

NAMI

Worker Safety, Labor and Employment Conference
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Chicago, Illinois

**Elements of an Effective SIF (Serious Injury and Fatality)
Prevention Strategy**

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Breadth. Depth. **Results.**

Presenter:

Mark A. Lies, II



Mark is a Labor and Employment Attorney and Partner with Seyfarth Shaw. Mark can be reached at (312) 460-5877, mlies@seyfarth.com.

He specializes in Occupational Safety and Health Law and related employment law and personal injury litigation. He graduated from the University of Notre Dame in 1968 and DePaul University School of Law in 1974. He was a Commissioned Officer in the U.S. Navy and is a Vietnam Veteran.

Program Objectives

- Discuss OSHA enforcement initiatives and trends.
- What to expect with the current administration.
- New penalty and liability policies.
- How to reduce the risk of OSHA citations.

OSHA Liability

- Initially, employer responsible for its own employees
- Employer had to ensure that its employees were protected against:
 - ▶ “Recognized Hazards” To Employee Safety and Health (General Duty Clause)
 - ▶ Hazards Identified In Specific Regulations
(29 CFR 1926, e.g. falls, electrical, lead, silica, etc.) (Construction Industry)
(29 CFR 1910, e.g. forklifts, confined space, noise, etc.) (General Industry)

OSHA Liability

- Liability was expanded under “Multi-Employer Workplace Doctrine”
- Now, each Employer is potentially responsible for the safety and health of another Employer’s Employee, if the Employer:
 - ▶ Creates the hazard
 - ▶ Exposes an Employee to the Hazard
 - ▶ Is responsible to correct the hazard, or
 - ▶ Is the controlling Employer on the site
- Liability can involve citations (against Employer) and criminal prosecution (against Employer and Management Representatives)

Many Different Categories of Employers and Employees On-Site

- Owner
- General Contractor
- Subcontractors
- Leased/Borrowed Employees
- Temporary Employees
- Consultants

Key: OSHA is looking at the workplace as a whole – so should you.

Critical Issues:

- Contractual relationship
- Exercise of control over “means and methods”
- Imminent Danger

Aggressive Enforcement

- Use of interpreters
- Emphasis on repeat citations
 - ▶ Cautionary tale:
 - Use of knowledge of previous inspection to justify willful citation
- Requests for Root Cause analysis and company insurance audits
- Severe Violator Enforcement Program
- Revised Penalty Policy
- Non-English speaking employees
- Recordkeeping/Ergonomics/Dust/Live Electrical Work
- Issuance of Revised Recordkeeping Rules, effective January 1, 2015

Aggressive Enforcement

- Employee by Employee Citations
 - ▶ PPE Standard
 - ▶ LOTO procedures
- Enhanced Use of General Duty Clause
 - ▶ Combustible Dust
 - ▶ Ergonomics
 - ▶ Workplace Violence
 - ▶ New chemicals (not listed on Z tables)
 - ▶ Arc Flash – Arc Blast
 - ▶ Heat Illness
 - ▶ Fall Protection
 - ▶ Avoidance of PELs in Existing Regulations

Revised Recordkeeping Regulation?



- All fatalities, including those caused by heart attack, must be reported to OSHA within 8 hours
- All workplace incidents that result in hospitalization for treatment, an amputation or loss of any eye must be reported to OSHA within 24 hours of the incident

OSHA Recordkeeping

Scope of Documents for Recordkeeping Inspection

- OSHA Forms 300, 300A and 301
- Medical records
- Worker's compensation records
- Insurance records
- Payroll/absentee records
- Company safety incident reports
- Company first aid logs
- Alternate duty rosters
- Disciplinary records relating to injuries and illness



OSHA Recordkeeping

Scope of Recordkeeping Inspection

- Interviews of designated recordkeeper, employees, management, first aid providers and healthcare professionals.
- Limited walk around inspection of main plant operations area.
- Possible expansion of scope of inspection or referral for inspection to other plant areas that may pose risks.
 - ▶ Plain view doctrine

