



Is OSHA Going to Put You in Jail?

Insights

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The answer to my admittedly provocative question is “probably not,” but recent developments demand that employers reconsider criminal exposure under labor laws, including the OSHAct.

My partner and fellow OSHA nerd, Ed Foulke and I were struck by the Region IV OSHA Administrator’s statement this week at the Georgia Safety, Health and Environmental Conference that he was the first OSHA Regional Administrator to have met with all of the US Attorneys in the states of his Region to encourage increased criminal prosecution related to OSHA violations and fatalities. We weren’t surprised that he was the first Regional Administrator to have satisfied D.C.’s orders to contact all US Attorneys. He’s a solid guy. But we were startled a bit when he said that he would also be contacting State Attorney Generals.

Criminal provisions under the OSHAct are weak and most Federal prosecutions involve employers who lied to OSHA or fabricated evidence, and they received their just deserves. However, State and local prosecutors have a much wider array of tools to use to pursue criminal actions against employers, and after the highly publicized Bumble Bee Tuna criminal indictment ([DA's News Release](#)), may be interested in using a few of these tools.

These events do not alone raise great concern, but add to the equation the September 10, 2015 [Justice Department Memo](#) committing to go after individual executives and not just companies, and the concern suddenly becomes more immediate.

Part of a Wider Effort

A disparate mix of groups lately have begun to get traction on their demands that somebody pursue criminal actions against employers involved in workplace fatalities. The Democrats have been unsuccessful for 20 years in efforts to amend the OSHAct to include more severe criminal sanctions. Having failed, they are now looking for ways employers may be prosecuted under other Federal and State laws. We don’t expect these efforts to immediately generate hordes of cases, but we would not write them off as merely a public relations effort. The Administration and many of its allies really do want to put employers in jail.

Primer on Fed-OSHA Criminal Powers

We'll quote a few excerpts below from the US Attorneys Handbook because these USAs, not OSHA, ultimately make prosecutorial decisions.

2012. OSHA -- Willful Violation of A Safety Standard Which Causes Death To An Employee

Title 29 U.S.C. § 666(e) provides criminal penalties for any employer who willfully violates a safety standard prescribed pursuant to the Occupational Safety and Health Act, where that violation causes the death of any employee. Four elements must be proved in order to establish a criminal violation of 29 U.S.C. § 666(e). The government must prove that: (1) the defendant is an employer engaged in a business affecting commerce; (2) the employer violated a "standard, rule or order" promulgated pursuant to 29 U.S.C. § 665, or any regulation prescribed under the Act; (3) the violation was willful, and (4) the violation caused the death of an employee.

A 2003 [PBS Frontline](#) series sums up criticisms of OSHA criminal prosecution efforts:

Since the creation of the federal Occupational Safety and Health Administration (OSHA) 32 years ago, there have been more than 200,000 workplace-related deaths. However, OSHA has referred only 151 cases to the Justice Department for criminal prosecution -- and the maximum penalty companies [can] face for a "willful violation" of OSHA laws is a misdemeanor. Federal prosecutors have declined to pursue two-thirds of these cases, and only eight of them have resulted in prison sentences for company officials. Here's a look at those eight cases.

Obtaining a criminal conviction is and **should be** difficult. Unlike in OSHA citations, a US Attorney must establish *beyond a reasonable doubt* that:

1. An OSHA Standard (not the General Duty Clause) was violated;
2. The violation was committed by the **employer**; (One complaint is that only in extremely rare circumstances have courts found that individuals exerted so much control over a corporate entity that the individual would be considered to be "the employer" for purposes of an OSH Act criminal charge)
3. The violation of the Standard was the direct cause of an employee's death; (Prosecutors must **prove beyond a reasonable doubt** that the conduct underlying the OSHA violation was both the "cause in fact" (i.e., the employer's conduct was the "but-for cause" of the accident) and the "legal cause" (the harm was a foreseeable and natural result of the conduct) of the injury.); and
4. The violation was committed willfully by the employer. (A "Willful" classification will not alone establish the criminal case.)

We'll talk more about the new DOJ Memo and its much wider implications for employers in our next post. The memo and other recent actions require some hard decisions on the part of In House Counsel, Compliance Managers and HR. However, the DOJ's position will also make it easier to attract the attention of harried executives. To horribly misquote the magnificent Samuel Johnson, "there is nothing like the prospect of going to the big house to focus an executive's mind."

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“Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.” Samuel Johnson, *The Life of Samuel Johnson LL.D. Vol 3*

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