Personal and Corporate Safety-Related Liability: Who and What Can Be Sued?

By Matthew T. Deffebach, J.D.

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CRIMINAL LIABILITY

Who goes to Jail?
Criminal Liability under the Act

• Section 666 of the Occupational Safety and Health Act (the “OSH Act”) provides for criminal sanctions when the employer’s willful violation of a standard, rule, order, or regulation has caused the death of an employee.
• An “employer” can be the employing business entity or an individual who is a corporate officer or director.
• The criminal penalty for these violations is imprisonment for up to six months and monetary penalties of up to $250,000 for individuals. For organizations, monetary penalties can be assessed up to $500,000.
• Action brought by the Department of Justice.

Shifting Likelihood of Criminal Liability

• Traditionally, very few cases have invoked criminal liability.
• Approximately 2 OSHA citations per year will involve criminal citation. Rarely targeting an individual.
• However, this attitude is changing…
Concern? OSHA/DOJ Partnership

- "Worker Endangerment Initiative"
- The DOJ has instructed U.S. Attorneys to increase criminal prosecutions under new/reorganized laws.
- The DOJ has moved a number of statutes into its environmental crimes section.
- The result? Prison terms can be 25 years instead of 6 months.

Yates Memo and Expected Increases in Criminal Citation

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

- Environmental and Natural Resources Division (ENRD) is coordinating with OSHA in development of settlement frameworks and demands for injunctive relief so that enforcing pollution control statutes “protect these workers in the front lines from environmental and health risks.”
- They are cross-training between federal agencies, such as OSHA and EPA, to better understand authorities, processes, and resources.
- Information sharing has “accelerated case development” in areas that were historically unenforced or under-enforced.
- Each case referral is reviewed for worker safety concerns.
- Will review crimes that only requiring knowing standard, not willfully knowing (OSH Act). For example: obstruction of justice; false statements; conspiracy; witness tampering; mail or wire fraud; and environmental and endangerment crimes.

Also criminal liability under state law
Individual Prosecution

- The two managers, Director of Operations Angel Rodriguez and Former Safety Manager Saul Florez, have been given sanctions of their own, according to prosecutors.
- Rodriguez has agreed to performing 320 hours of community service, pay $11,400 in fines and penalties and undergo workplace safety classes in order to plead a misdemeanour charge.
- As for Florez, he will undergo three years probation, 30 days of community labor and safety classes, and pay $19,000 in fines after pleading guilty to criminal safety violations. His felony conviction will be reduced to a misdemeanour only if such requirements are fulfilled.

Practical Steps

- Culture
- Attitude with the agencies
- The intent to do no harm:
  - Elk Energy. DOJ focused on supervisors' failure to exercise due care and ensure the work was performed safely (explosion offshore). Should have taken actions before welding occurred: "The failure to require pre-work inspections, to ensure safe piping, and to obtain authorization before the welding was performed."
  - Sawyer. DOJ established in asbestos remediation case that company failed to require PPE.
  - Bumble-Bee. State alleged that supervisors willfully violated rules that require implementing a safety plan, rules for workers entering confined spaces, and a procedure to keep machinery or equipment turned off if someone's working on it.
Civil Liability: OSHA Fines Will Increase

- Under the new budget deal, OSHA is directed to make a one-time "catch-up" increase to make up for more than two decades without increases.
- If OSHA applies the maximum catch-up increase allowed, the current maximum $70,000 fine for "repeat" and "willful" violations would grow to a maximum of $127,400, and the $7,000 maximum fine for "serious" and "failure-to-abate" violations would increase to $12,744.
- The adjustment must occur before Aug. 1, 2016. In subsequent years, OSHA also will be allowed — for the first time — to adjust its penalties levels based on inflation.
Civil Liability Generally

- No private right of action under OSH Act. Only DOL is the Plaintiff.

Not so FAST...

- Some state programs allow for a private right of action, including:
  - California, Oregon, Kentucky, Minnesota, New Mexico
- While federal OSH Act regulatory violations cannot be pursued, one popular claim remains against individuals that can be brought by the DOL.
Civil Liability – Retaliation

• The OSH Act states, “no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.” 29 U.S.C. § 660(c)(1)

For example…

  – the SOL sued both a medical clinic and the doctor who owned and supervised the employee in a retaliation claim. When the doctor attempted to dismiss himself, the court found that the OSH Act must have intended to include “persons” rather than just “employers,” when it comes to retaliation.
Retaliation—Watch Out!

SO WHAT SHOULD YOU KNOW ABOUT RETALIATION CLAIMS?

• Cat’s Paw Theory
  As told in the fable, the monkey wanted some chestnuts that were roasting in a fire. Unwilling to burn himself in the fire, the monkey convinced the cat to retrieve the chestnuts for him.

• An employer can be held liable for employment discrimination claims based upon the bias of a supervisor who influenced, but did not make the final employment decision.
SO WHAT SHOULD YOU KNOW ABOUT RETALIATION CLAIMS?

• Participation as a “Protected Activity”
  – U.S. Sup. Ct. decision in *Crawford v. Metropolitan Gov’t of Nashville & Davidson County*, found that “protected activity” for purposes of a retaliation claim includes passive participation in an internal investigation.

