Monday, October 20
9:00 am-10:30 am

004 Understanding & Surviving OSHA

Jose Chanfrau IV
General Counsel
Downrite Engineering Corporation

Scott Clearwater
Associate General Counsel
Hess Corporation

Greg Watchman
Associate General Counsel
Freddie Mac

Faculty Biographies

Jose Chanfrau IV

Jose M. Chanfrau IV is the general counsel for Downrite Engineering Corp. and a principal in Legal Solutions Group, LLC.

Mr. Chanfrau has years experience providing legal counsel to corporations, business entities, and individuals in negotiating construction services contracts, construction payment and defect litigation, environmental compliance, labor, employment law, health and safety, real estate, administrative law, bankruptcy, and commercial litigation.

Mr. Chanfrau has obtained advanced training on union avoidance, union organizing campaigns, collective bargaining, grievances, discipline and discharge cases, arbitration, and alleged unfair labor practices.

Scott Clearwater

Scott Clearwater is currently associate general counsel, environmental affairs, for Hess Corporation. Mr. Clearwater handles a wide variety of environmental, health, and safety issues for Hess' global marketing and refining and exploration and production operations. In that role, Mr. Clearwater assists clients on process safety management, OSHA compliance, transactional issues, remediation, and EHS litigation.

Over the past 20 years, Mr. Clearwater worked as in-house counsel and EHS director at Engelhard Corporation, in-house counsel at Mobil Oil Corporation, and as an associate at Winston & Strawn.

Mr. Clearwater has a BS from the University of Rochester and a JD from The College of William and Mary.

Greg Watchman

Gregory R. Watchman is associate general counsel for employment law at Freddie Mac in Tyson's Corner, Virginia.

Previously, Mr. Watchman served as acting assistant secretary of labor and deputy assistant secretary of labor at the US Department of Labor, Occupational Safety and Health Administration. In addition, he served as labor counsel to the labor committees in the US Senate and House of Representatives, working on a broad range of employment and labor law legislation. Mr. Watchman also has experience counseling employers on employment law issues, with the national firms Paul Hastings and Morgan Lewis.

Mr. Watchman presently serves ACC as vice-chair of the employment and labor law committee. Mr. Watchman has also received ACC's Jonathan S. Silber Award as Outstanding Committee Member of the Year.

Mr. Watchman received his JD from Cornell Law School and is a graduate of Williams College.

ASSOCIATION OF CORPORATE COUNSEL

2008 ANNUAL MEETING
SEATTLE, WASHINGTON

SESSION 004: UNDERSTANDING AND SURVIVING OSHA
October 20, 2008

PROGRAM MATERIALS

1. Power Point Presentation (51 slides)
2. Handout: OSHA Special Points of Interest (3 pages)
3. White Paper: "The Elements of an Effective Safety & Health Program" (8 pages)
4. White Paper: "Employee Medical Information—The Employee's Right to Privacy vs. OSHA Rights of Access" (10 pages)
5. Handout: OSHA Basics for White Collar Workplaces (27 slides)

OTHER RESOURCES

1. "Employer Rights and Responsibilities Following an Inspection" (OSHA 2002) (see www.osha.gov)

UNDERSTANDING & SURVIVING OSHA

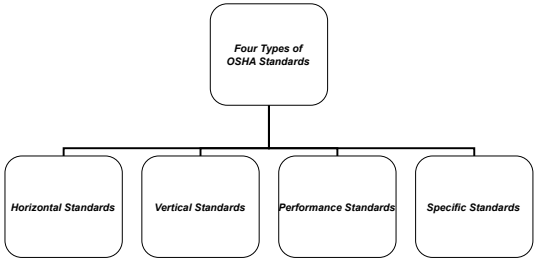
TODAY'S AGENDA

- Overview of Regulatory Framework
- Current OSHA Initiatives
- Recent Enforcement Actions & Cases
- Avoiding the Most Common Mistakes
- How to Avoid an Inspection
- How to Survive an Inspection
- How to Appeal a Citation

The General Duty Clause: The Catchall Provision

According to the Occupational Health & Safety Act of 1970 (Act) employers must furnish employment "*free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees*," and must comply with OSHA's standards.