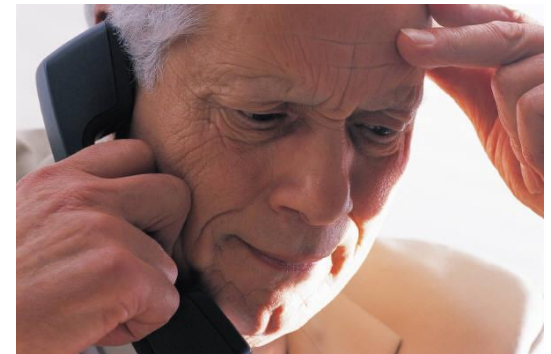
OSHA Recordkeeping

Civil

- Potential citations for under reporting or other errors
 - ▶ Other than serious
 - ▶ Serious
 - ▶ Willful (violation-by-violation citation)
 - ▶ Repeat
 - ▶ Failure to Abate

Criminal

- Liability of Employer
- Liability of Management Representative for false certification



Revised Penalty Structure

- Effective August 1, 2016 OSHA penalties increased to Consumer Price Index (CPI)

	<u>Current Maximum</u>	<u>August 1, 2016</u>
• Other Than Serious	\$7,000	\$12,600
• Serious	\$7,000	\$12,600
• Willful	\$70,000	\$126,000
• Repeat	\$70,000	\$126,000

- Will be revised every following year

Severe Violator Enforcement Program (SVEP)

- April 22, 2010 OSHA announces Severe Violator Enforcement Program (SVEP)
- Concentrates OSHA's enforcement efforts on employers with a “demonstrated indifference” to safety.

Severe Violator Enforcement Program (SVEP)

- “Demonstrated indifference” means:
 - ▶ Willful citations
 - ▶ Repeated citations
 - ▶ Failure to abate violations
- Plus
 1. A fatality or catastrophe
 2. A high-emphasis industrial operation or process (e.g. fall protection, amputation, dust, silica, trenching, lead).
 3. Process safety management covered facilities
 4. Prior egregious enforcement

Severe Violator Enforcement Program (SVEP)

- Severe violator gets heightened scrutiny including:
 1. Follow up inspections
 2. Inspections at other worksites operated by the employer
 3. Increased P.R., including news releases and communications with corporate headquarters
 4. Settlement would require increased safety obligations (e.g. hire additional safety personnel, injury/illness reporting obligations, self auditing requirements)
 5. Agree to Section 11(b) language which allows for future enforcement through contempt proceedings
 6. Elimination of certain citation penalty reductions
- In effect a “blacklist” and guilty until proven innocent.

Revised Penalty Policy

- April 22, 2010 OSHA issues revised penalty policy
- OSHA believes penalties are too low to deter violations
 - ▶ OSHA wants to be like EPA
- Under revised policy:
 1. OSHA will increase base penalty by 10% for any history of high-gravity serious, willful and repeat violations over the **last five years**
 2. At informal conference area directors cannot:
 - Reduce or withdraw willful or repeat citations
 - Reduce the penalty by more than 30%
 3. Look back 5 years to employer citation history for Repeat citations (previously 3 years)

Native Language Requirements

- April 28, 2010 OSHA issued a memorandum that all training must be given in a language that the employee understands
- Certain OSHA regulations require “training”, others require Employer to prove training was “effective” or “understood”
 - OSHA will look at how employer provides work instructions to employees and whether it is different than safety training (e.g. safety training in English but supervisor gives work instructions in Spanish).
 - OSHA will interview employees to determine whether they understand English only training (e.g. if employee cannot speak English but all training documents are English only, you have a problem).
 - Employers must determine whether employees are literate
 - Bilingual trainers and documentation may be required to prove training was compliant.

