

AMERICAN BAR ASSOCIATION SECTION OF LABOR & EMPLOYMENT LAW

**2007 CLE Conference
Philadelphia, PA**

OCCUPATIONAL SAFETY AND HEALTH LAW FUNDAMENTALS

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Structure of the OSH Act of 1970

- **29 U.S.C. §§ 651 et seq.**
- **OSHA**
- **OSHRC**
- **NIOSH**

Relationship to State OSHA Programs

- **Federal preemption of state regulation**
- **Concept of State Plans**
- **Fed/OSHA must approve**
 - must be at least "as effective as" Fed OSHA**
 - not identical though**

24 States and Two Territories Currently Have Approved Plans

| | | | |
|-----------------------|------------------|--------------------|-----------------------|
| Alaska | Arizona | California | Hawaii |
| Indiana | Iowa | Kentucky | Maryland |
| Michigan | Minnesota | Nevada | New Mexico |
| North Carolina | Oregon | Puerto Rico | South Carolina |
| Tennessee | Utah | Vermont | Virginia |
| Washington | Wyoming | | |

Once approved, state enforcement supplants federal enforcement.

NOTE: Connecticut, New Jersey, New York and Virgin Islands have plans that cover public sector (State & local government) employees only.

Federal OSHA regulates private sector employers.

Standards

- **29 U.S.C. § 652(8)**
- **Requires conditions, practices, processes**
- **Reasonably necessary or appropriate**
- **For safe/healthful employment**

Standards, cont'd.

- **Remedy significant risk of impairment**
- **Technological feasibility**
- **Economic feasibility**

Standards Rulemaking Procedures

- **Notice of proposed rulemaking**
 - **Advise public of intent**
 - **Publish proposed standard**
- **Hearings and comments**
- **Publish final standard**

Standards Rulemaking, cont'd.

- **Negotiated rulemaking**
- **Request for stays**
- **Challenge in U.S. Courts of Appeals**

Standards Rulemaking, cont'd.

- **General Industry/industry-specific**
- **Performance/specification**

Examples of Standards

- **Hazard Communication**
- **Fall Protection**
- **Lockout/Tagout**
- **Bloodborne Pathogens**

Examples of Standards, cont'd.

- **Personal Protective Equipment**
- **Emergency Action Plan**
- **Recordkeeping**
- **Powered Industrial Trucks**

Regulations

- **29 U.S.C. § 657(g)(2)**
- **Reasonably related**
- **To carry out responsibilities under the OSH Act**
- **Vast array of topics**

Regulations, cont'd.

- **Inspections**
- **Recordkeeping**
- **Discrimination complaints**
- **Medical access**
- **Challenge validity in U.S. District Courts**

Inspections Types

- **Imminent danger**
- **Fatality/catastrophe**
- **Complaint/referrals**
- **Programmed**
 - **General schedule**
 - **Emphasis programs**

Inspection Types, cont'd.

- **Phone/fax/letter**
- **Onsite**

Opening Conference

- **Greetings**
- **Credentials**
- **Type and scope of inspection**
- **Participants**
- **Consent v. search warrant**
- **Document review**
- **Trade secret issues**

Walkaround

- **Participants**
- **Employer's right to accompany**
- **Employee's right to accompany**
- **Scope of inspection**
- **Plain view doctrine**
- **Photographs/videos**
- **Employee interviews**

Closing Conference

- **Identify problem areas**
- **Time needed to abate**
- **Advise about rights to appeal**

Issuance of Citations

- **Cite standard/regulation or general duty clause**
- **Provide factual specification or sufficient notice**
- **Classify alleged violations**
- **Propose penalties**
- **Propose abatement period (method)**

Classifications of Citations

Willful

- **Conscious disregard of OSHA requirements**
- **Plain indifference to employee safety and health**
- **Penalties up to \$70,000 per instance**
- **Egregious multiplier**

Classifications, cont'd.

Repeated

- **Substantially similar violation on record**
- **Violation of same standard**
- **Three-year compliance record**
- **Penalties up to \$70,000**

Classifications, cont'd.

Serious

- **Assume accident occurs**
- **Substantial probability of death or serious physical injury**
- **Penalties up to \$70,000**

Classifications, cont'd.

Non-Serious/Other

- **Assume accident occurs**
- **Death or serious physical injury unlikely**
- **Penalties up to \$7,000**

Classifications, cont'd.

Failure-to-Abate

- **Cited violation never corrected**
- **Final order on record**
- **Penalties up to \$7,000 per day**

Classifications, cont'd.

