

Management Alert



What To Expect From OSHA In 2016 And Beyond ...

By Mark A. Lies, II, Patrick D. Joyce, and Adam R. Young

INTRODUCTION

The New Year is here and with that comes yet another year of enhanced OSHA enforcement and new OSHA regulations. Further, due to the upcoming end of President Obama's time in office, questions exist as to whether OSHA will continue with its aggressive agenda of enhanced enforcement with increased citations and greater penalties or whether OSHA will respond due to political pressure from the Congress. In either case, the New Year will bring new levels of uncertainty with the agency that we have not seen since the current Administration took office in 2009. This article will address OSHA's current and upcoming enforcement initiatives and trends, all of which will affect employers in the coming year.

OSHA'S ENFORCEMENT INITIATIVES

Though a number of OSHA's enforcement initiatives may not technically be considered new for 2016, we can expect that OSHA will continue to increasingly issue citations under the **General Duty Clause** and the **multi-employer worksite doctrine**. We can also expect OSHA to continue to focus its attention on the training and protection provided to **temporary employees**, especially under OSHA's Powered Industrial Truck (forklift) standard, Personal Protective Equipment (PPE) standards and Lockout Tagout (LOTO) regulations. OSHA has also been stepping up its workplace heat illness initiative, sending expansive subpoena requests to dozens of employers engaged in industries where employees typically are potentially exposed to heat, including manufacturing and construction, even if no injuries or illnesses have been reported. As such, it is important that employers remain aware of these issues to try to limit liability in 2016.

INCREASED OSHA PENALTIES

The new bipartisan budget, passed by both the House and the Senate and signed by President Obama on November 2, 2015, contains provisions that will raise OSHA penalties for the first time in 25 years. The budget allows for an initial penalty "catch up adjustment," which must be in place by August 1, 2016.

The maximum initial "catch up adjustment" will be based on the difference between the October 2015 Consumer Price Index (CPI) and the October 1990 CPI. The October 2015 CPI was released on November 17, 2015, and came in at 237.838. Based on the October 1990 CPI of 133.500, the maximum catch up adjustment will be approximately 78.16% and the new maximum penalties could be:

| | Current | August 2016 |
|-------------------------------|----------------|--------------------|
| Other than Serious violations | \$7,000 | \$12,471 |
| Serious violations | \$7,000 | \$12,741 |
| Willful violations | \$70,000 | \$126,000 |
| Repeat violations | \$70,000 | \$126,000 |

After the initial catch up adjustment, OSHA will be required to implement annual cost of living increases, with the adjustment tied to the year over year percentage increase in the CPI. Adjustments must be made by mid-January each subsequent year.

OSHA has the option to implement a catch up adjustment less than the maximum if the Agency determines increasing penalties by the maximum amount would (1) have a “negative economic impact” or the social costs of the increase outweigh the benefits and (2) the Office of Management and Budget agrees. However, Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels has long advocated for a substantial increase in penalties so it is difficult to envision the Agency seeking anything other than the maximum increase.

INCREASED USE OF THE GENERAL DUTY CLAUSE

Under the Occupational Safety and Health Act’s General Duty Clause, designated as section 5(a)(1), employers are required to protect employees from recognized workplace hazards that are correctible and likely to cause serious harm or death. Where OSHA lacks a specific standard to address a workplace hazard, the Agency has increasingly used the general duty clause as a “gap filler” for enforcement. OSHA thus has used the General Duty Clause to cite employers for a wide range of alleged hazards, and to enforce policies the Agency issued through guidance documents rather than formal regulations, including:

- ergonomics,
- illness due to exposure to heat and cold,
- arc flash/arc blast,
- combustible dust,
- chemicals and other hazardous materials for which there is no existing regulation, and
- fall protection.