Brief Overview of OSHA's Regulatory Framework

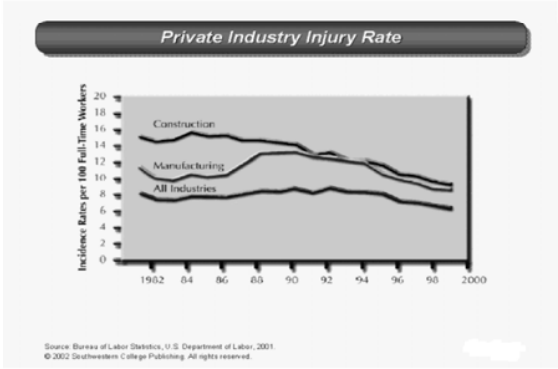


Inspection Priorities

- Imminent Danger Inspections
- Fatality/Catastrophe Inspections
- Complaint/ Referrals Inspections
- Programmed Inspections

Standards to Establish A Citation
(Secretary of Labor v. Atlantic Battery Company, Inc., 1994 WL 682922*6 (O.S.H.R.C.)

- The applicability of the standard.
- The employer's noncompliance with the standard's terms.
- Employee access to the violative conditions.
- That the employer had actual or constructive knowledge of the violation.



Federal Inspections - Fiscal Year 2006
38,579 Inspections

Number	Percent	Reason for Inspection
7,376	(19.1%)	Complaint/accident related
21,504	(55.7%)	High hazard targeted
9,699	(25.1%)	Referrals, follow-ups, etc.
Number	Percent	Industry Sector
22,891	(59.3%)	Construction
7,689	(19.9%)	Manufacturing
403	(1%)	Maritime
7,596	(19.7%)	Other industries

OSHA identified the following violations:

Violations	Percent	Type	Current Penalties
479	(0.5%)	Willful	$16,009,045
61,337	(73.1%)	Serious	54,139,361
2,551	(3.0%)	Repeat	9,688,804
288	(0.3%)	Failure to Abate	1,044,925
19,246	(23%)	Other	3,098,221
12	(0.01%)	Unclassified	1,044,925
83,913	TOTAL		$84,413,006

Source: OSHA http://www.osha.gov/as/opa/oshafacts.html visited 6/21/08

Penalties

- **De minimis Violation-** Violations of standard which have no direct or immediate relationship to safety or health.
- **Other Than Serious Violation-** These are violations where OSHA cannot predict if the violation will result in serious injury or illness but the hazard, nonetheless, does have a direct and immediate relationship to their safety and health.
- **Serious Violations-** To demonstrate a "serious violation" of a safety standard OSHA must prove: (1) that the cited standard applies and that its requirements were not met, (2) that employees were exposed to, or had access to, the violative condition, and (3) that the employer knew or, through the exercise of reasonable diligence, could have known of this condition; (4) furthermore, there must be a substantial probability that death or serious physical harm could result from the hazard.
- **Wilfull or Repeated Violations-** These violations according to OSHA involve evidence that shows either an intentional violation of the Act or plain indifference to its requirements. Repeated issuance of citations addressing the same or similar conditions or lack of communication of the OSHA standards to lower level personnel is enough to constitute a willful violation. If the willful violation results in the death of the employee, it could result in a criminal penalty punishable by up to six months of imprisonment and a fine of $10,000.00. 29 USC §666(a)

State Consultation Programs

According to 29 USC 667 nothing in the Act shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under section 6 subject to the approval of the Secretary of Labor. The state plan must at least meet the standards of federal OSHA.

The following states have approved State Plans:

- Alaska
- Arizona
- California
- *Connecticut*
- Hawaii
- Indiana
- Iowa
- Kentucky
- Maryland
- Michigan
- Minnesota
- Nevada
- *New Jersey*
- New Mexico
- *New York*
- North Carolina
- Oregon
- Puerto Rico
- South Carolina
- Tennessee
- Utah
- Vermont
- *Virgin Islands*
- Virginia
- Washington
- Wyoming

NOTE: The Connecticut, New Jersey, New York and Virgin Islands plans cover public sector (State & local government) employment only. (Source: OSHA)

OSHA'S JURISDICTIONAL LIMITS

- Section 4 (b)(1) of the OSH Act restricts OSHA's jurisdiction to industries in which another federal agency has not regulated in the area of worker safety
- This section limits OSHA's jurisdiction in such areas as rail safety (FRA), airline safety (FAA), & trucking safety (DOT)