Employee Literacy Challenges

- OSHA inspections revealing increasing lack of Employee Literacy
- Employees don't "understand" training
- English Speaking employees are unable to read safety and health programs
- OSHA challenges the particular language in safety programs
- Employers are rewriting safety programs to level of fourth grade educational comprehension
- Employers utilize more visual aids such as pictograms

Criminal Law Liability

OSHA

- Potential liability if:
 - ▶ Fatality
 - ▶ Violation of specific regulation
 - ▶ Violation was willful, and
 - ▶ Violation caused fatality
- Penalty
 - ▶ 6 months imprisonment, and/or
 - ▶ \$500,000 fine per fatality for employer
 - ▶ \$250,000 fine per fatality for individual

NOTE: No Miranda Warnings Necessary

Criminal Law Liability

OSHA – Additional Potential Criminal Liability

- Obstruction of justice for interfering with inspection
- Falsification of records
- Lying to federal inspector
- Tampering with witnesses

STATE LAW

- Murder
- Manslaughter
- Reckless Endangerment
- Battery

Liability for Employer and Manager

Whistleblower Laws

- Potential Employer Liability If:
 - ▶ Employee engages in “Protected Activity” (e.g., makes complaint about safety or health violation to Employer; files complaint with OSHA; participates in OSHA inspection), and
 - ▶ Employee Suffers “Adverse Action” (e.g., termination, discipline, loss of benefits), and
 - ▶ Employer takes Adverse Action and Retaliates against Employee because of Protected Activity

Whistleblower Laws

- Potential Employer Liability If:
 - ▶ Employee may File 11(c) Complaint with OSHA seeking damages
 - ▶ Potential liability of Employer
 - ▶ Personal liability of Manager
 - ▶ OSHA will investigate complaint
 - ▶ If OSHA finds reasonable cause that there was retaliation, case may be filed in Federal Court
 - ▶ All States have Whistleblower Laws that may apply

Where do we go from here?

- More important than ever to establish strong *unavoidable* employee misconduct defense.
- All four elements required
 - (1) Program for the specific hazard, e.g. fall, electrical, lead, asbestos, cadmium, forklift
 - (2) Employee training (documentation)
 - (3) Prior enforcement (disciplinary records)
 - (4) No reasonable opportunity for supervisor to identify and correct hazard.

Unavoidable Employee Misconduct

- How do we establish this defense?
 - ▶ A good hazard assessment
 - ▶ Training—there may be a cultural, literacy or language barrier.
 - ▶ Need to use translators, interpreters.
 - ▶ Need enforcement – this is where most employers fail.
 - ▶ Maintain records of enforcement/discipline.

Thank you!

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Elements of An Effective SIF – Employee Education and Reinforcement

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Holly Mockus

Product Manager, Alchemy Systems

April 5, 2016





Holly Mockus, Product Manager

With over 30 years of experience in the food industry at companies like ConAgra, Kellogg, and Sara Lee, Holly works as a product manager for Alchemy Systems creating world-class workforce development solutions for large, complex operations within the food industry.

Holly has held positions in food safety, quality assurance, sanitation, and plant regulatory affairs. She has authored several chapters related to the importance of record keeping and documentation in the food industry. She was honored to become the 2013 recipient of the Safe Quality Food Institute's Outstanding Achievement Award, was recently named a 2016 Food Logistics Champion, and is passionate about the importance of training in the food industry including the cultivation of successful safety cultures.

