haynesboone

MATTHEW DEFFEBACH
PARTNER
matthew.deffebach@haynesboone.com
T +1 713.547.2064

VICTOR WRIGHT
COUNSEL
victor.wright@haynesboone.com
T +1 713.547.2020

PUNAM KAJI
ASSOCIATE
punam.kaji@haynesboone.com
T +1 713.547.2693

MODINAT "ABBY" KOTUN
ASSOCIATE
abby.kotun@haynesboone.com
T +1 713.547.2660

BRENDAN FRADKIN
ASSOCIATE
brendan.fradkin@haynesboone.com
T +1 713.547.2062

OSHA NEWSLETTER

FEBRUARY 2016

OSHA'S 2015 TOP 10 MOST CITED WORKPLACE SAFETY VIOLATIONS RELEASED

Modinat "Abby" Kotun and Brendan Fradkin

OSHA has released its top ten most cited violations of 2015. The similarities between this year's list and prior lists are striking, indicating a consistent focus on certain violations. Other than a single position change between Lockout/Tagout and Powered Industrial Trucks, the list is exactly the same as in 2014. Employers should take extra precaution to ensure compliance with these issues. The 2015 Top 10 Cited Violations List is as follows:

1. 1926.501 – Fall Protection
2. 1910.1200 – Hazard Communication
3. 1926.451 – Scaffolding
4. 1910.134 – Respiratory Protection
5. 1910.178 – Powered Industrial Trucks
6. 1910.147 – Lockout/Tagout
7. 1926.1053 – Ladders
8. 1910.305 – Electrical, Wiring Methods
9. 1910.212 – Machine Guarding
10. 1910.303 – Electrical, General Requirements

OSHA ASSESSES $332,000 IN SANCTIONS AND COMPELS REHIRE IN WRONGFUL TERMINATION ACTION

Punam Kaji and Brendan Fradkin

In a sweeping condemnation of workplace retaliation, OSHA ordered a transportation company to pay $154,749 in back wages, $177,720 in punitive damages and attorney's fees, and the reinstatement of a terminated employee.

RCL Wiring LP, operating as Idaho & Sedalia Transportation Company, allegedly harassed and fired an employee for reporting a work-related injury. The employee had supposedly reported his injuries and requested reimbursement of his medical co-payments. According to OSHA's findings, in response, the company forced him to file an additional injury report, and threatened to discipline him when it was filed late. Following an investigation, the employee was terminated.

In addition to the rehire and damages, the company is also being forced to remove the employee's disciplinary information from his record, and must provide information regarding whistleblower's rights to its employees. Marcia P. Drumm, an OSHA regional administrator, commented that "whistle blower protections play an important role in keeping workplaces safe. It is illegal to discipline an employee for reporting an injury and seeking medical attention."[1]

[1] Worker Wrongfully terminated after workplace injury, company ordered to pay more than $332k in back wages and damages, as well as attorney's fees. OSHA Regional News Release (U.S. Dep't of Labor, Office of Public Affairs), December 9, 2015, available here: http://www.dol.gov/opa/media/press/osha/OSHA20152173.htm

NEW ENFORCEMENT WEIGHTING SYSTEM TO ALLOW INSPECTIONS FOCUSED ON MOST HAZARDOUS WORKPLACE ISSUES

Punam Kaji and Modinat "Abby" Kotun

Concurrent with the beginning of OSHA's 2016 fiscal year on October 1, 2015, OSHA has implemented a new Enforcement Weighting System ("**EWS**") that is designed to incentivize impactful inspections that require more time and resources.[1] Among the more heavily weighted inspections are cases with fines in excess of $100,000 and process safety management, ergonomic hazards, heat hazards, and workplace violence hazard inspections.

In the past, OSHA's primary metric to gauge enforcement activity was the number of inspections. Because one simple inspection was weighted the same as a more complicated inspection, inspectors and area offices were penalized, in effect, for taking on more complex inspections. According to OSHA Assistant Secretary Dr. David Michaels at the National Safety Council conference in Atlanta, "all inspections aren't equal – some are complex and require more time and resources – and many of those inspections have the greatest impact."[2] The new system takes into account the variations in time and resources and the impact a given inspection can have on worker safety.

