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OSHA

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to state requirements that extend beyond the scope of this booklet.

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he industrial revolution transformed a primarily rural society into an urban one, and few people could have anticipated the environmental and safety hazards that would accompany this change. Our society's response to handling the problems created by the industrial revolution was to enact a long series of occupational safety and health laws.

The first laws limited the number of hours women and children could work in factories. Soon thereafter, the federal government established national wage and hour standards for all employees. Eventually, the government went beyond regulating employees' hours and wages and began to regulate the work environment directly.

Initially, mines and railroads received the principal focus of this legislation, because of the seriousness of accidents and the country's early dependence on both industries. By the middle of the twentieth century, developments in technology had made it possible to trace the less obvious effects of other industrial practices. Improved knowledge in occupational health, combined with a complicated patchwork of state and federal safety laws, spawned the move toward a somewhat more unified body of occupational safety law.

BRIEF OVERVIEW OF OSHA

The Occupational Safety and Health Act (the “Act”) passed in 1970, is an extremely detailed and complicated body of federal law. There are thousands of pages of regulations covering everything from drinking water containers to underwater welding. This booklet’s purpose is to provide readers with general knowledge about the scope of the regulations and the potential liability for non-compliance. Therefore, this booklet should not be used as legal advice nor should it be used as a substitute for reviewing the actual regulations.

The following sections will briefly summarize: the different types of safety and health regulations; the record keeping and notice requirements; the inspection process; and citations and penalties. The complexity of the regulations tends to create numerous (and costly) traps for an unwary employer. This booklet is designed to help you more effectively recognize potential “problem areas” within your facility. If, after reading this, you have specific questions about your facility, please contact your attorney for detailed advice.

A. General Purpose Of OSHA

OSHA imposes a duty on employers to provide a workplace which is free from “recognized hazards.” There are two general goals within the Act. First, is the elimination of both obvious and non-obvious hazards. Second, is a requirement that employers keep various written records regarding safety in their work place for review by employees and OSHA investigators.

B. Coverage

Under OSHA, a covered employer is a “person engaged in a business affecting commerce who has employees.” There is no required minimum number of employees. Moreover, “affecting commerce” has been read extremely expansively so as to cover virtually any business. For example, courts have held that clearing land affected commerce because the land would be used to grow grapes which would become wine shipped in commerce.

Certain businesses are exempt from OSHA coverage for all or part of their operations, because they are gov-

erned by separate federal agencies. Employers in certain industries such as railroads, airlines, mines, and motor carriers face health or safety regulations issued by other federal agencies such as the Department of Transportation, the Federal Aviation Administration or others. Those regulations may preempt OSHA coverage to some extent, although OSHA regulations would still apply even in those industries if they are not preempted by more specific regulations. Fully exempt from coverage are the federal government, the states and political subdivisions.

Certain states have enacted their own safety and health laws that have been approved by OSHA, some of which apply to public employers. Therefore, employers must become knowledgeable of their state's safety and health standards and comply with them.

C. Safety Regulations Vs. Health Regulations

OSHA requires compliance with both safety and health regulations; there are important differences between the two. Safety regulations are generally based on easily identifiable hazards and are designed to protect employees from their own or others' negligence. Safety regulations involve such things as hard hats, machine guards, safety lines, guard rails, and the like. Health regulations protect employees from exposure to a harmful work environment. Health regulations are generally limitations on exposure to things such as toxic substances, radiation or noise.

D. Enforcement

The Act is typically enforced through inspections by OSHA compliance officers. The compliance officers may elect to inspect a facility based on an accident, information that a hazard exists (such as an employee complaint) or as part of a random program of inspections. OSHA will issue citations and assess penalties for any violations discovered during the inspection. Citations and penalties may be challenged before the Occupational Safety and Health Review Commission ("OSHRC") and then appealed to a United States Circuit Court of Appeals.

SPECIFIC STRUCTURE OF OSHA REGULATIONS

This summary begins with the *general duty of care* provision which applies to all employers. Next is an outline of the specific safety standards applicable to all industries. These standards cover areas such as facilities, machines, personal safety equipment and first aid. There follows a brief discussion of the special provisions applicable only to employers in certain industries, and an analysis of OSHA's record-keeping requirements. The final section discusses the procedures used in investigation and enforcement of the Act.

A. General Duty Of Care

The OSHA general duty of care provision provides:

Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Four elements are necessary to establish a breach of an employer's duty of care:

- a *hazard* existed in the workplace;
- the hazard was *recognized*;
- the hazard was causing or likely to cause death or serious injury to employees; and
- there were *feasible steps* the employer could have taken to abate the condition.

