

# Crucial Takeaways from AGC's National Safety Committee Meeting Last Week in Pittsburgh

Insights

7.15.15

First, hats off to our hosts, Master Builders and Constructors Association of Western Pennsylvania, who took the attendees to a Pirates-Padres game and better introduced us to the vibrant city of Pittsburgh. The content of the last two Committee meetings has also been outstanding. I'll try to later post more information.



## A. OSHA's New Construction Confined Space Entry Standard

***Jim Goss, the Government Affairs Committee, and a Pane of contractors discussed the new Standard reminded attendees of several points.***

1. Contractors may underestimate the impact of this new standard.
1. The definition of a confined space and a "permit" required confined space is broad and may apply even when a commonsense analysis clearly suggests that no hazard is present.
2. OSHA appears poised to apply this broad definition more broadly than in the General Industry setting.
3. Ensuring a proper rescue team is already difficult for General Industry employers and will be even more difficult for construction employers.
4. OSHA's Construction Confined Space Entry page has good resources.
2. OSHA has established a **Temporary Enforcement Position**; however, these assurances leave contractors concerned.

This memorandum provides guidance on the enforcement of the Confined Spaces in Construction standard published on May 4, 2015. The new standard goes into effect on August 3, 2015. Requests for an extension of the effective date have indicated a need for additional time for training and the acquisition of equipment necessary to comply with the new standard. OSHA will not delay the effective date, but instead will postpone full enforcement of the new standard for 60 days from the effective date of August 3, 2015 to October 2, 2015. During this 60-day period, OSHA will not issue citations to an employer *making good faith efforts to comply* with the new standard, as long as the employer is in compliance with either the training requirements of the new standard, found at 29 CFR 1926.1207, or the training requirements found at former 29 CFR 1926.21(b)(6)(i), which is provided:

All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

Employers who fail to train their employees consistent with either 29 CFR 1926.1207 or 1926.21(b)(6)(i) would properly be cited for violation of 1926.1207(a). Factors OSHA will consider when evaluating whether an employer is engaged in good faith efforts to comply with the new standard include:

- If the employer has not trained its employees as required under the new standard, whether the employer has scheduled such training,
- If the employer does not have the equipment required for compliance with the new standard, including personal protective equipment, whether the employer has ordered or otherwise arranged to obtain such equipment required for compliance and is taking alternative measures to protect employees from confined space hazards, and
- Whether the employer has engaged in any additional efforts to educate workers about confined space hazards and protect workers from those hazards.

## **B. The “Fair Pay and Safe Workplaces” Executive Order 13673**

1. This Executive Order, sometimes referred to as the “Blacklisting Executive Order,” could be a sleeper and presents an opportunity for an aggressive US DOL to create problems for contractors for a host of safety and labor legal violations. The DOL is creating an entire new group of bureaucrats to determine whether alleged violations warrant action, rather than relying on OSHA and other existing DOL professionals to make an evaluation. This new group of US DOL reviewers will apply a number of undefined terms, which are not otherwise defined in the FLSA, OSHAct or NLRA, and can rely on violations not yet litigated or appealed.

2. My friend and partner, Tom Rebel, wrote a thoughtful analysis of the Executive Order [at LINK](#).

The three contracting agencies issued a proposed rule amending the Federal Acquisition Regulations (FAR) intending to ensure federal agencies contract with only those **contractors that they find to be “responsible sources,”** i.e. those with a satisfactory record of integrity and business ethics.

Under the proposed rule, affected contractors and subcontractors will be required to:

1. disclose labor law violations within the past three years;
2. notify workers performing under the contract how their pay is being calculated each pay period;
3. notify independent contractors that they are being treated as such; and
4. refrain from entering into certain pre-dispute arbitration agreements with employees or independent contractors.

The document also outlines how contracting officers, in consultation with “agency labor compliance advisors” will determine whether a contractor is a “responsible source.” If not, the proposal provides rules on how they can become one (e.g., requiring certain remedial measures, including a compliance agreement) or whether the contractor will instead be referred for suspension and debarment.

- Forced Public Disclosure of Violations
- Federal contractors will be required to disclose labor law violations which have occurred within the past three years.

