



# WHAT TO DO WHEN OSHA COMES CALLING: HOW TO LEGALLY PROTECT YOUR RIGHTS



June 29, 2011

Presented by:

Edwin G. Foulke, Jr.

(404) 240-4273

[efoulke@laborlawyers.com](mailto:efoulke@laborlawyers.com)

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

**THANK YOU  
FOR YOUR COMMITMENT TO SAFETY**

**FISHER & PHILLIPS LLP**

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

2

# WHY ATTEND THIS TRAINING?

To maintain and constantly improve employee safety

The first step to prepare for an OSHA inspection is to maintain a safe and compliant workplace.

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

3

# WHY ATTEND THIS TRAINING?

## Avoid large OSHA penalties such as:

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. CES Environmental Services, Inc. (TX) – \$1.4 million
8. Goodman Mfg. Co. (TX) - \$1.215 million
9. A-1 Excavating (WI) - \$861,000
10. WRR Environmental Services (WI) - \$787,000
11. Cooperative Plus (WI) - \$721,000
12. Sims Bark Co & Sims Stone Co. (GA & AL) – \$576,000

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

4

# WHY ATTEND THIS TRAINING?

## Avoid large OSHA penalties such as:

13. Republic Engineered Products (OH) - \$563,00
14. Excelsior Brass Works (PA) - \$550,400
15. C.A. Franc (PA) - \$539,000 and criminal referral
16. All-Feed Processing & Packaging, Inc. (IL) - \$518,520
17. Loren Cook Co. (MO) - \$511,000
18. Cranesville Aggregate Co. (NY) - \$509,000
19. New Jersey Transit (NJ) - \$500,000
20. Parker Hannifin Corp. (MS) - \$487,700
21. Cambridge Contracting, Inc. (NY) - \$484,000.
22. Endres Processing Ohio, LLC (OH) - \$473,000
23. U.S. Minerals (IN) - \$466,400
24. US Minerals (IL) - \$396,000
25. Mar-Jac Poultry, Inc. (GA) - \$379,800

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

5

# SUPERVISOR LEGAL ROLE IN OSHA CITATIONS

To make out a federal OSHA citation, OSHA must prove that an employer knew of a violation, or with exercise of reasonable diligence, could have known of a non-compliant condition.

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

6

# SUPERVISOR ROLE IN OSHA CITATIONS: LEARNING OF OSHA VIOLATIONS

“Because employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by providing that a supervisory employee knew of or was responsible for the violation.”

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

7

# SAFETY RESPONSIBILITY : DISCIPLINE – THE KEY ELEMENT

Discipline has a “*pro-employee*” purpose and is the cornerstone of an effective safety management program. Analyze the role of Discipline by the elements of the OSHA “Affirmative Defense” of “Unpreventable Employee Misconduct.”

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

8

# SAFETY RESPONSIBILITY: UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE ELEMENTS

- Establish work rules designed to ensure safe work and to avoid OSHA violations
- Communicate the work rules to employees
- Train the employees as needed
- Take appropriate steps to discover violations
- Effectively enforce the rules and practices when violations are discovered; and
- **Document the above actions**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

9

# TOP 20 MOST FREQUENTLY OSHA STANDARDS

## SIC 1541 – GENERAL CONTRACTORS – INDUSTRIAL BUILDINGS AND WAREHOUSES

1. § 1926.451 Scaffold general requirements
2. § 1926.501 Duty to have fall protection
3. § 1926.403 Electrical general requirements
4. § 1926.20 General safety and health provisions
5. § 1926.453 Aerial lifts
6. § 1910.1200 Hazard communications
7. § 1926.1053 Ladders
8. § 1926.404 Electrical wiring design and protection
9. § 1926.405 Electrical wiring methods, components and equipment for general use
10. § 1926.502 Fall protection systems criteria and practices

