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Utilizing the Unpreventable Employee Misconduct Defense as a Roadmap for Your OSHA Compliance and Safety

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Overview

- OSHA – Appreciating the Risk
 - Penalties
 - “Repeat” Citations
 - Indirect Costs
- OSHA Citations
 - The Inspection
 - OSHA’s Burden of Proof
 - Defenses / Affirmative Defenses
- Unpreventable Employee Misconduct Defense
 - Elements
 - Establishing the Affirmative Defense (before OSHA Shows Up)
- 10 Takeaways

OSHA Penalties

(effective 1/13/17)

Type of Violation	Max. Penalties
“Serious” “Other-Than-Serious”	\$12,675 per violation
“Failure to Abate”	\$12,675 per day
“Willful” “Repeat”	\$126,749 per violation

“Repeat” Citations

- Risk of “repeat” OSHA citations (\$126,749 per violation)
 - Cited for the same or similar conduct within the past 5 years
 - All sites fair game
- \$825,000 corporate-wide settlement for retailer (13 inspections in 8 different states)
 - blocked emergency exits
 - obstructed access to exit routes
 - electrical equipment
 - improper material storage

“Repeat” Citations

- \$825,000 settlement + retailer must:
 - provide immediate safety training
 - abate issues as quickly as possible
 - issue newsletter to employees (at least quarterly) regarding health and safety issues
 - submit to multiple safety audits at stores selected by OSHA, and address any issues identified
 - implement additional administrative and engineering controls
 - adopt a safety and health program focusing on the elements included in OSHA’s Safety and Health Program Management Guidelines

Recordkeeping & Public Disclosure

- Electronic recordkeeping rule
 - Report OSHA form 300A to OSHA electronically by 7/1/17
 - 250 or more employees
 - 20-249 employees in certain high-hazard industries
 - Still required to post OSHA form 300A internally from 2/1/17 to 4/30/17
- Publicly available for entire world to see

Recordkeeping & Public Disclosure (cont.)

- OSHA in 2002 (“Letter of Interpretation”):
 - “*no fault recordkeeping system*”
 - “*The concept of fault has never been a consideration in any recordkeeping system of the U.S. Department of Labor.*”
- OSHA in 2016 (Dr. David Michaels of OSHA):
 - “*high injury rates are a sign of poor management*”
 - “*Our new reporting requirements will 'nudge' employers to prevent worker injuries and illnesses to demonstrate to investors, job seekers, customers and the public that they operate safe and well-managed facilities.*”

Violations

- Recordkeeping violations
 - 2010: retail distribution center fined \$182,000 for multiple “willful” and “repeat” recordkeeping violations
 - 141 instance-by-instance willful recordkeeping citations against two related companies for knowingly and intentionally failing to record certain work-related injuries or illnesses (\$1.21 million total proposed penalties)

Indirect OSHA Costs

- OSHA “Regulation by Shaming”
 - Press releases (\$40,000+ in penalties)
 - Publicly-available injury/illness data
- Reputation within industry
- Bad publicity and loss of goodwill
- Loss of public/private contracts
- Expensive and anti-competitive abatement

Indirect OSHA Costs (cont.)

- Evidence of negligence in civil matter (“negligence per se” in some states)
- Increase in insurance premiums
- Legal expenses
 - OSHA enforcement action
 - Liability action
 - Subpoena Duces Tecum for documents
 - Non-party depositions
 - Impleader action against employer

OSHA Inspection Basics

- Questionnaire/Rapid Response Investigation
- On-Site Inspection
 - Opening conference
 - Document requests
 - Walk-around
 - Interviews (management, hourly employees)
 - Testing
 - Closing conference

OSHA Citation Basics

- Citation
 - Issued within 6 months of violation
 - Informal conference and/or Notice of Contest (w/in 15 business days of receipt of Citation) – neither affects the deadline of the other
 - Consider your defenses and consider contesting

OSHA's Burden of Proof

- OSHA must prove all four elements (by a preponderance of the evidence):
 - the standard applies to the alleged hazard;
 - the employer failed to comply with the standard
 - an employee was exposed (or had access) to the hazard or violative condition; and
 - the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition

What can you do to protect yourself?

(And at the same time protect your employees?)

