



OSHA Changes Demand Strong Executive Leadership

Safety and Legal Update

TAUC Leadership Conference

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54 MILLION REASONS TO MAINTAIN A SAFE CULTURE

- Feb. 11, 2016 \$54 million Houston Jury Verdict Worker Fatality
- Multiemployer Site
- OSHA Citations and Press Release
- 75% assigned to General Contractor/Joint venture, who wasn't cited!
- No Punitive Damages

OSHA AND HARM TO BRAND

“Contractor's serial disregard of fall dangers underscores the necessity for National Safety Stand-Down to Prevent Falls in Construction, May 2-6”

.... Builders Inc has failed 21 of 27 federal safety inspections in 12 months by putting its employees at risk of potentially fatal fall hazards. The company faces proposed penalties totaling **\$789,536** for violations in 20 of those inspections.

“.... Builders has an extensive OSHA history that reflects a callous disregard for its employees” ... “A developer and contractor that hire this company are truly rolling the dice on worker safety ... this employer must make immediate changes before something worse happens.”

Continuing Increase In OSHA Exposure

Penalty increase

- Serious- increase from \$7,000 to \$12,500
- Willful/repeat- increase from \$70,000 to \$125,000
- **Retroactive** – *OSHA FAQ: If employers are inspected before the effective date, but receive OSHA citations after that date, will they be subject to the higher penalties?*
- State Plan adoption? *E.g.: VA, NC, SC.*

FOCUS ON THE ENTIRE CORPORATION

- Improvements to OSHA's Internal Recordkeeping System;
- SVEP Program evolution;
- New OSHA Questionnaire about Corporate Identity and 2015 Field Operations Manual;
- Tie in with Government Contracting;
- Emphasis on "*Enhancements*," Corporate Settlement Agreements and multisite abatement;
- Central Transport (12/7/15) Enterprise-wide Abatement – Not through settlement process
- Hannaford (08/09/15) Corporate Settlement – Ergonomics
- White House's Office of Information and Regulatory Affairs (OIRA) completed Review of Electronic Recordkeeping Rule on **April 29, 2016**. Final content not yet known.
- Proposed definition of Enterprise: "*if Corporation A owns a majority of the stock of subsidiary Corporation B, the establishments owned and operated by Corporation B would be considered part of the Corporation A enterprise.*"

EXAMPLE OF THE EFFECT OF REPEAT CITATIONS ON COMMON VIOLATIONS ... *BY LOW HAZARD RETAIL EMPLOYERS.*

OSHA uses Repeat Citations to beat on companies with multiple locations or on entire, with the result that even “safe” industries . (e.g., retail citations – Dollar Tree, pharmacies, big box stores)

- OSHA fines NJ Stores \$50,000.
- Missoula Stores \$217,000 for “willfully putting workers at risk.”
- Massachusetts Store \$177,800.
- Texas Store \$262,500.
- Delaware Store \$103,000 for second time violations.
- \$121,000 to NJ Store for repeat violations.
- Texas Store \$116,200 penalties.
- Store \$143,000 for willful violations.
- \$121,000 to Illinois store.

December 10, 2015 Corporate Settlement

EMPHASIS ON TEMPORARY AND NON TRADITIONAL EMPLOYEE PROBLEMS

Imagine the possibilities if an employer doesn't even know the number of temps on site and has not focused on this issue.

- Temps don't receive the same training as full time employees performing the same duties;
 - Aren't included in Hearing Conservation or Respiratory Protection Programs;
 - Not included in safety meetings;
 - No documentation of on-the-job training;
 - Not aware of emergency response plans;
 - Supervisor roles may be unclear;
 - *The Fissured Workplace: Why Work Became Bad for So Many and What Can be Done to Improve It.* (USDOL's Lodestone).
- ✓ **Similar effect with Union Locals and Hiring Halls – need to confirm or have proof of training – employer's ultimate responsibility.**

OTHER ISSUES

- Frustrations about Recordable Injuries.
 - Work-related;
 - Questionable;
 - Alcohol and Drugs (new Interpretation)
 - Travel;
 - Rating Services and Unreasonable Customer Demands;
- Continued Whistleblower/Retaliation emphasis.
 - Not just safety;
 - Incentive Programs and Rules/Discipline;
 - “Discriminatory Harassment” and Bullying/Workplace Violence.
 - Language in some Settlement Agreements (e.g., Region III).
- Fitness for Duty Requirements: The Importance of a Documented Individualized Interactive Analysis v. Making *Knee-Jerk Decisions*
- **Other Legal Challenges** – FLSA Overtime Exemption changes; NLRB attacks on Employer policies; EEOC process changes;

WHAT MAKES AN EMPLOYEE'S DEATH WORSE? A CRIMINAL INVESTIGATION.

Few things are as terrible as losing one of your employees.

Guilt is normal. One's shock and remorse stems from one's basic decency.

- Now assume that the local DA and law enforcement are interested ... and perhaps the ATF because an explosion occurred ... which means that the Chemical Safety Board and State and Local Fire Marshalls are involved.
- Or maybe you lost a tower crane in New York City or Philadelphia, and now, both law enforcement and other investigators on site looking at the accident and at your history with the City Inspectors.
- Or maybe a chemical release occurred ... and it's a slow news day.

QUESTIONS TO ASK YOURSELF

When should I worry about criminal exposure?

- What factors raise concerns?
- When should we lawyer up?
 - Where is the job?
 - What caused the fatality ... fall, trenching, explosion, crane collapse, chemical release?
 - OSHA Emphasis areas?
 - Local political climate, including elections?
 - Number of Federal, State and Local agencies investigating?
 - Multiemployer site?
 - New Hires Temps, Subs involved?