In 2016, we expect that the Agency will use the General Duty Clause to cite employers for repetitive tasks causing ergonomic issues and musculoskeletal disorders. Moreover, in light of the increasing publicity given to the hazard because of tragic incidents involving workplace shootings, OSHA will continue its emphasis on citing employers for workplace violence incidents and violations, particularly in certain industries such as healthcare, certain retail facilities and public transportation such as taxi cabs. Employers should maintain policies and training on these issues to prevent liability and business disruptions from OSHA’s increased use of the General Duty Clause in 2016.

OSHA TO REDUCE RELIANCE ON PERMISSIBLE EXPOSURE LIMITS

In a move that could drastically affect day to day operations at a large number of employers, OSHA has signaled in a new permissible exposure limit (PEL) request for information from industry and other stakeholders that it plans to “revoke a small number of obsolete PELs.” Though the rulemaking did not list the PELs OSHA is considering revoking, the revocation of any PELs opens the door for greater use of the General Duty Clause to regulate employee exposure through standards that are not generally industry standards such as NIOSH standards or ACGIH recommended exposure limits. Several commentators believe the PEL walk back is simply OSHA’s attempt to increase employer liability for more citations while avoiding formal rulemaking to establish PELs. Combined with higher fines to be implemented by August, 2016, this could be seen as a new revenue stream for OSHA.

MULTI-EMPLOYER WORKSITE DOCTRINE

The presence of multiple employers, contractors, consultants, and temporary workers at the same workplace is increasingly common in construction, manufacturing and other industries. OSHA has taken note and made the prosecution of multiple employers at the same workplace a major Agency priority. Under OSHA's Multi-Employer Worksite policy, more than one employer may be citable for a hazardous condition that violates an OSHA standard, so long as OSHA determines that they violated a duty under the Act. This can occur even when the employer being cited had no employees exposed to the hazard in issue. The Agency will use a two-step process to determine whether more than one employer is to be cited.

The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. A **creating employer**, who caused a hazardous condition, is citable even if the only employees exposed are those of other employers at the cite. The **exposing employer**, whose own employees are exposed to the hazardous condition, is citable if (1) it knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, (2) it failed to take steps consistent with its authority to protect its employees. The **correcting employer**, who is responsible for correcting the hazardous condition, is citable if it fails to meet its obligations of correcting the condition. The **controlling employer**, who has supervisory authority over the worksite and the power to correct safety and health violations or require others to correct them, is citable if it fails to exercise reasonable care to prevent and detect violations on the site. In General Industry the host employer is typically the controlling employer, while in the Construction Industry it is the General Contractor, and, therefore, carry a higher compliance burden than other employers.

If OSHA determines an employer falls into one (or more) of these four categories, OSHA will then determine whether the employer met its obligations with regard to preventing and correcting the violations. It is important to note that the Multi-Employer Worksite Policy can also be utilized for **criminal prosecution** of employers if the underlying elements are present which require (1) a fatality, (2) violation of a specific regulation, (3) the violation was willful and (4) there is a causal connection between the violation and the death. As OSHA continues its aggressive application of the Multi-Employer Worksite Doctrine, employers should be wary as to potential liabilities for contractors, temporary workers, and other non-employees at their worksites.

FINAL IMPLEMENTATION OF NEW GLOBALLY HARMONIZED SYSTEM (GHS) STANDARDS

OSHA adopted new HCS 2012 SDS standards on December 1, 2013. Chemical end users must come into compliance with the new SDSs passed down from up-stream suppliers and manufacturers by June 1, 2016. Employers should not simply swap in a new SDS for an old MSDS and throw away the old MSDS. Previous MSDSs should be kept on file for several reasons:

- to provide proof that an employer was compliant with old HazCom standard.
- the prior MSDSs can be useful evidence in defending against worker's compensation claims by employees for occupational diseases alleged to have arisen from exposure to hazardous materials during the course of employment and
- the prior MSDS can be useful evidence in defending third party toxic tort claims alleged to have been caused by exposure to hazardous materials that the employer may have incorporated into products manufactured and sold by the employer or by products that are resold or distributed by the employer.