The general duty of care provision is used in situations where no specific standard is applicable. An example of the application of the general duty of care has been to ergonomic hazards. In a recent case against a cookie manufacturer it was held that an employer's duty of care included protecting employees from ergonomic hazards such as repetitive motions. The specific violation involved assembly line employees whose jobs entailed the repetitive task of filling paper cups with cookies. OSHA failed, however, to demonstrate any feasible means by which the employer could have eliminated the hazard so the OSHRC vacated the penalties imposed.

B. Safety Standards Applicable To All Industries

OSHA standards outline many safety procedures and devices that are to be used across all industries. It is the employer's obligation to be knowledgeable about these standards and to ensure employees' compliance. **Employers must comply with these standards unless:** 1) there is a different standard applicable to their specific industry; or 2) the company is governed by another federal agency and, therefore, exempt from OSHA.

The following is a list and general summary of the areas where OSHA has issued specific standards. The regulations themselves contain extensive detail, too voluminous for inclusion in this booklet; therefore, if one or more of the following areas applies to your business, you should carefully examine the appropriate regulation or consult a specialist for advice.

1. Structural Safety Standards

- walking and working surfaces

Includes general requirements that floors and walkways remain clean. It also includes safety measures for platforms, scaffolding, stairs, and runways

- means of egress

Outlines requirements for visibility, number, location and access to exits

- powered platforms

Covers the safety apparatus for permanent powered platforms, man lifts, and vehicle mounted powered platforms

- electrical

Covers all electrical equipment and installations used to provide electric power and light to employees. OSHA has recently promulgated new performance-related standards regarding electrical systems.

2. Machine Safety Standards

- machinery and machine guarding.

Covers protection from rotating parts, sparks, chips, etc. Safety rules may not be a substitute for machine guards. Moreover, certain machines such as saws have specific standards which are much stricter.

- hand and portable power tools.

Covers safety and maintenance of electric and pneumatic hand tools, explosive actuated fasteners and cleaning with compressed air.

- welding, cutting, and brazing.

Provides for the use of protective equipment, oxygen fuel gas systems and ventilation, as well as specific regulations depending on the type of welding or cutting involved.

- materials handling and storage.

Covers use and storage of equipment needed to use, move or store materials. Examples include loading docks, passageways, cranes and helicopter cranes.

3. Lockout/Tagout And Confined Space Permits

Regulations have been issued regarding working in confined spaces and *lockout/tagout* programs. Lockout/tagout are procedures established for isolating machinery from any sources of power during service or maintenance. A lockout device is used to “lock out” a power isolating device so that the machine may not be energized until the lock is removed. Tagout systems are simply warning tags placed on the power isolating device. “Tags” may be used where machines are incapable of lockout or where it can be demonstrated that a tagout will offer the same level of protection.

The confined space program is designed to protect employees working in confined areas where a hazard may exist. Employers must establish written procedures for issuing permits for entry into confined areas which contain potential hazards. Therefore, it is important to

evaluate the work area carefully and to determine which confined areas must be declared “permit space” based on the particular conditions.

4. Personal Protective Equipment

This covers equipment worn to protect an employee including respirators, protective shields and barriers. Note that even if employees own their own equipment employers may still be responsible for the maintenance and cleanliness of the equipment.

5. Hazardous Materials

The regulations dealing with hazardous materials generally cover the use and storage of flammable and combustible gases and liquids. These regulations also cover the use and storage of explosive substances such as those used in blasting.

6. Fire Protection

This section covers the use of fire suppression systems, fire brigades, fire extinguishers and evacuation plans. It does not mandate any one type of system but merely requires the appropriate use of the listed alternatives.

C. Health Standards Applicable To All Industries

The following standards focus on the protection of employees’ general health as opposed to the above standards which pertain to immediate safety. These standards are also applicable to all industries. Therefore, compliance is required unless there is an industry specific standard which takes precedence.

1. Environmental/Administrative Controls

Environmental and administrative controls are designed to limit an employee’s exposure to conditions that have been determined to be detrimental to long term good health. Detailed health standards exist for noise, radiation, sanitation, and ventilation. You should constantly be aware of occasions where your employees are exposed to conditions such as these. Depending upon the severity of exposure, periodic monitoring may be necessary to ensure that employee exposure is in compliance with OSHA limits.

