HAHN LOESER

LIABILITY FOR SAFETY PRACTITIONERS

May 18, 2018

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1. INTRODUCTION

This presentation addresses both the civil liability and the criminal liability of safety personnel under Federal law and Ohio law.

2. LIABILITY FOR THE SAFETY PERSON WHO WEARS MANY HATS

While this presentation addresses the civil and criminal liability of the safety person, keep in mind that those individuals who perform human resources functions or who have employment-related authority or responsibilities over and above pure safety functions may have separate liability.

For example, Ohio Revised Code Chapter 4112 protects employees against unlawful and discriminatory employment practices. (See Ohio Revised Code Section 4112.02): It shall be an unlawful discriminatory practice:

> "For any employer, because of the race, color, religion, sex, national origin, disability, age or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

In *Genaro v. Central Transport*, 84 Ohio St.3d 293 (1999) the Ohio Supreme Court ruled that a supervisor or manager may be held jointly and severally liable with the employer for discriminatory employment conduct. See also, *Caiazza v. Mercy Medical Center*, 2014 Ohio 2290 (5th Dist.) (held: individual supervisors and managers can be held accountable for their own discriminatory conduct under O.R.C. Chapter 4112); *Griffin v. Finkbeiner*, 689 F.3d 584 (6th Cir. 2012) (applying Ohio Law); *Han v. Univ. Dayton, et al.*, 2013 U.S. App. Lexis 22788 (6th Cir. 2013) (applying Ohio law).

It is important to check with your employer to see if the employer has employment-related practices insurance coverage to protect you in the event that you get sued for wrongful discharge or employment-related claims related to your role as a Human Resources professional.

3. CIVIL LIABILITY FOR OUTSIDE/RETAINED SAFETY PROFESSIONALS

A. TORT OR CONTRACTUAL LIABILITY FOR PROFESSIONAL SERVICES

See e.g., 30.JI 331.10 (Ohio's Standard Jury Instruction for Professional Negligence Claims)

> A professional owes a duty to the client to use the skill, knowledge, care and diligence normally possessed by members of his or her profession or trade; that is, to do those things that such a

> professional would do and to refrain from doing those things which such a professional would not do.

- See also, Restatement of the Law 2d, Torts (1968) Section 22A

- See also, Restatement of Torts, 2d Section 324A

> "One who undertakes for consideration to render services to another which he should recognize as necessary for the protection of a third person is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care . . ."

See also, *Cincinnati Bell v. Straley* (1988), 40 Ohio St.3d 372 held: a claim by an employer against a third party who injures an employer's employee creates a cause of action for breach of contract:

> Where a third party negligently injures an employer's employee and such injury is a direct result of a breach of contract which the third party had with employee's employer, and as a direct result of such breach the employer suffers damages, such damages are recoverable against the third party in an action for breach of contract. *(Midvale Coal Co. v. Cardox Corp.* (1949), 152 Ohio St. 437, 40 0.0. 428, 89 N.E.2d 673, approved).

ISSUES

- Professional Liability Insurance
- Additional Insured
- Contractual Disclaimers
- Confidentiality and Trade Secret Issues

Ohio Revised Code Sections 1333.61 — 1333.69 — Trade Secret Statute

> (D) "Trade Secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

- Is the outside safety professional's inspection report confidential?
- Consulting Contract should address use or dissemination of inspection report and recommendations.
  - Subject to subpoena
  - Subject to Contract
- Use by Safety Professional in the event of a lawsuit by customer or third party.

4. CRIMINAL LIABILITY UNDER THE OSHA ACT AND FEDERAL STATUTES

Generally, a supervisor cannot be held liable under the OSHA Act as either the employer or for aiding and abetting the employer so as to incur criminal liability. See, *United States v. Shear,* 962 F.2d 488 (5th Cir. 1992); *United States v. Doig,* 950 F.2d 411 (7th Cir. 1991); *United States v. Pinkston-Hollar; United Stated v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp.2d 453 (D. NJ 2007). In *Shear,* the Court noted:

> While we acknowledge the language in *Doig* and *Pinkston-Hollar* that in some situations supervisory employees could be prosecuted under § 666(e) as employers, we are not here presented with such a case, and thus do not decide whether or under what circumstances such an individual could be found liable under Section 666(e).

