

# Emerging Issues in OSHA Enforcement and Liability

*presented by*

*Mark A. Lies II*

*Seyfarth Shaw LLP*

*131 South Dearborn Street, Suite 2400*

*Chicago, IL 60603*

*[mlies@seyfarth.com](mailto:mlies@seyfarth.com) (312) 460-5877*

**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](mailto:mlies@seyfarth.com). He specializes in Occupational Safety and Health Law and related employment law and personal injury. 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.**

**“I don’t tell jokes....**

**I just watch the  
government and report the  
facts ....”**

**Will Rogers**

**OSHA regulations may appear somewhat  
confusing....**



**...but your responsibility to comply  
with safety standards have been in  
existence for a long while.**

# ACCOUNTABILITY

**If a builder has built a house for a man and his work is not strong, and if the house he has built falls in and kills the the householder, that builder shall be slain.**

**King Hammurabi of Babylon  
18th Century B.C.**

# Program Objectives

- Discuss OSHA enforcement initiatives and trends.
- What to expect with a new administration.
- New penalty and liability policies.

# Many Different Categories of Employers and Employees On-Site

- Owner
- Owner's Representative
- General Contractor
- Subcontractors
- Leased Employees
- Borrowed Employees
- Safety Consultants

# 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.)

# 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**

# OSHA Liability

## ➤ OSHA inspections

- employee rights
- employer rights
- OSHA rights

## ➤ Employee rights

- right to private one-on-one interview with inspector
- right to refuse interview

# OSHA Liability

## ➤ Employee rights

- right to have another person present
- right to end interview at any time
- no duty to sign statement or be tape recorded or photographed
- cannot lie to inspector

# OSHA Liability

## ➤ Employer rights

- right to limit inspection to complaint or accident
- right to accompany inspector
- right to attend non-private employee interview
- no duty to produce documents not required by law

# OSHA Liability

## ➤ Employer rights

- right to end inspection if disruptive
- right to require search warrant (should confer with senior management and legal counsel on decision)

# OSHA Liability

## ➤ OSHA rights

- to conduct inspection, either with consent or search warrant
- right to use video camera
- cannot record voice without notice and consent
- right to inspect documents required by law
- right to truthful responses

# Aggressive Enforcement

- Use of interpreters
- Emphasis on repeat citations
- Requests for Root Cause analysis and company insurance audits.
- Cautionary tale: Use of knowledge of previous inspection to justify willful citation.

# Aggressive Enforcement

- Employee by Employee Citations
  - PPE Standard
  - LOTO procedures

# PPE – Respiratory Protection



# Aggressive Enforcement

- Enhanced Use of General Duty Clause
  - Combustible Dust
  - Workplace Violence
  - New chemicals (not listed on Z tables)

# Combustible Dust Fires



**Organic Dust in Massachusetts Foundry**



**Grain Handling Dust Fire**

# Aggressive Enforcement

- Enhanced Use of NFPA
  - 654 Combustible Dust
  - 70E National Consensus Standard-Electrical Safe Work Practices

# What is on the horizon?



# Ergonomics Standard

- Clinton Administration's Ergonomics Standard failed.
- The campaign of Sen. Barack Obama's (D-III) said he would "reinstate OSHA's ergonomics rule" while supporting a policy protecting small businesses that might be adversely affected by a new regulation.
- Sen. Joseph Biden Jr. (D-Del) said he does not favor a new standard . "We don't need new initiatives, we need new inspectors to go in and make sure [employers] are abiding by the existing law."

Sources: *The Hill*; *The Ergonomics Report*<sup>TM</sup>

# Protecting America's Workers Act

- First Introduced in 2005. Introduced in 2007 again by Sen. Kennedy (co-sponsored by Sen. Biden).
- Increased protection for whistleblowers.
- Changes to civil penalty structure
  - Willful violation min. \$50K up to \$100K, can go up to \$250K
  - Prohibits “unclassified” citations.

# 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 corporation
- \$250,000 fine per fatality for individual

**NOTE: No Miranda Warnings Necessary**

# Criminal Law Liability

## OSHA

- Obstruction of justice for interfering with inspection
- Falsification of records
- Lying to federal inspector
- Misrepresentation of subcontractor status to avoid OSHA liability

# Criminal Law Liability

## STATE LAW

- Murder
- Attempted Murder
- Battery
- Assault
- Reckless Endangerment

## DOUBLE JEOPARDY

- Does Not Apply
- Possible Federal and State Prosecution

# Recent Criminal Actions

- Scaffold collapse
- Illegal asbestos removal and explosion
- Illegal asbestos removal without personal protective equipment
- Confined space cyanide poisoning
- Excavation collapse
- Electrocution involving failure to train electrical workers
- Failure to provide or enforce use of personal fall arrest system

# Protecting America's Workers Act

## ➤ Criminal Sanctions

- Amputation, disfigurement, loss of brain capacity.
- Changes crime from misdemeanor to felony (min. one year jail time).
- Subject to federal sentencing guidelines for imprisonment as well as monetary penalties.

# 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

# Whistleblower Laws

Employer takes Adverse Action and Retaliates against Employee because of Protected Activity

Employee may File 11(c) Complaint with OSHA seeking damages

OSHA will investigate complaint

# Whistleblower Laws

If OSHA finds reasonable cause that there was retaliation, case may be filed in Federal Court

All States have Whistleblower Laws that may apply

# Whistleblower Suits

- Employee right to refuse work if there is imminent danger.
- Changes under pending legislation include:
  - Scope of protected activity to include reporting injuries or unsafe conditions to employers
  - Compensatory damages
  - Private right of action

# "Discounting Death"

- Sen. Kennedy's Report, April 28, 2008
- Informal conferences following fatalities will no longer result in any changes of classification.
- Notices of contest **MUST** be filed.
- Increased referrals to DOJ for prosecution.

# OSHA v. ADA

- Certain jobs have built in safety requirements, i.e. use of respirator.
- Employees need to be qualified by physician or through medical questionnaire. No qualification=no job.
- Exceptions to ADA prohibitions about asking employee's about medical issues/disabilities.

# OSHA v. ADA

- Employees who have had significant weight loss or gain.
- Visual acuity for vehicle/forklift operation.
- Ability to hear alarms.
- Working around heat/wearing FR clothing.
- Mental/emotional issues that raise workplace violence concerns.
- Insulin dependency
  - EEOC Guidance is Coming...

# OSHA State Plans

- Increased enforcement in California, Oregon, Washington.
- Obligations to have safety committees.
- Independent enforcement strategies.
- Increasing use of state criminal code.

## Other issues

- Baby boomers are retiring at rate of 5,000 a day.
- New supervisors with little or no background in OSHA need to be trained.

# Where do we go from here?

- More important than ever to establish strong unavoidable employee misconduct defense.
  - (1) Program for the specific hazard, e.g. fall, electrical.
  - (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—yet, new supervisors many times have had no training in delivering discipline.
- Maintain records of enforcement/discipline.