The new SDSs also presents an opportunity for employers to update their training, hazard communication, and safety procedures for chemicals. The new SDS includes sixteen separate sections, some of which are similar or identical to the existing MSDS sections. There are, however, a number of significant changes and compliance challenges.

When OSHA begins enforcement against employers on June 1, 2016, it will focus on whether the employer has reviewed the SDSs to identify any new risks as well as whether it has evaluated its existing compliance programs in light of the sixteen requirements in the new SDSs.

The Hazard Communication Standard affects nearly every employer, from chemical manufacturers to retailers to hotels whose employees work with cleaning agents. Employers need to be aware of their obligations to communicate hazards of chemical substance, and must have a process for updating existing labels, SDS, hazard assessments, and training programs to comply with HCS 2012. Here are some best practices for employers to follow:

- Employers should review the new SDSs in a timely fashion upon receipt.
- If the employer does not receive the SDSs in a timely fashion, it should promptly communicate in writing with the manufacturer to obtain the SDSs. If the employer does not receive the SDSs by June 1, 2016, OSHA has indicated that it will not cite employers who show “good faith efforts” to obtain the SDSs.
- Employers should evaluate the workplace using the SDSs to identify hazardous chemicals and how their employees may be exposed.
- Employers whose employees work with or around hazardous chemicals must ensure that they review the updated SDSs and assess each of the employer’s underlying compliance programs (e.g., emergency action plan, storage of flammable and combustible materials, PPE, respiratory protection, etc.) that may be impacted by the SDSs.
- Employers should ensure that employees who work with or around hazardous chemicals are trained to recognize the pictograms and hazard warnings that will be required under the new Hazard Communication Standard. Employers should document this training and develop mechanisms to ensure that employees understand the hazards of working with or around hazardous chemicals.

TEMPORARY EMPLOYEES

In 2014, OSHA implemented an initiative to protect temporary employees under the premise that those workers are not provided the same level of training and protections as full-time employees. Under this initiative, OSHA inspectors are required to inquire during inspections whether the inspected worksite has temporary employees and determine whether those employees are exposed to hazardous conditions. Moreover, during the inspection, OSHA will also inquire as to whether the training provided to the temporary workers is in a language and vocabulary the workers can understand. If OSHA determines that the host employer failed to provide adequate training or protections to the temporary employees, OSHA could issue citations not only to the temporary staffing agency, but also the host employer under the multi-employer worksite doctrine. In order to enforce this initiative, OSHA has hired compliance officers who are bilingual (or certified interpreters) to conduct employee interviews of employees to determine if the employees understood the training. If the training were in English and the employee is not fluent in English, then the training is not “effective” and the employer can be cited. Likewise, if the training material is in writing and the employee is illiterate, the training may not be considered “effective.”

POTENTIAL RECORDKEEPING RULE CHANGES

One anticipated rule would require employers to submit their injury and illness records “regularly,” electronically instead of only when OSHA requests them through a formal request. With such disclosure, the OSHA 300 Log and supporting documents could be used to trigger OSHA inspections. In addition, the records would be made available to the public so anyone could see an employer’s injury and illness rates. This opens employers to risk of adverse public reaction if such information becomes available in the media, without understanding the context of the records and the complexity of the recordkeeping requirements so the public may erroneously construe the injury and illness rate as creating an unsafe workplace. This disclosure could also result in additional worker’s compensation litigation by attorneys who could utilize this information to file claims.

Even more concerning for employers is another anticipated rule that would make the recordkeeping requirements an “ongoing obligation.” OSHA is expected to interpret this change to allow OSHA to cite recordkeeping violations up to five years old, well past the OSH Act’s six month statute of limitations. This is in direct contradiction to well established case law, including a 2012 D.C. Circuit decision affirming the six month limit.¹ There is hope, however, through a recent Eighth Circuit Court of Appeals² case that prevents OSHA from reinterpreting a rule in such a way that is “plainly erroneous or inconsistent with the regulation.” This will be an area to which employers should pay close attention.