Note that other Federal Statutes impose criminal liability on anyone who violates the statute; employer or employee.

- **29 U.S.C. Sec. 666(g) (Part of Federal OSHA Statute)** states as follows:

Whoever knowingly makes any false statement, misrepresentation, or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

- **28 U.S.C. Sec. 201** states that it shall be unlawful to bribe a public official to influence any official's action or to induce the public official to do or omit to do any act required by Federal law.

- **18 U.S.C. Sec. 1001** states as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned note more than five years, or both.

On December 17, 2015, the United States Department of Labor and the Justice Department entered into a Memorandum of Understanding to coordinate an enhanced program to pursue criminal prosecutions for OSHA and workplace safety violations.

Representative OSHA-Related Criminal Cases:

- Case Note: In July 1998, a construction company owner was indicted by the U.S. Justice Department for obstruction of justice and the construction supervisor/foreman pled guilty to making false statements to OSHA investigators following a fall accident and fatality at a job site near Cincinnati, Ohio. The foreman falsely told OSHA investigators that fall protection was in place prior to the accident, when, in fact, the employees were not utilizing fall protection.

- Case Note: In 1998, the President of a painting company was fined $100,000.00 and sentenced after pleading no contest to criminal charges that he falsified employee training certificates and sent them to the Charleston, WV OSHA Office.

- Case Note: April 2000 — A Federal Judge sentenced an Idaho man to 17 years in prison for environmental/OSHA crimes that left a 24-year-old employee with permanent brain damage from cyanide poisoning.

  The employer was also convicted of making false statements to OSHA by fabricating and backdating a safety plan for entering a confined space and falsely stating that employees had been given safety equipment before entering a tank that contained cyanide gas.

- Case Note: On December 6, 1999, a Florida bridge painting company agreed to pay $500,000 in criminal fines for submitting falsified lead blood level test

results. The employer altered lab results to show employee blood levels under the 40 microgram action level when, in fact, actual employee blood lead levels were from 45 to 73 micrograms per deciliter of whole blood. *United States v. Datnalas, Inc,* **Case No. 99-412-CR-J-25-F (M.D. Fla.) OR-4-95-107.**

- Case Note: December 29, 1999 — A Florida subcontractor was sentenced to house arrest followed by three years' probation for a criminal OSHA violation following a willful failure to comply with OSHA's confined space regulations, leading to an explosion that killed an employee.

  The subcontractor also pled guilty to a felony for falsifying records submitted to OSHA in an attempt to cover up the cause of the worker's death.

- Case Note: November 22, 1999 — U.S. District Court Judge Sandra Beckwith of the Southern District of Ohio sentenced two employees of a steel erection company to probation, fined both employees, fined the company $300,000 and placed the company on five years' probation following a fatality in Mason, Ohio on August 9, 1996. The safety director and regional manager were both sentenced to six months imprisonment, three years supervised probation and fined. The job foreman was sentenced previously following a guilty plea to making false statements to OSHA about the accident.

- Case Note: On March 18, 1999, the owner of a construction company was sentenced to twelve months of incarceration after he attempted to bribe an OSHA Compliance Officer who had cited one of the company's construction sites (auto dealership) and who conducted a follow-up inspection and who was going to again cite the employer. The owner attempted to bribe the CSHO $1,000 not to write the follow-up citations and then attempted to bribe the assistant Area Director. The CSHO had tipped off the F.B.I. and that Assistant Area Director was wearing a wire at the time of the second bribe.

- Case Note: On July 31, 2001, an Iowa company and senior executive pled guilty in Federal Court to obstructing an OSHA investigation following an accident that resulted in the death of a firefighter. After an Illinois grain elevator explosion, a salvage company employee entered the damaged grain bin and collapsed from carbon monoxide exposure. A firefighter who went in to rescue the employee died of carbon monoxide poisoning. The salvage company then conspired to go back and create a bogus confined space entry permit. *United States v. Stickle Enterprise, Ltd.,* Case No. 00 CR 50061 (N.D. OR-4-95-107.

