

Fifth Circuit Rules that Global Hazard Assessments Without Confirmation of Similarity for Each Location Are Not Permissible

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We previously [reported](#) on a divided Review Commission decision (*Wal-Mart Distribution Center #6016*) where the majority, in our opinion, failed to account for the reality of how sophisticated retailers conduct PPE assessments. As we noted, the case was being appealed to the Fifth Circuit Court of Appeals. Unfortunately, the Fifth Circuit adopted the Review Commission's faulty reasoning. In *Wal-Mart Distribution Center #6016 v. OSHRC*, the Fifth Circuit ruled that employers cannot apply the findings from one hazard assessment to other locations without confirming that the other locations are identical to warrant such application. No. 15-60462, 2016 WL 1376214 (5th Cir. Apr. 6, 2016). Wal-Mart's Searcy, Arkansas Distribution Center submitted an application to join OSHA's Voluntary Protection Program ("VPP"). As part of the VPP application process, OSHA audited the Searcy location in January 2008; during the audit, Wal-Mart informed OSHA that the Searcy hazard assessment would be applied to its other distribution centers. In February 2008, OSHA inspected Wal-Mart's New Braunfels distribution center and subsequently issued a citation for failure to conduct a hazard assessment (under 29 C.F.R. Section 1910.132(d)(1)) for that specific location.

The Fifth Circuit Court of Appeals found that "[w]hile 1910.132(d)(1) may not require an employer conduct a full-fledged hazard assessment of all identical workplaces, it is reasonable to interpret 1910.132(d)(1) to require an employer to confirm that workplaces are indeed identical before a hazard assessment for one workplace can qualify as the hazard assessment for another location." *Id.* at *3. In coming to this conclusion, the court first analyzed the ambiguity of the regulation. After looking at the regulatory language, the regulation's preamble, and the appendix accompanying the regulation, the Court found that all three sources failed to resolve the regulation's ambiguity as to whether Wal-Mart may use one location's hazard assessment as the hazard assessment of another location. As a result, the Fifth Circuit gave substantial deference to OSHA's own interpretation of the regulation and found that interpretation reasonable.

While the outcome is troublesome regarding future enforcement (if no further appellate action is taken) Wal-Mart prevailed on notice grounds. The Court found that by OSHA granting the Wal-Mart Searcy location VPP status, along with the fact that Wal-Mart notified OSHA during the VPP audit that it was using the Searcy hazard assessment for its other distribution centers, Wal-Mart had a fair expectation that its procedures were satisfactory and were not on notice of which practices, if any, were in violation of Section 1910.132(d)(1).