

# OSHA's General Duty Clause: A Guide to Enforcement & Legal Defenses

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## Overview

- General Duty Clause (GDC) is “gap filler” to address recognized hazards that OSHA has not yet regulated
  - OSHA often looks to voluntary consensus standards as basis for GDC citations (ANSI A10, NFPA 70E etc.) as well as information in manufacturer’s handbooks and warning labels
- During recent 3-year period, OSHA use of GDC increased 15%
- In FY 2011, OSHA proposed over \$7 mil. in penalties for GDC violations
- All GDC citations are “serious” in gravity, and can be classified as “willful” or “repeat” ... but GDC willful violations cannot be basis for criminal prosecution
- Every state plan state must have its own version of GDC

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## Uses of GDC

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- OSHA uses GDC frequently to cite:
  - Ergonomic hazards
  - Workplace violence
  - Impairment on the job
  - Chemical exposures for which there are no PELs
  - Infectious disease control in workplace (Ebola, influenza) not covered by BBP standard
  - Combustible dust
  - Hazards in off-road equipment
  - Heat-related illness

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## General Duty Clause: The Statute

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Section 5(a)(1) of the OSH Act requires:

“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.”

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## Elements of GDC

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- Necessary elements to prove a violation of the general duty clause:
  - ► The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
  - ► The hazard was recognized;
  - ► The hazard was causing or was likely to cause death or serious physical harm; and
  - ► There was a feasible and useful method to correct the hazard.

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## General Duty Clause

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- Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or “common-sense” recognition.
- A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer’s own employees within previous 6 months.
  - PAW ACT (S 1112 and HR 2090) would change this ... and also adds: “Each employee or other person exposed to a hazard in violation of [this subsection] may constitute a separate violation.”

## General Duty Clause

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- The occurrence of an accident/incident does not necessarily mean that the employer has violated Section 5(a)(1), although the accident/incident may be evidence of a hazard.
- GDC citation shall address the hazard in the workplace that existed prior to the accident/incident, not the particular facts that led to the occurrence of the accident/incident.
- The hazard for which a citation is issued must be reasonably foreseeable. All of the factors that could cause a hazard need not be present in the same place or at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.
- It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.

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## GDC: Employer Recognition

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- Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the OSHA inspection.
- Employer awareness of a hazard may also be demonstrated by a review of:
  - company memorandums,
  - safety and health audits
  - safety work rules that specifically identify a hazard,
  - operations manuals,
  - standard operating procedures,
  - collective bargaining agreements,
  - prior accidents/incidents,
  - near misses,
  - injury and illness reports, or workers' compensation data.

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## GDC: Employer Recognition

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- Employer awareness of a hazard may also be demonstrated by prior Federal OSHA or OSHA State Plan State inspection history which involved the same hazard.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard.
- An employer's own corrective actions may serve as the basis for establishing employer recognition if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

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## GDC: Industry Recognition

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- Industry recognition of a hazard can be established in several ways:
  - Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);
  - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
  - Manufacturers' warnings on equipment or in literature;
  - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard.
  - Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;

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## GDC: Industry Recognition

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- Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
  - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred;
  - If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition.
- Otherwise, such private standards normally shall be used only as corroborating evidence of recognition.

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## GDC & PELs: *Fiberdome*

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- In 2013, OSHA cited Fiberdome under GDC for exposure to styrene BELOW the codified PEL but ABOVE industry recognized “best practices” – citation was accepted by employer.
- OSHA’s PELs RFI sought input on using GDC for enforcement of chemicals in lieu of adopting new or updated PELs for air contaminants – next step is proposed rule.
- OSHA says “Employers have responsibility to limit exposure to chemicals that can harm workers even if the exposure level is below the OSHA PEL.”
- Will OSHA use the new SDS information on exposures to enforce through GDC? Stay tuned ...

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## GDC & Ergonomics

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- After ergonomics standard rescinded by Congress, OSHA is limited to GDC enforcement
- OSHA says it will cite ergo hazards or issue “hazard letters” – OSHA will conduct “follow up” inspection within 12 mo of sending letter and if hazards not corrected, “willful” violation
  - Best way to rebut is to get professional ergo assessment and follow its recommendations in advance of OSHA revisit
- OSHA refers employers to NIOSH and labor recommendations on how to establish effective ergo program
- If GDC cites ergo hazards at one workplace, employer may have to implement similar abatement at all workplaces (CSA provisions)

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## GDC & Workplace Violence

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- OSHA has no standards regulating this issue but has lots of guidance which is the basis for a “recognized hazard”
- If employer has experienced prior acts of workplace violence or is aware of threats or other potential violence indicators, should implement a prevention program (engineering controls, admin controls and training)
- If no controls are present and incident occurs, GDC citation can be issued

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## GDC & Infectious Diseases

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- OSHA uses BBP standard to enforce in health care and other workplaces where hazards exist, but this does not cover airborne illnesses
  - Rulemaking is in progress ... SBREFA panel completed
- OSHA put out guidance on Ebola prevention and also on pandemic flu and can enforce through GDC
- Guidance includes employee training, hygiene and cough etiquette, and social distancing
- Employers should adhere to CDC guidelines as well for comprehensive worker protection

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## GDC Affirmative Defenses

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*Lay groundwork for these during inspection --*

- Unforeseeable Employee Misconduct
- Technical/economic infeasibility
- Greater hazard
- Multi-Employer worksite (NOT our worker or equipment)
- Preemption
- Improper Inspection
- Reasonable Promptness
- Lack of Particularity



## Use of GDC in WC & Tort Litigation

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- Accepting a GDC citation in a case involving personal injury can be construed as admission of negligence for worker's comp and in personal injury/wrongful death tort litigation
- If gross negligence (willful) is involved, some states allow exception to WC exclusive remedy or multiply benefits due to employee
- In some states, OSHA citations are admissible as proof of "negligence per se" and GDC violations constitute "breach of duty" owed to employee
  - May also be contract ramifications that lead to indemnification claims on multi-employer worksites ...

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## Conclusion

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- GDC use by OSHA is expanding and Congress may further extend the ways in which it can be used to cite employers under Multi-Employer Workplace doctrine
- GDC can be useful to address emerging hazards during pendency of standards (e.g., combustible dust, infectious diseases)
- GDC citations require "recognition" of hazard which penalizes proactive employers and rewards those who play ostrich
- GDC citations are subject to same affirmative defenses as other types of OSHA citations and may be more easily defended because knowledge is not automatically imputed to employer.

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# Questions???

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