- Case Note: On April 11, 2001, a Texas executive was sentenced to six months incarceration for hiring ten illegal aliens to perform asbestos abatement with no P.P.E. A supervisor also pled guilty to making false statements under oath during the course of the related OSHA proceeding. The supervisor was fined

and placed on one year's probation. *United States v. Ha;* Case No. CRH-00-183 (S.D. Tx).

- Case Note: On December 9, 2015, the owner of a Pennsylvania based roofing company pled guilty to four counts of making false statements, one count of obstruction of justice and one count of willfully violating an OSHA regulation causing the death of an employee who fell 45 feet to his death while working on a roof with no fall protection.

  The owner falsely stated to OSHA investigators that the roofing employees were wearing fall protection and the owner attempted to coerce employees into telling OSHA that the employees were wearing fall protection.

5. OHIO CRIMINAL LIABILITY FOLLOWING A WORKPLACE ACCIDENT

Most states have some criminal statutes that impose liability for injury or death to a person. The state of California aggressively pursues criminal prosecution for workplace safety violations.

On April 24, 1991, there was a catastrophic explosion of a chemical reactor vessel at a chemical manufacturing facility in Newark, Ohio. The explosion killed an employee. **See, *Sec. of Labor v. Wiley Organics, Inc. dba Organic Technologies,* OSHRC Docket Number 91-3275**.

The Federal OSHA case was stayed pending the outcome of Ohio criminal proceedings against the Company and its owner. The explosion was attributed to the owner's failure to follow safety procedures, thus exposing employees to increased risks of fires, explosions, hot materials and toxic materials. The president of the company pled guilty to a misdemeanor charge of criminal endangering for his acts/omissions that led to the explosion and resulting death to an employee.

Environmental Enterprises, Inc., Cincinnati, OH

On December 28, 2012, a fire broke out at Environmental Enterprises resulting in an employee fatality. In June 2013, OSHA issued 16 "Serious" and 4 "Willful" citations and $325,700.00 in monetary penalties.

No criminal OSHA charges were filed. However, in January 2016, Environmental Enterprises and two supervisors were indicted by Ohio Attorney General Mike Dewine's office for involuntary manslaughter, reckless homicide, tampering with records, tampering with evidence and violating the terms of an Ohio EPA Solid Waste license. In May 2017, a plea deal concluded the criminal charges.

In September of 2017, the State of Ohio filed a complaint in the Hamilton County, Ohio Common Pleas Court to enforce Ohio's hazardous waste laws against Environmental Enterprises and to recover monetary penalties. The matter is set for trial February 8, 2019.

6. OSHA ISSUES MAY ALSO SUPPORT AN OHIO EMPLOYEE'S WRONGFUL DISCHARGE CLAIM AGAINST AN EMPLOYER AND SUPERVISORS

In addition to protections afforded employees under Federal law who believe they have been discriminated against for making safety complaints or talking with OSHA (See 29 U.S.C. Sec. 660(c), OSHA 11(c)); 29 C.F.R. 1977.1 *et. seq.);* an employee's complaint to OSHA about safety, followed at some point by the employee's termination or adverse employment action, can support an Ohio common law employment claim against an Ohio employer which may go to a jury. ***Kulch v. Structural Fibers,*** Inc. (1997), 78 Ohio St.3d 134.

In *Kulch*, an employee made a complaint to the Occupational Safety and Health Administration regarding employee health problems believed related to toxic chemicals in the air in the workplace. Employees had previously complained to management. The employee's complaint to OSHA prompted an inspection of the plant, including exposure monitoring. The employer received substantial OSHA fines.

After the OSHA inspection, the employee began to receive a series of reprimands and write-ups in his personnel file. Within five months of the OSHA inspection, Kulch was fired. Kulch made an 11(c) discrimination complaint to the OSHA 11(c) office. Following a full investigation, the Department of Labor dismissed Kulch's 11(c) complaint. Despite Federal OSHA dismissing the 11(c) complaint and finding no evidence of retaliation by the employer, Kulch sued his employer in state court alleging that he was fired for making complaints about safety to the Occupational Safety and Health Administration.

The Ohio Supreme Court held that an employee who claims to have been discharged for making safety complaints to OSHA can maintain an Ohio law wrongful discharge claim against his or her employer and held that this claim will usually go to the jury.