Training is the Key

- From Mark's Presentation

- OSHA inspections revealing increasing lack of Employee Literacy
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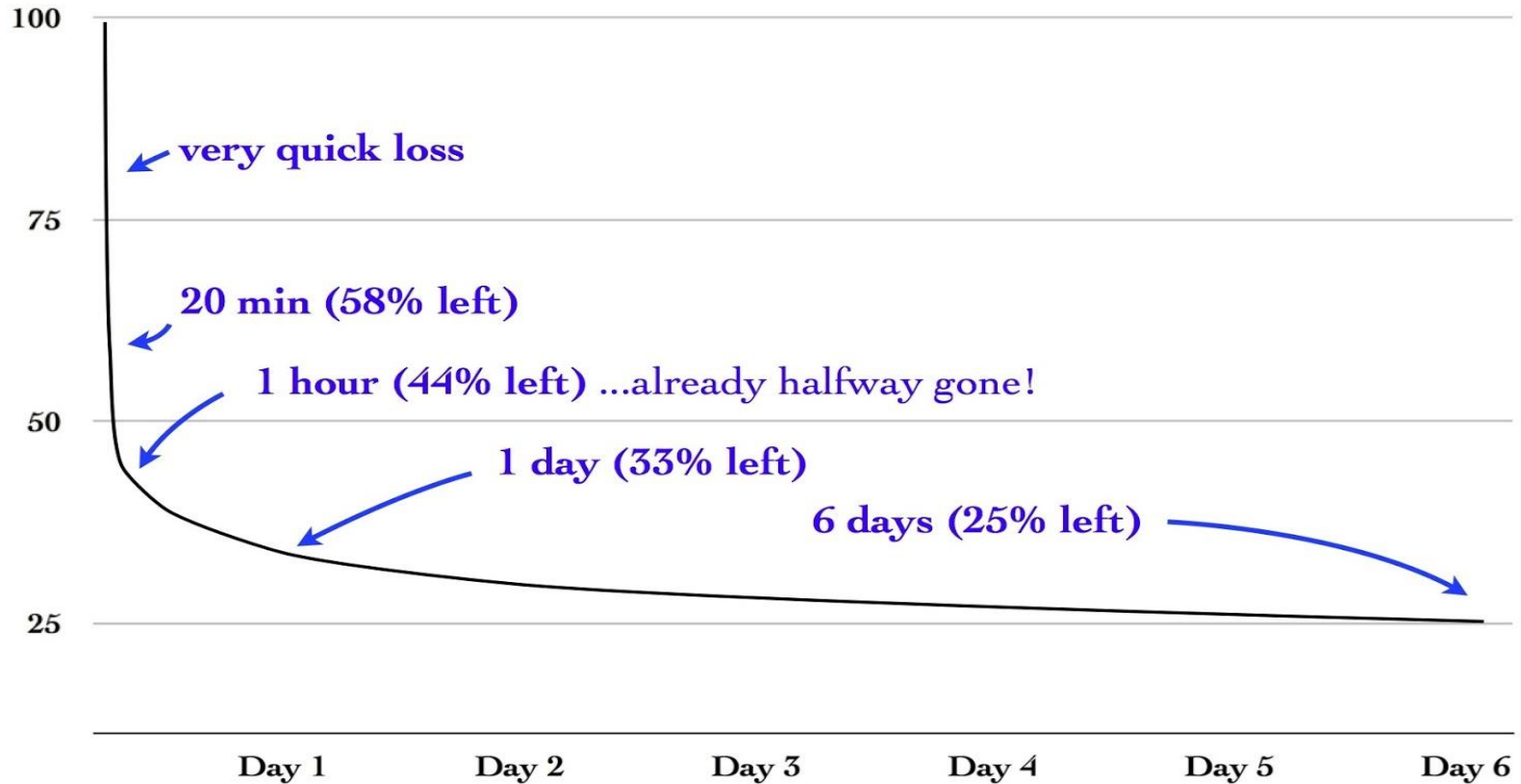
Learning & Development



Training Alone

Ebbinghaus' Forgetting Curve

(How much of something do we forget each day?)



