prize drawing” for a group of employees because one employee reports an injury. NO
  - Cancelling a “substantial cash prize drawing” for a group of employees because one employee failed to comply with applicable safety rules. YES
  - Cancelling a “substantial cash prize drawing” for a group of employees because one employee failed to comply with applicable safety rules and was injured; ees seldom complied with safety rules – prize only cancelled when injury reported: NO
  - Cancelling party because one employee failed to complete safety training course. YES
Incentive Programs - Continued

• Consider “positive” incentive programs

- Recommending safety improvements
- Promoting employee participation in safety-related activities
  • For example, if everyone wears their hearing protection . . .
- Identifying hazards
- Participating in investigations of injuries or near misses
- Serving on safety committees
Litigation

• Lawsuit filed by ABC/NAM to block the anti-retaliation provisions of the rule. Asserts that the Rule “will for the first time in the history of OSHA prohibit incident-based employer safety incentive programs and routine mandatory post-incident drug testing programs.”

• Nov. 28, 2016 – Texas federal judge refused to grant Plaintiff’s request for national preliminary injunction on the rule, noting that the decision is “not a comment or indication as to whether Defendants will ultimately prevail on the merits.”
Other Implications of 1904.35

• 1904.35(b)(1)(iv) provides: “You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.”

• 1904.36 provides: “In addition to § 1904.35, Section 11(c) of the OSH Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury, or illness.”

  • Under 11(c) employees have 30 days to file a complaint.
  • Under 1904.35, the 6-month statute of limitations applies and OSHA can issue a citation even if no complaint is filed.
  • OSHA believes that “some employees may not have the time or knowledge necessary to file and 11(c) complaint . . .”

  – See, Preamble to Final Rule, May 12, 2016
VII. OTHER INFORMATION
THAT DIDN’T REALLY FIT ANYPLACE ELSE
Whistleblower Cases

• OSHA enforces whistleblower provisions of 22 statues.

• In 2016 – OSHA updated its Whistleblower Investigations Manual and said that OSHA will find merit in a complaint when it believes that there is a “reasonable cause” to believe a violation occurred. (Previously, OSHA used a “preponderance of evidence” test.)
  - This lower investigative standard may result in more whistleblower cases moving to a judge’s review.

• In 2015, OSHA received a record 3,288 whistleblower complaints.
Temporary Worker Initiative

• In 2013 – OSHA launched a temporary worker initiative. Memorandum to Regional Administrators:
  - “. . . please direct CSHOs in your region to determine . . . whether any . . . temporary workers . . . are exposed to a violative condition . . . whether those workers have in fact received required training in a language and vocabulary they understand. Recent inspections have indicated problems where temporary workers have not been trained and were not protected from serious workplace hazards due to lack of personal protective equipment. . . .”

• NOTE: OSHA has issued a series of Temporary Worker Bulletins addressing topics from PPE to Hazard Communication Training. See, https://www.osha.gov/temp_workers/
Temporary Worker Initiative
(continued)

• These are not targeted inspections
  - Within the scope of existing inspection
  - CSHOs directed to determine:
    1. Whether there are temporary workers;
    2. Whether they are exposed to a violative condition; and
    3. Whether temporary workers have received training in a language and vocabulary they can understand.
Who Is the Employer of a Temporary Worker?

• Temporary workers are considered to be the employees of the host employer if the temporary workers are being supervised by the host employer.

• An employer cannot contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them. However, an employer may carry out its statutory duties through its own private arrangements with third parties.
OSHA Recordkeeping – Temporary Employees

• The OSHA Recordkeeping Regulation, 29 C.F.R. § 1904.31, requires that an employer, "record on the OSHA 300 Log the recordable injuries and illnesses of all employees on [the employer's] payroll" and of "employees who are not on [the employer's] payroll if [the employer] supervise[s] these employees on a day-to-day basis." 29 C.F.R. § 1904.31(a).

