

**Welcome
and Thank You for Joining
Prosecution & Liability:
Reducing Risks
During The Obama Administration**

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Prosecution & Liability: Reducing Risks During The Obama Administration

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Henry Chajet and Mark Savit



Patton Boggs is a 600+ attorney firm with unique expertise at the intersection of traditional law and lobbying. Henry Chajet in DC and Mark Savit in Denver, co-chair the safety, health, and crisis response team, with expertise in agency investigations, enforcement defense, standard setting, insurance, and litigation, in seven US offices.

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Complaint: Weak OSHA Enforcement

- **Congress: OSHA penalties “shockingly low”**
- **Since 1970, 71 total OSHA criminal cases**
vs.
317 EPA cases in 2008 alone
- **AFL-CIO: Average penalty in a worker death:**
\$11,300.

Labor Secretary Hilda Solis

- **“There’s a new Sheriff in town.”**
- **“A new direction”...“back in the enforcement business”... “not voluntary programs and alliances.”**
- **130 New OSHA inspectors already hired**
- **“Severe violators program” & other new initiatives**
- **New agency leaders that emphasize enforcement**
- **Safety & health agency budgets exceed \$1 Billion**

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Congress, Critics & OSHA Converge

- **OSHA “Reform” bills- increase fines and criminal enforcement, add new regulations**
- **New OSHA leader (J. Barab): former House staff, primary author of “OSHA Reform”**
- **DOL OSHA Nominee (Dr. D. Michaels): Plaintiffs’ funded group at GW University – Opposes Daubert Test –Weak OSHA Critic**

The New OSHA Criminal Law Approach

- **August 2009: multi-employer indictment. Xcel, Public Service, RPI Coating: five criminal OSHA counts: \$500,000 / count.**
- **Two officials of RPI charged with five counts: up to six months jail and up to \$250,000 for each count, if convicted.**

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The New OSHA Severe Violator Program

- Oct 30th, BP fined \$87M, four times more than any prior OSHA fine.
- Failure to abate, willful and egregious violations issued.
- Failure to abate citations are related to hazards cited after a 2005 explosion that killed 15 workers at BP's Texas City Refinery.



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OSHA's New Routine Enforcement

- **Sept, 2009: \$225,500 factory fine; no injury or accident**
- **Multiple “repeat” violations – eye protection; lock out training; guarding; uninspected ropes and hooks; unguarded grinders; and uninspected electrical.**
- **Multiple “serious” - fire extinguisher and crane inspections; unmarked slings; unguarded electrical; damaged insulation; gas cylinder storage; slip hazards.**
- **Repeat or Willful: up to \$70,000 civil fine per violation**

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Related Legal Concepts Impact Risk

Contracts

Goods, Services,
Insurance

Statutory Liability

Regulatory
Criminal

Tort Liability

Negligence, Product
Liability, Punitive

Predictability

Duties

Benefits

Breach

Cost

Harm

Damages

Recovery

Penalty

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Workers Comp Or Not? Coverage? Changing Risk Allocations

- **Workers Comp – Capped / Defined - Workplace “Accidents”**
- **“Willful” Or Criminal Conduct: Not Covered By Comp?**
- **“Willful” or criminal conduct: insurance coverage?**
- **Third party fault/contract provisions: risk transfer , but no immunity**
- **Government reports and citations admissible evidence**
- **Financial risks change when OSHA finds the cause of a loss, and/or violations of law, and/or “willful” conduct**

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As Fault Increases, Legal Risks Increase, And Penalties Increase

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Major Federal Agencies

Investigation & Evidence Collection Duties

- OSHA
- MSHA
- NIOSH
- EPA
- FDA
- BATF
- CPSC
- DoT
- Chem SB
- NTSB
- Coast Guard

