

The next new OSHA arrives
Coming out party held in San Antonio

It was a rare treat for safety and health pros. When was the last time the Labor Secretary and the OSHA chief spoke at the same safety and health meeting, from the same stage on the same day?

Every new occupant of the White House, or more specifically the Department of Labor, at some point early on announces their intent to reform, redirect, reinvigorate, recast or “add value” to the Occupational Safety and Health Administration. Every four or eight years the political pendulum in Washington takes OSHA for a ride to the business-friendly right or organized labor-leaning left, swinging from conciliation and cooperation to revved up enforcement and standards-setting.

After listening to Labor Secretary Hilda Solis and acting OSHA boss Jordan Barab speak last Monday, June 29th, at the opening day of the American Society of Safety Engineers’ (ASSE) annual professional development conference, held in San Antonio, it appears OSHA is in for its most pronounced policy swing in decades.

“We’ve got a very activist Secretary of Labor and a very activist head of OSHA,” said a longtime safety professional after the eventful day.

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10 TENETS OF OBAMA’S OSHA

Here are highlights of the new agenda, as laid out by Solis and Barab:

1 — OSHA is back. DOL Secretary Solis and OSHA chief Barab have strong union ties, and are pushing an aggressive OSHA plan that in large part mirrors goals organized labor has promoted for OSHA.

Solis, for instance, spoke of her working class parents in Los Angeles, both union members, “fighting side by side on their shifts to ensure workers came home safe,” and instilling in her the value that you “fight for what is right.”

2 — More than 150 new inspectors will be hired in fiscal year 2010. OSHA’s budget will increase ten percent — with enforcement getting \$25.5 million versus less than a \$1 million increase for compliance assistance.

3 — Number of annual inspections will increase from 38,000 nationwide to perhaps 44,000, according to some sources. OSHA has not announced any inspection quota or target. Solis puts it simply: “More enforcement, less voluntary protection focus.”

4 — Penalties will be higher for violations. Consider these six-figure-plus enforcement headlines in the five-month span since Inauguration Day in January: more than \$1.1 million in penalties against Milk Specialties Co. in Whitehall, Wis.; \$500,000 to be paid by Tyson Foods;

more than \$255,000 in fines against a New Hampshire firearms manufacturer; \$217,000 in fines against Delek Refining; more than \$141,000 in fines against Hess Corp.; \$105,000 in proposed penalties against an Orlando manufacturer; a Petrolia, Pa., chemical company fined more than \$121,000; fall hazards at a Torrington, Conn., site lead to more than \$118,000 in penalties; \$273,000 in fines against a Jamestown, N.Y., employer for lack of asbestos safeguards; \$148,000 against Miranda Roofing for fall hazards; and an El Paso, Texas, construction contractor fined \$106,200 for alleged workplace safety violations.

5 — New standards will be promulgated for **diacetyl flavoring (popcorn lung), combustible dust exposure protection, cranes and derricks, confined space in construction,** and **rewriting the hazard communication** standard in be consistent with new international MSDS laws, commonly called the Global Harmonization System (**GHS**).

6 — Broad, sweeping new standard proposals will be issued, probably in 2011 or 2012, on **ergonomics** and basic requirements for maintaining a worksite **safety and health program**.

7 — **OSHA will be more aggressive with standards and policing / enforcement than at any time in the last 20 years,** since the late 1980s - early 1990s regime of Labor Secretary Elizabeth Dole, OSHA chief Jerry Scannell, and OSHA deputy Alan McMillan.

8 — The boom years are over for **VPP growth**. Unions do not like VPP because they argue OSHA’s audits of candidate companies to gain entry to VPP program are too weak and inconsistent. Barab says there will be no more annual quotas to drive VPP expansion.

9 — **Incentive programs, no favorites of the new OSHA leaders, will be scrutinized during inspections.** Again, this reflects union thinking. Unions argue incentive programs too often lead to workers not reporting injuries in order to win prizes, and a focus on worker behaviors over plant physical conditions. How OSHA might penalize employers operating incentive contests that inspectors can document as promoting under-reporting is unclear. Employers’ general duty to provide a safe and healthful workplace, the so-called General Duty Clause, may be invoked, as OSHA announced it will do earlier this year to protect workers against influenza exposure, and it has done in the past where a hazard exists but no corresponding standard.

10 — **Recordkeeping accuracy and safety in the chemical industry** will receive particular scrutiny as the objects of forthcoming OSHA National Emphasis Programs.

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“WE’RE BACK”

“We’re back,” said the diminutive and energetic Solis, smiling as she stood in a concrete back hallway that exits the Henry B. Gonzalez Convention Center, talking with Barab following a brief press conference that came after her ten-minute speech to about 3,300 ASSE members at the meeting’s opening session, held in a cavernous, generic convention ballroom.

“Make no mistake about it,” she told the standing room only crowd which lined the hall’s walls and had attendees sitting on the floor, “the Department of Labor is back in the enforcement business. We are serious, very serious.”

