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## General Duty Clause

### OSHRC to Review Use of General Duty Clause



By Matthew Loughran

The Occupational Safety and Health Review Commission is using a pending health-care worker safety case to examine whether the general duty clause of Occupational Safety and Health Act should be used to force health-care providers to prevent exposure to hazards in the workplace, attorneys and occupational safety experts told Bloomberg BNA.

The commission requested briefing on the use of the general duty clause by the Labor Department's Occupational Safety and Health Administration in a case that involves the murder of a health-care worker, employed by Integra Health Management Inc., who was stabbed to death by a potential client outside of the client's home (*Sec'y of Labor v. Integra Health Mgmt., Inc.*, OSHRC, No. 13-1124, briefing notice 9/18/15).

The briefing notice asks for comments on the extent to which a health-care provider should be able to protect its employees from potential violent acts of third parties, and whether an employer's failure to do so should be considered a violation of the general duty clause of the Occupational Safety and Health Act .

The commission's review is expected to provide needed guidance on whether it is appropriate for OSHA to use the general duty clause in inspecting and overseeing health-care workplaces for occupational hazards, according to the attorneys and experts who spoke to Bloomberg BNA.

"This is an example of the recent broad use of the general duty clause by OSHA, particularly for health-care employers," Jeffrey Tanenbaum, a partner with Nixon Peabody, San Francisco, told Bloomberg BNA.

Although Tanenbaum suggested OSHA may be interpreting the statute too broadly, worker safety advocates countered that the OSHA citations were appropriate given the prevalence of workplace violence in the health-care industry.

"This is an industry with incredible rates of workplace violence, so it's important for OSHA to use all of the tools available to address the problem," Matthew Shultz, the executive director of the Center for Progressive Reform, told Bloomberg BNA.

#### Service Coordinator Attacked

The case before the commission involves citations issued by OSHA to Integra, a company that contracts with insurance companies to make physical and mental assessments of insured individuals in order to assist them in obtaining needed treatments.

According to stipulated facts in the case, Integra employs a network of community service coordinators who are assigned a caseload of potential members and who are required to meet with these individuals, conduct assessments and encourage them to register for services.

The coordinator in this case worked in the Tampa, Fla., area and was assigned to assess a potential member who was a diagnosed schizophrenic with a history of violent behavior and incarceration. During an unannounced visit to the individual's home, the coordinator was stabbed to death by the man.

After an investigation following an anonymous tip about the killing, OSHA cited Integra for a serious violation of the general duty clause by exposing the coordinator to "the hazard of being physically assaulted by members with a history of violent behavior" and for a less than serious violation for failing to report the employee's death in a timely manner to the agency. OSHA sought a total of \$10,500 in penalties as a result of the combined citations.

***The level of inquiry and the level of specificity that OSHA is requiring is something that can only be properly considered in a rulemaking.***

In a June 15 decision, administrative law judge Dennis L. Phillips affirmed the citations and the penalties as proposed. Phillips noted that Integra had several safety rules in place, but he called them inadequate. He noted that the victim had been hired just a few months before and hadn't completed her

#### BNA Snapshot

##### OSHRC Review of Integra Health Management Citations

**Development:** OSHRC calls for briefing on whether OSHA properly used general duty clause of OSH Act to cite health-care employer in murder of field worker by her potential client.

**Takeaway:** Practitioners and experts expect commission to provide guidance on use of general duty clause to prevent exposure by health-care workers to workplace violence.

—Jeffrey Tanenbaum,  
Nixon Peabody, San Francisco

safety training when she tried to speak with the potential client at his home.

### Petition for Review

Integra filed a petition for review with the commission, arguing that the judge's interpretation of the clause in its case "represents a fundamental departure from past construction of the Act."

The company said that the judge's conclusion that people "with a history of violent behavior" should be screened out "raises numerous questions of line-drawing that render such a standard wholly unworkable." The judge didn't explain what type of violent conduct would qualify as sufficiently severe to prompt an employer to withhold services, or how far back an employer must look when investigating criminal history, Integra said.

Integra also argued that OSHA failed to meet the burden of offering effective abatement measures, which is a necessary component of a citation for a general duty clause violation. The employer said that the Department of Labor's expert witness admitted that she couldn't be sure that the additional training recommended by OSHA would have reduced the risk of violence.

