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OSHA Liability 2017: Déjà vu All Over Again

By Mark A. Lies II*

INTRODUCTION

As 2017 draws to a conclusion, it is important to look back at what occurred in 2017 and hopefully learn from events because, as human beings, if we do not learn from history, we are doomed to repeat it, in this case, with tragic results. The Romans understood this because they had a mythical god, Janus, who had two heads, one looking backward to the past and one to the future.



The month of January is named after him and was supposed to be a time to reflect on the prior year's experiences and hopefully avoid similar events in the coming year.

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OSHA ENFORCEMENT IN 2017

In 2017, OSHA essentially continued to operate as it had during the Obama Administration since there was no Assistant Secretary of Labor for OSHA appointed and approved by Congress to replace Dr. David Michaels. As a result, the career OSHA bureaucrats continued to operate as they had in the past. For those employers with nationwide operations, it was very common to see in 2017 that the OSHA regulations were being enforced unevenly or inconsistently from one Region to another because there was a lack of central direction from Washington. This inconsistency was further complicated by the fact that OSHA has experienced significant numbers of retirements of career Baby Boomers at the Area and Regional Office levels, as well as in the Solicitor's office which prosecutes the citations at trial.

This inconsistency is also evident within the State Plan OSHA Programs. An employer can expect to be treated with very different interpretations of the underlying Federal OSHA regulations depending on whether it is cited, for example, in Indiana, Michigan, Minnesota, Nevada, Washington and other states. Often times the State Plan regulations do not recognize Federal interpretations of Federal regulations or case law from the OSHA Review Commission or Federal courts, creating further uncertainty.

2017 OSHA EXPERIENCE

The following discusses pitfalls in 2018 based upon 2017 occurrences:

OSHA Inspections - Failure to become aware of the rights of OSHA, the employer and employees during inspections. Many employer lack basic understanding of the process, especially in the area of OSHA employee interviews which are the source of 60-70% of citations. Employers never inform their employees of these rights and do not prepare employees for the interviews or consider "debriefing" them after the interviews. Attached to this is a summary of

those rights. Many employers do not know what documents they are required to maintain and produce for OSHA. A summary of those documents is attached.

PARTICULAR HAZARDS

Some of the more frequent hazards encountered in 2017 include:

Lockout Tagout (LOTO)/Machine Guarding - Employers are required to have a written LOTO procedure for each piece of equipment. In 2017, many employers were found to be lacking these procedures, they were not current as to the correct procedure or employees were never trained how to use them. Other employers did not conduct the annual periodic inspections. Regarding machine guarding, many employers failed to conduct a job hazard assessment to identify whether guarding was necessary or adequate or, worse, failure to enforce keeping guards in place. As a result, there were many fatalities and amputation type injuries.

Powered Industrial Trucks (PITS) - Employers cannot allow employees to operate PITS unless and until they have been trained, authorized and certified with supporting documentation. Employees must also be recertified every three years and retrained after an accident or near miss. Employers were cited for failure to train the PITS operators or to enforce the safe operation of the equipment. In addition, many employers allowed outside contractors or temporary employers to operate the equipment without training. PIT accidents typically result in serious injury or death.

Personal Protective Equipment (PPE) - Employers are required to conduct a hazard assessment to identify hazards which require PPE (gloves, eye protection, foot protection, etc.), to certify the assessment and certify that the PPE was provided. In addition, employers must enforce the use of PPE. Many employees sustained serious injury because PPE was never provided or required to be used.

Fall Protection - Employers are required to protect employees against the hazard of a fall. OSHA has extensive regulations requiring the use of fall protection (guardrails, safety nets or personal fall protection) when employees perform elevated work. This year saw many tragic accidents where employees fell off of roofs, mobile equipment, interior structures, truck trailers, towers and other elevated equipment.

Hazardous Substances - Employers must provide Hazard Communication training to employees working with hazardous substances and document such training. There are also requirements for labeling. The failure to provide this training has resulted in employee exposure to hazardous chemicals or other substances that may be in the worksite.