Current OSHA Initiatives/Enforcement

- Site-Specific Targeting (SST)
  - Based on injury & illness data reported by employers
  - Covers worksites with 40+ employees and above-average injury & illness rates
- Enhanced Enforcement Program (EEP)
  - Can broaden inspections from one site to other sites of same employer
- National Emphasis Programs (NEPs)
  - Lead, silica, shipbreaking, amputations, refineries, trenching, chemical plants (PSM), diacetyl
- Local Emphasis Programs (LEPs)

Current OSHA Initiatives/Rulemaking

- Health Standards: Silica, Beryllium, Diacetyl
- Safety Standards: Explosives, Vertical Tandem Lifts (Longshoring), Confined Spaces/Construction, Electric Power Transmission, Cranes & Derricks
- Hazard Communications

Current OSHA Initiatives

- Partnerships
  - Alliances
  - Voluntary Protection Programs
  - Informal Partnerships
- Legislation
  - Increased Penalties

Recent Enforcement Actions & Cases

- BP Products, Oregon, Ohio refinery
  - OSHA proposed $2.4 Million fine
  - Identified a number of violations similar to those found in BP's Texas City refinery, which had an explosion killing 15 workers (resulting in OSHA penalty of over $20 Million)
  - Citations included: locating people in vulnerable buildings among process units; failing to correct deficiencies with gas monitors, failing to prevent non-approved electrical equipment in locations with flammable gases, failing to develop shutdown procedures, and failing to resolve recommendations made after a prior safety incident

Recent Enforcement Actions & Cases

OSHA Seeks $8.7 Million Fine Against Sugar Company

- On July 25, 2008, OSHA proposed an $8.7 Million penalty against Imperial Sugar for safety violations resulting in the death of 13 workers in a sugar dust explosion
- OSHA claims senior management was aware of combustible dust hazards and did not take appropriate action to eliminate them
- Agency found 118 "egregious" violations
- Ventilation and dust collection issues fell under agency's "general duty" clause

Recent Enforcement Actions & Cases

Konie Cups International: $64,250

Despite earlier warning by Fire Dept, OSHA discovered locked exit door and door key not easily accessible in case of emergency, resulting in "willful" violation

Munro Muffler: $107,000

OSHA found locked fire exits, fall exposures, improper gas cylinder storage. OSHA alleged repeat and serious violations because same issues were found at other company stores

Recent Enforcement Actions & Cases

North East Linen: $79,250

Two employees, who were cleaning a wastewater tank, were discovered at the bottom of the tank, which was oxygen-deficient and contained hazardous chemicals. Serious citations included failure to provide hazard communication and confined space entry training

Avoiding the Most Common Management Mistakes

The Case of Safeco Corporation

Safeco Corporation manufactures toys. The plant and corporate offices are located in Pennsylvania, housing 1,516 employees and another 362 contingent workers employed by contractors.

The Case of Safeco Corporation

The company has a safety program. The safety team completed their 2008 internal safety audit of the plant in April, and the team is now working its way down the list of hazards and compliance deficiencies it identified in the audit report. The safety team focuses on hazards created by its own employees; the company's contractors are required by contract to ensure that their own employees follow safety rules.

The Case of Safeco Corporation

When the team finds hazards, a team member follows up with the responsible employee(s) to make sure they understand the rules. Repeat offenders are required to take additional training. When injuries or illnesses occur, the safety team errs on the side of caution and records any ambiguous ones as recordable on the OSHA log.

The Case of Safeco Corporation

The company is proud of its safety record, and believes that given its "one big family" philosophy, workers would report any unsafe conditions to management before going to OSHA. In fact, there have been few complaints. The company has not had any interaction with OSHA since a boiler exploded in 1998, and hopes it stays that way.

The Case of Safeco Corporation

Compliance Issue #1:

"OSHA Doesn't Inspect White Collar Offices or Service Businesses"

The Case of Safeco Corporation

You are Safeco's in-house counsel, and you are asked to assess any potential compliance risks and provide advice.

How would you advise the company?

White Collar & Service Workplaces

- OSHA does inspect white collar & service workplaces
- For example, the agency might do so in response to a complaint, a fire, or a safety incident
- These workplaces should make sure they are up to speed on the basic compliance rules

White Collar & Service Workplaces:
Basic Compliance Building Blocks

- *Fire Safety & Emergency Action Plans*
- *Hazard Communication*
- *Personal Protective Equipment*
- *Training*
- *Slips, Trips & Falls*
- *Electrical*
- *Ergonomics*

OSHA Recordkeeping Requirements 101

- **Who must complete and maintain the OSHA forms?**
  - Companies with ten (10) or more employees during the last calendar year
- **What must be recorded?** Injury or illness to any employee whether permanent, part time, temporary hourly or salaried.
- **When must you contact OSHA?**
  - Any workplace incident that results in a fatality or the hospitalization of three or more employees.