• Record on only one employer’s OSHA 300 Log.
  - Host and temp agency are both responsible for contacting OSHA within 8 hours if there is a work-related fatality.
Walking Working Surfaces – Fall Protection

• Nov. 17, 2016, OSHA published a final rule updating the Walking Working Surfaces Standard for general industry.

• Effective January 17, 2017 – some phased-in requirements.
  - 5/17/17 – training exposed workers on fall hazards
  - 11/20/17 – inspecting and certifying permanent anchorages
  - 11/19/18 – installing personal fall arrest or ladder safety systems on new fixed ladders over 24 feet and on replacement ladders; Equipping existing fixed ladders over 24 feet with a cage or personal fall arrest system.
  - 11/18/36 (yes, 2036) – replacing cages with ladder safety or personal fall arrest systems on all fixed ladders over 24 ft.

• Dec. 27, 2016 – 7th Circuit was asked to review one aspect of the rule involving the use of rope descents up to 300 ft.
Storage Racks

- 1910.176(b): Secure Storage: Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.
  - Periodically inspect storage racks – damaged pallets, leaning product, structural damage to racks from forklifts.
  - Train forklift drivers to report damage.
  - Use qualified personnel to repair damaged racks.
  - Do not store within 18 inches of a sprinkler.

- **See**, OSHA Interpretation Letter, September 29, 2008. “The 18-inch vertical clearance requirement is treated as a horizontal plane throughout the storage area or room.”
Summer Heat

• **See**, OSHA Fact Sheet on Heat Stress.

• Heat Illness Prevention Program key elements include:
  - A Person Designated to Oversee the Heat Illness Prevention Program
  - Hazard Identification
  - Water – Rest – Shade
  - Acclimatization
  - Modified Work Schedules
  - Training
  - Monitoring for Signs and Symptoms
  - Emergency Planning and Response

• **See also**, February 29, 2016 – NIOSH published revised recommendations to help prevent heat stress.
Heat Safety Tool
By U.S. Department of Labor (DOL), Occupational Safety and Health Administration (OSHA)

NOTE: The OSHA Heat Safety Tool for Android is temporarily unavailable.

When you’re working in the heat, safety comes first. With the OSHA Heat Safety Tool, you have vital safety information available whenever and wherever you need it - right on your mobile phone.

The App allows workers and supervisors to calculate the heat index for their worksite, and, based on the heat index, displays a risk level to outdoor workers. Then, with a simple "click," you can get reminders about the protective measures that should be taken at that risk level to protect workers from heat-related illness - reminders about drinking enough fluids, scheduling rest breaks, planning for and knowing what to do in an emergency, adjusting work operations, gradually building up the workload for new workers, training on heat illness signs and symptoms, and monitoring each other for signs and symptoms of heat-related illness.

Working in full sunlight can increase heat index values by 15 degrees Fahrenheit. Keep this in mind and plan additional precautions for working in those conditions.

The OSHA Heat Tool is available in Spanish for Android and iPhone devices. To access the Spanish version on the iPhone, set the phone language setting to Spanish before downloading the app.

Stay informed and safe in the heat; check your risk level.

For more information about safety while working in the heat, see OSHA’s heat illness webpage, including new online guidance about using the heat index to protect workers.

The source code for this app is available for download:
- iPhone: All-in-One (ZIP)
Workplace Violence

• July 12, 2016 – Labor unions petitioned OSHA to issue a workplace violence protection standard.
  - Would require a written workplace violence prevention program.
    • Procedures for conducting hazard assessment and remediation.
    • Procedure for responding to and reporting incidents after they occur.
    • Focus is on healthcare facilities.
  • OSHA is issuing citations under its General Duty Clause for workplace violence.

• July 18, 2016 – Four members of the House and Senate wrote Labor Secretary Perez seeking a workplace violence standard in the healthcare industry.
QUESTIONS?