OSHA: A businessman's guide

by Anthony J. Obadal

The Occupational Safety and Health Act of 1970 became effective on April 28, 1971. That date marked the end of another protracted battle between business and labor interests. The date also, however, marked the beginning of a continuing series of skirmishes concerning the application and interpretation of the Act. These encounters occur at the rulemaking level, on the jobsite, before administrative law judges and the Occupational Safety and Health Review Commission, and in the federal courts. Additionally, battles are fought in Congress over the enactment of possible amendments to the Act.

Clearly, numerous legal issues arise under this Act which are of vital concern to employers. This is a short summary of what you, as employers, can do to protect yourselves from becoming entangled in the intricacies of OSHA. But be forewarned, this is not a do-it-yourself course in how to avoid OSHA problems. It is not a substitute for a sound health and safety program and appropriate legal advice. With that reservation in mind, let us proceed with the outline of the three major areas of OSHA law.

The general duty clause

The principle case interpreting Section 5(a) (1), the "general duty clause," is found in the federal court case National Realty & Construction Company v. OSAHRC. No effort to understand the Act can be complete without a knowledge of this case.

In National Realty the government charged an employer with a violation of his duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees," charging that the employer had permitted an employer to ride on the running board of a front-end loader. That rather simple factual case gave rise to a significant opinion by the United States Court of Appeals for the District of Columbia, which concluded that while employers have a duty to do everything possible to prevent hazardous conduct by employers, that duty does not extend so far as to mandate that the employer be guarantor of employer conduct.

The court went on to elaborate upon the elements necessary for a general duty violation. First, a recognized hazard must be one within the common knowledge of safety experts in the industry or known as a hazard by the particular employer. For example, does your experience as an employer provide you with knowledge of any particularly hazardous work? In one case, Brennan v. OSAHRC and Vy Lactos Laboratories, Inc.., the court concluded that an employer's tests which demonstrated damage was sufficient for knowledge of a hazard, even though no specific industry code or standard was involved.

The National Realty court also found that precautions to correct the recognized hazard must be feasible. This feasibility test was articulated in following, often-quoted language, when the court said that because of the broad definition of the general duty clause: The Secretary (of Labor) must be constrained to specify the particular steps a cited employer should have taken to avoid the citation, and to demonstrate the feasibility and likely utility of those measures.

The court went on to say: Only by requiring the Secretary (of Labor) at the hearing to formulate and defend his own theory of what a cited defendant should have to do, can the Commission and the Courts assure even handed enforcement of this clause.

The summary, the National Realty court stopped short of imposing an absolute duty on employers to prevent accidents. However, it did recognize that final responsibility for safety rests with the employer and that that duty cannot be waived or diminished by such factors as contributory negligence or assumption of risk on the part of your employees. Furthermore, employers should note that among the feasible precautions that they

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must take are care in hiring and adequate training to prevent injury. By following these steps you provide safety for your employees and your attorney with a major line of defense in many situations when you contest an OSHA citation.

The court skirted the interesting and vitally important issue of whether the general duty clause is so vague as to violate the due process requirement of the Fifth Amendment. The issue was originally raised in 1970, when the Minority Report asserted that the Act did not provide, as laws must, a clear path along which those who must comply can travel. The unfair feature of Section 5(a) (1) is that there are no criteria available to advise employers, in advance, of what is required of them. It is only after OSHA cites an employer that he is made aware of what was expected of him to do to avoid violating the Act. Many attorneys believe that this issue must ultimately be resolved by the Supreme Court.

To summarize the general duty clause, here are a few principles which have evolved out of the general duty cases. Where an accident results from unforeseeable employee negligence or misconduct, there may be no violation. Similarly, where an employee acts contrary to repeated warnings about safe operating techniques, there may be no violation. However, where an employer acts contrary to employer's safety rules which are not enforced, there probably will be violation. Finally, the showing of a hazard without a showing of feasible corrective measures, is insufficient to sustain a violation.

While the employer's burden is heavy, the Courts recognize reasonable limits on that burden. As the U. S. Court of Appeals for the Fifth Circuit said: "If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such efforts . . . ." Horne Plumbing and Heating Company v. OSAHRC & Dunlop.

The specific standard clause

Section 5(a) (2) of the Act delegates the Secretary of Labor the power to set specific standards. There are two methods by which this activity could occur. The first gave the Secretary authority for a two-year period to adopt and promulgate, without public rulemaking, all existing federal safety and health standards and existing national consensus standards relating to safety and health. This authority has expired.

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The second method provides for the setting of standards by means of the rulemaking procedure, which involves public notice and informal hearings. It is under this latter authority that the standards for maintenance of utility lines has been promulgated. Employers and associations should take advantage of their right to participate in the process of making standards which affect your business or industry. Failure to do so might mean that your side of the issue may never be aired, with unfavorable standards as a consequence.

Even when unfavorable standards are promulgated, they may be challenged in the courts. Both business and labor have had success in this regard. For instance, Bethlehem Steel Corporation filed suit in the U. S. Court of Appeals for the Third Circuit, challenging the validity of a paragraph in the OSHA regulations relating to industrial slings, on the grounds that affected parties had not received adequate notice and opportunity to comment. The court vacated the standard and remanded the case to the Secretary of Labor, where the standard was later deleted. Bethlehem Steel Corp. v. Dunlop.