Notice Mandates

- **Insurance - Loss Notice Required**
- **Different agency mandates for notification, updates and reports.**
 - **OSHA 1-800-321-OSHA w/in 8 hrs of a fatality or 3 or more hospitalizations (except some states with stricter mandates)**
 - **MSHA 1-800-746-1553 w/in 15 mins. of fatality and 12 events, at a quarry, cement plant, processing facility, or mine.**
 - **National Response Center – 1 800 -424 8022 Federal & State EPA: immediate calls for oil, chemical, and other hazardous materials**
 - **Other Agencies (e.g. Homeland Security –ATF –explosives)**

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Risks Of Notice Failure

- **Insurance: coverage denials.**
- **Government: penalties and evidentiary presumptions; infer “cover up” motives.**
- **Plaintiffs: fact inferences / presumptions**

Post Loss: Coverage Risk Reduction

- **Loss /claim notice. Maintain records.**
- **Integrate coverage analysis with investigation strategy**
- **Critical Immediate Factors**
 - **Understand and use correct coverage terminology**
 - **Understand, and if possible, avoid exclusion terms**
 - **Protect legal privileges & confidentiality**
 - **Avoid admissions that adversely impact coverage**

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Boiling Liquid Expanding Vapor - Fire & Explosions Excluded

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Bin Event: – Silos Excluded

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Expected Events In Large Loss Cases

- **Secure evidence to prevent adverse consequences**
- **Agencies arrive ASAP, seek immediate information**
- **Coordination of multiple agencies can be a challenge**
- **Full cooperation (basic facts/site visit), while securing time for counsel to provide advice, review document and interview requests**
- **Physical evidence, documents, conversations, interviews can be used for lawsuits, enforcement, fines, criminal prosecutions, coverage denials, and claims by or against third parties**
- **Beware of damaging admissions, early in the investigation**

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Rail Car TDI Event—NTSB attempt to send relief valve to valve manufacturer for testing - rebuffed to protect evidence

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Routine Agency Actions Elevate Risks

- **Routine fines – evidence in later, large loss cases**
- **Minimize routine compliance enforcement risks using:**
 - **Training and audits**
 - **Repeat violation prevention program**
 - **Contest and informal settlement process**
 - **Exculpatory language for penalty payments**
- **Document defenses**
 - **unpreventable employee misconduct**
 - **third party at fault & contract provisions**
 - **good faith compliance efforts**

Key Facility Compliance Risks

- **Casual Admissions By Untrained Managers**
- **Self Inspection / Investigation / Audits**
- **Safety Complaints & Committee Minutes**
- **Improper or Missing Training Records**
- **Poorly Worded Budget Justifications**
- **Failure To Maintain Disciplinary Records**
- **Prior Enforcement Actions Not Addressed**
- **Emails**

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Tools To Reduce Legal Risks

- **Company Rules, Policies, Programs & Training**
- **Risk Reduction Management Training**
- **Employee Warning/ Discipline/Counseling Programs**
- **Simple, Focused & Documented Safety Reminders**
- **Self Inspections/Audits With Documented Follow Up**
- **Documented Contractor Management Programs**
- **Contract Provisions Re Insurance and Compliance**
- **Insurance Coverage & Exclusion Reviews**

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Employee Procedures That Reduce Risk

- **Rule: Employees Must Examine For, Identify and Correct Safety or Health Hazards, or Report Them To Management If They Can Not Correct Them Safely**
- **Management Training Re Employee Complaints:**
 - **Listen & Immediately Protect Against Risk**
 - **Enlist A Witness**
 - **Evaluate With Needed Expertise**
 - **Communicate Evaluation Results Clearly**
 - **Never Ignore A Complaint or Assume It's Invalid**

Post Accident Criminal Prosecution Risks

- **Post accident conduct is the the leading cause of criminal prosecutions in large loss cases.**
- **Providing false statements, misleading investigators, destroying or altering documents, obstructing a government investigation, or conspiring to obstruct an investigation, are all potential felonies.**
- **Obstruction and conspiracy include encouraging others to mislead, lie or commit other post event crimes.**

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Non-Counsel Phone & Email Responders