De Minimis

- **Lack of direct relationship to employee safety or health**
- **No impact on compliance history**
- **No penalties**

Calculation of Proposed Penalties

- **Gravity - severity and probability**
- **Size of business (up to 60% reduction)**
- **Good faith (up to 25% reduction)**
- **History (up to 10% reduction)**

Abatement

- **Must promptly correct any alleged violations**
- **OSHA prescribes an abatement period**
- **Generally, no more than 30 days**
- **Abatement obligation stayed when citation contested**

Employer Responses to Citations

- **Accept**
- **Request informal conference**
- **Contest**

Employee Response to Citations

- **Contest reasonableness of abatement period**
- **Participate in employer-initiated proceedings**

Burden of Proof

- **Burden on OSHA**
- **To establish**
- ***Prima-facie* case**
- **Of a violation by**
- **Preponderance of the evidence**

Prima Facie Case (Standard)

- **Cited standard applies**
- **Terms were violated**
- **Employee exposure**
- **Employer knowledge**

Example

- **29 CFR 1910.303(g)(1)(i)**

Maintain specified amount of clear access space in front of parts operating at 600 volts or less that are likely to require examination, adjustment, servicing, or maintenance while "alive."

Prima Facie Case (General Duty Clause)

- **Hazard in workplace**
- **Recognized by employer or industry**
- **Death/serious physical harm**
- **Feasible means of abatement**

Affirmative Defenses

- **Excuse violations otherwise established**
- **Alternative arguments**
- **Burden of proof on employer**

Unpreventable Employee Misconduct

- **Work rule in place**
- **Communicated to employees**
- **Means in place to detect violations**
- **Discipline imposed for violations**

Infeasibility

- **Infeasible to comply**
- **Alternative protective measures**
- **Alternative of seeking a variance**

Statute of Limitations

- **6-month rule**
- **Continuing violations**

Greater Hazard

- Hazards of compliance greater than hazards of non-compliance
- Alternative protective measures unavailable
- Variance inappropriate/unavailable

FED OSHA Multi-Employer Citation Policy

- **Creating employer**
- **Exposing employer**
- **Correcting employer**
- **Controlling employer**
- ***Summit Contractors***

Informal Conferences

- **Conducted by OSHA after citation is issued**
- **Timing**
- **Parties discuss settlement**

Procedures

- **Call OSHA to schedule**
- **Conduct w/in 15 working days of receipt of citation (Fed OSHA)**
- **Post notice in workplace**

Participants

- **OSHA reps.**
- **Company reps.**
- **Employee reps.**

Agenda

- **Disposition of items**
- **Classifications**
- **Penalties**
- **Time for abatement**
- **Abatement method**

Other Considerations

- **Potential for future repeated and willful citations**
- **Exposure in related civil actions**
- **Workers' compensation bar**
- **Intent to harm**
- **Gross negligence resulting in death**

Closing the Deal

- **Settlement authority**
- **Settlement agreements**
- **Submission of check**
- **Provision of abatement verification**

Contesting Citations

- **Notice of contest**
- **Docketing with OSH Review Commission**
- **Solicitor's Office**
- **Company representative**
- **Employee participation**

Contesting Citations, cont'd.

- **Assignment of ALJ**
- **Simplified Proceedings**
- **Pleadings, discovery and motions**
- **Hearing before ALJ**
- **Decision of ALJ**

Contesting Citations, cont'd.

- **Review by OSHRC Commissioners**
- **Appeal to U.S. Circuit Courts of Appeals**
- **Appeal to U.S. Supreme Court**

Changed Congressional Landscape

- **Democratic control of Congress**
- **Increased Congressional oversight of OSHA**
- **Rep. George Miller (D-Calif.)**
- **Chairman, House Education and Labor Committee**
- **Closer look at OSHA's "failure to protect American workers"**

Congress/Rep. Miller, cont'd.

- **OSHA transformation "from law enforcement organization into so-called voluntary compliance organization"**
- **"Inadequate efforts to protect immigrant workers"**

Congress/Rep. Miller, cont'd.

- **"Chronic underreporting of workplace injuries and illnesses"**
- **"Ineffective penalty structure"**
- **"Capitol Grill" takes on new meaning**

OSHA Enhanced Enforcement Policy

- **Triggered by fatality or high gravity violations**
- **Follow-up inspections**
- **Programmed inspections**
- **Increased awareness**
- **"Creative" settlement provisions**
- **Section 11(b) enforcement**

OSHA Site-Specific Targeting Program

- **March 2007 - OSHA sent notification letters to 14,000 employers**
- **2006 DART rate of > 5.3 (Nat'l avg 2.4)**
- **Primary and secondary inspection lists**
- **Wall-to-wall comprehensive inspections**

Concluding Comments

Open Discussion