OSHA Recordkeeping Requirements What Forms Must Be Kept?

- OSHA Form 300 Log of Work Related Injuries and Illnesses.
- OSHA Form 300A Summary of Work Related Injuries and Illnesses.
- OSHA Form 301 Injury and Illness Incident Report.

The Case of Safeco Corporation

Compliance Issue #2:

"Our Safety Audit Will Demonstrate Good Faith By Showing That We Regularly Look For Hazards"

The Case of Safeco Corporation

Compliance Issue #3:

"If it's not my employee, it's not my problem."

Internal Audits May Be Used Against You!

- Consider whether audit should be conducted under attorney-client privilege
- Use trained inspection team
- Document compliance issues
- Ensure open issues are corrected and tracked to closure
- Uncorrected issues may be evidence of a "willful" violation!

"If It's Not My Employee, It's Not My Problem."

- **Who is Considered an Employee for OSHA Purposes?** OSHA looks to the party who controls the work site.
- **Who Controls the Work Environment?** Although it may seem that determining "Who controls the work environment?" is a straightforward proposition, once you add the element of contingent workers and a multi-employer work site, not only is there not a bright line, to the extent there is any line at all it is definitely very hazy and wavy.

OSHA's Multi-Employer Policy

- More than one employer may be citable for a hazardous condition that violates an OSHA standard.
- OSHA may cite:
  - "Creating" employer
  - "Exposing" employer
  - "Controlling" employer
  - "Correcting" employer

See: OSHA Instruction CPL 02-00-124 - CPL 2-0.124 - Multi-Employer Citation Policy.

The Case of Safeco Corporation

Compliance Issue #4: "We focus on correcting hazards, not on disciplining employees."

- OSHA inspectors will look for evidence that safety rules are regularly ***enforced*** through employee discipline
- Can affect scope of inspection, extent and classification of citations, and amount of proposed penalties

Contingent Workers

- "Contingent Workers" are part-time, temporary, and contract workers who do not have a traditional relationship with a single work-site employer.
- According to a 2005 Department of Labor study, contingent workers comprise over 9.7 percent of the civilian workforce consisting of independent contractors, on call workers (workers called to work only as needed), temporary help agency workers and workers provided by contract firms.

The Case of Safeco Corporation

Compliance Issue #5: "I'll record every potentially recordable incident, to avoid recordkeeping citations."

- Cautious approach makes sense
- But beware OSHA's targeted inspection program -- focused on reported injury & illness rates

The Case of Safeco Corporation

Compliance Issue #6: "My employees would come to me with safety concerns rather than going to OSHA."

- Most employees fear retaliation
- But most want quick resolution of safety issues if trustworthy avenue is available
- Review your internal complaint process to make sure it fosters trust (provide multiple avenues, allow anonymous complaints, provide responses, involve employees)

How To Avoid an Inspection

- Take steps to minimize possibility of OSHA complaints or incidents that could trigger an OSHA inspection
  - Make sure your safety program and internal complaint processes are robust
  - Address the most significant hazards
  - Resolve workplace disputes (if you are undergoing labor problems or other disputes with employees, it is more likely that employees will call OSHA)
- Respond promptly to OSHA "warning letters" and phone/fax communications
- Track OSHA's targeted inspection program
  - Is your industry on the "high hazard" list? (manufacturing, landscaping/ horticultural services, oil & gas field services, fruit & vegetable processing, concrete & concrete products, blast furnace & basic steel products, ship, boat building & repair, public warehousing & storage)
  - Is your reported injury and illness rate high enough to trigger an inspection?

The Case of Safeco Corporation

Compliance Issue #7: "The less we interact with OSHA, the better."