senseandsensation.com

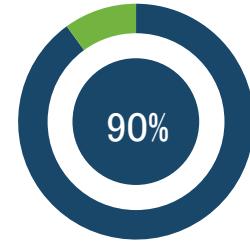
Training Alone is Not Enough



<15% of learners successfully apply what they learn



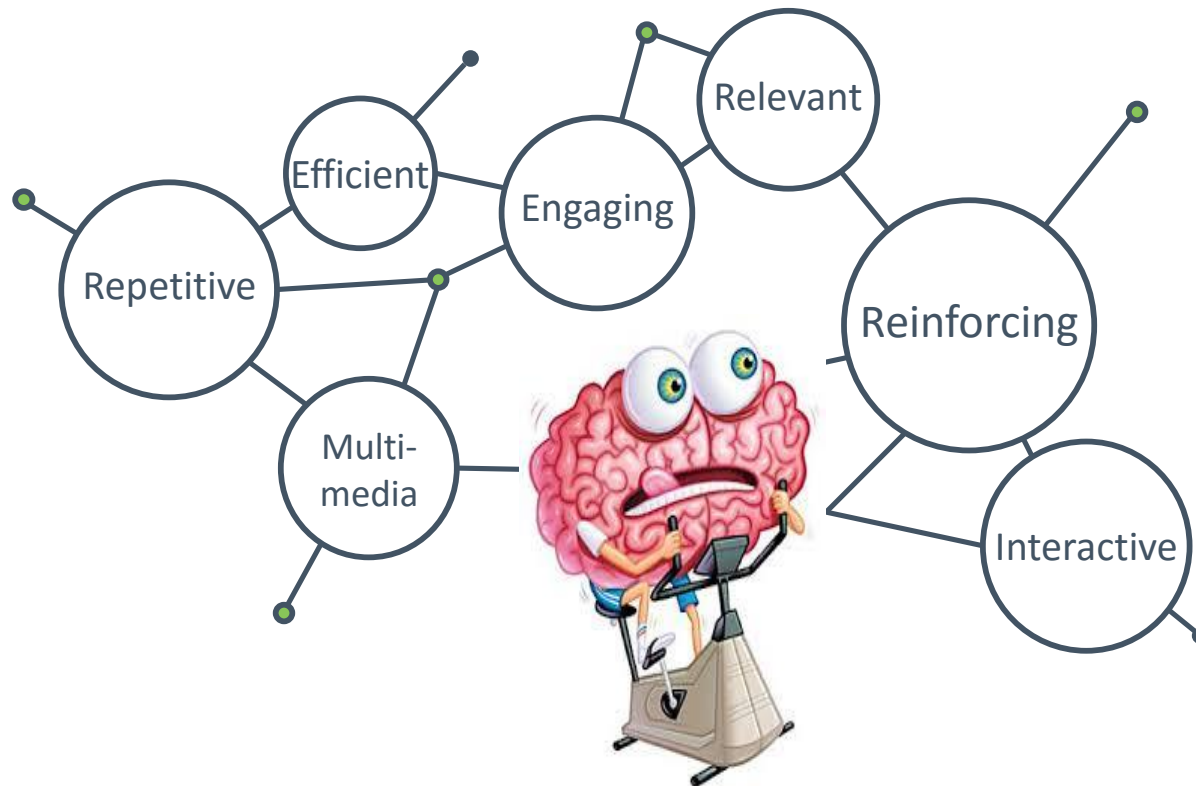
80% of content is forgotten within 30 days