Labor Secretary Solis comes across as the toughest talking DOL head since Elizabeth Dole in the early 1990s took an active interest in OSHA affairs and informed business and the safety profession “the cop is back on the beat.”

And Jordan Barab, a Washington safety and health player for more than 25 years, spoke at the ASSE meeting with an authority not usually associated with someone wearing the “acting” label. He was specific about OSHA’s future plans and did not deflect or defer any questions to the yet-to-be-named permanent OSHA chief.

Both Solis and Barab spoke in tempered, determined and “make no mistake about it “ tones. Barab a bit more witty and quick with a joke, befitting his decades of been there, seen that experience inside the Washington Beltway and years authoring his acerbic blog, “Confined Space.”

In her speech that began at eight in the morning, Solis was clear about the kind of leadership safety and health pros can expect from OSHA and the DOL in the next three-plus years, referencing “OSHA’s renewal of vigorous enforcement,” “intolerable” construction industry fatalities, and again, “We are serious about safety.” After talking about unsafe scaffolding, trenching cave-ins and falls in construction, Solis asserted, “As long as I am Secretary of Labor the department will go after anyone who puts worker lives needlessly at risk.”

She used her speech to announce a Texas construction safety initiative. “Texas has the dubious distinction of having more workers die than any other state,” she said. Beginning in July, OSHA will increase the number of inspectors in Texas and prevent injuries and fatalities at construction sites. Later in the day Barab referred to them as SWAT teams.

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PARALLEL MESSAGES

Both Solis and Barab came to San Antonio to deliver two distinct messages, actually. One intended for the ASSE audience. The second used the ASSE meeting as a platform to fire warning shots at negligent employers, corner cutters, and the non-compliant unwashed operating outside the Henry B. Gonzales Convention Center.

Message number one from Solis: “It’s really an honor to be here with so many people so keenly involved in protecting employees,” she said. “You make a meaningful contribution. The work you do is not easy, especially to sell your message in these hard times.”

Message number two: “As I have said since my first day on the job, the U.S. Department of Labor is back in the enforcement business.”

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HEROES AND VILLIANS

Barab continued the parallel messaging in his speech to attendees after lunch on Monday. “We appreciate your work,” he told ASSE members. “We have your back. Your fight is our fight, that’s why we (Solis and Barab) came here today. Fifteen minutes later, he closed his speech saying, “It’s a new day. We’re in this fight together. You’re all heroes in my book.”

Here’s one example how Barab balanced his twin themes: “You look at some of these horrible accidents and wonder how someone isn’t in jail,” he said. “We’re looking at legislation to go after those responsible. Not ASSE members. As far as you are concerned, OSHA standards are the floor. You ultimately bear the burden or reap the benefits of what we do in Washington. Participate in the process, in hearings and comment periods. We need to hear from you.”

On the other hand, Barab several times made reference to “a lot of companies out there” who are cutting corners with safety and health. “Every day someone gets ground up in a piece of machinery or falls,” he said. “I can’t understand how anyone can be killed in a trench. These are obvious hazards and completely unacceptable deaths that need to be prevented.”

The duality of Solis’s and Barab’s talks were lost on at least some ASSE members. It seemed a matter of listeners hearing what they choose to hear.

“I thought Barab’s message was very, very to the left,” said a longtime ASSE member. “Both he and Solis, I thought their message to this audience was horrible. They’re preaching to the choir here. Standards definitely need to be updated. But I don’t want to hear more talk about all this. Let’s see what action happens.”

“These people here (at the ASSE meeting) are professionals, they have programs, some are very good, almost all are at minimum compliant. Enforcement, stronger enforcement, doesn’t mean much to them,” said a safety vet with a long string of ribbons hanging from his attendees’ badge listing various honors and ASSE affiliations. (ASSE members interviewed for this article are quoted anonymously due to the longstanding fear that any criticism of OSHA might bring the wrath of regulators down on their employers.)

One attendee thought Barab over-reached with his speech. “He’s only the acting head of OSHA,” he said. “He sure doesn’t talk like he’s ‘acting’. He should wait for his permanent replacement.”

Another thought Barab had toned down his speech from one given in May. “I heard him in Washington and it was a “we’re coming after you” speech. “He had EHS pros scared, especially at the prospects of going to jail for fatalities if Congress passes tougher criminal penalties.”

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FULL SPEED AHEAD

“The Secretary asked me to go full speed ahead on an agenda,” Barab told his audience.

(The Department of Labor has made Barab a deputy assistant secretary for occupational safety and health, a position he’ll occupy once a permanent chief is confirmed. Sources in San Antonio believed a short list of candidates is being vetted, which includes Barab. Indeed, in her morning press conference, Solis referred to Barab as “a candidate with excellent insights and experience,” while explaining why she named an acting head of OSHA rather than a permanent appointment. “I didn’t want to wait,” she said. Barab in his afternoon speech, predicted a White House nomination for a permanent OSHA chief probably won’t come until September or October.)