Under the new EWS, each inspection/investigation is assigned a value, an Enforcement Unit ("**EU**"), with all inspections receiving an EU value of at least one. The categories are as follows:

1. Federal Agency Inspections – 2 EUs
2. Process Safety Management Inspections – 7 EUs
3. Combustible Dust Inspections – 2 EUs
4. Ergonomic Hazard Inspections – 5 EUs
5. Heat Hazard Inspections - 4 EUs
6. Non-PEL Exposure Hazard Inspections – 3 EUs
7. Workplace Violence Hazard Inspections – 3 EUs
8. Fatality/Catastrophe Inspections – 3 EUs
9. Personal Sampling Inspections – 2 EUs
10. Significant Cases (i.e., cases with a $100,000+ fine) – 8 EUs
11. Non-Formal Complaint Investigations – 1/9 EU
12. Rapid Response Investigations – 1/9 EU

Dr. Michaels reiterated in his memorandum announcing the new system that OSHA can conduct "inspections and issue citations for any sort of serious hazard, whether or not [there is] a specific applicable standard," foreshadowing potential increases in General Duty Clause citations.

[1] Memorandum, Enforcement Weighting System (Sept. 30, 2015), available here: https://www.osha.gov/dep/enforcement/ews_memo_09302015.html

[2] OSHA Quick Takes, October 1, 2015, available here: https://www.osha.gov/as/opa/quicktakes/qt100115.html

NEW SILICA EXPOSURE STANDARD ONE STEP CLOSER TO FINALIZATION

Modinat "Abby" Kotun and Punam Kaji

On December 21, 2015, the Labor Department sent a draft of OSHA's final rule on occupational exposure to crystalline silica to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). OIRA has the authority to review regulations and has 90 days to conduct its review, with the opportunity for a 30-day extension. The sending of the rule to OIRA signals that the rule could be finalized in the next 90 to 120 days.

While OSHA maintains that it still plans to publish the final silica rule in February 2016, the actual publication date remains to be seen. Although the contents of the rule sent to OIRA are unknown, it is believed that the revised silica standard will lower the permissible exposure limit for crystalline silica by half, from 100 micrograms of respirable crystalline silica per cubic meter of air to 50 $\mu g/m^3$ (on an 8-hour time-weighted average). The new standard is also expected to establish exposure monitoring, medical surveillance, and recordkeeping requirements, among others.

Haynes and Boone, LLP previously published two articles on this subject: the first followed the development of OSHA's proposed rule on Occupational Exposure to Crystalline Silica; and the second discusses a hazard alert by OSHA and NIOSH on Worker Exposure to Silica during Countertop Manufacturing, Finishing and Installation.[1]

[1] *See* Haynes and Boone Publication, April 20, 2015, New OSHA/NIOSH Hazard Alert on Worker Exposure to Silica during Countertop Manufacturing, Finishing and Installation (http://www.haynesboone.com/news-and-events/news/publications/2015/04/20/new-osha-niosh-hazard-alert-on-worker-exposure-to-silica); Haynes and Boone News Alert, August 28, 2013, OSHA Releases New Proposed Silica Rule (http://www.haynesboone.com/news-and-events/news/alerts/2013/08/28/osha-releases-new-proposed-silica-rule).

ENTERPRISE-WIDE ABATEMENT RELIEF UPHELD BY ADMINISTRATIVE LAW JUDGE

Matthew Thomas Deffebach and Punam Kaji

In a recent case, *Central Transport, LLC*, (OSHRC Nos. 14-1452, 14-1612, and 14-1934, Dec. 7, 2015), Administrative Law Judge Carol A. Baumerich allowed OSHA to argue for enterprise-wide relief, essentially giving OSHA a "one and done" approach to enforcing safety regulations. Enterprise-wide relief allows OSHA to allege in litigation that violations should be abated at all facilities nation-wide even if an inspector only encountered an infraction at the facility being inspected.

In a 2013 decision, *Delta Elevator Service Corp., dba Delta Beckwith Elevator Co.*, (OSHRC No. 12-1446), an Administrative Law Judge found that enterprise-wide relief was not permissible, thus *Central Transport, LLC* marks a potential change in the wind.