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

10

# TOP 20 MOST FREQUENTLY OSHA STANDARDS

## SIC 1541 – GENERAL CONTRACTORS – INDUSTRIAL BUILDINGS AND WAREHOUSES

11. § 1926.21 Safety training and education
12. § 1926.651 Specific excavation requirements
13. § 1904.32 Recordkeeping - annual summary
14. § 1926.503 Fall protection training requirements
15. § 1926.100 Personal protective equipment – head protection
16. § 1926.701 Concrete and masonry construction general requirements
17. § 1926.1052 Stairways
18. § 1926.102 Personal protective equipment – eye and face protection
19. § 1926.652 Requirements for protective systems
20. § 1926.1101 Toxic and hazardous substances - asbestos

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

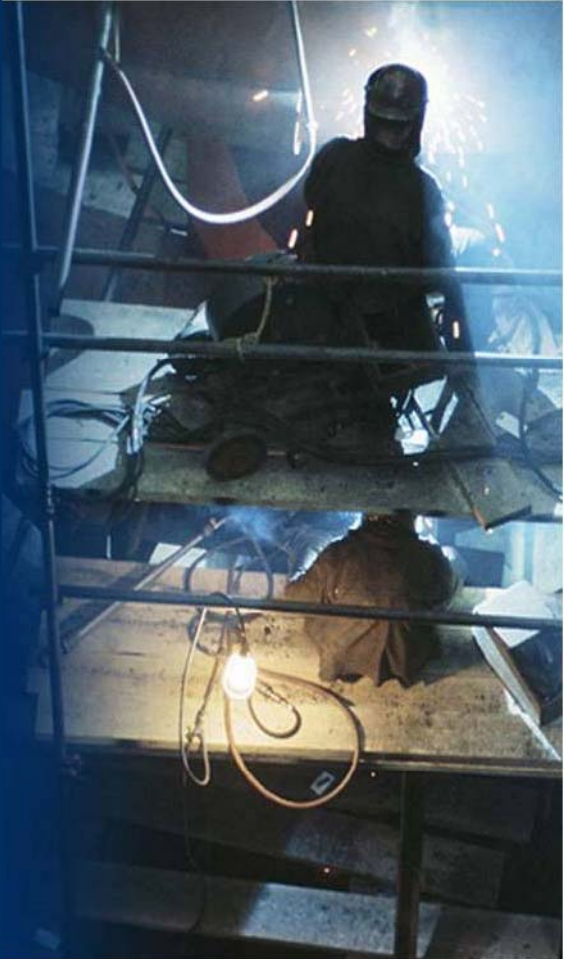
©COPYRIGHT 2011  
ALL RIGHTS RESERVED

11

# THE ACT

## Occupational Safety & Health Act of 1970

- Nixon Administration
- Effective 4/28/71



FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

12

# COVERAGE & EXEMPTIONS

General rule: applies to all employers

- In all states, territories, & D.C.
- Except as specifically exempted



FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

13

# ADMINISTRATIVE STRUCTURE

- Federal law
  - Supremacy clause
  - Supersedes state safety laws
- Opt-Out (local enforcement option)
  - “Approved” state plan

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

14

# FEDERAL OSHA

- Occupational Safety and Health Administration
- U.S. Department of Labor – Secretary of Labor Hilda Solis
- Assistant Secretary of Labor – David Michaels
- 10 Regional Offices
- Multiple “Area” Offices
- Website: [www.osha.gov](http://www.osha.gov)

## **OSHA Region Offices**

**Boston – I**

**New York – II**

**Philadelphia – III**

**Atlanta – IV**

**Chicago – V**

**Dallas – VI**

**Kansas City – VII**

**Denver – VIII**

**San Francisco – IX**

**Seattle – X**

**FISHER & PHILLIPS LLP**

ATTORNEYS AT LAW


*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

15

# THE ROLE OF THE OSHRC AND FEDERAL COURTS

- 
- Contest Citations
  - 11C Actions -- Whistleblower/ Discrimination Actions
  - Rule-Making Review