Multi-Employer Worksites - Another liability involved multi-employer worksites where there are a number of employers at the same worksite. Each employer has OSHA duties to other employer's employees at the site depending on whether the employer is one of the following:

- employer who creates the hazard
- employer who exposes the employee to the hazard
- employer who is responsible to correct the hazard
- employer who has control over the worksite or a particular hazard

Many employers are totally unaware of these liabilities and fail to take appropriate action to protect other employees, including:

- independent contractor employees
- temporary staffing employees

OSHA INFORMAL CONFERENCES

Many employers fail to adequately prepare for the OSHA informal conference after citations are issued. Unfortunately, many let the typical fifteen (15) working day period (State

Plan program time periods may vary) to attend a conference or file a written contest to the citation and it becomes a final court order. In other instances, employers do not adequately prepare for the conference to assert their factual and legal defenses and when they attend they cannot articulate the defenses. Worse yet, many attend and make “admissions” of liability which support the violation.

Many employers are unaware that every citation which is accepted creates a five year period during which any subsequent violation during that period which is “substantially similar” can result in a Repeat citation with significant penalties. In so doing, they accept citations which should have been contested for expediency and have no conception of the potential legal minefield that may be created in the next five years.

CONCLUSION

Hopefully, we all can learn from our own unfortunate experiences or those of others in 2017 to avoid repeating errors which result in accidents or regulatory liability in order to avoid these liabilities in 2018. If you have any questions about these issues, please do not hesitate to contact the undersigned. We hope you all have a safe and healthy New Year.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@sevfarth.com to be added to the address list.

Employee Rights During An OSHA Inspection

The following information is intended to provide general information regarding employee rights during an OSHA inspection. Please note that the Company is committed to the safety and health of our employees and is providing you this information because the OSHA inspector may not inform you of your rights and the Company wants you to be aware of this information so you can exercise your rights in an informed and voluntary manner.

From time to time, Company facilities may be inspected by the Occupational Safety and Health Administration (OSHA). During those inspections, the OSHA inspector may ask to speak with you about your experiences with or training regarding the Company's safety and health programs, or about certain events that have taken place at your Company location. You are entitled to certain rights and subject to certain obligations during an OSHA inspection as follows:

YOUR RIGHTS

- You have the right to speak with the OSHA inspector. You also have the right not to speak with the OSHA inspector. It is ***your decision*** whether to voluntarily speak with the inspector or not.
- You have a right to be interviewed at the Company's location and can decline to answer questions from an inspector who may contact you at home by telephone or in person. You can tell the inspector to arrange the interview at the Company's location.
- Your participation in an OSHA inspection is considered "protected activity," and the Company cannot and will not retaliate against you ***in any way*** because of your participation in an OSHA inspection.
- If you decide to speak to the OSHA inspector, it is ***your decision*** whether to speak with the inspector in private or with someone else present. You have the right to ask another partner or a member of Company Management to be present during your interview.
- You have the right to take a break or end the interview at any time for any reason. The interview is not supposed to take an undue period of time. Remember, it is ***your decision*** whether to speak voluntarily with the inspector at all.
- If you decide to speak to the OSHA inspector, you have the right to understand the questions being asked of you. If you do not understand a question, you may ask the OSHA inspector to repeat the question. The inspector is supposed to ask you for information and not to tell you that you must agree to certain information. If you have difficulty speaking or understanding English, you may request that an interpreter be provided for you. You also have a right to have another individual of your choice present to act as your interpreter.
- You have a right to decide whether to sign a statement at the end of your interview. You may decline to sign a statement if you so choose. You may sign a statement if

you so choose. If you do decide to sign the statement, you are entitled to receive a copy at the time of the interview and **do not sign it** until the inspector tells you he or she will provide you a copy at the end of the interview. If you decide to sign a statement, make sure that you read it and tell the compliance officer to correct any errors or mistakes before you sign it.

