



## Judge Says OSHA Can Seek Hazard Abatement at Worksites it Never Inspected

Insights

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We saw more OSHA changes in 2015 than in any time in the last 30 odd years. Nevertheless, an OSHA Administrative Judge issued a decision a few weeks ago that could eclipse OSHA's 2015 pronouncements on temporary employees, ergonomics and inspection weighing process. The judge ruled that OSHA can seek abatement measures beyond the site inspected. In other words, OSHA can attempt to require an employer to abate hazards allegedly present at worksites it never inspected.

Many of our readers know that OSHA has increasingly sought add-on commitments beyond the requirements of the OSHAct in exchange for settling citations. This trend informally began with more significant death and catastrophic cases and became official policy in responding to employers placed on OSHA's Enhanced Enforcement Program, later renamed and strengthened as the Severe Violator Enforcement Program (SVEP). Now, employers often offer additional useful commitments to encourage OSHA movement on citations issued. However, it is increasingly becoming an OSHA demand for modest movement on more routine citations. Some of these commitments have traditionally only been associated with the complex and sometimes legally hazardous Corporate Settlement Agreements., also known as "Enterprise wide Agreements."

The stunning nature of the Judge's decision is that the Judge is saying that OSHA can demand these broad corporate wide add-ons through litigation instead of through the process of bargaining and settlement negotiations following citations. This analysis seems unsupported by the OSHAct.

### ***Secretary of Labor v. Central Transport, LLC***

In her December 7 ruling in *Secretary of Labor v. Central Transport, LLC*, an administrative law judge denied the Respondent's Motion to Strike OSHA's claim based on its request to seek "enterprise-wide" abatement. The ALJ found that OSHA may proceed with its request to require an employer to abate hazards existing, "upon information and belief," at worksites other than the location where the inspection occurred. The Judge may yet be overturned by the full Occupational Safety and Health Review Commission (OSHRC) (unlikely) or in an eventual appeal to the pertinent Circuit Court, but the ALJ's decision nonetheless is a stunning expansion of OSHA's powers to exceed the demands of the OSHAct or OSHA Standards. Many of the add-ons agreed to in settlements are solid commonsense strategies to improve safety, but that fact does not excuse rewriting the OSHAct.

The case at issue arose after OSHA conducted a single inspection at the Respondent's Massachusetts facility. OSHA cited the Respondent for, among other items, violation of a standard governing the safe operation of powered industrial trucks. After the citations were contested, OSHA sought abatement of the industrial truck hazard at not only the Massachusetts location, but the other 170 shipping terminals operated by the Respondent in the U.S. This is the sort of situation that usually arises in the context of a corporate wide settlement arising after multiple OSHA inspections and citations for the same items.

The Respondent argued that in seeking abatement of alleged hazards at worksites it never conducted, OSHA violated, among other things, notions of due process. Central Transport noted its fear that allowing OSHA to move forward in its case would establish precedent for allowing OSHA to require enterprise-wide abatement after every inspection.

The ALJ disagreed, citing the “*other appropriate relief*” clause of Section 10(c) of the Act as a possible basis for the relief sought. In its opinion, [found here](#), the court downplayed the precedential ramifications of its holding, citing previous cases identified by the Secretary where the OSHRC found that “there is no language in the [OSH] Act dictating that the only way in which an abatement requirement can be imposed is through a citation,” and held that OSHA could move forward with its request for enterprise-wide abatement.

### **Enterprise-Wide Agreements**

Twenty (20) enterprise-wide agreements have been reached by Fed-OSHA in the last 5 years. Only two other enterprise wide agreements were publicly recorded from 1970 to 2010.

These agreements, copies of which can be found on OSHA's website, generally require employers to perform company-wide abatement of hazardous conditions. Instead of correcting the alleged hazard only at the location where the inspection at issue took place, the employer must rectify this issue at multiple locations. This is the same issue seen in *Central Transport*.

Under these agreements Fed-OSHA can seek, among other things, company-wide abatement of employers' facilities, even if some are located in state-plan states.

### **What can employers learn from this decision?**

1. **Communicate safety concerns amongst all company locations.** Make sure your locations talk to each other in order to ensure that every location is aware of all citations lodged against the company. A copy of all citations and settlement agreements should be shared with management and safety personnel at all locations.
2. **As we often write, determine your most common compliance challenges or the routine violations of your industry**, such as Powered industrial trucks, Guarding, Lock Out, blocked exits and extinguishers, etc., and put in policies to catch those violations before they arise to citations. Devise inspection processes.

3. **Update your training, as we expect this trend to continue.** In light of this decision, and OSHA's recent preference for enterprise-wide settlement agreements, we expect OSHA to continue to seek company-wide hazard abatement. Confirm that your supervisors are providing all required training to your employee, and document this activity. Especially retrain location supervisors to handle changing OSHA inspections.
4. **Review your 300 logs, and look for trends.** If you have 1 or 100 locations, review your 300 logs to look for trends in reported injuries and illnesses. If there is a particular machine, or activity, that is leading to injuries, now is the time to rectify it. Such a pattern will be the focus of OSHA, especially if it seeks company-wide abatement.
5. **Attend industry-specific conferences.** Make sure to stay up to speed with issues, such as illness and injury rates, occurring in your industry. Attending conferences where best practices are discussed is a great way to do this. This knowledge will help you prepare for a broad and thorough review of your workplace safety programs.

### ***Related People***

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