#### WE ALSO DISCUSSED THE PROPOSED DISRUPTIVE CHANGES TO THE WAGE-HOUR SALARY TEST FOR OVERTIME EXEMPTION.

### **C. Much of the Program focused on what makes a Successful Construction Safety Professional and how to get there.**

I spoke on “**What Safety Professionals Must Know about HR, Employment Law and How the Legal Process Works,**” and discussed a number of concepts:

1. Successful Safety Professionals must possess a strong understanding of HR concerns, employment law and an understanding of the legal and administrative processes which affect them. We discussed a number of points, including the following ones.
2. OSHA inspections are only the appetizer when serious injuries and catastrophes occur, and one must anticipate the civil and administrative actions which may later flow from an injury, fatality or catastrophic event. A safety professional can never myopically focus on only the event itself.
3. Everything is interrelated and the US DOL, unions and plaintiff lawyers are considering every possible way to use an event to hold a contractor liable or to use the event to pressure or embarrass the employer.

4. Safety Professionals must recognize and prioritize the diverse roles of the construction safety professional. It's not easy representing the company while being a successful advocate for employees.
5. Like lawyers, safety professionals must learn to "issue spot." You don't have to have all of the answers, but you do have to spot the potential problems. There is no shame in not having all of the answers, but one will never succeed if they cannot recognize the issues and also "what they don't know."
6. Understand that every claim is made up of elements that the government or a plaintiff lawyer must prove. As an example, OSHA must prove that there is a hazard, employees were exposed, a standard applies, and the employer knew of or should have known of the violation with the exercise of due diligence.
7. Many legal problems walk into the workplace on two legs. Contractors create the atmosphere necessary for problems by hiring (or rehiring) poor employees, and by not dealing with them in a timely fashion. Discrimination claims are driven more by the perceptions of the claimants than the facts.
8. Safety professionals must know the Americans with Disabilities Act (ADA) and understand the role of the necessary individualized interactive process before concluding that the employee cannot perform the essential functions of the job or whether the person constitutes a direct threat to safety. No area generated more questions than the application of the ADA.

#### **D. The future of Construction Safety and Health Professionals.**

1. The final day of the conference concluded with a Panel discussion led by Rick Reubelt, Committee Chair, on What Makes a Successful Safety and Health Professional," were:

- Rick Reubelt, Chair, AGC National Safety Committee, Haselden Construction, Inc.
- Carl Heinlein, CSP, ARM, CRIS, Sr. Safety Consultant, ACIG
- Mike Fredebeil, CSP, National Director, Construction Safety, Willis
- Howard A Mavity, Fisher Phillips

2. The entire group participated. The following items represent some of the goals articulated in discussions.

1. The group will continue to take steps to elevate the role of Construction Safety Professionals in the Company, including through National and Chapter programs.
2. Younger people are increasingly viewing being a safety professional as equally desirable to other management roles and we should work to support that trend.
3. The National Safety Committee, perhaps through the Professional Development subcommittee, will develop opportunities for newer professionals in the Committee.

4. We will continue to work toward involving more Association members and to seek more female and minority participation.
  5. To promote more companies to act as Hunt (now AECOM), has done over the years by bringing interns to meetings along with its large contingent of regional safety professionals.
  6. Continuing cooperative efforts with schools who have a safety major, and invite area school construction safety students to meetings, such as our January meeting in Phoenix.
  7. Encourage safety professionals to get MBAs, become wizards with BIM and Lean concepts, and become a part of the management process.
  8. Help with soft skills ranging from HR knowledge to communications and public speaking.
3. The Panelists and committee members made many observations **about “What Makes a Successful Construction Safety and Health Professional.”** I’ll blog about the suggestions in another post, but I’ll close with Rick Reubelt’s succinct statement about why he works well with upper management and the craftspeople: *“I’m a builder.”*



*I am committed to Construction safety and Fisher Phillips has supported my involvement in the AGC for many years attending National Safety Committee meetings for 15+ years, presenting at numerous Chapters and to the national group, and to serving as one of the instructors for AGC’s fine Advanced Safety Management Training Course (ASMTTC). So I was genuinely pleased that after almost 30 years with the AGC, the National Safety Committee overlooked my lawyerness and voted me an “Honorary Construction Safety and Health Professional.” This recognition means more to me than the legal awards I have received because this is a great group of friends and colleagues who do something that matters. Thanks!*

Howard

## ***Related People***





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