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**OVERVIEW OF CIVIL AND CRIMINAL  
LIABILITY PRINCIPLES RESULTING FROM  
WORKPLACE INCIDENTS**

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## **OVERVIEW OF CIVIL AND CRIMINAL LIABILITY PRINCIPLES RESULTING FROM WORKPLACE INCIDENTS**

### **I. Introduction**

The presentation will review the general principles of civil and criminal liability for individuals and corporations under selected federal statutes as well as elements of substantive violations, the penalty structures for individuals and corporations, including criminal penalties for individuals, and the differences between civil and criminal violations.

### **II. General Principles of Federal Civil Liability**

Workplace incidents can trigger the applicability of a wide array of federal and state statutes. As a result, corporations and individuals may be held civilly liable for workplace incidents. The scope of liability is determined by the facts and circumstances that surround each such incident. For example, a major incident involving a fatality at a petrochemical company may generate multiple inspections from various governmental agencies: Occupational Safety & Health Administration (OSHA); Environmental Protection Agency (EPA); Chemical Safety Board (CSB); Fire Marshall; Police Department, etc. As a result, the company and/or its officers, directors, and managers may face several tiers of litigation such as: workers' compensation; OSHA, EPA, and third party tort actions (personal injury). This presentation will touch on a few of the key issues under federal law.

#### **A. Liability Under OSHA**

Under Section 17 of the Occupational Safety & Health Act (the Act), OSHA is empowered to propose civil monetary penalties against "employers" who violate the Act. Generally, an employer may face allegations that it has violated a specific standard or the general duty clause of the OSH Act. To prove a violation of a specific standard, OSHA must prove the following: 1) the cited standard applies; 2) a failure to comply with it; 3) employee exposure to a

violative condition; and 4) the employer knew, or with the exercise of reasonable diligence, should have known of the violative condition. In the absence of a specific OSHA standard, employers may be held liable for violations of OSHA's general duty clause. The general duty clause, in part, states that: "[e]ach employer -- shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" In order to prove a violation of the general duty clause, OSHA must prove the following: 1) the employer's employees were exposed to a hazard; 2) the hazard is "recognized" either by the employer or the employer's industry; 3) the hazard is causing or is likely to cause death or serious physical harm; and 4) the hazard is capable of feasible abatement.

Depending on the circumstances, the employer may have many defenses available. Some of the more common defenses are: lack of knowledge; inapplicability of the cited standard; lack of employee exposure to a violative condition; and unpreventable employee misconduct.

OSHA proposes the penalty for each alleged violation and the penalty varies with the classification of the violation. OSHA has six classifications. They are de minimus, other than serious, serious, repeat, willful and egregious. A de minimus violation has no direct or immediate relationship to safety and health. De minimus violations are technical violations that have no penalties nor abatement obligations. An other than serious violation is cited "...where the most serious injury or illness that would be likely to result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health." FIRM at III6. A serious violation involves a substantial probability that death or serious physical harm could result from a workplace condition. OSHA has the discretion to consider a violation to be a

repeat violation when, at the time of the alleged repeat violation, there is an Occupational Safety and Health Review Commission final order against the same employer for a substantially similar condition. A violation is willful if the employer intentionally violates the requirements of the OSH Act, (or its standards), or acts with plain indifference to employee safety. For allegedly “outrageous situations,” OSHA may use its egregious policy and issue willful citations on an instance by instance basis. This allows OSHA to consider each instance of non-compliance as a separate willful violation and, as a result, significantly increases the proposed penalty.

The penalties vary with each of the six classifications. The range of penalties for employers is as follows:

De minimis notice	\$0
Other than serious	\$0-\$7,000
Serious	\$1 - \$7,000
Repeated	\$0 - \$70,000
Willful	\$5,000 - \$70,000
Egregious	\$5,000 - \$70,000 per instance

Employees as employees are not fined under the civil provisions of the OSH Act.