2. Toxic And Hazardous Substances

The toxic and hazardous substance regulations differ from the hazardous materials safety standards described earlier. The safety standards are directed at the handling and storage of flammable or combustible liquids and gases. The toxic and hazardous substance standards specify limits of exposure to various substances which are known to be harmful or carcinogenic. These standards provide a comprehensive list of chemicals and the maximum safe exposure limits. Where toxic substances are involved, employers are generally required to: conduct periodic monitoring; train employees annually regarding the hazards of exposure and protections employees should take; provide specific hygiene facilities and/or personal protective equipment; and keep detailed exposure records.

In some situations OSHA also requires employers to conduct medical surveillance, such as when workers are exposed to certain levels of asbestos or vinyl chloride. Such substances have separate regulations with even stricter guidelines for working conditions, monitoring and emergency response. Therefore, it is vital to know exactly which toxic or hazardous substances are being used in your facility in order to determine which specific safeguards apply. Where medical surveillance and monitoring is done, employers must inform employees of the existence, location and availability of their medical and exposure records when employees first begin their employment and at least annually thereafter.

3. Biological Hazards

OSHA's Bloodborne Pathogens Standard applies to any employer with one or more employees who may, in the course of performing assigned job duties, be "reasonably anticipated" to come into contact with blood or other potentially infectious substances.

The standard requires a covered employer to create a written exposure control plan and ensure that employees have access to the plan, provide training to all employees who may be exposed to the hazards, and maintain accurate medical records for each employee who may be exposed.

Concerning records of training, employers must maintain the dates and summaries of the training classes, names and qualifications of the trainers, and names and job titles of employees attending the classes.

The standard also requires Hepatitis B virus vaccinations be offered to certain employees. OSHA will likely be issuing additional standards regarding other communicable diseases which are not transmitted by exposure to blood or other bodily fluids.

4. Hazard Communication Program

A hazard communication program is required to ensure that employees are aware of all chemicals in the work place which present “a physical hazard or a health hazard.” The program is to be established by the employer and should include the following:

- listings of all the hazardous chemicals known to be present in a workplace (or specific work area if more appropriate);
- employee training on the physical properties of the chemical, proper emergency response, and the specific physical and health hazards;
- material safety data sheets (MSDS) maintained in the workplace and made available to employees which provide specific information for each chemical listed; and
- chemical names and hazard warning on all containers—chemical manufacturers and importers must also include their name and address.

This program applies to toxic substances, flammables, combustibles, unstable chemicals, water reactive chemicals, compressed gases, or any other substance for which there is “statistically significant evidence” that chronic or acute health effects may occur.

D. Standards Applicable To Certain Specific Industries

The above health and safety standards apply to virtually all industries. OSHA also subjects certain employers to

stricter industry specific standards in addition to the general standards outlined above. The industry specific standards address safety problems which are unique to certain industries, such as:

- construction;
- longshoring;
- shipyards;
- grain handling facilities;
- pulp and paper mills;
- saw mills;
- textiles;
- telecommunications;
- agriculture (no general standards apply);
- bakeries;
- laundries;
- electric power generation and transmission; and
- logging.

These industries must comply with both the standards applicable to all industries and their own industry specific standards. In the event of conflicting standards, the industry specific standards take precedence.

RECORD KEEPING REQUIRE- MENTS

The second major goal of OSHA is to require that employers keep a record of their safety history. Employers must record any work related injury incurred by employees in three different logs: an OSHA 200 log; a supplemental report; and an annual summary. Not every minor scrape or bruise must be documented. OSHA has defined “recordable occupational injuries or illness” as those which result in:

- death (regardless of the length of time between the injury and death);
- days away from work;
- restricted work or transfer to another job;
- medical treatment beyond first aid;
- loss of consciousness;
- a significant injury or illness diagnosed by a physician or other licensed health care professional.

An injury or illness is “work-related” if an event or exposure in the work environment either caused or contributed to the condition or significantly aggravated a pre-existing injury or illness. On the other hand, if an illness or injury shows signs or symptoms that surface at work but result solely from non-work circumstances, this is not work-related and need not be recorded.

Employers must create and communicate a method for employees to report promptly work-related injuries and illnesses. If an injury is work related, it must be listed in the OSHA 300 log, the Injury and Illness Incident Report (OSHA 301 form) and the annual summary (OSHA 300-A). Each of the three is discussed below.

Small employers (with 10 or fewer employees throughout the year) and employees in specified standard industrial classification codes (primarily in non-hazardous service industries) are generally exempt from most of the recordkeeping requirements. Some smaller employers have been specifically asked by OSHA or the Bureau of the Labor Statistics to keep the records and, therefore, are required to do so. All employers, however, are required to report to OSHA any workplace incident that results in a fatality or the hospitalization of three or more employees.