Elements of the OSHA Criminal Action

- Defendant was the **employer**;
- Defendant violated an **OSHA Standard**;
- The violation **directly caused** an employee's **death**; and
- Defendant **willfully** committed the violation.

**The prosecution must prove each element
“beyond a reasonable doubt.”**

Criminal Enforcement Developments to Monitor

- New York and Philadelphia local prosecutions and “*Alliances.*”
- Cal-OSHA *Bumble Bee Tuna*
- 27 year sentence to Peanut Company CEO for salmonella and now announcement about Dole.
- Allman Biopic Criminal case
- Late 2015 – Regional Administrators approach US Attorneys and some AGs;
- *Yates Memo*
- *U.S. v. Gordon Smith*
- *Atlantic States Steel Pipe*

Focus on Site and Corporate Safety Programs

- Roe of OSHA's **Proposed Safety and Health Program Guidelines**.
- As part of OSHA's evidence of the Element that the *Employer Knew of the hazard or should have known with the exercise of due diligence*.
- Defending against Employer's Affirmative Defense of Unpreventable Employee Misconduct.
- Could this be comparable to OSHA's 5(a)(1) efforts to establish industry recognition of Ergonomics and Workplace Violence approaches?
- What's the Program's relationship to **1926.20** and 21?

OSHA HAS THE BURDEN TO PROVE CERTAIN ELEMENTS

- Existence of a Hazard
- Exposure
- Applicable Standard
- Employer knew of or should have known of the Hazard with the exercise of Due Diligence

YOU HAVE THE BURDEN TO PROVE THE UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

- 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

Can you Document the above actions – are you consistent?

SECTION 5(a)(1) GENERAL DUTY CITATIONS

- Existence of a Hazard
- Exposure
- Employer knew of or should have known of the existence of the Hazard
- Hazard recognized by the Employer's Industry
- Recognized Abatement
- Similar analysis to 1926.20(b)?

“Good Company” Problems

- Imbalance of compliance and safety;
- Top Leadership delegates safety responsibility;
- Rules not “Culture;”
- Supervisors Make Bad decisions.
 - Ask “why” they made those bad decisions.
 - Often lack of supervisor training and development.
- Craftspeople/experienced employees make bad decisions.
 - Ask why?
- Expansion and Growth.
 - Lowering standards;
 - Procedures may slide;
- Bringing back former supervisors;
- Rehiring bad or mediocre employees;
- Using Temps and sub contractors without adequate processes;
- Owner demands;
- Job wind down;
- Weird new designs and issues;

QUESTIONS TO ASK YOURSELF

- What is your Company's Safety Culture or Identity?
- What are your specific goals for safety?
- How are you going to get there?
- What are the Milestones?
- How will you evaluate process?
- What capital and people are needed?
- What are the challenges? Culture? Process? History?
- Does management consider safety to be more than a cost item?
- Can you prove that a safety-focused culture leads to success and profits?

HOW WOULD YOUR EMPLOYEES RESPOND IF ASKED THESE SAFETY QUESTIONS?

(Agree/Disagree/Strongly Agree/Strongly Disagree)

- We practice at the jobsite what is in our Corporate Safety Policy.
- I always receive site/job-specific training.
- Supervisors hold us to safety rules.
- Our subs work safely.
- All of our people are trained.
- We cover the specific safety issues for the job that day.
- I hold coworkers accountable for safety.



EMPLOYEE “SAFETY CLIMATE SURVEY” EXAMPLES OF “AGREE/DISAGREE” QUESTIONS

1. Management or your site has an open door policy on safety issues.
2. Safety is the number one priority in my mind when working each day.
3. Co-workers often help each other to work safely.
4. Safety rules and procedures are carefully followed.
5. Management clearly considers the safety of employees of great importance.
6. I am sure that it is only a matter of time until I am involved in an accident.
7. Sometimes I am not given enough time to get the job done safely.

EMPLOYEE “SAFETY CLIMATE SURVEY” – EXAMPLES OF QUESTIONS

8. I am involved with safety issues at work.
9. This is a safer place to work than other companies where I have worked.
10. I am strongly encouraged to report unsafe conditions/near misses/hazard recognition.
11. At my site, management turns a blind eye to safety issues at times.
12. Some safety rules and procedures do not need to be followed to get the job done safely.
13. Some safety rules and procedures are not really practical.

EMPLOYEE “SAFETY CLIMATE SURVEY” – EXAMPLES OF QUESTIONS

14. It is necessary to let safety slide a little in real life.
15. Safety is one of the first three things upper management talks about when they come onsite.
16. Upper management seldom comes on the floor.
17. Upper management is involved in safety training.
18. Upper management is involved in new employee orientation.
19. Our safety record is one of the top two things to owners.
20. I received safety training specific to my current job site.
21. Contractors cooperate and coordinate about safety.

SURVEY OF EMPLOYEE ATTITUDES

93% of employees say that their Company is currently at risk of an injury or death caused by one of five avoidable workplace dangers:

- *“Get it Done”*
- *“Un-discussable Incompetence”*
- *“Just this Once”*
- *“This is overboard”*
- *“Are you a team player”*

And nearly one-half are aware of injury or deaths caused by these factors ...

SURVEY – EMPLOYEE ATTITUDES

Despite being aware of these five threats and the past incidents, only one in four employees said that they speak up and try to correct unsafe conditions... even to a coworker not tied off

Culture must change.





Thank You

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This presentation does not constitute legal advice. Every situation is different and may require consultation with counsel.

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