### **B. Civil Liability Under Tort**

Torts are civil wrongs for which a remedy may be obtained, typically in the form of monetary damages. There are many different kinds of torts (e.g. negligence, strict liability, intentional, etc.). State workers’ compensation laws reduce the number of torts that arise in the workplace due to the exclusivity bar which prohibits employees from suing their own employer for workplace injuries. However, torts action may result in civil liability for employers for

workplace incidents that affect individuals who are not subject to the exclusivity bar in the relevant workers' compensation law or that take place in states that have enhancement provisions in their workers' compensation act (e.g. Texas permits a jury trial for punitive damages for certain occupational fatalities). In order to prevail in the typical negligence tort, the plaintiff must prove the following; 1) the employer owed a duty (defined by the standard of care); 2) the employer breached the standard of care (e.g. OSHA standards may define the standard of care); 3) the breach proximately caused the claimed injury; and 4) that there was, in fact, an injury. One of the most important elements of such a negligence action is the standard of care. Often times, when injuries arise from workplace incidents, the standard of care is defined, in part, by an OSHA standard.

In the context of a tort suit, damages are related to the legal interests that are being protected. Tort law typically recognizes three distinct legal interests: 1) protection from physical harm; 2) protection from emotional harm; and 3) protection from economic harm. Damages against tortfeasors (the entity or entities committing the wrongful act) are usually in the form of monetary penalties. If a person has been injured by a defendant, it is proper for the defendant to compensate that person in a manner commensurate with the injury. For example, an individual physically and/or emotionally injured can receive monetary damages to compensate for: pain and suffering; medical costs; and loss of income (past and present). The penalty amounts for tort suits varies greatly and depends on the injuries suffered.

While employees as employees are not fined under the civil provisions of the OSH Act, they can be subject to monetary damages for the torts that they commit while in the workplace. For example, an employee who operates a crane negligently and injures an independent contractor may subject himself to individual tort liability as well as his employer. It is worth

noting, however, that in many states, workers' compensation laws prohibit lawsuits for occupational injuries caused by a co-worker.

### **III. General Principles of Federal Criminal Liability**

#### **A. Corporations**

In general, a corporation may be found criminally liable for the acts or omissions of its employees or agents providing: those acts or omissions were within the actual, apparent or inherent authority of the agent; and were performed with some intent to benefit the corporation. Actual authority is the authority expressly given to an agent or employee. Apparent authority is the authority which outsiders would normally assume the agent to have, judging from his or her position in the corporation and the circumstances surrounding his or her past conduct. Inherent authority is the authority implied or inferred from the words used, from customs and/or from the relations of the parties. "Intent to benefit" focuses on the employee's state of mind at the time the wrongful conduct was performed - i.e. did the employee intend to benefit the corporation? The corporation does not have to actually benefit or be the primary beneficiary of the employee's conduct. All that is required is that the employee, acting within the scope of his authority, have some intent to benefit the corporation.

A corporation may be found criminally liable based on the collective knowledge of its agents, even if no individual agent had the requisite knowledge to commit the offense. The knowledge obtained by the corporate employees acting within the scope of their employment is imputed to the corporation. All of the knowledge obtained by all of the corporate employees acting within the scope of their employment may be imputed to the corporation.

#### **B. Officers, Directors, and Managers**

A corporate officer who participates in unlawful conduct as a principal, aider and abettor, or as an accessory after the fact may be criminally liable. A corporate officer, director or manager may be liable for criminal actions taken at his or her direction or with his or her permission.

### **C. Common Federal Offenses**

#### Aiding and Abetting

Aiding and abetting requires at least two actors: the principal who actually commits the crime and the one who aids or abets the commission of that crime. The aider and abettor must knowingly and willfully associate him or herself with the crime and knowingly perform some act in furtherance of the crime. The act may range from mere words to the provision of necessary equipment. Mere presence at the scene of a crime, coupled with knowledge that a crime is being committed, does not constitute aiding and abetting.

#### Conspiracy

A conspiracy is a partnership in crime. To form a conspiracy, a jury must find an agreement between two or more persons to accomplish some unlawful purpose or plan and that at least one of the conspirators has committed an overt act in furtherance of the conspiracy. The agreement need not be formal or express. In fact, proof of a conspiracy will rarely be accomplished through direct evidence. Rather, its existence may be inferred from the conduct of the alleged conspirators and the surrounding circumstances. To become a member of a conspiracy, the conspirator does not have to know every detail of, or the identity of every member of the conspiracy, but he or she must know the essential nature of the plan and the kind of criminal conduct contemplated. Thereafter, he or she must knowingly and intentionally associate him or herself with the objectives of the conspiracy. The overt act, which may be

lawful or unlawful, may be performed by any member of the conspiracy so long as it was done in furtherance of the conspiracy.