What if Your Employee Should Have Known Better?

Case Example: Employee not wearing hard hat

Best Defense:

- A. Employee should have known better
- B. Employee already had training and “came trained”
- C. Employees told to be safe in morning safety meetings – be careful!
- D. Hard hats were available on site
- E. None of the above**

Unpreventable Employee Misconduct

- Must proactively establish this defense.
- You are protecting NOT ONLY your business, but ALSO your employees
- Often, your only hope in cases in which there is no dispute that the violative conduct occurred

Unpreventable Employee Misconduct Defense

- Employer MUST show:
 - 1) Established work rules designed to prevent the violation;
 - 2) Adequately communicated these rules to its employees;
 - 3) Taken steps to discover violations; and
 - 4) Effectively enforced the rules when violations have been discovered

Inability to Establish All Elements

- U.S. Court of Appeals for 7th Cir. (2017)
“lack of disciplinary or follow-up action”
- U.S. Court of Appeals for 3rd Cir. (2015)
“had not satisfied the third and fourth prongs of this test”
- U.S. Court of Appeals for 1st Cir. (2012)
“a deficiency in ... efforts to discover incidents of noncompliance”

Step 1: Establish Work Rules

- Two parts: (1) identifying hazards; and (2) creating rules to protect against the hazards
- Hazard identification
 - Typical hazards employees expect to face
 - Collect existing information about workplace hazards
 - Information from workers (interviews)
 - Safety Data Sheets
 - Inspection reports from insurance carriers, governmental agencies, and consultants
 - Injury and illness records (OSHA 300 Logs)
 - Results of medical reports/consultations
 - Equipment and machinery operating manuals/warnings
 - Inspect the workplace (observe)

Step 1: Establish Work Rules (cont.)

- Hazard identification (cont.)
 - Conduct accident investigations
 - Near miss/near hit analysis
 - Include hazards associated with emergency and non-routine situations
 - Fires and explosions, chemical releases, hazardous material spills, startups after planned or unplanned equipment shutdowns (LOTO), natural disasters, weather emergencies, medical emergencies

Hazard Identification: More Guidance

- Ask: why is OSHA citing others in your industry?
 - Construction
 - Manufacturing
 - Healthcare
 - Retail, etc.
- Rules should not only protect against identified hazards but ALSO be in conformity with applicable OSHA regulations
- <https://www.osha.gov/law-regs.html>



**Top 10 Violations in Construction (NAICS 23)
New York State
CY 2016**

Rank	Standard
1	1926.501(b)(13)
2	1926.501(b)(1)
3	1926.100(a)
4	1926.1053(b)(1)
5	1926.503(a)(1)
6	1926.404(f)(6)
7	1926.451(e)(1)
8	1926.102(a)(1)
9	1910.1200(e)(1)
10	1926.1053(b)(4)



Top 10 Violations in Manufacturing (NAICS 31-33)
New York State
CY 2016

Rank	Standard
1	1910.212(a)(1)
2	1910.1200(e)(1)
3	1910.1200(h)(1)
4	1910.147(c)(4(i)
5	1910.134(e)(1)
6	1910.212(a)(3)(ii)
7	1910.151(c)
8	1910.22(a)(1)
9	1910.134(c)(1)
10	1910.134(f)(2)



**Top 10 Violations in Healthcare (NAICS 62)
New York State
CY 2016**

Rank	Standard
1	1910.1200(h)(1)
2	1910.1030(d)(2)(i)
3	1910.1030(g)(2)(i)
4	1910.1200(e)(1)
5	1904.39(a)(2)
6	1910.1030(c)(1)(v)
7	1926.1101(g)(1)
8	1904(29(b)(3)
9	1904.4(a)
10	1910.1030(c)(1)(iv)(B)

**Top 10 Violations in Retail (NAICS 44-45)
New York State
CY 2016**

Rank	Standard
1	1910.1200(e)(1)
2	1910.1200(h)(1)
3	1910.151(c)
4	1910.37(a)(3)
5	Section 5(a)(1)
6	1910.178(l)(1)(i)
7	1910.23(c)(1)
8	1910.157(c)(1)
9	1910.157(g)(1)
10	1910.157(g)(2)

Step 1: Form of the Written Rules

- Rules must be rules: no ambiguity (“must”, “at all times”, “required”, “never” ...)
- Not general procedures, suggestions, or “best practices”
- Same level of protection as OSHA standard
 - Balancing – too broad (“be safe”) versus too detailed (entirety of OSHA construction standards)
- MUST be in writing
- Document everything

Step 1: Where Can Rules Be Found?

