

Legal Issues & Developments in Occupational Safety and Health

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Taft/

The Occupational Safety and Health Administration

- Federal OSHA and state plans, such as KY-OSH
- Types of inspections: complaint, programmed, random, referral from other agency, post-accident
 - Safety – inspect for physical hazards, such as machine guarding, PIT, fall hazards, material handling, electrical, etc.
 - Industrial Hygiene – inspect for health hazards, such as chemical exposure, dust, ergonomic, noise, etc.

Potential Penalties

- Citations and civil penalties against employer:
 - Serious/Other-than-serious: up to \$16,550 per violation
 - Repeat/Willful: up to \$165,514 per violation
- OSHA can refer cases for criminal prosecution in cases involving willful violations that result in fatality; Municipalities can also pursue criminal charges
 - In rare cases, directors/managers can be individually prosecuted
 - Individuals can be criminally prosecuted for obstructing an OSHA investigation or providing false information or falsifying records

New Leadership

- Trump Administration
 - Federal employment cuts
 - EO 14192 – “Unleashing Prosperity Through Deregulation”
- Secretary of Labor - Lori Chavez-DeRemer
- Assistant Secretary of Labor for OSHA – David Keeling
- Proposed/pending OSHA budget cuts
 - House - Reduce annual budget by ~\$50M, cut 223 FTE, reduce inspections and shift focus to compliance assistance
 - Senate – Maintain FY 2025 budget (\$632M)
 - Other Federal agency budgets FY 2025:
 - DOT - \$146B
 - \$21.8B to FAA, \$1.3B to NHTSA,
 - EPA - \$11B
 - TSA - \$11.8B
 - BLS - \$644.8M

Ongoing Enhanced Enforcement Activity for Trenching/Excavation

- July 2022 – OSHA issued press release announcing “OSHA enforcement staff will consider every available tool at the agency's disposal” to enforce trenching and excavation safety requirements
- 22 trenching/excavation-related fatalities in first 6 months of 2022 (up from 15 in 2021)
- OSHA compliance officers to perform more than 1,000 trench inspections nationwide where they may stop by, and inspect, any excavation site during their daily duties
- Policy remains in effect

Other Developments and Initiatives

- New worker walkaround rule
- Heat Illness Prevention Standard
- Enforcement of respirable crystalline silica standard
- Electronic submission of OSHA injury and illness records
- COVID-19 ETS Rescinded, rulemaking halted

Alleged Violations – What OSHA Must Prove

- OSHA must prove the following to establish a serious violation of a specific safety regulation:
 - 1) An applicable standard
 - 2) Existence of a hazard (Safety or Health)
 - 3) Exposure of an employee to the hazard
 - 4) Employer knew of the exposure to the hazard
- Knowledge of a hazard includes:
 - 1) actual knowledge
 - 2) constructive knowledge - employer could have known through the exercise of reasonable diligence

Alleged Violations – What OSHA Must Prove

- OSHA must prove the following to establish a violation of the General Duty Clause (Section 5(a)(1) of the Act):
 - 1) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
 - 2) The hazard was recognized;
 - Includes actual or constructive knowledge of the employer, general recognition by the industry, or common sense;
 - 3) The hazard was causing or was likely to cause death or serious physical harm; and
 - 4) There was a feasible and useful method to correct the hazard.

Supervisors and EHS Personnel are Critical to OSHA Compliance

- Employer's legal duty to comply with the Act must be carried out by managers/supervisors (i.e., the agents through which the employer acts)
 - Supervisors are the employer's eyes, ears, and voice for monitoring and ensuring workplace safety
- Supervisor – has authority over other employees, power to direct work of other employees on behalf of the employer, authority of EHS
- Supervisor actions and knowledge are imputed to the company for purposes of OSHA violations
 - including supervisor's actual knowledge and what the supervisor could have known through reasonable diligence
- Exercise caution with hourly "lead" employees
 - Can be deemed supervisors by OSHA, so they need to be adequately trained to recognize and address safety issues

Supervisor Roles in Workplace Safety

- Supervisors and EHS responsible for many critical aspects of maintaining a safe workplace:
 - Conducting hazard assessments
 - Training employees, including initial training as well as regularly communicating with and coaching employees regarding safety issues
 - Role modeling
 - Monitoring compliance with and enforcing the rules
 - Conducting accident investigations
- Doing these things effectively serves two purposes:
 1. Ideally, avoid or identify and eliminate hazards, prevent injury
 2. If a hazard nevertheless exists, demonstrate to OSHA that the hazard was beyond employer's control (i.e., affirmative defense)

Affirmative Defense: Unavoidable/Unpreventable Employee Misconduct

- All four elements are required
 1. An established work rule to prevent the violation
 2. Effective communication of the rule to employees (i.e., training)
 3. Methods of discovering violations of the rule (i.e., regular monitoring such that in a particular instance there was no reasonable opportunity for supervisor to identify and correct hazard)
 4. Effective enforcement when violations are discovered (i.e., discipline)

Unavoidable/Unpreventable Employee Misconduct, cont'd

- How to establish:
 - Conduct hazard assessments
 - Establish safety policies and rules
 - Conduct effective training
 - Conduct routine monitoring of employee compliance
 - Regularly and consistently enforce the rules when violations are discovered
 - **Maintain records of all of the above**

