



Howard's Weekly Wrap Up – March 25 – Part I.

Insights

3.31.18

I've been crazy busy lately, so actually this belated Wrap Up would be better titled ***"Past Three or Four Week Wrap Up."*** Last Fall saw a frustrating and still unexplained spike in workplace deaths. OSHA has six months in which it has to issue citations, so the last three weeks have involved five OSHA Informal Conferences and travel to California, Pennsylvania, Florida and parts in between. Throw in a number of recent multiple fatality cases, and my writing had to take a break. So hang on for a multipart effort to catch up.

Practical Observations.

When I started these updates, I was eager to share day-to-day observations we at FP observed in our cases and from employers in the news. Occasionally I'll share observations and lessons about bad or what you may cheerfully view as 'dumb employers.' However, I generally focus on good employers because I am blessed with solid clients and know more about industry leader companies than bad players ... and it is vital to remember that good employers who focus on safety and good HR still see breakdowns on individual site and plant level. Never ... ever ... assume that your employees or supervisors will not make mistakes

- **Safety Minutes** – I've previously mentioned the value of properly utilized Safety Minutes. Many employers require foremen and supervisors to start pre-work meetings with a Safety Minute; usually a topic provided by the safety manager. More enlightened employers will ask executives to open meetings with a safety minute. Employers who impress the heck out of me, have CEOs who actually are passionate about opening every meeting with a safety minutes ... and not because their labor lawyer told them it was a good idea. I rarely reference a client by name, but this time I'll do so, Scott Anderson has humbled me by faithfully demanding a safety minute before every meeting ... and the excellent Boilermakers Local ___ assured me that "he's for real ... he does this at every meeting ... it's not just for show." Another CEO, Randy Hall, upon hearing me talk about Scott, felt vindicated for working toward the same goal. Best of all these safety minutes focus on safety lessons outside work, which of course also translate to increased safety awareness at work.

My personal action point? My client and Practice Group members had best expect me to become more faithful in using Safety Minutes.

The point is not to get you to use Safety Minutes, but to "want" to use them in order to model safety to the rest of the company. Employees and frontline supervision have an ability to sense when their

the rest of the company. Employees and frontline supervisors have an ability to sense when their leadership is serious about safety.

- **Documentation** – I know that employers are tired of attorneys harping about documentation, but employers so often train employees on safety requirements, or have reason to reasonably rely on past experience, but the employer does not document the on-the-job site-specific training or the training at past jobs or employers. Or the employer does not document how they determined that they needed respirators and the respirators used are appropriate. Similarly, no matter how detailed the form, employers wrestle with getting frontline supervisors to thoughtfully complete these daily pre-work forms, briefings, or JSAs. Forms with numerous blocks to check-offs get pencil whipped, but even if an employer requires supervisors to write daily tasks, hazards, and steps, the employer must stay on top of their efforts to ensure consistency. I could restate this message every week and it would never become redundant Practice Pointer? Periodically review construction daily JSAs or pre-work meeting forms or weekly plant safety walk-arounds. Look to see if every day or week's form looks the same. Work to move away from checklists and get the supervisors to fill in daily details.
- **Embedded Work** – We lose a great deal of sleep concerned for contractors who perform embedded work at a customer's site, such as at outages or annual shutdowns. Although the courts and the OSHRC have inadequately defined the diligence required of contractors working on a customer's site, their duties "*should be*" as follows:

(. . . it is impossible for a particular employer to anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations by others"). Gulf States, Inc., 7 O.S.H. (BNA) ¶ 2152 ALJ Nov. 30, 1979) quoting Grossman Steel & Aluminum Corp., 4 OSH (BNA) ¶ 1185 (O.S.H.R.C. May 12, 1976).

To establish constructive knowledge of the hazard. "The test is whether the Secretary established that [Jacobs] could have discovered the violative condition through the exercise of reasonable diligence." Jacobs Field Services of N. Am., Inc., & Its Successors, Respondent, 2015 O.S.H. Dec. (CCH) ¶ 33445 (2015)

The reality is that OSHA Area and Regional Offices will not engage in this nuanced an analysis. OSHA WILL TAKE THE POSITION THAT THE EXPOSING EMPLOYER MUST ASSESS AND DETERMINE THE HAZARDS AND TAKE APPROPRIATE STEPS ... PERIOD. OSHA will not consider the fact that no contractor, no matter how sophisticated, cannot have the same awareness of hazards and understanding of a complex refinery, power plant or chemical plant as the customer/owner. Accordingly, a contractor must take and document their reasonable steps taken to evaluate and confirm site employer confined space entry, LOTO, and hazard assessments. OSHA does not care that the contractor may be required to adhere to the site/customer's procedures and assessments. OSHA does not care that the contractor may be unaware of a single valve failure from 300 valves. OSHA does not care that no other industry employer has found this hazard in this setting. They will

site you as if the OSHA did not say that OSHA has the burden to prove that the employer knew of the hazard or “**should have with the exercise of reasonable diligence.**”

My Action Points? Recognize that no employer can rely on another employer to meet their safety obligations with regard to their employees. Then, document the reasons why you found the site’s assessments and required procedures to be correct. If you have doubts, push the customer a bit. More often than not, a good customer’s assessments and procedures may be correct and with their superior knowledge, the customer should know. Document your reasons and steps, and if challenged, do not be reluctant to challenge OSHA’s refusal to recognize that an employer’s obligation is NOT to be omniscient, but to exercise due diligence.

Other Legal Updates – Part I.

- Where to start ...? Let’s go by sheer volume, which means that reliably liberal **Washington State** gets the prize for three new employment laws:

<https://www.fisherphillips.com/resources-alerts-equal-pay-for-equal-work-washington-updates>
<https://www.fisherphillips.com/resources-alerts-washington-state-bans-the-box>
<https://www.fisherphillips.com/resources-alerts-washington-bars-sexual-harassment-nondisclosure-agreements>

- **From Fred Prince at Walterprincelaw.com, confirmation that Cal-OSHA may go easy on investigating State employers (unlike State OSHA Plans such as NC-OSHA who regularly hold NC state agencies to the NC-OSHA law as much as private employers ... no favoritism.):**
<http://www.sacbee.com/entertainment/living/health-fitness/article205151159.html>

UPDATE - Cal/OSHA Hotel Housekeeping Injury Standard Effective July 1, 2018

March 15, 2018 by Benjamin Ebbink

As we reported in January, after nearly six years of discussion and debate, the Cal/OSHA Standards Board (Board) approved a standard on “Hotel Housekeeping Musculoskeletal Injury Prevention.” The final regulation was recently approved by the Office of Administrative Law and will be effective July 1, 2018.

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Keep in mind that an essential point to this regulatory development is that this regulatory effort is part of a nationwide effort by UNITE-HERE and other unions to use safety as a wedge between employers and employees and to organize them ... and it works.