Employers must keep injury and illness records for each establishment. An establishment is a “single physical location where business is conducted or where services are performed.” If employees work in dispersed locations, records must be kept at the place where they report for work. If their reporting site varies, OSHA requires that employers link each of the employees with one of their establishments for recordkeeping purposes.

The OSHA 300 Log, annual summary (OSHA 300-A) and the Incident Report (OSHA 301) forms must be kept for five years following the end of the calendar year that these records cover.

A. OSHA 300 Log

The OSHA 300 Log contains entries for the dates and severity of various injuries at an individual facility. The information required includes: the name of the employee; job title; date of injury; injury description; whether it is a fatality; number of days unable to work (including days which were not scheduled workdays); and job transfer. The information must be recorded on the Log within seven calendar days of learning that a recordable injury or illness occurred. OSHA 300 Logs are to be available for inspection by employees, former employees and their representatives (unions) upon request.

The OSHA 300 Log, which replaced the OSHA 200 Log, on January 1, 2002, contemplates the recording of hearing loss and musculoskeletal disorders. The effective date for recordkeeping in these areas is January 1, 2003.

Workplace injuries and illnesses which raise privacy concern, such as needle stick and sharp injuries, or sexual assault, must be listed anonymously on the OSHA 300 Log with more detail documented on a separate confidential OSHA 300 form.

During the five year storage period for the OSHA 300 Log, employers must update the Log with newly discovered recordable injuries or illnesses and show any changes that have occurred in the classification of previously recorded injuries and illnesses. (The annual summary and the OSHA 301 Incident reports need not be updated).

B. The Incident Report Forms (OSHA 301)

An accident report form must also be filled out for each recordable injury or illness. You may use the OSHA Form 301 or an equivalent form such as a state worker's compensation form since these usually require similar information.

Whichever form is used, it must provide detailed information such as: how the accident occurred; whether a fatality occurred; name, address and occupation of employee; and name and address of the treating physician. This form is available upon request from OSHA and must be completed within seven calendar days of learning of the accident or illness. This form must also be made available to an employee, former employee, employee representative or OSHA compliance officer upon request.

C. Annual Summary (OSHA 300-A)

The annual summary is a compilation of the information in the OSHA 300 Log for a given year. This report must be signed by the employer and posted in a manner that will allow employees to review it. The summary is to be posted by February 1 each year and remain posted until April 30. The summary must be completed and posted even though there may have been no injuries or illnesses during the year.

D. Death And Serious Injury

In the event that an accident occurs which results in a single fatality or the hospitalization of three or more employees, you **must notify OSHA by phone or in person within eight hours of the death or three hospitalizations**. This expedited notice requirement applies if three employees are hospitalized **within thirty days** of the injury causing event.

INSPECTIONS

Generally, for employers, the most feared aspect of OSHA is the inspection by a compliance officer. However, an inspection will be far easier if employers understand their rights and the procedures the compliance officer must follow.

Generally a compliance officer will want to conduct an inspection for one of several reasons. Frequently, an inspection is in response to an employee complaint or an accident. OSHA also conducts programmed inspections (in industries with high rates of lost work days) or random inspections.

A. When The Inspector Knocks

Often, the first issue an employer must address is whether to consent to a search. You have the right to refuse to consent to an inspection which has not been authorized by a search warrant except for places open to the general public. If OSHA has already obtained a warrant, access is generally required but only to the extent authorized by the warrant (again, with the exception of public areas where access is allowed with or without a warrant). There are procedures for challenging a warrant but they are outside the scope of this booklet.

OSHA can usually obtain a warrant in a relatively short period of time (sometimes within a day) so insistence upon a warrant is not always best. The advantages of allowing warrantless entry include having more control over the inspection. The investigator must ask the employer's permission to see various areas of a facility during a warrantless inspection. Many believe that consenting to a warrantless inspection demonstrates good faith that one wants to create a safe work place, and helps prevent an adversarial interaction. However, a warrantless inspection may be unwise without a supervisor or manager present who is knowledgeable and capable of dealing with safety issues.

B. Opening Conference

An opening conference allows the OSHA compliance officer to explain the purpose of the inspection. The officer

will usually state if this inspection is prompted by a complaint, an accident, or if it is a general programmed inspection. The compliance officer will also disclose: the specific areas he needs to inspect; whether he will take samples or photographs; and if he will interview any employees.

The officer also has the right to ask that an employee representative (or union representative if the company is unionized) be present. The compliance officer will also ask for the identity of any contractors or subcontractors working at the facility.