- If likely to have OSHA interaction, don't wait for a complaint or incident
- Consider informal outreach, partnership with Area Office (e.g., on a safety conference or training video), or more formal alliance

How to Survive an Inspection

- When an inspector arrives, document name, credentials and obtain purpose and scope of inspection
- If the inspector arrives with a search warrant, ask for copy and contact legal counsel
- Designate one company representative as OSHA's point of contact

How to Survive an Inspection

- Opening Conference
  - Determine scope of investigation
  - Personnel advised of objectives, logistics, scheduling of inspection activities
  - Inspector(s) may be required to attend safety orientation before inspection

How to Survive an Inspection

- Site Inspection
  - Make copies of all documents provided to inspector
  - If documents are confidential, make sure they are marked as such
  - Duplicate any photographs taken by the inspector and ensure no confidential business information appears in the photographs

How to Survive an Inspection

- Site Inspection
  - Stay with inspector at all times
  - Limit inspection to scope determined during opening conference
  - Document all issues discussed and name of employees interviewed. Company has right to advise employee that she/he can request company representative be present
  - Employees should answer only questions asked and avoid statements that may be construed as admissions of non-compliance

How to Survive an Inspection

- Closing Conference
  - Be deferential, but request copies of all sample/analytical reports, interview reports, field notes and inspector's report
  - Ask inspector for a receipt acknowledging what documents were provided
  - Document problem areas indicated by the inspector, along with applicable standards, abatement procedures and potential penalties
  - Use closing conference as an opportunity to demonstrate good faith efforts -- promote company's safety programs and commitment to safety and health

How to Appeal a Citation or Penalty

- Request an Informal Conference
  - Meet ASAP With Area Director (must be within 15 working days of receipt of citation, before Notice of Contest due)
  - Attorneys may participate, but it is not necessary
  - Company's union representation should be invited
  - Opportunity for possible penalty reduction, extension of abatement dates, deletion and/or reclassification of citations and create open communication with the Area Director

How to Appeal a Citation or Penalty

- Notice of Contest
  - Must file within 15 days from date of receipt of citation – NO EXCEPTIONS
- Mediation
- Discovery & ALJ Hearing
- Appeal to OSH Review Commission and then federal courts of appeals

How to Appeal a Citation or Penalty

- Informal Conference
  - Area Director may propose modified citations or penalty assessment
  - If you reach a settlement, make sure to include a non-admission clause in any settlement agreement, indicating employer does not admit to any violations

The Future of OSHA:

What Does the Next Administration & Congress Have in Store?

- Increased penalties, enhanced enforcement authority
- Rulemaking on S&H Programs, Silica, PELs, & more
- "Leveraged" enforcement programs under "new governance" model

ASSOCIATION OF CORPORATE COUNSEL

ACC 2008 ANNUAL MEETING PROGRAM 004-UNDERSTANDING & SURVIVING OSHA

10/20/2008 ACC 2008 Annual Meeting Program

SPECIAL POINTS OF INTEREST:

- > **Multi-Employer Policy.**
- > **Contingent Workers.**
- > **Hallmarks of an effective Health & Safety System.**
- > **OSHA Recordkeeping Requirements.**
- > **How to Avoid An Inspection.**

OSHA'S MULTI-EMPLOYER POLICY

The Creating Employer

The creating employer is the employer that caused the hazard and may be cited even if the only employees exposed are those of other employer.

Controlling Employer The controlling employer is one who has general supervisory authority over the work site including the power to correct health and safety violations itself or requiring others to do so. This measure of control by the controlling employer can be established by contract or by the exercise of control and practice.

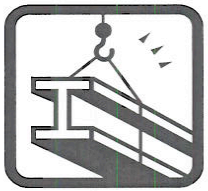
Exposing Employer

The exposing employer is one whose own employees are exposed to the hazard. If the violation is created by another employer, the exposing employer may be cited if:

- It knew of the hazardous condition or failed to discover it using reasonable diligence; and
- Failed to take steps consistent with its authority to protect its employees such as requesting that the creating employer correct the hazardous condition or take measures to correct it.

Correcting Employer

The correcting employer is the one engaged in a common undertaking in the work site and must take reasonable care in detecting and correcting hazards in the work site. As the Policy points out, a creating, correcting or controlling employer will often also be an exposing employer and can be a correcting employer as well which means that an employer can be cited for violations created by others even if they are both subcontractors in different crafts that had little contact



DEVELOPMENTS IN THE MULTI-EMPLOYER POLICY: SECRETARY OF LABOR V. SUMMIT CONTRACTORS, INC. OSHRC DOCKET NO. 03-1622

Summit is a general contractor in the construction of dormitory buildings in Little Rock, Arkansas was cited under OSHA's "Multi-employer citation policy" for failure to ensure that employees of Summit's masonry subcontractor were utilizing fall protection while working on scaffolds in excess of 12 feet above the ground in violation of OSHA's fall protection standard.