#### **D. Criminal Liability Under OSHA**

Section 17(e) of the Act provides that any employer who willfully violates any standard, rule or order and that violation causes the death of an employee may be criminally liable under the Act. By statute, “employer” is defined as any person, partnership, association, corporation or company which affects commerce. Willfulness can be established by proving that the employer or one of its employees knows of the Act’s requirements and intentionally refuses to comply with them. Malice or evil intent is not required to prove willfulness. The violation must be of a standard, rule or order. A violation of the general duty clause will not result in federal criminal liability. For example, in United States v. Pitt-DesMoines, Inc., the defendant was a steel subcontractor working on the construction of the U.S. Post Office in Chicago. During the construction process, the superintendent was repeatedly notified of its failure to abide by an OSHA regulation called the “connection rule.” That rule requires that during the raising process, steel beams be connected with two bolts which are tightened wrench-tight. Despite the repeated warnings, the superintendent continued to allow the workers to connect beams with only one bolt and by merely hand-tightening or, in some cases, by not using nuts at all. Subsequently, part of the structure collapsed, killing two ironworkers. Hence, there was criminal liability and Pitt-DesMoines was fined \$1,000,000 and placed on probation for five years.

In United States v. Dye Construction, a superintendent knew that the appropriate standard required a trench to be shored up. Notwithstanding, he allowed two employees to lay pipe in the trench, which caved in and killed one of the employees. The jury concluded that the superintendent knew the requirements of the standard and simply disregarded them and that the

violation of the standard caused the death. Hence, there was criminal liability. It is worth noting that in United States v. Ladish Malting, the 7th Circuit Court of Appeals held that an employer cannot be held criminally liable unless the employer had “actual knowledge” of the conditions that led to the fatality.

Under very rare circumstances, corporate officers, directors and managers may be held criminally liable under Section 17(e). If an officer, director, or manager’s role in a corporate entity (particularly a small one) is so pervasive and total, that individual may be considered an “employer” for purposes of criminal liability. In United States v. Cusack, Quality Steel, Inc. (“Quality”) was erecting a steel frame for a warehouse in New Jersey when an employee was fatally injured. The government indicted Quality’s president and only officer, John Cusack for willfully violating OSHA’s structural steel assemble regulations thus causing the fatality. Since Quality was run as a sole proprietorship and Cusack made every decision for the company, controlled its operations and had unlimited access to its funds, he qualified as an “employer.” Therefore, Cusack was subject to criminal liability in his individual capacity even though Quality was incorporated.

In United States v. Doig, the S.A. Healy Company (“Healy”) was building a tunnel in the metropolitan Milwaukee area when an explosion killed three of Healy’s employees. The government indicted Healy’s project manager, Patrick Doig for aiding and abetting Healy in willfully violating the OSHA regulations that allegedly caused the explosion. However, the government did not assert that Doig was an “employer” under the OSH Act. The 7th Circuit Court of Appeals held that individuals cannot be held criminally liable under the OSH Act unless they are proven to be an “employer” and, therefore, Doig was not criminally liable. In addition, since Healy’s culpability only stemmed from the actions of Doig, the court held that Doig could

not be charged with aiding and abetting himself. The court further stated that responsible corporate officials who have the power to prevent violations of OSHA regulations may be held criminally liable. It is worth noting that in Reich v. Sea Sprite Boat Co., Inc., the 7th Circuit held that the president of a corporation can be held in criminal contempt for a corporation's failure to pay its OSHA penalties.

As enacted, Section 17(e) provides that "any employer who willfully violates [the OSHA Act] ... and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both." If the violation is a repeat violation, Section 17(e) provides that "punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both." In 1984, Congress enacted the Criminal Fine Enforcement Act (CFEA) increased the maximum fines for all federal criminal offenses. Under the CFEA, individuals who have been convicted of a felony or misdemeanor that resulted in a fatality face a maximum fine of \$250,000. Organizations that have been convicted of a felony or misdemeanor that resulted in a fatality face a maximum fine of \$500,000.