C. The “Walk Around” Of The Facility

You have the right to accompany the OSHA agent around your facility, and it is essential that this be done. The compliance officer has the right to request that the designated employee representative also participate in the inspection. As the inspector tours the facility he may take samples, photographs or interview employees. Employers should ask for duplicates and take similar pictures and samples. Do not rely on OSHA to provide duplicate pictures or samples at some point in the future.

Management representatives should be present during the interview by the compliance officer of any supervisory or management personnel. If a written statement is given, the person giving the statement has a right to a copy. Where non-supervisory employees are interviewed by the compliance officer, representatives of management are generally not permitted to be present. Sometimes exceptions are made if the employee requests a manager to be with him. In any event, the employee has the right to a copy of his statement, and this should be explained to him.

During the inspection, the compliance officer will look to ensure that the mandatory OSHA poster describing the rights and responsibilities of employers and employees is on display.

D. Closing Conference

The compliance officer will conduct a closing conference at the conclusion of his inspection. At this time he will discuss any actual or potential safety violations his inspection has disclosed. In addition, the compliance officer may discuss potential penalties, abatement of violations and prohibition against reprisals against employees.

CITATIONS AND PENALTIES

In the event that violations are alleged, OSHA will issue citations to the employer shortly after the inspection. A citation must be posted “prominently and promptly” in the workplace where it can be seen by employees, including posting at or near the place of the alleged violation. The type of violation for which a citation may be issued will depend on the severity of the offense and knowledge of the condition by the employer. There are five different categories of violations:

- de minimis;
- other than serious;
- serious;
- willful; and
- repeat.

De minimis citations are the least serious, and there is usually no penalty assessed because they generally do not directly affect the health or safety of employees.

The penalties which accompany violations range from a maximum of \$7,000 for each serious or “other than” serious violation to a maximum of \$70,000 for each willful violation or repeat violation. Employers may also face penalties of up to \$7,000 per day for each day the violation goes unabated. Criminal penalties, including imprisonment, may be imposed where a willful violation has led to the death of an employee or false information has been provided to OSHA.

In recent years, OSHA has applied in some circumstances its “instance by instance” penalty provisions. These are seen in situations where the agency believes that the employer’s conduct is egregious. This approach assesses penalties for each employee affected by the alleged violation of the Act. For example, if seven employees were exposed to an airborne contaminant, the assessed penalty could be \$50,000 for each employee exposed to the same condition for a total of \$350,000, all for the violation of one standard.

The exact penalty imposed for violations will depend on several factors. OSHA will evaluate whether the

employer knew or should have known of the condition at the time of the violation, and will also consider if there were procedures in place to detect this type of condition and whether those procedures were routinely followed. For example, an employer may be given a reduced fine if there were adequate safety measures in place, but an employee's failure to follow them resulted in a violation.

Employers may contest citations, the penalty imposed and/or the abatement period by notifying OSHA within 15 working days of receiving the citation. The procedure for contesting a violation begins with filing a notice of contest with the Area Director of the agency. A hearing before an administrative law judge will then be scheduled. Any decision of the administrative law judge may be appealed to the Review Commission. After the Review Commission has rendered a final decision an employer or OSHA may seek judicial review in a United States Circuit Court of Appeals.

After receiving a citation, an employer may want to take advantage of the "informal conference" available at the OSHA's Area Office. At the conference, a representative of the agency will meet informally with company representatives to discuss the citation, ideas for abatement, and potential settlement. If no resolution is reached at the informal conference, the employer may still file a notice of contest. It is important to know that the time limit on the filing of a notice of contest continues to run even if there is an informal conference. This makes it important to schedule the conference in time to allow for the timely filing of the notice of contest.

CONCLUSION

There are four general questions every employer needs to ask in the OSHA context:

1. Do we know and are we in compliance with all applicable safety and health standards?
2. Do we maintain adequate safety records?
3. Do we have procedures in place to help recognize potential OSHA violations in advance?
4. Is this facility prepared for an OSHA inspection?

Complying with the complicated regulations in OSHA has raised the cost of doing business for many. However, aside from avoiding liability for citations or penalties, there are non-monetary benefits to compliance. OSHA has encouraged all employers to become conscious of safety in the work place to a much greater degree than before. This has reduced the number of work place injuries and illnesses and contributed to better relationships between employers and their employees.

Employer and employee participation in safety procedures under OSHA contributes to a general feeling that management and employees are on the “same team.” The long term benefits can include increased productivity and a reduction in the cost associated with frivolous complaints from disgruntled employees. In essence, smart employers not only comply with OSHA, but learn how to use it to their advantage.

For further information, contact any office of Fisher & Phillips LLP or visit our website at www.laborlawyers.com

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