Central Transport, LLC is a transportation provider offering supply chain services all over North America, including 45 states and Canada. OSHA argued that the employer failed to comply with powered industrial truck regulations not only at the inspection site, but at other locations also. Central Transport filed a motion arguing that the enterprise wide relief sought by OSHA was not permitted under the Occupational Safety and Health Act (the "**Act**"). Judge Baumerich found that OSHA is authorized to request enterprise-wide relief as a form of "other appropriate relief," as stated in the Act.

If OSHA is able to use this case as precedent successfully, employers could face costly and burdensome abatement requirements following a one-location OSHA inspection. Thus, this case is one to watch.

11TH CIRCUIT DISTINGUISHES *COMTRAN* DECISION REGARDING SUPERVISOR MISCONDUCT AND EMPLOYER KNOWLEDGE

Punam Kaji and Modinat "Abby" Kotun

You may recall the 11th Circuit's 2013 pro-employer

ruling *ComTran Grp. v. U.S. DOL*, 722 F.3d 1304 (11th Cir. 2013), finding that supervisor misconduct cannot be used to establish the element of employer knowledge. Although a manager's conduct is generally imputed to the employer, *ComTran* put the burden on the Secretary of Labor to show employer knowledge of the violative condition, either constructive or actual, aside from the supervisor's misconduct.

However, in a few recent decisions, supervisor misconduct has been used to support the employer knowledge element. In an unpublished 11th Circuit case, *Florida Lemark Corp. v. Sec'y, U.S. DOL* (No. 15-10445, Dec. 14, 2015), the court was not persuaded by the employer's argument rooted in the *ComTran* precedent. Florida Lemark, a construction company, was one of many employers involved in the collapse of a garage causing the death of four workers. The accident was due to the structural failure of a column, which should have been grouted within two days of installation, but allegedly was not. Florida Lemark argued that the column had been grouted, but if the manager had failed to do so, Florida Lemark had no knowledge of such misconduct.

The 11th Circuit upheld the Occupational Safety and Health Review Commission's finding that an employer cannot rebut employer knowledge through supervisor misconduct when the employer did not take any steps to ensure that grouting was done or to audit its proper completion. Thus, the supervisor's misconduct was reasonably foreseeable.

In January 2016, the 11th Circuit issued another ruling, *Quinlan v. Sec'y, U.S. DOL*, No. 13-12347, Jan. 8, 2016), narrowing the *ComTran* precedent. In *Quinlan*, the 11th Circuit found that when a supervisor engaged in misconduct with an employee, the supervisor's knowledge of his own misconduct and the employee's misconduct satisfy the employer knowledge element. The supervisor and the employee were seen on the edge of a fifteen-foot wall without fall protection. The *Quinlan* decision turned on the fact that the supervisor was not the sole actor in the misconduct as in *ComTran*, rather the supervisor allowed misconduct to continue after observing it and participated in that misconduct.

These cases, distinguishing *ComTran*, may impose some challenges to relying on the *ComTran* decision to rebut employer knowledge in many instances involving supervisor misconduct. The employer must ensure that the alleged misconduct is the type of activity that is audited and regulated by the employer. Further, when a supervisor acts with other employees or oversees misconduct, employer knowledge may be established.

POSSIBLE PRISON TIME FOR WORKPLACE SAFETY VIOLATIONS

Stephen L. Corso and Poorav K. Rohatgi

The recent Memorandum of Understanding (the "**MOU**") between the U.S. Department of Justice ("**DOJ**") and Department of Labor ("**DOL**") reinvigorated the Worker Endangerment Initiative by "redoubling" the agencies' cooperative "efforts to hold accountable those who unlawfully jeopardize workers' health and safety," Deputy Attorney General Sally Quillian Yates announced on December 17, 2015.[1, 2] An accompanying memorandum sent to all 93 U.S. Attorneys across the country uses the relatively lower misdemeanor penalties of criminal sanctions under the Occupational Safety and Health Act of 1970 (the "**OSH Act**") as an impetus to urge federal prosecutors to couple workplace safety violations with other serious offenses carrying penalties ranging from 5 to 20 years imprisonment and significant fines.[3] Those offenses include conspiracy, false statements, obstruction of justice, witness tampering, and environmental and endangerment crimes. This development follows the Yates memo, which compels federal prosecutors to "combat corporate misconduct" by indicting culpable individuals at all levels, including managers, supervisors and corporate officers, in addition to indicting the companies themselves.[4]