- **Be cautious. Consider yourself a witness and a possible target**
- **Avoid discussions re causation, blame, speculation & rumors**
- **Non lawyers should not give legal advice, but can collect follow up information –consider using a standard form**
- **You may not have the protection of attorney client privileges, subjecting conversations, emails, and writings to discovery**
- **Do not advise or consol with:**
 - **“It wasn’t your fault; -----caused it...”**
 - **“Given the budget cuts, it was predictable.”**
 - **“It’s Comp Case, Don’t Worry About Lawsuits”**
 - **“Don’t Tell OSHA...” or “Tell them....”**
 - **“Tell the press....”**

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Published Management Reminders: If You Talk to the Government YOU MUST TELL THE TRUTH.

- **No “Miranda” warnings, if you are not “in custody”**
- **Investigator discussions are voluntary, unless subpoenaed**
- **I don’t feel like talking at this time, if true, can be the best response**
- **You have the right to counsel**
- **Right to be accompanied by anyone, and to stop an interview at any time**
- **Right to refuse to sign a written statement**
- **Right to refuse to be recorded**
- **Right to present exculpatory evidence**
- **Right to ask questions (e.g. to judge the investigation direction)**
- **Right to seek assistance**

Published Management Pitfalls



- Your statements can be used against you.
- Do not advise others to talk or not talk.
- Do not make damaging admissions.
- Avoid inconsistent statements.
- Do not alter or destroy evidence or documents.
- Do not speculate on how an event occurred or why.

NEVER LIE OR MISLEAD THE INVESTIGATOR

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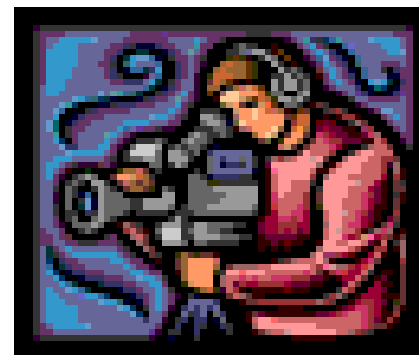
Press & Community Relations

Focus On

- **Compassion For Injured & Community**
- **Safety, Security & Environmental Protection Now**
- **Investigation Will Find Cause For Future Prevention**
- **Cooperation With Government Investigators**

Avoid

- **No Comment Statement**
- **Detailed Answers**
- **Discussions Of Fault**
- **Admissions**



