

Cutting Edge Construction Legal Issues

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Legislative Overview

- Democratic leadership means more oversight for OSHA, MSHA
- “OSHA Reform” focuses on criminal penalties and whistleblower protection enhancement
- Congress is forcing regulatory agendas
 - Mine Safety (RELs to PELs could impact OSHA)
 - Employer-paid PPE
 - Diacetyl (“Popcorn Lung”)
 - Ergonomics (health care)
 - Process Safety Management/Combustible Dust
 - WILL CRANE SAFETY BE NEXT???

Congressional Wish List

- Immigrant safety and health
- Asbestos ban
- Permissible Exposure Limit Update
- Protection of state/local public sector workers
- Enhanced whistleblower protection
- Higher criminal penalties
- More emphasis on agency enforcement, in lieu of compliance assistance

Protecting America's Workers Act S. 1244 and HR 2049

- Extends OSHA coverage to public sector EEs
- Makes felony charges available for an employer's repeated and willful violations of OSHA that result in a worker's death (10 years) or serious injury (5 years).
 - Adds \$250,000 criminal penalty for first offense.
- Increases OSHA civil penalties to \$100,000 and sets a minimum statutory penalty of \$50,000 (and maximum of \$250,000) per citation for a worker's death caused by a willful violation.
- Serious violations resulting in death have minimum of \$20k and maximum of \$50k
- Lesser violations raised from \$7k to \$10k

Protecting America's Workers Act

- Updates Whistleblower Protection to incorporate new administrative procedures
- Mandates DOL to investigate all cases of death or serious incidents of injury.
- Gives workers and their families the right to meet with DOL investigators.
- Requires employers to inform workers of their OSHA rights.

Ban Asbestos in America Act

- S. 742: Ban Asbestos in America – passed Senate and awaiting House action.
- Would ban asbestos containing products (in House bill, no *de minimis* exception),
- Requires investment in research and treatment, and
- Includes a public awareness campaign to protect workers and address take-home contamination issues affecting their families.
 - The legislation directs NIOSH to study and recommend whether to include non-asbestiform minerals as well as “biodegradable fibers.”
 - MAJOR impact on construction materials!

OSHA Issues

- Construction directorate lost key leaders
- Foulke in trouble, may leave early
- Completed rule on Employer-Paid PPE (no real relief for construction) – enforcement begins on 5/15/08
- Rulemaking agenda affecting construction:
 - Completion of cranes/derricks final rule (OMB review 10/07)
 - Confined space in construction (proposed rule published, next step will be public hearings)
 - Electric power transmission and protective equipment (final rule slated for 4/08)
 - Crystalline silica?

Enforcement Activity

- In FY 2007, OSHA conducted 39,324 total inspections, a 4.3 percent increase over its stated goal of 37,700.
- Total violations of OSHA's standards and regulations were 88,846, a 6 percent increase from Fiscal Year (FY) 2006.
- In FY2007, OSHA identified 719 Enhanced Enforcement Program (EEP) cases, a record high.
 - If an inspection is classified as an EEP case, then it may receive follow-up inspections, inspections of other workplaces of that employer, and more stringent settlement provisions.
- The agency cited 67,176 serious violations, a 9 percent increase from the previous year and a more than 12 percent increase over the past four years.
- The number of cited repeat violations also rose from 2,551 in FY 2006 to 2,714 in FY 2007.
- Targeted special emphasis programs include focus on
 - Overhead Power Lines
 - Bridge and Tunnel Construction
 - Residential Construction

Contractor Legal Issues

- *Summit Construction* – decision limited in scope to construction, holds only “creating” or “exposing” employer can be cited (where hazard impacts “his employees” per 29 CFR 1910.12(a))
 - OSHA has appealed to US Court of Appeals, 8th Circuit – decision pending
 - Not binding on state OSHAs (e.g., MOSH, VOSH)
- Contrary holding in *Twentymile Coal* (MSHA case, US Court of Appeals, DC Circuit 7/06) – said Secretary of Labor has unreviewable discretion to cite the prime employer, contractor or both!

Media Issues

- All statements “on the record” – can be obtained by OSHA for prosecution use (ditto state attorneys)
- No comment not good approach in “fat/cat” case
- OSHA monitors media, can initiate investigation even where outside “reportable” criteria
- Video footage used for enforcement documentation (Three Rivers Stadium case)
- Access/safety issues (Crandall Canyon)
- Planning critical – team approach needed, as well as advice of counsel
 - Consider using outside experts/counsel as spokesperson

Questions?

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