On January 16, 2002, the Ohio Supreme Court decided ***Pytlinski u Brocar Products, Inc.*** (2002), 94 Ohio St.3d 77, holding that Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge may be pursued. The ***Pytlinski*** court expanded upon its previous decision in ***Kulch v. Structural Fibers, Inc.*** (1997), 78 Ohio St.3d 134 and ruled that an employee who complains of safety violations does not need to file a complaint with OSHA or meet the statutory requirements of Ohio's whistle blower act, O.R.C. Section 4113.52 in order to pursue a "whistleblower" cause of action for wrongful discharge.

Since ***Pytlinski*** creates a public policy basis for wrongful discharge independent of Ohio's whistleblower statute, aggrieved employees have a four-year statute of limitations to pursue a

wrongful discharge claim, instead of the 108-day limitation set out in O.R.C. Section 4113.52 and required of whistleblowers in ***Contreres v. Ferro Corp.*** (1993), 73 Ohio St.3d 244.

NOTE: It is not discriminatory to discipline an employee for violating an employer's safety rules. (See 29 CFR 1977.22)

This area of public policy law favoring workplace safety continues to be addressed by the Courts. *Dohme v. Eurand Am, Inc.*, 130 Ohio St.3d 168 (2011); *Langley v. Daimler Chrysler Corp.*, 407 F. Supp.2d 897 (N.D. Ohio, W.D. 2005), aff'd. 502 F.3d 475 (6th Cir. 2007); *Sosby v. Miller Brewing Co.*, 415 F. Supp.2d 809 (S.D. Ohio, W.D. 2005), aff'd., 211 Fed. Appx. 382 (6th Cir. 2006).

While there is no individual or supervisory liability under Ohio's Whistleblower Statute, O.R.C. Section 4113.52, Ohio Courts hold that individual liability may exist for claims of retaliation or wrongful discharge in violation of Ohio's public policy in favor of workplace safety. *Jenkins v. Central Transport*, 2010 U.S. Dist. Lexis 7739 (N.D. Ohio E.D.); *Keehan v. Certech, Inc.*, 2015 U.S. Dist. Lexis 165634 (N.E. Ohio E.D.); *Armstrong v. Trans-Service Logistics, Inc.*, 2005 Ohio 2723 (5th Dist.).

Documentation of employee discipline is necessary for an employer to prevail in an OSHA proceeding on the affirmative defense of unforeseeable employee misconduct. (See Sec. of Labor v. Quendell, OSHRC Docket No.: 14-1434; Decision and Order Feb. 23, 2015) and to prevail on the unilateral employee negligence defense to an Ohio VSSR claim. (*State Ex. Rel. Ohio Paperboard v. Industrial Commission*, 152 Ohio St.3d 155 (2017) and to rebutt an employee claim of retaliation. *Schuler – Hass Electric Corp.* 21 BNA OSHC 1489, 1494.

7. OSHA 11(c) RETALIATION CLAIMS

OSHA is the primary enforcement agency for whistleblower/anti retaliation remedies found in numerous Federal statutes, including:

- Asbestos Hazard Emergency Response Act
- Clean Air Act
- Comprehensive Environmental Response Compensation & Liability Act
- Consumer Product Safety Improvement Act
- Energy Reorganization Act
- Federal Railroad Safety Act
- Federal Water Pollution Control Act
- Moving Ahead for Progress in the 21st Century Act
- National Transit Systems Security Act
- **Occupational Safety & Health Act**
- Pipeline Safety Improvement Act
- Safe Drinking Water Act

- Sarbanes – Oxley Act
- Seaman's Protection Act
- Section 402 of the FDA Food Safety Modernization Act
- Section 1558 of the Affordable Care Act
- Solid Waste Disposal Act
- Surface Transportation Assistance Act

29 USC Section 660(c) (OSHA Anti-Retaliation Statute) states as follows:

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within 30 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

29 CFR 1977.3 provides as follows:

Section 11(c) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act. Any employee who believes that he has been discriminated against in violation of section 11(c) of the Act may, within 30 days after such violation occurs, lodge a complaint with the Secretary of Labor alleging such violation. The Secretary shall then cause

appropriate investigation to be made. It, as a result of such investigation, the Secretary determines that the provisions of section 11(c)(1) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. Section 11(c) further provides for notification of complainants by the Secretary of determinations made pursuant to their complaint.