Here’s a quick overview of the future agenda of “the new OSHA,” as Barab described the agency:

- **“OSHA will not wait any longer to deal with construction fatalities.** SWAT teams of inspectors will sweep over Texas in the coming weeks” as part of a new initiative aimed specifically at the Texas construction industry.

- **National Emphasis Programs are in the works for enforcement action in the chemical industry and closer review of injury and illness recordkeeping for evidence of under-reporting.**

OSHA’s look into the recordkeeping accuracy of a select number of companies will also include reviewing medical records and safety program policies that might affect injury and illness reporting. “I know safety bingo and incentive contests are a very big business, along with the behavioral philosophies that back up many of these programs” said Barab. “But we are going to take a very close look at incentive programs that award prizes for fewest recorded injuries. That make workers reluctant to report.” In general, said Barab, “we believe the focus should be on engineering out the hazards, on physical conditions,” not worker behaviors.

- **“Standards-setting is not broken, it’s ailing,”** said Barab. He made an exception for updating decades-old permissible exposure limits (PELs). That process “may be broken,” and OSHA “may not be able to do anything within” its existing regulatory framework, he said. New legislation from Congress may be required, he said.

- **“We’ve got a long way to go, a lot of catching up to do with standards-setting,”** he said. “The days are over of delayed standards-setting, starving OSHA’s budget,” and signing too many superficial industry and association alliances, he said. “It’s a new day. We want strongly protective standards that make sense.” The lack of standards action in recent years impacts OSHA’s credibility, he said.

- **Short-term standards priorities** are requirements for combustible dust, “popcorn lung disease,” cranes and derricks, revising the hazcom standard to align MSDS requirements with the UN-backed globally harmonized system (GHS) and confined spaces in construction,” said Barab.

Longer term, **ergonomics and a standard for safety and health programs basics** are on OSHA's radar.

- **“We must confront the elephant in the room, ergonomics,”** said Barab, who coordinated the Clinton administration's ergonomics standard-setting in the late 1990s. “Ergonomics is a political football with powerful players who don't want to see it on the field. Well, we're going to pick up that football” and work with stakeholders to fix what Barab described as an enormous occupational problem. “Too many people are getting hurt” with ergo-related injuries and illnesses, he said.

“We must address (this occupational safety and health problem), our name is the Occupational Safety and Health Administration.” First, OSHA must study the legalities of the Congressional law used by the Bush administration in 2001 to repeal the ergo rule, and come to an understanding of how the law interprets the requirement for OSHA to come out with a substantially different version of the standard if it intends to move ahead with standards-setting, round two.

- **Barab several times asked the ASSE community for its engagement in standards-setting activity.** “Give us your input. Your experience is really a reality check. We didn't get the engagement we expected from industry when working on the ergonomics standard in the late 1990s. We wanted them to come forward and describe successful ergonomics programs. We need to hear from you. It gets boring hearing from the same five associations at every hearing.”

- As for **setting requirements for the basic foundation elements of a safety and health program**, Barab said OSHA is heavily engaged now in studying options. Barab believes much support exists for this standard, which he said would be on OSHA's regulatory radar screen in one or two years.

- **A thorough review of OSHA's Voluntary Protection Program will be conducted**, with an overall de-emphasis on VPP, but no elimination.

- **Oversight of state OSHA programs will be strengthened.**

- **Penalty structures, last updated in 1990, are being examined within the confines of current OSHA legislation.** Congressional proposals have already been drafted to raise penalties. “Right now the average penalty for a serious OSHA violation is about \$900,” said Barab. “It basically doesn't add up to a lot. That's not much of a disincentive.”

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WILL PROS BUY THE NEW OSHA?

Barab ended his speech by returning to his twin messages. “I'm speaking to the choir here.” But he added, “Economic hardship is no excuse for taking short cuts with safety and health. When companies start cutting corners, I know you are unfortunately often the first to go. Your job

probably is more important in hard times because workers afraid to lose their jobs won't raise concerns."

The coming months will tell whether Solis and Barab: 1) have motivated ASSE members to get more involved in the regulatory process; 2) insulted their professionalism and accomplishments with the talk of a lot of bad actors out there; or 3) sacred them with union-like battle cries about winning "the fight" for safety and health justice that many ASSE members feel they have already fought within their organizations at a number of points in their careers.

Most ASSE members interviewed after Solis's and Barab's speeches made it clear they don't want to be drawn into a fight that is not theirs, a fight between OSHA and risk-taking small contractors and some larger employers who blame workers for accidents and shirk needed safety and health investments.

For one thing, there's a profound philosophical difference between the majority of ASSE members who believe most employers want to do what is right for worker protection, and the new OSHA's belief that there are a lot of bad guys out there. And second, most ASSE members have their hands full with an overloaded plate of stressful responsibilities, leaving them ill-equipped to stand by OSHA and fight for what is right, as Solis said.

By Dave Johnson, Editor