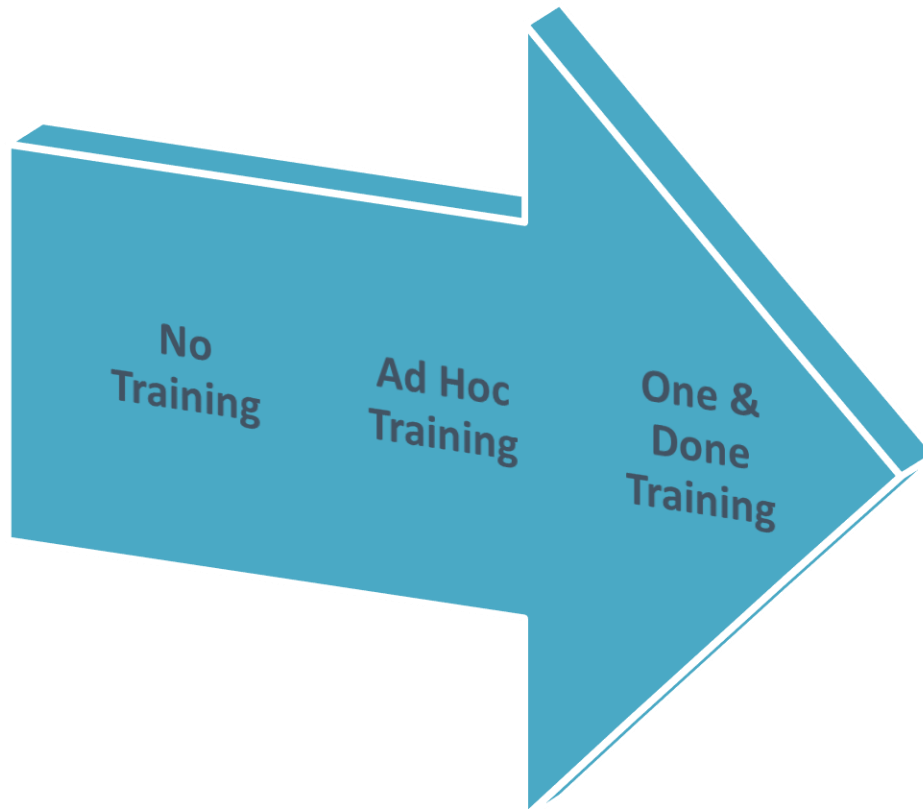
90% of content is forgotten after one year

<http://www.slideshare.net/GoGrovo/grovo-corp-microlearningtrainingtrainerplaybook>

Cerebral Cement



Shifting Paradigm



Shifting Paradigm



24/7 Communications?

- Reinforcing training
- Walking the Walk, Talking the Talk
- 24/7/365
- Developing the right behaviors throughout your workforce
- Strengthening Supervisor/Employee relationships
- Decreasing accidents, near-misses and overall results



80% of
content is
forgotten
within 30
days

Why is it Effective?

- Picks up where today's training leaves off
- Utilizes and engages the Supervisor; the direct line to employees
- Provides constant reminders
- Cerebral cement

BECAUSE IT WORKS!



Designed
around the
concept of
“Drip Effect”
or “Drip
Theory”

Results

Time	Total Case Injury Rate (TCIR)
General Industry Standard	7.0
<i>Prior to 24/7 Communications Beta</i> (September 2015)	8.82
<i>After 24/7 Communications Beta</i> (December 2015)	5.49
March 2016	4.25