29 CFR 1977.4 provides as follows:

Section 11(c) specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under the Act. Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons." Consequently, the prohibitions of section 11(c) are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 11(c) would extend such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. See, *Meek v. United States*, 136 F.2d 679 (6th Cir. 1943); *Bowe v. Judson C. Burns*, 137 F.2d 37 (3rd Cir. 1943).

29 CFR 1977.22 provides as follows:

Employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by the employer in furtherance of the Act are not exercising any rights afforded by the Act. Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations will not ordinarily be regarded as discriminatory action prohibited by section 11(c). This situation should be distinguished from refusals to work, as discussed in 1977.12.

In *Perez, Secretary of Labor, United States Dept. of Labor v. Terry Fayad*, 101 F. Supp.3d 129 (D. Mass. 2015), the United States District Court awarded damages under 11(c) of the OSHA Act to a dental hygienist fired for making safety complaints to OSHA about the way the dental practice disposed of contaminated anesthetic needles. The District Court made the following ruling:

The evidence is convincing that this action was regarded by Fayad as a breach of trust that caused the termination of her employment, precisely the protected activity that makes this a retaliatory discharge. I am persuaded that the

> defendants' stated reason is merely pretextual. Accordingly, I conclude that Healey was discharged in retaliation for filing a complaint with OSHA, which is a clear violation of section 11(c) of the Act.
>
> X X X
>
> The Secretary is entitled to damages, to be awarded to Healey, in the form of back wages for the period of November 23, 2010 through December 31, 2011, which I previously determined to be the furthest date the back wages claim would likely reach (see Final Pretrial Conf. Tr. 10 (dkt no. 158)), totaling $51,644.80, which I calculate by subtracting wages for November 18 and 22, 2010 from the Secretary's proposal, consistent with my finding that Healey was not terminated until November 23. I award compensatory damages with respect to the profit sharing plan losses through 2011 in the amount of $13,450.26, as testified to at trial by the Secretary's witness Michael Mabee, as well as for emotional damages in the amount of $20,000 for a total of $33,450.26. I do not award punitive damages because I do not find the conduct at issue to be unusually reprehensible, beyond what any retaliatory discharge must be. See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Finally, I do not find Fayad individually liable for back wages. The parties do not dispute that he can be held liable for compensatory damages.

Perez, 101 F. Supp.3d at p. 134.

In **March 2018**, OSHA ordered **Jet Logistics, Inc. and New England Life Flight, Inc.** to reinstate a pilot who was terminated after complaining about what he reasonable believed were his employer's violations of FAA regulations and for reporting safety concerns.

OSHA ordered the Flight Company to pay the pilot $133,616.09 in back wages and interest; $100,000 in compensatory damages, attorneys' fees and ordered the company to refrain from retaliating against employees.

In **March 2018**, the Columbus OSHA Office and the Secretary of Labor entered into a settlement agreement with **EMS, Inc.** of Steubenville, Ohio to resolve a retaliation lawsuit. OSHA found that the employer fired a field technician after he filed complaints with OSHA that employees were exposed to confined space and respiratory hazards. EMS was ordered to reinstate the employee, pay all of his back wages and to remove all references of his termination from his records.

8. MISCELLANEOUS

Knowledge of A Hazard is Still Deemed Imputed to the Employer Even When Management and Supervisory Employees who had Knowledge of Hazards or Unsafe Work Conditions Had Long Left the Company.

In *Caterpillar v. OSHRC,* 122 F.3d 437 (7th Cir. 1997), the Seventh Circuit ruled that an employer will still be treated, as a matter of law, as having knowledge of a particular hazard, even if the supervisor or safety person who was the only management person who knew of the hazard left the company and the new supervisor or safety person knew nothing about these prior safety problems or hazards. See also, *United States v. L.E. Myers Co.*, 361 F.3d 364 (7th Cir. 2004); later proceeding, 562 F.3d 845 (7th Cir. 2009).

Also, under Evidence Rule 801(D)(2)(d), statements by a safety person or supervisor are not hearsay and may be an admission that binds the employer.