• Temporal Proximity
  – Courts look to the passage of time between the protected activity and the adverse employment action.

But what about INJURIES??
TORT LIABILITY FOR SAFETY PROFESSIONALS

- Workers’ compensation statutes generally insulate the injured employee’s supervisor from tort liability. Exclusive Remedy Bar.
- However, a supervisor may be subject to personal liability in the following scenarios:
  1. the supervisor engages in some form of misconduct or
  2. the supervisor is acting in a separate capacity, distinct from his obligations as a supervisor.

**However, these are all dependent on state law. You should check current state of applicable law with legal counsel.**

SUPERVISOR MISCONDUCT

<table>
<thead>
<tr>
<th>Standard of Misconduct</th>
<th>Applicable States</th>
</tr>
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<tbody>
<tr>
<td>Grossly Negligent</td>
<td>Florida, Iowa, Virginia, Minnesota and Missouri</td>
</tr>
<tr>
<td>Willful, Wanton, or Recklessly Negligent</td>
<td>Hawaii, New Mexico and Wyoming</td>
</tr>
<tr>
<td>No exception addressed in state law</td>
<td>Nebraska, Maine, Wisconsin, Colorado, Massachusetts, Rhode Island, Idaho, Georgia and Kansas.</td>
</tr>
</tbody>
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**Indiana**

- Before an injury can be said to have been intended by an employer, two requirements must be met. *Foshee v. Shoney’s Inc.*, 637 N.E.2d 1277, 1281 (Ind. 1994).

- First, the employer itself must have intended the injury. *Id.* It must be the employer who harbors the intent and not merely a supervisor, manager, or foreman. *Baker*, 637 N.E.2d at 1275.

- Second, the employer must have intended the injury or had actual knowledge that an injury was certain to occur. *Foshee*, 637 N.E.2d at 1281.

- Check with counsel, but did not see published cases against individuals.

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**Recap**

**Employee Injured**

- Can the Employee sue the Supervisor who was somehow involved?
  - Workers Compensation Insurance in place, then **NO unless** supervisor misconduct or supervisor acting in individual capacity.
  - Workers Compensation Insurance **not** in place, then **YES** (as individuals can be sued for negligence).

**Third Party Injured**

- Can the Third Party sue the Supervisor who was somehow involved.
  - Yes under various negligence theories.
OH NO….NEGLIGENCE!

SO WHAT DO YOU NEED TO KNOW ABOUT A NEGLIGENCE CLAIM?

- Many types of claims:
  - Negligence generally
  - Negligent retention
  - Negligent hiring
  - Negligent supervision
  - Malicious prosecution
NEGLIGENCE CLAIM-GENERALLY

Duty
• a duty of care owed by the defendant to the plaintiff

Breach
• a breach of that duty

Causation
• Actual: an actual causal connection between the defendant's conduct and the resulting harm
• Proximate: proximate cause, which relates to whether the harm was foreseeable

Damages
• damages resulting from the defendant's conduct.

Other Negligence Claims

• **Negligent Investigation** Elements:
  – A reasonable person would have investigated
  – Such investigation would have exonerated the employee
  – The employer either failed to investigate or did so poorly
  
  Currently, only Montana recognizes this cause of action. **NOT Indiana.**

• **Malicious Prosecution** Elements (in Indiana):
  – The defendant initiated or continued the original case with an improper purpose or malicious intent
  – The original case was terminated in favor of the plaintiff
  – The defendant did not have reasonable grounds or probable cause to support the original case
Negligent Retention and Supervision

• **General Elements:**
  – Proof of the underlying tort
  – The Employer knew or should have known that the employee was unfit for the position or that hiring them posed a risk of harm to third persons
  – That unfitness was the proximate cause in the injury that resulted

IF A SUPERVISOR ACTS NEGLIGENTLY, WHEN IS THE EMPLOYER LIABLE TOO?

Vicarious Liability

• An employer can be held responsible for the wrongful acts of an employee acting in the course and scope of employment.

Vice-Principal Liability

• Certain individuals create liability based on their supervisory position within a company, as their actions are deemed actions of the company itself.
“NEGLIGENCE PER SE” ESTABLISHED BY OSHA REGULATIONS

- Negligence per se means an act is considered negligent because it violates a statute.
- State and Federal Law. **Indiana: Violation of OSHA regulation is not negligence per se.**
- Majority of Circuit Courts have found that violating an OSHA regulation does not establish negligence per se, but it is not completely black and white under the law.
  - 2nd, 3rd, and 4th Circuit: no negligence per se
  - 1st Circuit: split decision
  - 6th Circuit: can establish negligence per se

OSHA REGULATIONS INADMISSIBLE

- In several jurisdictions, OSHA standards are inadmissible.
- California, by statute, specifically prohibits the introduction of safety code provisions.
- Other states prohibit the introduction of OSHA standards through case law – Arizona, Maryland, Michigan and Mississippi.
“DUTY OF CARE”
ESTABLISHED BY OSHA REGULATIONS

• In *Robertson v. Burlington Northern R. Co.*, the 9th Circuit allowed evidence of OSHA regulations regarding noise levels to be admitted into evidence in a case brought by an employee complaining of hearing loss as a result of his job with the railroad company.