NEW SILICA RULE EXPECTED TO BE RELEASED BY JANUARY 2017

Crystalline silica particles are commonly dispersed in the air when workers cut, grind, crush, or drill silica-containing materials such as concrete, masonry, tile, and rock. OSHA estimates that 2.2 million American workers are regularly exposed to respirable silica, with 1.85 million of those workers in the construction industry. Other common sources of exposure are building products manufacturing, sandblasting and hydraulic fracturing (fracking) of oil and gas wells. Crystalline silica exposure can cause lung cancer, chronic obstructive pulmonary disease, and silicosis, an incurable and sometimes fatal lung disease.

OSHA has outlined a new Silica Rule as a top priority since the beginning of the Obama administration. The Agency sent a draft rule to the White House Office of Management and Budget (OMB) in February 2011, and has pledged to release a final rule by January 2017. (See the notice of proposed rulemaking at <https://federalregister.gov/a/2013-20997>).

OSHA’s Silica Rule that will establish permissible silica exposure limits for all workers at 50 micrograms per cubic meter of air, cutting allowable exposures in half in general industry and maritime businesses, and even more in construction. The proposed rule also includes preferred methods for controlling exposure -- such as using water saws to reduce airborne silica dust. The rule will also require that employers conduct periodic air monitoring, limit workers’ access to areas where exposures are high, enforce effective methods for reducing exposures, provide medical exams for workers who have been exposed to elevated levels of silica, and require training for workers about silica-related hazards.

ENHANCED CRIMINAL LIABILITY

OSHA has had the ability to seek criminal liability against employers and managers since the advent of the law if a willful violation of a regulation causes the death of an employee, although a conviction is a **misdemeanor** with a six month period of imprisonment and a \$500,000 penalty for the employer and \$250,000 for an individual.

This seemingly minimal criminal liability has now given rise to a recent criminal enforcement agenda announced by the Department of Justice on December 17, 2015, to seek additional liability against employers when there is a workplace safety violation having nothing to do with a fatality. The DOJ will seek criminal penalties under other criminal laws for lying during an OSHA inspection, making false statements in government documents, obstructing justice and tampering with witnesses which are **felonies** and can result in imprisonment ranging from 5 to 20 years and enhanced monetary penalties.

With the advent of this criminal prosecution initiative, employers must be extremely careful during OSHA inspections, particularly in the aftermath of a fatality or serious injury, not to engage in any conduct that remotely approaches lying during an inspection, obstruction of justice, tampering with witnesses and must engage knowledgeable counsel at the outset to be able to understand and avoid these liabilities.

¹ *AKM LLC v. Perez*, No. 11-1106, 2012 BL 84910 (D.C. Cir. Apr. 6, 2012)

² *Perez v. Loren Cook Company*, No. 13-1310, ___ F.3rd ___ (8th Cir. Oct. 13, 2015)

OSHA'S USE OF THE RAPID RESPONSE FORM

On January 1, 2015, OSHA's more robust reporting rules took effect, requiring employers to report all work-related in-patient hospitalizations, amputations, and losses of an eye within 24 hours of the event:

- Within **eight (8) hours** after the death of any employee as a result of a work-related incident (which includes heart attacks);" and
- Within **twenty-four (24) hours** after the in-patient hospitalization of one or more employees or the occurrence of an injury to an employee involving an amputation or loss of an eye, as a result of a work-related incident."

To streamline these reports, OSHA adopted new procedures: the Interim Enforcement Procedures for New Reporting Requirements. Under these Interim Enforcement Procedures, OSHA triages new reports to determine whether the report warrants an inspection or a "Rapid Response Investigation" (RRI). "Category 1" reports -- including fatalities, multiple hospitalizations, repeat offenders, and imminent dangers -- will automatically trigger an on-site inspection. "Category 2" reports may trigger an on-site inspection if they involved two of the following factors: continued exposures, safety program failure, serious hazards, temporary workers, referrals from other agencies, and pending whistleblower complaints. If Category 2 factors are not present, the Agency may initiate a Rapid Response Investigation in lieu of an inspection.