The DOJ and the DOL are rededicating their efforts to criminally prosecute workplace violations by associating misdemeanor criminal and civil statutory violations with harsher criminal offenses found in Title 18 of the U.S. Code and with environmental offenses. However, this is not a new prosecutorial strategy. Perhaps the most systematic use of this coupling strategy involved a string of cases concerning

McWane, Inc., a cast-iron pipe manufacturer.[5] In separate criminal cases in Alabama, New Jersey, Texas, and Utah between 2006 and 2010, in addition to indicting the subsidiary companies, federal prosecutors indicted a vice president, general manager, and mid-level managers and supervisors.[6] Those individuals were convicted and received prison sentences from 6 months to almost 6 years for Title 18 offenses—making materially false statements, obstructing justice, and conspiracy—and for violating various workplace safety and environmental statutes, including the OSH Act, the Clean Water Act, the Clean Air Act ("**CAA**"), and the Resource Conservation and Recovery Act.

More recently, in 2015, former owners and managers of a metal-salvaging company pleaded guilty to one criminal felony count for conspiring to violate the CAA's work practice standards by directing employees to remove and dispose of asbestos without the necessary protective equipment.[7] One former manager was sentenced to 5 years in prison. In another criminal prosecution, a former president pleaded guilty to violating the OSH Act and making a false statement regarding whether an employee received proper protection when handling hydrogen sulfide and was sentenced to 12 months in prison.[8] Similarly, following the trial of Massey Energy's former chief executive officer, on December 3, 2015, the jury returned a guilty verdict on a federal charge of conspiracy to willfully violate mine health and safety standards outlined in the Mine Safety and Health Act.[9] The executive faces up to one year in federal prison.

State prosecutors are also paying more attention to workplace safety violations. For example, according to the Los Angeles County District Attorney's office, Bumble Bee Foods has agreed to pay more than $6 million in fines for "willfully violating safety rules."[10] The criminal investigation was spurred by the discovery of a dead employee in an industrial oven.

Given the Justice Department's renewed focus on prosecuting individuals for workplace safety violations, company executives and managers across the United States should note the enhanced risks and take measures to prevent themselves from being in these crosshairs.

For more information, please contact the Haynes and Boone attorney with whom you work or any of the following attorneys in the firm's OSHA and Workplace Disasters Practice Group:

---

[1] http://www.justice.gov/opa/pr/departments-justice-and-labor-announce-expansion-worker-endangerment-initiative-address

[2] http://www.justice.gov/enrd/file/800526/download

[3] http://www.justice.gov/enrd/file/800431/download

[4] http://www.justice.gov/dag/file/769036/download

[5] http://www.justice.gov/enrd/us-v-mcwane-corp

[6] http://www.justice.gov/enrd/us-v-mcwane-corp

[7] http://www.justice.gov/opa/pr/owners-managers-former-salvage-operations-former-textile-plant-tennessee-sentenced-prison

[8] http://www.justice.gov/opa/pr/former-president-port-arthur-texas-chemical-company-sentenced-federal-crimes-related-employee

[9] http://www.justice.gov/usao-sdwv/pr/federal-jury-returns-guilty-verdict-blankenship-trial

[10] http://www.latimes.com/local/lanow/la-me-ln-bumble-bee-worker-killed-settlement-20150812-story.html

IN OTHER NEWS

Employers should also be aware of this other recent development:

- OSHA has announced that it is beginning a new regulatory project to "revoke a small number of obsolete" permissible exposure limits ("**PELs**") listed in its regulations.[1] OSHA did not mention which PELs it intends to revoke, but the agency believes the outdated PELs impart a "false level sense of security to workers and employers who mistakenly believe that the PEL represents the level at which there are no adverse health effects." Once it revokes the obsolete PELs, OSHA intends to use other tools to protect the safety and health of workers, including citations under the General Duty clause. OSHA has scheduled a Request for Information for July 2016.

[1] Revocation of Obsolete Permissible Exposure Limits (PELs), Request for Information, RIN 1218-AD01, available here. http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1218-AD01

If you have any questions, please visit the Haynes and Boone Occupational Safety and Health Act (OSHA) and Workplace Disasters page of our website or contact one of the lawyers listed in this newsletter.