Employers may also challenge a specific standard as a defense during a contest to a citation, arguing that it is unenforceable because it is unreasonable on the grounds of vagueness. Modern Automotive Service, Inc.

In Hoffman Construction Company v. OSAHRC & Dunlop, the OSHA "personal protective equipment" standard which states (t)he employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions . . . The employer, who was cited because his workers were not wearing safety belts when working above the ground, argued that the standard was so vague that no employer could reasonably be advised of the kind of conduct required to achieve compliance. The employer won. However, other Circuit Courts of Appeals have upheld the personal protective equipment standard as not being void for vagueness.

There are, in addition to attacking a standard's interpretation as vague, a number of other important issues which you should be acquainted with regarding specific standard citations. In the first place, just the showing of a standards breach is not sufficient for a violation. This is not a strict liability situation, similar to what is developing in tort law. The Secretary of Labor must not only establish that a breach of a specific standard occurred but that the employer knew or "with the exercise of reasonable diligence, should have known of the existence of the violation." North American Rockwell Corp. Here the Review Commission held that the existence of airborne asbestos fibers in excess of the health regulations was not a violation. The Seventh Circuit affirmed, stating that: It was not the purpose of the Act to make an employer an insurer of the safety of his men. . . The employer's task is difficult enough without adding responsibility for potentially hazardous conduct of which the employer is unaware. . . .

The Ninth Circuit followed this reasoning in Brennan v. OSAHRC and Alsea Lumber Co. when it held that an element of proof of both serious and nonserious violations is knowledge. Furthermore, the onus is on the Secretary of Labor to come forward with the proof and not on the employer to demonstrate his lack of knowledge. The Court said: "To revive the citation . . . would be to subject an employer to a standard of strict liability, under the special duty clause, for deliberate employee misconduct. We do not find that result to be within the intent of the Congress."

Businessmen involved in tree trimming should be aware of a 1975 case in which the Review Commission ruled that the use of ballistic nylon leggings by employees where clearing a wooded area was not required under the Act. The use of such chaps was not the custom in the industry and therefore not required. Asplundh Tree Expert Company.

Some major OSHA principles and developments

Search Warrants

Are announced OSHA inspections of the workplace without search warrants permitted by the Fourth Amendment of the U. S. Constitution? The Supreme Court is now considering this issue in Barlow's, Inc. v. Usery.

The case arose when the employer barred an OSHA compliance officer from inspecting his premises on the grounds the government did not have a search warrant. OSHA sought a federal court order compelling inspection. The Court refused, stating that the action "is unconstitutional and void in that it directly offends against the prohibition of the Fourth Amendment of the Constitution of the United States of America," which guards against government searches without warrants first obtained upon a showing a probable cause to believe that a violation has been committed. If the Supreme Court upholds the decision, OSHA would be barred access to worksites where it could not receive permission from a federal judge. The effect would eliminate warrantless OSHA inspections unless consented to by the employer.

Right to a jury trial

Pending before the U. S. Supreme Court are two cases where the employers have argued that the Act is violative of the Seventh Amendment to the U. S. Constitution in that jury trials are not allowed on the existence of a violation. Frank Irey, Jr., Inc. v. OSAHRC and Atlas Roofing Co., Inc. v. OSAHRC. Last year similar Federal Coal Mine Health and Safety Act penalties were upheld by the Court as civil in nature and requests for jury trials were denied.

Refusals by employees of allegedly unsafe work

In Usery v. Whirlpool Corp. employess refused to clean a large guard screen over a conveyor. They were given written reprimands and lost six hours pay. The court rejected the employees' suit and invalidated a Department of Labor regulation, which justified their walking off the job, as inconsistent with Congress' interest when it passed the Act. See Dunlop v. Daniel Construction Co., Inc.

However, there is more recent authority to the contrary. In Usery v. The Babcock and Wilcox Co. a federal court held that the Act prohibits an employer from discharging employees for refusing to perform work assignments which they believe to be dangerous. Thus, until this issue is resolved by the Supreme Court or the U. S. Courts of Appeals having jurisdiction in your geographic area, be wary of reprimanding any employees for refusing work on safety grounds.

Employer liability for employee refusal to comply with safety standards

In two cases where employers took all steps, short of termination, to educate their employees to wear hard hats, the Courts of Appeals held that they were still liable for their employees' refusal to wear the hats. Atlantic & Gulf Stevedores, Inc. v. OSAHRC and ITO Corp. v. OSAHRC and Usery. Thus, employees must, to avoid citations under the Act take all steps in their power to obtain employer compliance. The cases make clear that these steps include suspension and discharge if necessary.

Do not interfere with an investigation

The federal court in Massachusetts issued an order restraining a firm from discriminating against or threatening any of its employers who cooperated with an investigation of alleged violations. Usery v. New England Telephone & Telegraph Co. The firm's actions? According to the Department of Labor's complaint, a plant manager and an attorney told two employees not to speak with any investigators who were preparing for a hearing outside of the presence of a company attorney. Similarly, imposing a fine upon an employee for filing a safety complaint is also a violation of the Act. In Dunlop v. Trumbull Asphalt Co., Inc., the court ordered the firm to rehire the employee and pay him his back salary from date of discharge to date of the court decision.

Conclusion

This brief review should acquaint you with some of the major principles of the Act which substantially affect employers' interest. The review is merely a tool to assist you in complying and showing your compliance with the Act. A creative safety and health program ultimately is the best defense to a charge of an OSHA violation. □

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