- If the inspector wants to ask you questions about information contained in a written document, such as training records, safety programs or policies, you have a right to ask to be shown the document before answering the question or you can decline to answer any questions regarding any written document.
- You have a right to decide whether to be voluntarily photographed, videotaped, or recorded during your interview. You may agree to be photographed or recorded. You may decline to be photographed, videotaped or recorded.

YOUR OBLIGATIONS

- If you decide to voluntarily speak with the OSHA inspector, you ***must*** answer his or her questions ***truthfully***.
- You can decline to answer any particular question during the interview and do not have to explain the reason for your refusal to answer.
- If you decide to voluntarily speak with the OSHA inspector, you must answer his or her questions based on ***your own personal knowledge*** and ***to the best of your recollection***. You must not speculate about any events which you did not personally observe or for which you were not actually present to observe. You also must not relate “hearsay” (i.e. gossip or rumor) which may not be truthful or accurate.

COMPLIANCE CHECKLIST

<p>1. Control of Hazardous Energy – Lockout/Tagout (LOTO)</p>	<p>29 CFR 1910.147 – requires the employer to develop procedures to protect employees who service or maintain its machines against unexpected energization or startup of equipment or release of stored energy.</p> <p>29 CFR 1910.147(c)(7) – the employer must train its “authorized” employees how perform LOTO with these procedures, as well as “affected” employees who may be exposed to the equipment.</p> <p>29 CFR 1910.147(f)(2) – requires the on-site employer and outside employer to inform each other of their respective lockout or tagout procedures.</p> <p>Document retention: The LOTO standard requires employers to certify that periodic inspections have been performed at least annually. Accordingly, employers should retain certifications for 1 year, or until a new certification is created. It is also advisable that employers retain employee LOTO training records for the duration of employment.</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No Comments</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No Comments</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No Comments</p>
<p>2. Occupational Noise Exposure</p>	<p>29 CFR 1910.95 – requires the employer to provide a hearing conservation program (education, annual audiograms, hearing protection) for employees who are exposed to noise levels equal to or exceeding an 8 hour time weighted average (TWA) of 85 decibels on the A scale. The employer must conduct a noise survey to determine those jobs which may require employees to be included in the program. Employees who suffer hearing loss at certain frequencies must be included on the OSHA 300 Log. The employer must develop a written program and administer it.</p> <p>Document retention: Employers must retain noise exposure measurement records for two years. Employers must also retain audiometric test records for the duration of the affected employee’s employment.</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No Comments</p>

3. Personal Protective Equipment (PPE)	<p>29 CFR 1910.132 – the employer must conduct an initial certified hazard assessment of the workplace to determine if hazards are present which require personal protective equipment for eyes, face, head and extremities to protect against injury. The employer must provide each employee with the necessary PPE, train the employee in the use of PPE and enforce its use. The employer must pay for the PPE with limited exceptions.</p> <p>A second certification is required to confirm that the PPE was provided, the employee received training in how to utilize it and that the employee “understood” the training.</p> <p>Document retention: Employers should retain the written certifications of a hazard assessment and employee training for the duration of employment for all employees exposed to identified hazards. It is also advisable for employers to retain employee PPE training records for the duration of employment.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments
4. Hazard Communication (Employee Right to Know)	<p>29 CFR 1910.1200 – requires the employer to develop a written hazard communication program to protect employees against any hazardous chemical which presents a physical or health hazard. The employer is required to conduct an assessment to determine which hazardous chemicals may be present, to inform employees of the presence of the hazardous chemicals, train employees on how to read a Safety Data Sheet (SDS) for each hazardous chemical.</p> <p>Employers are entitled to access to the SDS and to obtain copies.</p> <p>Document retention: Employers must retain SDSs for the duration of employment plus 30 years for all employees exposed to the chemical in question, unless there is some other record of the identity of the substance or chemical, where it was used and when it was used. The employer must also be sure it has a copy of all SDSs for all chemicals that are currently in use. It is also advisable for employers to retain employee hazard communication training records for</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments

