



Goodbye Carrot, So Long Stick...Hello Club!

Insights

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Most would agree that workplace safety is of the utmost importance. Accordingly, the Occupational Safety and Health Act of 1970 (“OSH Act”) was enacted for the purpose of ensuring that employers provide their employees safe working environments.^[1] In enforcing the OSH Act, the Department of Labor (“DOL”), specifically the Occupational Safety and Health Administration (“OSHA”), has utilized a “Carrot and Stick”-like approach—the carrot being the use of compliance assistance programs to incentivize employer compliance and the stick being the monetary penalties for non-compliant employers. The Department of Justice (“DOJ”) and the DOL have recently combined forces in an attempt to give teeth to the OSH Act. This new approach could result in larger monetary fines and possible prison sentences for employers who violate worker safety standards. The effect, if successful, could feel more like a “club” approach rather than a carrot or stick.

The DOJ recently adopted new initiatives to strengthen its prosecution of worker safety violations. On December 17, 2015, Deputy Attorney General Sally Quillian Yates announced that the Environmental Crimes Section (“ECS”) of the Environment and Natural Resources Division and the DOL will be working in tandem to increase the frequency and effectiveness of criminal prosecutions of worker safety violations.^[2] Currently, the OSH Act provides criminal sanctions for several types of conduct impacting worker safety: (1) willfully violating a specific standard, and thus causing the death of an employee; (2) giving advance notice of OSHA inspection activity; (3) falsification of documents filed or required to be maintained under the OSH Act, and (4) assaulting a compliance officer, or otherwise resisting, opposing, intimidating, or interfering with a compliance officer in the performance of her/her duties.^[3] Each of these, with the exception of assault, is a misdemeanor punishable by a fine of no more than \$10,000 and/or imprisonment for no more than 6 months.^[4] According to the December 17, 2015 Memorandum, the new DOJ/DOL initiative not only seeks to increase the monetary penalties for OSHA violations, but will increasingly pursue criminal prosecutions against non-compliant employers. A criminal prosecution under this new initiative could result in penalties ranging from 5 to 20 years’ incarceration for a guilty party.^[5] To be clear, these criminal prosecutions could include jail time for individual executives and managers of a company.^[6]

In pursuit of these efforts, the DOL and the DOJ entered into a Memorandum of Understanding (“MOU”) on December 17, 2015. The MOU establishes the process and framework for coordination between the DOJ and DOL in implementing its plan of increased criminal prosecutions for workplace safety violations.^[7] Dep. Atty. Gen. Yates encouraged the U.S. Attorneys to consider

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utilizing Title 18 and environmental offenses (such as the Clean Air Act, Clean Water Act and the Toxic Substances Control Act), which often occur in conjunction with worker safety crimes, as a deterrence tool. “Prosecutors can make enforcement meaningful by charging other serious offenses that often occur in association with OSHA Act violations—including false statements, obstruction of justice, witness tampering, conspiracy, and environmental and endangerment crimes,” said Dep. Atty. Gen. Yates. Statutes included in this new plan are the OSH Act, the Federal Mine Safety and Health Act of 1977 (“MINE Act”) and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”). While it seems that the DOJ and DOL have a set course as to their intent to increase criminal prosecutions for worker safety violations, a new senate bill might have an effect on its enforcement.

On November 18, 2015, Senator Orrin Hatch introduced senate bill S.2298—*Mens Rea* Reform Act of 2015.^[8] (The *Mens Rea* Reform Act (S. 2298) is available at <https://www.congress.gov/114/bills/s2298/BILLS-114s2298is.pdf>). If enacted, the bill would apply a default *mens rea*, or “guilty mind,” standard to all statutes and regulations that set forth criminal liability provisions if they don’t already include such a standard.^[9] Applying the *mens rea* bill, an employer would only be convicted for violating an OSH Act regulation if they acted willfully or knew it was illegal and were deliberately breaking the law. In contrast, a willful requirement under the OSH Act refers to an employer’s heightened awareness of the law and a plain indifference to it.

Arguably, the willfulness requirements under the OSH Act and the proposed *mens rea* bill are similar. However, many regulations, including all of OSHA’s, do not incorporate *mens rea* at all.^[10] As such, if the bill were to pass it would require the DOJ to prove that the employer and/or individual supervisor acted willfully in all OSHA criminal cases involving statutes and regulations without *mens rea* provisions, seemingly resulting in a more difficult burden of proof in many cases.

What Does This Mean For Employers?

Currently, there is no change in the law as a result of the December 17, 2015 MOU; however, it is an obvious sign that the DOJ, DOL and the U.S. Attorney’s Office intend to increase their efforts to hold employers accountable for criminal violations of worker safety laws and regulations. Even if the *Mens Rea* Reform bill passes, employers still face increased criminal prosecutions under worker safety statutes already containing *mens rea* requirements. Now, more than ever, employers need to shore up their safety programs—develop safety programs if needed and strengthen safety programs already in existence. Perform in-house audits of OSH Act policies and training for OSH Act compliance. Not only can worker safety compliance keep employees safe, which we all want, but it might keep an employer out of jail.

Be proactive!! The “club” is in hand.

^[1] Occupational Safety and Health Act (“OSH Act”), as amended Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §651 et. Seq. (1970)).

[2] Dep. Atty. Gen. Sally Quillian Yates Memorandum for all United States Attorneys dated December 17, 2015.

[3] *Id.* See also, 29 U.S.C. § 666(e)-(g) and Fact Sheet No. OSHA 91-36, “New OSHA Civil Penalties Policy”.

[4] The assault of a compliance officer is a criminal offense subject to a fine of not more than \$5000.00 and imprisonment for not more than 3 years.

[5] Dep. Atty. Gen. Sally Quillian Yates Memorandum for all United States Attorneys dated December 17, 2015.

[6] Dep. Atty. Gen. Sally Quillian Yates Memorandum (“Yates Memorandum”) dated September 9, 2015.

[7] Memorandum of Understanding Between the U.S. Departments of Labor and Justice on Criminal Prosecutions of Worker Safety Laws dated December 17, 2015.

[8] Mens Rea Reform Act of 2015, S. 2298, 114th Cong. (2015).

[9] *Id.*

[10] Stephen Lee, *Mens Rea Bill Could Impede OSHA Enforcement*, BNA OCCUPATIONAL SAFETY AND HEALTH DAILY (February 4, 2016).

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