Calling the application of the general duty clause in the case unconstitutional, Integra said it appeared that the review commission had never concluded "on facts even remotely analogous to the instant case that an employer's failure to prevent violent, criminal acts by third parties constituted a violation of the Act."

In its invitation for briefs, the commission requested that the parties, as well as others interested in commenting, address the issues Integra raised in its petition. Specifically, the commission requested comment on whether the general duty clause applies to cases such as this and whether OSHA established that Integra or other companies in its industry recognize the hazard and have a feasible and effective means to materially reduce the hazard.

Finally, the commission sought comment on whether OSHA's Guidance for Preventing Workplace Violence for Healthcare and Social Service Workers has had any effect on such incidents. Interested parties have until Oct. 28 to file comments.

### Practitioners Warn of Overreach by OSHA

"Over the last decade, OSHA has liberally used the general duty clause to act as a super-control over employers," Valerie Butera, a member of Epstein Becker & Green in Washington, told Bloomberg BNA. "You can't predict or prevent all hazards, but, as an employer, you are never quite sure what will result in a citation after an investigation."

Nixon Peabody's Tanenbaum agreed. "Here, OSHA is interpreting the general duty clause in such a way that an employer basically has to ensure that a workplace is free of any and all hazards, which is broader than the statute is actually written and more than any employer can do," he said.

According to Matthew Deffebach, a partner with Haynes and Boone, in Houston, one of the most concerning aspects of the use of the clause in *Integra* was the emphasis on the violent history of the potential client. He pointed to language used by the administrative law judge in affirming the OSHA citations in this case as changing how employers have to investigate hazards.

"This decision really puts the history of patients front and center," he told Bloomberg BNA. "Now, as a health-care employer are you required to look into the history of all your patients to determine if there is sufficient violence in their past to create a hazard?" he asked.

"While the decision stops short of this, employers are understandably concerned about how far OSHA may take the recognized hazard," Deffebach added.

Tanenbaum warned that the use of the clause in this way can act like an individual regulation, just for a specific employer, but without the benefit of notice and comment from stakeholders that is required for a rulemaking. "The level of inquiry and the level of specificity that OSHA is requiring is something that can only be properly considered in a rulemaking," he said.

"This is like a backdoor rulemaking," Butera agreed. "But with this review in the *Integra* case, I think the review commission is looking to weigh in on this practice and, hopefully, they will rein it in," she said.

At the very least the commission decision should provide desperately needed guidance on when OSHA can and should use the general duty clause, she added.

"The way that the clause is written, it serves as a basic safety floor for employers and employees," Tanenbaum said. "Although employers need to keep their workplaces free of recognizable hazards that they can feasibly abate, as the clause is being used right now, employers are being asked to make 100 percent certain that the workplace is completely free of all hazards," he added. "That's just not possible."

According to Deffebach, the key is really whether the hazard is recognizable and feasibly able to be abated. "If the hazard is of the type that you can't control, such as the actions of a third party in this instance, how can you take the necessary precautions to protect your employees?" he asked.

### High Rates of Workplace Violence

Other experts see the commission's review as addressing a growing problem of workplace violence in the health-care industry.

Peg Seminario, director of safety and health for the AFL-CIO, told Bloomberg BNA, "if you look at the numbers of incidents of workplace violence in the health-care industry, they are growing, and they are the types of hazards that the general duty clause was written to cover."

She added, "the decision by the administrative law judge here was very reasoned and took into account all of the things that Integra could have done to protect this young woman from getting murdered and determined that any protections that they had in place either weren't enough or weren't being properly followed."

Center for Progressive Reform's Shultz said that any decision by OSHRC could have a broader effect than just dealing with health-care workplace violence.

"Using the general duty clause sends a message across many industries that employers have a responsibility to keep their workers safe from all threats—not just the basic slips, trips, and falls," he said.

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### **For More Information**

The briefing notice is at <http://src.bna.com/sr>.

The ALJ's decision is at <http://op.bna.com/env.nsf/r?Open=rdae-a2lt26>.

Integra's petition for review is at <http://src.bna.com/yo>.

The OSHA Guidance on Workplace Violence is at <http://src.bna.com/yp>.

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