7. Fire Extinguishers	<p>29 CFR 1910.157 – requires the employer to provide fire extinguishers and mount, locate and identify them so that they are readily accessible to employees.</p> <p>If employees are expected to use the fire extinguishers, the employer must provide training upon initial employment and at least annually thereafter. The employer must develop an educational program if it expects the employees to use the fire extinguishers. Many employers specifically prohibit employees from using the fire extinguishers to avoid this training obligation. If the employer permits the employees to use the fire extinguishers, the educational program and training should be in writing and maintained for the length of employment.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments
8. Permit-Required Confined Spaces	<p>29 CFR 1910.146 – requires the employer to identify all confined spaces within the workplace that employees or outside contractors may be required to enter and contain a hazardous atmosphere, engulfment hazard, an internal configuration that could trap or asphyxiate an entrant or other serious safety or health hazard. The employer must develop a written program and procedures for employees who enter the confined spaces. Only trained and authorized employees can enter the space.</p> <p>1910.146(c)(8) – requires the host-employer to provide certain information to other contractors who will have their employees enter the space.</p> <p>Document retention: Employers must retain each canceled entry permit for at least 1 year and review them within one year after each entry. It is also advisable to retain employee confined space training records for the duration of employment.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments
9. Bloodborne Pathogens	<p>29 CFR 1910.1030 – requires an employer to develop a written program to protect employees at the workplace who are reasonably expected to have occupational exposure to bloodborne pathogens, i.e., bloodborne diseases. The employer is required to assess all jobs to determine if there is such exposure and if so, to train</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments

	<p>employees in the hazards, provide PPE and to develop procedures for medical evaluation and treatment if an employee has actual exposure.</p> <p>Document retention: Employers must retain employee exposure records for the duration of employment plus 30 years. Training records must be retained for 3 years from the date on which the training occurred, although it is advisable to retain training records for the duration of employment.</p>	
10. Respiratory Protection	<p>29 CFR 1910.134 – requires the employer to conduct an assessment of the workplace to determine if there are harmful dusts, fumes, mists, sprays or vapors which may create a respiratory health hazard. If there are such hazards, the employer is required to develop a written respiratory protection program, to evaluate employees to determine if they are physically capable of wearing a respirator, to provide such respiratory protection, at the employer’s cost, and train employees how to wear and maintain respiratory protection. The employer must enforce use of the respiratory protection.</p> <p>Document retention: Employers must retain records of employee medical evaluations for the duration of employment plus 30 years. Employers must also retain fit test records for respirator users until the next fit test is administered.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments
11. Electrical Safety (Safety-Related Work Practices)	<p>29 CFR 1910.331-.335 – requires an employer who will permit its employees to perform work on or in the vicinity of exposed energized parts (which cannot be locked out and tagged out) to provide extensive training in the hazards of working or in the vicinity of live electrical equipment, protective clothing and insulated tools and devices. The employer must designate employees as “authorized” in order to perform such work or “unqualified” in which case such employees cannot perform such work. The employer may be required to conduct an electrical exposure hazard survey of electrical equipment under NFPA 70E in</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments

	<p>order to determine what PPE should be used, what training is necessary, and to otherwise be in compliance with OSHA safety requirements.</p> <p>Document retention: OSHA’s electrical safety standards do not have any specific record retention requirements, however it is advisable to retain employee training records under these standards for the duration of employment. If an employer conducts an electrical exposure hazard survey, the employer should retain it for as long as the hazard exists.</p>	
12. Access to Employee Exposure and Medical Records	<p>29 CFR 1910.1020 – requires employer to inform employees of their right to have access to all records maintained by the employer that reflect an employee’s exposure to any toxic substance or harmful physical agent (e.g., chemicals, dusts, vapors, noise, mold, etc.) or any medical records which the employer maintains on an employee, except for certain exceptions. Employees are entitled to have access and to obtain a copy at the employer’s expense.</p> <p>Document retention: Employers must retain employee exposure records for the duration of employment plus 30 years. If the employer maintains certain employee medical records, the employer must retain them for the duration of employment plus 30 years.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments
13. Powered Industrial Trucks	<p>29 CFR 1910.178 – requires an employer to develop a written program to train all employees who will be required and authorized to operate powered industrial trucks (including forklifts, manlifts, etc.) as to the hazards of such equipment and to certify their training after they receive classroom-type training and are actually observed operating the equipment under the physical conditions at the workplace, such as aisles, ramps, etc. The employee must be retrained and recertified every three years, at minimum, or after an accident or “near miss” which resulted from an unsafe act.</p> <p>Document retention: The powered industrial truck standard does not specify how long training certifications must be</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments

	retained after the initial certification or the certification required every three years or after a “near miss”. It is advisable that employers retain the training certifications for the duration of employment for each employee.	
14. OSHA 300 Log of Work-Related Fatalities, Injuries and Illness	<p>29 CFR 1904.0 – the OSHA 300 Log must be maintained by employers unless there is an exemption, based on the NAICS code or the size of the employer. The employer is required to record on the Log, within seven (7) calendar days, each fatality, injury or illness that is recordable under OSHA definitions. The host employer is required to enter into its Log the injuries or illnesses of outside employees at the worksite under certain conditions, for example, temporary employees who are under the direction and control of the host employer.</p> <p>The OSHA 300 Log must be maintained and certified by the employer on an annual basis. For each entry on the Log, there must be an OSHA 301 Incident Report form, or its equivalent, which can be the employer’s First Report of Injury or Illness form required by the State worker’s compensation law. An annual summary must be prepared and posted using the 300-A annual summary form or an equivalent. In order to comply with OSHA’s recordkeeping requirements, it is critical that employees are trained from their initial employment that they must immediately report any occupational injury or illness to determine if it is recordable.</p> <p>Document retention: The OSHA Log, the annual summary, and the OSHA Incident Report forms must be retained by employers for 5 years following the end of the calendar year that these records cover. The OSHA Log must be maintained on an “establishment basis” based on NAICS codes. It is possible that employers may have some “establishments” where a Log must be maintained, and others where maintaining a Log is not necessary.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments

15. General Duty Clause	<p>Section 5(a)(1) of the OSHA Act requires an employer to identify “recognized hazards likely to cause serious injury or death” to an employee, which hazards may not be regulated by a specific OSHA regulation, and to take “feasible” actions to abate or correct such hazards.</p> <p>This duty can be based upon the “recognition” of the hazard in the employer’s own, existing programs, or within the employer’s industry. Some examples of this legal obligation may be:</p> <ul style="list-style-type: none"> Ergonomics Heat illness Workplace violence Combustible dust <p>Document retention: While there are no specific standards for “recognized hazards” covered under the General Duty Clause, and thus no specific record retention requirements, it is advisable for employers to retain any training records it has developed addressing any “recognized hazards” for the duration of employment, including the written policy, training records and documents that evidence discipline for violation of the policy. Remember that certain documents related to General Duty Clause obligations may also fall under exposure/medical record-keeping requirements (see #11 above).</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments
16. Disciplinary Records	<p>There is no regulation that requires an employer to maintain written records of employee discipline for violations of the employer’s safety and health policies. If, however, the employer wants to credibly assert the “unavoidable employee misconduct” defense to avoid liability for OSHA citations, the employer is highly recommended to maintain written records of discipline indicating the nature of the violation, the date, the name of the employee who committed the violation and the name of the supervisor who imposed the discipline.</p> <p>This same documentation can be useful in the event that the employer has to defend an employment discrimination or wrongful termination action by being able to prove</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No Comments

	that the action was based on a legitimate non-discriminatory reason, that is, violation of safety and health policies.	
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