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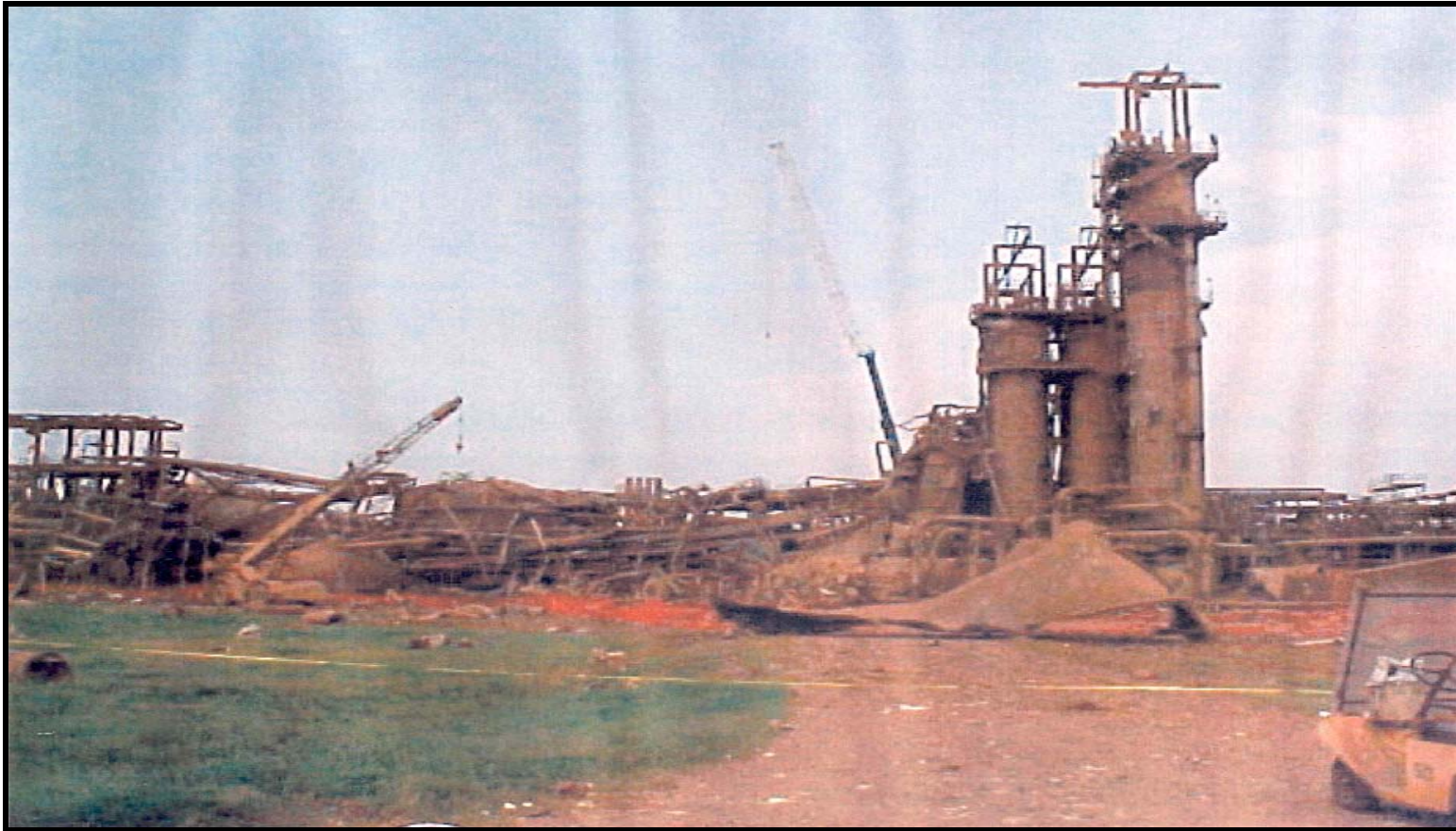


Refinery, Pre-Accident, “Relief Valves Closed”

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**34,000 Claims / \$350 Million Loss / 28 Injured /
Millions In Potential Penalties & 2-Year Criminal Investigation**



Refinery, Post Accident

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**Refinery Rebuilt, Insurance Recovery, Cases Settled,
No Criminal Prosecutions**

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Questions



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Patton Boggs Safety & Health Law & Crisis Management Team

Companies are faced with an ever-growing array of federal regulations, funded with more than one billion dollars for safety and health inspections, investigations and enforcement. Regulatory compliance is a daunting task but perhaps the easiest challenge posed by OSHA, MSHA, NIOSH, ATF, EPA, DOT, the Chemical Safety Board, NTSB, and others. Far greater risks are posed by agency investigations. Evidence developed by the agencies and their enforcement actions not only pose risks of penalties but also impact insurance coverage, liability lawsuits and criminal prosecutions. Patton Boggs provides proven liability prevention services, including:

- Audits
- Program/policy development
- Management training
- Acquisition compliance due diligence
- Regulatory counseling and advocacy
- Contractor management programs
- Crisis/incident response & defense
- Liability and coverage analysis
- Internal investigations
- Expert retention and management
- Enforcement counseling and defense
- Litigation, arbitration, and mediation
- Informal settlement representation
- Agency rulemaking advocacy/litigation
- Private standards counsel and litigation
- Scientific research counsel
- Product stewardship and liability counsel
- Congressional counsel & lobbying
- “Whistleblower”/ discrimination defense
- “White collar” defense

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