- Anywhere (where there is documentation)
- Health and safety plans
- Daily toolbox talks
- Pre-task planning (PTP), identifying:
 - the day's work activities;
 - hazards associated with each work activity; and
 - steps crews will (**READ: "MUST"**) take to avoid the identified hazards
- Employee handbook
- "Safety Rules"
- Disciplinary records

Step 2: Adequately Communicate the Rules

- Critical Distinction
 - Not just made available
 - Instead: steps taken to ensure rules are understood and able to be followed
- Distribute rules to each employee
- Any non-English speaking workers?
- Acknowledgment form: received, read, understands, agrees to abide, and will ask questions

Step 2: Adequately Communicate the Rules

- New hire safety orientation: in-depth indoctrination re: safety culture, systems, and processes
- Training (**multiple methods and procedures**)
 - New hire safety orientation
 - Site specific safety training
 - Refresher training
 - Toolbox talks
 - Near miss/near hit analysis
 - Site safety committee

Step 3: Take Steps to Discover Violations

- Daily walkthroughs/site visits/audits by supervisors
 - Document the walkthroughs, including:
 - Date, time, how long on site
 - What safety policies the walkthrough was designed to observe (e.g., compliance with strict PPE policy, etc.)
 - The results (e.g., all employees wearing hard hats/PPE – or not.)
 - Consider using safety Apps

Step 3: Discovering Violations – A Detour to Safety Incentive Plans

- OSHA's concern: incentive programs (either unintentionally or intentionally) provide employees an incentive not to report injuries
- A positive incentive program:
 - encourages or rewards workers for reporting injuries, illnesses, near-misses, or hazards; and/or
 - recognizes, rewards, and thereby encourages worker involvement in the safety and health management system.
- Incentives tied to leading indicators NOT lagging indicators

Step 3: Safety Incentive Plans (cont.)

- Plans that do NOT violate OSHA
 - Providing tee shirts to workers serving on safety and health committees
 - Offering modest rewards for suggesting ways to strengthen safety and health
 - Throwing a recognition party at the successful completion of company-wide safety and health training
- Plans that DO violate OSHA
 - awarding paid time off to a unit that has the greatest reduction in incidence rates
 - rewarding workers with a celebration for achieving an injury/rate reduction goal or maintaining an injury-and illness-free worksite for a period of time.

Step 4: Enforcement of Rules

- Must have a written disciplinary program
 - Share the program with all employees
 - First offense: verbal warning, etc.
 - Second offense: ...
 - Third offense: ...
- Must keep records
 - Document all discipline (including verbal warnings; standard “write-up” forms), including the rule that was violated
 - Employees must sign form to acknowledge receipt and violation of company policy
- **Bottom line: must enforce the rules when discovering violations**

Benefits

- Protecting your:
 - Reputation
 - Finances
 - Future
 - Employees' safety and health
 - Peace of mind

10 Takeaways

1. Know critical OSHA deadlines – 15 working days to contest an OSHA citation and/or appear for an informal conference
2. Upon receiving an OSHA citation, automatically request an informal conference with OSHA and strongly consider contesting
3. Create work rules; convey rules to employees/train employees; conduct walk-throughs to discover any violations; discipline employees for noncompliance - document everything

10 Takeaways

4. Know that the 4th Amendment applies to OSHA inspections – right to request warrant
5. You generally have the right to delay an OSHA inspection by one hour
6. If conducting a site audit, be prepared to immediately correct/eliminate any hazards
7. Maintain accurate injury and illness logs (300, 300A, 301 forms) and do not over-record

10 Takeaways

8. Understand your reporting obligations for any injuries and illnesses
 - Fatalities within 8 hours
 - Amputations, loss of an eye, and/or inpatient hospital admissions within 24 hours
9. Never pay an OSHA citation as issued
10. Maintain records and document everything

Questions?