![Warning Sign]

Noise area
May cause
hearing loss
Use proper ear
protection

“DUTY OF CARE”
ESTABLISHED BY OSHA REGULATIONS

*4Front Engineered Solutions, Inc. v. Rosales*,

• A new 2015 case out of Texas state court of appeals, found an employer’s action or inaction contrary to OSHA regulations and interpretations is not necessarily per se negligence, but *OSHA’s regulations and interpretations can be relevant to establish a standard of care owed by an employer* in an action not barred by the exclusive remedy defense of workers’ compensation.

• This case was about forklift safety and training.
**INDIANA UPDATE**

OSHA regulations do not themselves establish a duty of care beyond common law or statutory duty. However, OSHA regulations in a contract or other document can help establish the duty as part of a contractual duty.

**WHEN CAN AN EMPLOYER’S OSHA CITATION RECORD BE USED AGAINST THEM IN A CIVIL MATTER?**

- In many states, a party may not admit into evidence testimonial or documentary evidence of OSHA violations by the employer or a Compliance Officers’ post-inspection report.
- This evidence has often been held to be inadmissible as irrelevant, prejudicial, and hearsay.

However, the Supreme Court of Alabama has held to the contrary.
Temporary Worker Initiative (TWI)

- Launched in 2013
- Purpose: to increase OSHA’s focus on temporary workers in order to highlight employers’ responsibilities to ensure these workers are protected from workplace hazards
- Temporary Worker Definition:
  - Workers hired and paid by a staffing agency; and
  - Supplied to a host employer to perform work on a temporary basis
- OSHA considers the staffing agency and host employer to be “joint employers” in this situation.

Enforcement + Outreach + Training
1904 Report guidance

When a staffing agency supplies temporary workers to a business, typically, the staffing agency and the staffing firm client (also known as the Host Employer) are joint employers of those workers. Both employers are responsible to some degree for determining the conditions of employment and for complying with the law. In this joint employment structure, questions regarding which employer is responsible for particular safety and health protections are common. This bulletin addresses how to identify who is responsible for recording work-related injuries and illnesses of temporary workers on the OSHA 300 log.

Implications of “I am a joint employer”

- Comply with Multi-Employer, etc. but be cautious about the Joint Employer assumption.
  - FLSA Collective Actions, unpaid overtime and other wage claims
  - Harassment, discrimination, retaliation liability for actions of Temp employer as to its employees
  - FMLA and ADA issues
  - Counting employees for coverage purposes
  - Union activity
  - Joint and Several liability for other damages
  - Deep pocket in litigation?
NLRB Leading the Charge to Expand Joint Employment

- Joint employment has become a priority concern for several agencies, including the NLRB.

- *Browning-Ferris Industries of California, Inc.* departed from well-settled precedent to establish a new, broad standard for determining when two entities are “joint employers” under the National Labor Relations Act.

- Since 1984, previous standard generally looked to whether the putative joint employer exerted a direct and immediate degree of control over “essential terms and conditions of employment” such as hiring, firing, discipline, supervision, and direction.

Joint Employment under *Browning-Ferris*

- Is there a common law employment relationship?
  - According to the Board, a common law employment relationship exists where an individual is employed to perform services in the affairs of another person or entity and is subject to that person or entity’s control with respect to how those services are performed, whether or not that control is indirect or not exercised.

- Do the putative joint employers “share or codetermine those matters governing essential terms and conditions of employment”?

- Board majority emphasized intent to apply to as many employment relationships as possible.
Implications of Browning Ferris

• Broad implications affect virtually all staffing relationships because essential terms of employment include:
  – Number of workers to be supplied
  – Scheduling
  – Determining method and manner of work performance

• May also affect other relationships:
  – Franchisors (pending McDonald’s, USA, LLC) litigation names franchisor as joint employer
  – Parties to post-acquisition transition services agreements
  – Private equity involvement in portfolio companies

• Other agencies and courts already citing NLRB to apply expanded joint employment tests in other contexts (Title VII, OSHA).
• Other agencies going even further
  – FLSA – economic realities test broader than common law employment

SURVEY OF CITATIONS UNDER THE TWI

Survey of OSHA citations under the Temporary Worker Initiative since its inception
## SURVEY OF CitATIONS UNDER THE TEMPORARY WORKER INITIATIVE

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>Range of Proposed Fines</th>
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</table>
| Host and SA Mirror Citations | Host: $7,000 - $161,000  
                        SA: $7,000 - $114,000 |
| Hosted Cited for Substantially More | Host: $42,000 - $362,500  
                        SA: $4,900 - $32,000 |
| Only Host Cited | Host: $84,000 - $303,900 |
| SA Cited for Substantially More | Host: $7,000  
                        SA: $46,8000 |
| Only SA Cited   | SA: $6,000                       |
|                 | 33 total cases                   |

Time for questions
Personal and Corporate Safety-Related Liability: Who and What Can Be Sued?