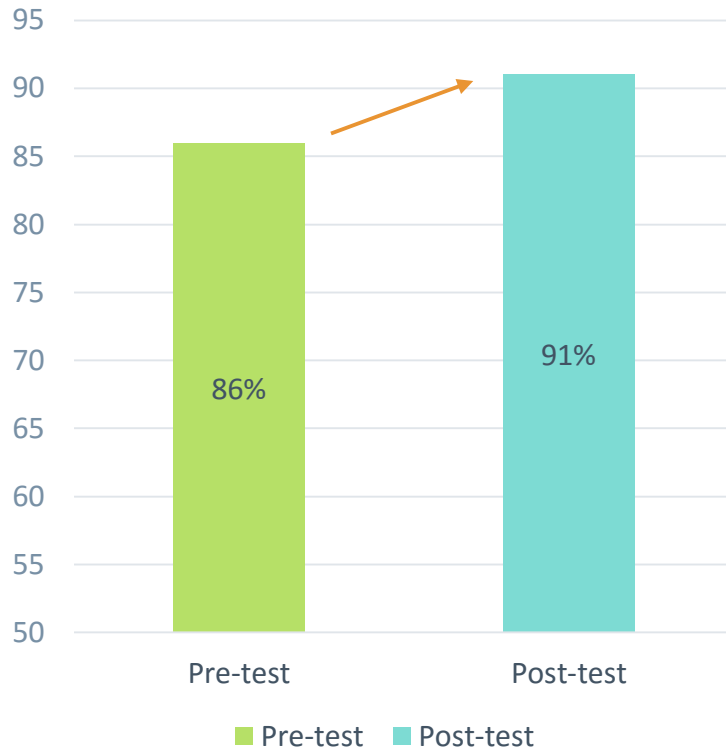


Increase of
Reporting on 24/7
Communications
Topic (Slips, Trips &
Falls)*
20%

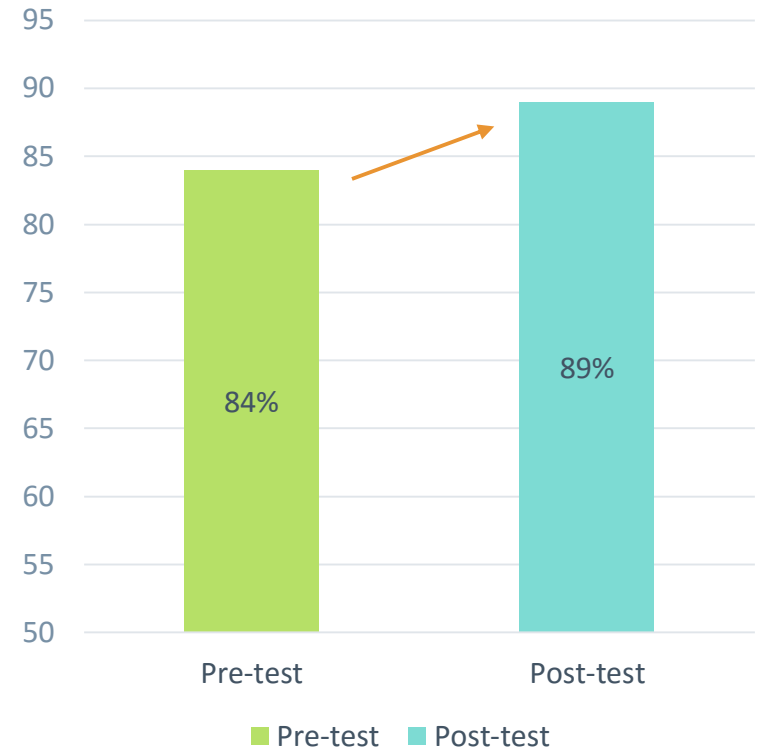
*Observations & Near Miss Reporting recorded in the Safety, Quality Data Management (SQDM)

No More One and Done!

Slips, Trips, Falls



Lock Out Tag Out (LOTO)



ROI - Turnover

23.4%	U.S. voluntary turnover rate (US Bureau of Labor Statistics)
\$35,000	Average pay for manufacturing employee
\$17,500	Replacing an employee costs one-half to five times that employee's annual salary
\$402,500	Annual cost of turnover for a firm of 100 employees

ROI - Safety

\$198.2 Billion	Annual cost to US economy for workplace injuries and fatalities
71,000	Recordable illness and injuries in food manufacturing in 2013
40%	Workplace injuries from employees with less than 1 year on the job
1.3 Million	Workplace non-fatal injuries that result in days away from work

* National Safety Council

**Occupational Safety and Health Administration

ROI - Productivity

70%

American workers not-engaged or actively disengaged

\$550 Billion

Dollars in lost productivity per year

Broad Reaching ROI

Company

- Decreased turnover
- Increased productivity
- Brand protection
- Consistent quality
- Repeat sales
- Employee engagement
- Culture stability
- Safe behaviors



Community

- Self supporting
- Family provider
- Community support
- Long term employability
- Skills development
- Economic stewardship
- Health and wellbeing
- Safety proponent

Creating an Optimized Workforce

Training

Group-based / e-Learning / Kiosk / Create your own with Creator



Communications

High impact digital communications, posters, and huddle guides



Coaching

Employee observation / on-the-job trainings / SOPs



Deliver

Perform

Drive

Front-Line Culture

Food Safety

GMPs / HACCP / GFSI schemes / 24/7 audit-readiness / Supply Chain Credibility

Workplace Safety

OSHA regulatory standards / Safe behavior / Minimize risk and cost

Operational Excellence

Increasing yield and productivity through efficiency and engagement

THANK YOU

Holly Mockus, Product Manager
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