OSHA may initiate a Rapid Response Investigation where the Area Director believes that there is a "reasonable basis that a violation or hazard exists." The Agency will direct employers to "find out what led to the incident and what modifications can you make now to prevent future injuries to other workers." The Agency will fax a letter instructing employers to "immediately conduct your own investigation into the reported incident and make any necessary changes to avoid further incidents," and complete a "Non-Mandatory Incident Investigation" form (attached to the letter). The employer's report and investigation will be used by the Agency to determine whether to conduct its own inspection. A word of caution, these rapid response forms could be used against employers as admissions of liability for a violation of a regulation as well as grounds for OSHA to find a "willful" violation if the employer responds in a way that it appears to admit prior knowledge of the hazard which could be an "admission" of liability. Accordingly, as rapid response forms are increasingly used in 2016, employers should write only limited, careful responses and avoid any language that might support an admission. Employers must preserve attorney client privilege in the conduct of their underlying root cause analysis investigation and disclosures on the forms, and seek the advice of counsel where necessary.

HOW TO DEAL WITH AN AGING WORKFORCE

According to the U.S. Bureau of Labor Statistics, one in every five American workers is over 65, and in 2020, one in four American workers will be over 55. Though the overall effects of an aging workplace are not entirely clear, there are several precautions employers should take to protect aging employees:

- Workstations and job tasks must be matched to the needs of the individual employee.
- Older workers tend to have fewer accidents but when they do have accidents, the injuries tend to be more severe resulting in a longer recovery time.
- Older workers tend to experience more back injuries.
- Older workers are more likely to develop musculoskeletal injuries because they have been performing repetitive motions for a longer period of time.
- Muscular strength and range of joint movement may decrease.
- Vision and hearing challenges may be more prevalent in older workers.

OSHA has begun to analyze the potential hazards associated with these employees and will likely propose guidance.

MIDNIGHT REGULATIONS AND INTERPRETATIONS

As with any outgoing administration, there is always the potential for “midnight regulations,” often implemented through rulemaking in the waning days of an Administration, particularly after an election. Though President Obama will not leave office until January 20, 2017, employers should prepare for last minute regulations or potential “executive orders” that may have lasting effects on employers. For example, under the Clinton administration, OSHA issued an ergonomics rule shortly after the 2000 election and Congress was forced to repeal the rule shortly after President Bush took office in January 2001. The likelihood of midnight regulation under President Obama depends heavily on which party wins the presidency in November 2016. To avoid potential political fallout for a new administration, OSHA will likely implement any new regulations as early as possible in 2016.

Midnight regulations are not the only potential consequence of an outgoing administration. New last minute interpretations of existing regulations and guidance could also have a significant impact on employers. While the Eighth Circuit’s ruling in *Loren Cook Company*, discussed above, may lessen the likelihood of drastic reinterpretations of rules, employers should still be on the lookout for changes in interpretation and implementation that may affect how companies do business.

CONCLUSION

The first seven years of the current Administration have been very challenging for employers under OSHA and other employment laws. 2016 may be the most challenging as the current Administration wants to project its agenda in the waning days of its authority. The President has said that in his last year he intends to “**leave it all on the field**” as to his agendas which means that employers must continue to be vigilant, keep informed and respond properly.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mliies@seyfarth.com to be added to the address list.

[Mark A. Lies](#), II is a partner in Seyfarth’s Chicago office, and [Patrick D. Joyce](#) and [Adam R. Young](#) are both associates in the firm’s Chicago office. If you would like further information, please contact your Seyfarth attorney, or Mark A. Lies, II at mliies@seyfarth.com, Patrick D. Joyce at pjoyce@seyfarth.com, or Adam R. Young at ayoung@seyfarth.com.

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