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

16

# STATE PLANS

- Must be “at least as effective as”
- States free to enact more demanding standards
- 27 state plans – AK, AZ, CA, CT (Public Sector Only), HI, IL (Public Sector Only), IN, IO, KY, MD, MI, MN, NV, NJ (Public Sector Only), NM, NY (Public Sector Only), NC, OR, PR, SC, TN, UT, VT, VI (Public Sector Only), VA, WA, WY

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

17

# PRE-INSPECTION ACTION PLAN

- OSHA Poster
- Assignment of responsibilities
- Training/recordkeeping
- Hazard assessment and abatement
- Equipment needed during inspection
- Review of previous citations
- **Review of insurance and third-party audits**
- **Periodic audits and reviews**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

18

# WHY ME?

## INSPECTION PRIORITIES

- Imminent danger
- Fatalities/catastrophic accidents
- Employee complaints/referrals
- High-hazard industries &
- Special emphasis programs



# THE ELEMENTS OF AN OSHA INSPECTION

The Knock at the Door

The Opening Conference

The Walk-Around

The Closing Conference

**CAUTION**



**CAUTION**

FISHER & PHILLIPS LLP  
ATTORNEYS AT LAW  
*Solutions at Work*<sup>®</sup>

©COPYRIGHT 2011  
ALL RIGHTS RESERVED  
20

# THROUGHOUT THE ENTIRE INSPECTION ALWAYS REMEMBER

- It is your facility
- You have rights. . .
  - Inspection conducted in a reasonable manner
  - Inspection conducted during a reasonable time
- Completion of inspection within 6 months
- Be cooperative and responsive **but maintain control of the inspection**



FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

21

# MAINTAINING CONTROL

- Includes determining before an inspection...
  - What OSHA standards are applicable – do you comply?
  - **Previous OSHA Citations – are they all corrected?**
  - Assure support staff (receptionists, secretaries, guards) are trained.
  - Know what to say when government is at your door.
  - Who is the right company person to contact, including your OSHA Counsel?

# THE KNOCK

- **No advance knowledge**
- Will not “come back later” – 1-hour rule
- Credentials – if unsure, call Area Director to confirm



FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

23

# SHOULD YOU DEMAND A WARRANT?

- A policy call
- Few employers routinely require warrants
- May be necessary to gain time, such as when a manager or counsel needs to be present
- An “ex parte” procedure

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

24

# OPENING CONFERENCE

- Ascertain purpose of the inspection.
- Establish “scope” of the Inspection – get copy of complaint if applicable
- Set ground rules for inspection.
- **Don't volunteer information.**
- Treat the Inspector in a professional fashion
- Notification of corporate officials and counsel
- Coordination with on-site contractors and vendors
- Trade secret issues

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

25

# THE WALKAROUND

- Inspection may last several hours or several months
- **Employer – right to accompany CO**
- An Employee Representative, if any, must be permitted to attend entire inspection
- Limit the area seen by the CO

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

26

# THE WALKAROUND

- Require CO to comply with all company safety and health rules, including training, where applicable
- Take accurate notes on areas reviewed and all discussions and comments from CO
- Do everything the CO does (photos, video, air monitoring, etc.)
- Maintain control
- **No staging of event or accident**
- **No destruction of evidence or misrepresentations – even if inadvertently**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

27

# THE INSPECTION

- CO will usually take photographs
  - Video equipment
  - Right to protect proprietary trade secrets
- CO may perform relevant tests
  - e.g., air sampling, noise monitoring
- **Advise CO that only side-by-side sampling or monitoring will be allowed**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

28

# THE INSPECTION

- Interviews
  - Schedule away from production floor or work area
  - Normally in company conference room
- **Tape-recording**
- **Signed statement**
- Deposition

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

29

# THE INSPECTION

- Hourly Employee Interviews
  - OSHA takes position no management present
  - Up to employee – can have Employee Representative
  - **Advise employee of his/her rights, appreciation of cooperation, and to tell the truth**
- Warning: Employees have whistleblower rights

