



## Increased Criminal Prosecution of Employers – Part Two – Should You Be Concerned?

Insights

9.23.15

Note: This series was prompted by the DOJ's September 9 "Yates Memo" focusing on increased executive prosecutions and renewed interest by OSHA in criminal actions.

We don't see many employee or consumer safety criminal prosecutions, but when we do see one, people of all political persuasions tend to agree with bringing down the hammer. Anyone disagree with yesterday's announcement of groundbreaking 28 year sentence for the peanut company CEO whose actions caused nine deaths and numerous cases of salmonella. Read this description from the [local paper](#):

*A federal jury convicted Parnell, 61, of knowingly shipping contaminated peanut butter and of faking results of lab tests intended to screen for salmonella. Judge W. Louis Sands estimated Parnell faced up to 803 years in prison for his crimes, but a punishment that severe would have been "inappropriate." He didn't elaborate.*

*"These acts were driven simply by the desire to profit and to protect profits notwithstanding the known risks" from salmonella, the judge said. "This is commonly and accurately referred to as greed."*

*Federal investigators found a leaky roof, roaches and evidence of rodents at the plant, all ingredients for brewing salmonella. They also uncovered emails and records showing food confirmed by lab tests to contain salmonella was shipped to customers anyway. Other batches were never tested at all, but got shipped with fake lab records saying salmonella screenings were negative.*

*Emails prosecutors presented at trial showed that Parnell once directed employees to "turn them loose" after samples of peanuts tested positive for salmonella and then were cleared in another test. Several months before the outbreak, when a final lab test found salmonella, Parnell expressed concern to a Georgia plant manager, writing in an Oct. 6, 2008, email that the delay "is costing us huge \$\$\$\$\$."*

This week we're stunned at the allegations of Volkswagen's institutional fraud. In the safety world, we're still talking about the criminal settlement in the Bumble Bee Tuna fatality and the criminal sentences arising from the fatality at the Midnight Ride biopic filming. There have been demands for more white-collar prosecution for years, and despite the periodic corporate handwringing, we've seen minimal change. Not even after the financial meltdown. My concern is that we may be

witnessing an environment where such prosecutions will finally increase. Have we reached the proverbial critical mass? I'm not sure.

We've seen America's antiestablishment feelings played out in politics with the inexplicable successes of Donald Trump and Bernie Sanders. In this environment, it's possible that demands for increased criminal prosecutions may gain traction. Even fiscal conservatives are angry about a lack of criminal prosecutions following the Great Recession financial meltdown. Other industries may be the recipient of the public's desire to see someone somewhere held responsible for acts that go beyond mere corporate greed, stupidity and bad conduct.

### **Not Much Carrot these Days but Plenty of Stick**

I've assisted management with over 425 workplace fatality cases, countless union drives and every imaginable investigation, and as a result, I spend a great deal of time working with management to prevent problems. So, on one level, I don't mind criminal prosecutions being used as a further motivator to create a sense of urgency to guarantee a safe workplace and abiding by the law. Both the carrot and the stick are needed. However, most corporate misbehavior does not warrant criminal action. One seldom encounters corporate leadership that just doesn't care. Simple negligence or dropping the ball must not be the basis for depriving someone of their liberty. On a populist level one may applaud CEOs being "held accountable," but we must adhere to a dispassionate analysis of what conduct warrants imprisonment. I worry about public anger driving prosecutorial decisions. The various incarnations of the Protecting American Workers Act have gone too far in encouraging criminal actions but such a bill is unlikely to see daylight. So the question is whether the government will more aggressively and "creatively" start using existing tools.

We may see an increase in corporate prosecutions, incl

uding by state AGs, DAs and State's Attorneys. My concern warrants some scrutiny of processes and a few hard decisions.

### **Additional Concerns Raised by the "Yates Memo"**

I promised more detail on the DOJ's new "[Yates Memo](#)" in [my last post](#), so I'll close with a few:

- The DOJ Memo reduces the occasions and benefits of corporate cooperation with the DOJ.
- Experts speculate that the DOJ Memo may require corporations to "give up executives." Note the Memo excerpt below:

***"Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts related to the misconduct."***

- To be eligible for **any** corporate credit, corporations must provide the department with all relevant facts about individuals involved in corporate misconduct.
- Both criminal and civil corporate investigations will focus on individuals from the inception of the investigation.
- Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
- Absent **extraordinary** circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
- Corporate cases should not be resolved without a clear plan to resolve related individual cases prior to expiration of the statute of limitations and declinations regarding individuals in such cases must be memorialized.
- Civil attorneys should consistently focus on individuals along with companies, evaluating whether to bring suit against an individual based upon considerations beyond that individual's ability to pay.

(The last six points are from [National Law Review's September 12 article](#). I recommend this quick read). [Another interesting perspective is found at LINK](#). Also, text of "[Yates Memo](#)."

### ***Related People***



**Howard A. Mavity**  
Partner  
404.240.4204  
Email