Effective Training

- Must be understandable to employees
 - Be mindful of any literacy or language barriers
- Must be sufficiently reinforced
 - Procedures covered in training must be followed in practice
 - Appropriate refresher training conducted to ensure retention of information and ongoing awareness
 - Ensure timely completion of legally required refresher training (PIT)
- Employees forget things, stale/dated training unlikely to be deemed effective or adequate
 - Documentation is key to rebut an “empty head”

Monitoring Compliance

- Supervisors must actively monitor employees' compliance with safety rules and policies and address issues immediately
- The crux of the employee misconduct defense is that the hazard/violation occurred despite the employer's regular/routine efforts to monitor compliance, such that there was not a reasonable opportunity for a supervisor to become aware of problem in a particular instance

Monitoring Compliance, cont'd

- Methods of monitoring and reinforcing rules:
 - Shift walks or rounds
 - Routine safety audits
 - Pre-shift meetings – review incidents, near misses, etc. as a group, solicit safety feedback/concerns
 - Ensure that routine inspections are completed on time (such as PIT daily checklists, periodic tool/equipment inspections)
 - Encourage reporting of near-misses
 - Encourage people to speak up about safety concerns
 - Promptly follow up on reports of near misses, specific safety concerns, and policy violations discovered

Monitoring Compliance, cont'd

- Examples of things to look for when monitoring:
 - Distracted operation of equipment/PIT (cell phone usage)
 - Not wearing proper PPE
 - Engaging in unsafe work practices (signs of substance abuse)
 - Not using fall protection
 - Bypassing LOTO procedures
 - Bypassing machine guards
 - Missing periodic tool/equipment checks
 - General safety issues in the work environment (material storage problems, blind spots, housekeeping, etc.)

Enforcement/Discipline

- Supervisors must be able to confront employees regarding policy violations, immediately
- Effectively communicate that conduct is impermissible in a positive, supportive manner
 - Be sure the employee understands the issue and the correct approach after the discussion, demonstrate when necessary
 - Ask employee if there is anything preventing them from following the safety procedure in the future
- Discipline must be issued consistently
- DOCUMENTATION, no matter the type of discipline (including verbal warnings)
- Follow up to ensure the employee has taken the necessary corrective action to improve

Specific OSHA Regulations

- Powered Industrial Trucks (PIT) – forklifts, manlifts, turret trucks)
- Material Handling – secure storage of materials in stacks or storage racks)
- Personal Protective Equipment (PPE) – gloves, safety glasses, ear plugs, foot protection
- Fall Protection – employees performing elevated work on PITs, entering storage racks, accessing roof
- Machine guarding – prevent access to point of operation, danger zone

Specific OSHA Regulations

- Hazard Communication Standard – information and training regarding hazardous chemicals, access to SDSs
- Protection against air and other contaminants (PELs contained in Z Tables) – asbestos, lead, etc.
- Respiratory protection standard
- Emergency Action Plan – evacuation of employees in event of fire, chemical release, alerting first responders (police/fire departments and internal first aid, CPR, AED certified employees)

If an Accident Occurs

- Alert first responders, assist employee(s) involved, notify management and safety personnel
- Promptly conduct incident investigation
 - Determine all employees involved and potential witnesses
 - Quarantine the area/equipment
- Assess the need for retraining
- Conduct safety stand-down
- Written communications (emails) will be discoverable, be mindful of what you write
- Determine whether report to OSHA is required

Be Prepared for an Inspection

- Establish an inspection management plan
- Designate a point person to interface with OSHA (including on nights/weekends) – wait until appropriate point person is present to commence inspection
- Contact legal counsel (employer entitled to legal representation during inspection, OSHA must wait reasonable amount of time)
- Understand the basis for the inspection (i.e., complaint, random, post-accident)
- Understand/manage the scope (i.e., specific equipment, area, or wall-to-wall)
 - Limit access based on scope, anything in “plain view” is fair game

Interacting with the Inspector

- Accompany the inspector through the entire inspection, document/photograph everything
- Supervisors should not answer questions or be interviewed without a company representative present (either an attorney or member of management)
 - What you say (admit) can be used against the company
 - Do not admit you do not have something (“I will have to check and get back to you on that”)
- Be cooperative and truthful, but mind the scope of the inspection or question(s)
 - Do not offer extraneous information
 - Answer the question(s) asked
- Do not speculate

Interacting with the Inspector, cont'd

- Prepare non-management employees who are likely to be interviewed
- Inform them that interviews are voluntary
- Non-management employees may request a representative of their choosing, free to decline the interview if inspector says no
- They must also be cooperative and truthful, but mind the scope of the inspection or question(s), and not speculate
- Ask for clarification if a question is confusing
- Not required to sign a statement, ask for a copy if signing and be sure it is accurate
- Can decline to be photographed or videotaped

Whistleblowers

- Employees engage in “protected activity” under the Act when they:
 - Report or complain about safety concerns to management
 - Report an injury to management
 - File a complaint with OSHA
 - Participate in an OSHA inspection
- Protected activity can form the basis of a retaliation claim
 - Contact HR before issuing discipline where protected activity is present
 - Take employee complaints/concerns seriously, even if apparently incorrect, employees who feel disregarded are more likely to call OSHA

Questions?