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

30

# THE INSPECTION

- Management and supervisor interviews
  - **Always another management/counsel present – agent of Company**
  - Definition of manager?
  - Fatality investigation – attorney always present
  - **No tape-recording**
  - **Signed statement**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

31

# THE INSPECTION

- Documentation
  - Recordkeeping
  - Training
  - Safety and health policies
  - Monitoring results
  - Medical surveillance
  - Medical access orders
  - **Previous safety audits**
  - **Standard required documents**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

32

# CLOSING CONFERENCE

- **Employers' opportunity for free discovery**
- Advise of observed unsafe conditions
- Usually, brief description as to possible violations – no discussion of penalties, classification and abatement dates
- Note any abatement made during the inspection
- Suggest possible corrections
- Request photos and monitoring results
- Discuss appeal rights
- **Not a time for debate**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

33

# CITATIONS

- In writing
- Violation described “with particularity”
- Timely – citation must issue within 6 months of the violation
- Proposed penalty specified
- Served by certified mail
- Post for 3 days or until abatement, whichever is longer

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

34

# TYPES OF CITATIONS

- De minimis
- Other than serious
- Serious
- Willful
- Repeat
- Egregious
- Criminal

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

35

# PENALTIES

- Other than serious
  - Up to \$7,000 per violation
- Serious
  - Up to \$7,000 per violation

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

36

# PENALTIES

- Willful
  - Up to \$70,000 per violation
  - Grouping Permitted
  - \$5,000 Minimum
- Repeat
  - Up to \$70,000 per violation
- Egregious
  - Up to \$70,000 per violation
  - No Grouping
- Failure to abate
  - Up to \$7,000 per day

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

37

# PENALTIES –CRIMINAL VIOLATIONS

- Willful violation & employee death:  
    **\$10,000 or 6 months or both**  
    Second conviction:  
    **\$20,000 or 12 months or both**
- Advance notice of inspection  
    **\$1,000 or 6 months or both**
- Falsification of required records, etc.  
    **\$10,000 or 6 months or both**
- Murder or attempted murder of CO  
    **Term of years to life**

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

38

# CITATION OPTIONS

- Agree to citations, pay full penalty
- Informal conference/informal settlement
- **Notice of Contest – 15 working days (Federal); some state plan states different time period**
- Formal settlement
- Hearing

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

39

# HEARINGS

- Occupational Safety and Health Review Commission
- Formal complaint and answer
- Discovery similar to Federal Court
- Hearing before Administrative Law Judge
- ALJ issues written opinion
- Appeal to three-member Review Commission
- Other options – expedited proceedings



FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011  
ALL RIGHTS RESERVED

40

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

*Solutions at Work*®

# Final Questions?

[www.laborlawyers.com](http://www.laborlawyers.com)

Atlanta · Charlotte · Chicago · Columbia · Dallas · Denver · Fort Lauderdale · Houston · Irvine · Kansas City · Las Vegas  
Louisville · New Jersey · New Orleans · Orlando · Philadelphia · Portland ME · Portland OR · San Diego · San Francisco · Tampa

Fisher & Phillips LLP  
is dedicated exclusively to  
representing employers in the practice of  
employment, labor, benefits, OSHA, and  
immigration law and related litigation.

**THESE MATERIALS AND THE INFORMATION PROVIDED DURING THE PROGRAM  
SHOULD NOT BE CONSTRUED AS LEGAL ADVICE OR AS CRITICAL OF THE  
CURRENT OR PAST ADMINISTRATIONS.**

**FISHER & PHILLIPS LLP**

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

[www.laborlawyers.com](http://www.laborlawyers.com) • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

42

# BE SAFE!



**FISHER & PHILLIPS LLP**

ATTORNEYS AT LAW

*Solutions at Work*<sup>®</sup>

www.laborlawyers.com • Phone (404) 231-1400

©COPYRIGHT 2011

ALL RIGHTS RESERVED

43