



Weekly Round Up – February 4, 2018

Insights

2.03.18

Mercifully, this has not been a week of big OSHA developments, so we focus on practical observations on safety compliance and on managing OSHA inspections.

Because safety professionals in particular, and managers in general, need to know more than their discipline, we reference employment law developments which affect safety and other business areas.

If you are reading the FP Workplace Safety Blog version of this Post and would like to see the full version, with observations from readers, and on movies, books and things to drink, you can go to howardmavity.com.

This Week's Labor, Employment Law and OSHA Legal Developments.

An always read is my FP partner Rich Meneghello's monthly summary collection of the previous month's FP articles: **[January 2018: The Top 18 Labor And Employment Law Stories.](#)**

As you revise your employment application process, note the continued trend of states and municipalities banning applicant questions about pay. While intended to promote pay equity, the move also eliminates an employer tool for ascertaining the real reasons that an applicant left previous employment or other problems with their work experience. Now, employers such as Amazon and others are voluntarily eliminating such questions. Read **[Growing Number Of Employers Are Removing Pay History Questions From Job Interviews And Applications.](#)**

Practical Observations.

Flu and Wellness – The seriousness of this year's Flu and flu-like illnesses was brought home to me this week when I ended up in the hospital with pneumonia or pneumonia-like virus. As I talked to clients this week, several of them volunteered similar experiences with recurrent attacks of "flu" or "sinus infections," rounds of medicine and then something worse. For one take, read this article [Flu symptoms similar to adenovirus: What is adenovirus?](#)

We've already pasted previous articles about responding to flu in the workplace, and the key points remain the same – employers, perhaps through their Wellness Programs, should emphasize the flu vaccine, washing hands, getting sleep, and staying home when sick. Add to those points, the need to educate employees about the seriousness and variations of this year's Flu season. Good article from [EHS Today, How to Keep the Flu from Breaking Out in Your Plant.](#)

Signing OSHA Witness Statements – the FP Workplace Safety Practice Group emphasizes forthright and professional dealings with OSHA and other government agencies, but that does not mean that employers should fail to exercise their legal rights in responding to and managing a government investigation. It's the duty of a government investigator such as an OSHA Compliance Officer, to build a file to support the elements required to make out the violations that the CO believes occurred. It is not the employer's job to help make out the elements of a violation, especially when the CO may be wrong. Section VII.A. of the OSHA Field Operations Manual (FOM) notes the purpose of Witness Statements and that signature is voluntary:

Interview statements of employees or other individuals shall be obtained to adequately document a potential violation.

Statements shall normally be in writing and the individual shall be encouraged to sign and date the statement.

The short time period in which OSHA must complete its investigation and the understaffed realities of OSHA mean that citations issued, upon further more detailed analysis, may not satisfy the elements necessary to sustain a citation before a Judge. Without exceptions, when employers contest and go through the litigation process, additional facts come out and they often help the employer.

Section VII.B. of OSHA's FOM expressly notes that statements are useful where problems may later occur:

CSHOs shall obtain written statements when:

- There is an actual or potential controversy as to any material facts concerning a violation;
- A conflict or difference among employee statements as to the facts arises;
- There is a potential willful or repeated violation; and
- In accident investigations, when attempting to determine if potential violations existed at the time of the accident.

Therefore, an employer has to ask themselves why it should encourage supervisory employees to sign a Statement prepared by the investigator. Investigators generally try to accurately set out the witness' statement but they are trying to establish a case – statements are never completely neutral. Even more importantly, witnesses often sign statements that they later realize were inaccurate or that they did not thoughtfully consider. For the same reasons, management-side attorneys often take only sparse strictly factual statements or do not get a signed statement early in an investigation.

Once the statement is in writing and signed – accurate or not – it will be used against the employer. So, while we wholeheartedly agree with an employer's desire to fully cooperate, we generally recommend against supervisory employees signing a statement. Unlike non-supervisory employees, the supervisor can bind the company. They are your agent.

Non-supervisory employees are a different matter – it's the employee's decision and an employer should not interfere in any way with an employee signing a statement. Nothing more effectively destroys trust between an employer and investigator than even an appearance of discouraging employees from cooperating in an investigation. The sensitivity of managing hourly employee interviews is one reason why employers may later regret failure to consult with counsel.

Podcasts.

Mentorship - This podcast shares a fascinating story of an immigrant's success, and the importance of his mentors. We talk mentorship but often are not purposeful in our efforts. [The Model Health Show](#) TMHS 265: [Creating Fit Bodies, Successful Mentorship and the Truth about Discipline – With Bedros Keuilian](#)

Wellness and Healthcare – One doesn't expect to learn about advances in stem cell therapy from a podcast including Mel Gibson, but [this episode](#) from the colorful Jo Rogan Experience podcast, with [Dr. Neil Riordan](#) provides a matter of fact update on efforts which may soon influence health and the burgeoning costs of taking care of an aging and less healthy workforce.