In overturning administrative judge's decision and vacating the citation against Summit, by a two to one vote, the Occupational Health Review Commission rejected the Secretary of Labor's argument that "his employees" includes employers not having employees exposed to the cited hazard. The Secretary filed an appeal to the Eighth Circuit Court of Appeals, Elaine Chao v. Summit Contractors, Case No. 07-2191 with oral argument held on

SECRETARY OF LABOR V. SUMMIT CONTRACTORS, INC. OSHRC DOCKET NO. 03-1622

January 17, 2008. It should be noted that :

- the Chairman of the Commission, Scott Railton, the author of the majority opinion, left the Commission on the same date that the decision was issued.
- Commissioner Thomasina V. Rogers issued a vigorous dissent where she stated that it is the unique position of the general contractor—whose main function is to supervise the work of subcontractors—that gives it the control to ensure hazard abatement.

Although some commentators have been heralding the death of the Multi-Employer Policy, until the Eighth Circuit rules on the Summit case it is premature to start celebrating its demise.

Cases of Special Interest

Secretary of Labor v. Centex Construction Co., 1999 WL 89343 (O.S.H.R.C.A.L.J.)

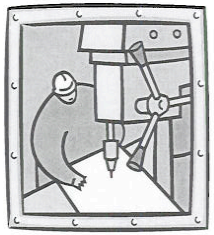
E&R Erectors, Inc. v. Secretary of Labor, 107 F.3d (3rd Cir. 1997)

But compare Melerie v. Avondale Shipyards, Inc., 659 F.2d 706 (5th Cir. 1975)

IBP v. Herman, 144 F.3d 861 (D.C. Cir. 1998)

Although the Multi Employer Policy has in its application been associated with the construction industry, OSHA refuses to limited the scope of its application.

WATCH OUT FOR CONTINGENT WORKERS!



"Contingent Workers" are part-time, temporary, and contract workers who do not have a traditional relationship with a single work-site employer.

Because contingent workers typically have a relationship with more than one employer, the doctrine of Co-employment comes into play.

Co-employment is a legal doctrine which applies when two businesses exert some control over an employee's work or working conditions. It is this relationship that makes on or more employers liable for a citation.

In determining who is an "employee" the Supreme Court held in the 1992 case Nationwide v. Darden, 503 U.S. 318 (1992) held that "Where a statute containing that term does not helpfully define it, this Court presumes that Congress means an agency law definition unless it clearly indicates otherwise."

In Darden, the Court noted that the definition of "employee" used by the Employee Retirement Income Security Act of 1974 (ERISA) as "any individual employed by an employer" was "circular and explained nothing."

The Fair Labor Standards Act, Family Leave Act and Occupational Safety and Health Act all use the same definition of "employee" as ERISA which means that with respect to claims arising under these statutes, according to Darden courts must rely upon traditional agency law and any interpretations of the term promulgated by federal agencies pursuant to their rulemaking authority to determine who is an "employee."

With respect to OSHA cases, courts have applied the test developed by the Court in Darden and applied in Loomis Cabinet Company v. Occupational Safety & Health Review Commission, 20 F.3d 938,942 (9th Cir. 1994) which although different from the "totality of the circumstances" and "economic reality test" reaches the same result, it looks at the substance rather than the form of the employment relationship.

According to OSHA, "control" can be established by a contract or in the absence of contractual provisions, by the exercise of control in practice.

According to a 2005 Department of Labor study, contingent workers comprise over 9.7 percent of the civilian workforce.

HALLMARKS OF AN EFFECTIVE SAFETY AND HEALTH MANAGEMENT SYSTEM

- Developing a process of document and data control.
- Applying a system of operational control.
- Establishing plans and procedures for emergencies.
- Checking management systems and take any necessary corrective action.
- Introducing performance, measuring and monitoring practices.
- Establishing and documenting responsibility and authority for accidents, incidents, nonconformities and corrective & preventative action.
- Establishing a procedure for records and records management.
- Auditing and assessing the performance of the management system.
- Performing management reviews of the system at identified and defined intervals.

Special points of interest:

- Develop accountability action plans to improve health and safety in a way that contributes to improved business results.
- Establish systems to evaluate where you are now and to identify the business benefits of improving your management of health and safety.
- Determine the types of hazard associated with emergencies in the workplace and how injury can occur.
- Prepare an action plan to identify, assess and control emergencies in the workplace.
- How to implement effective control methods including engineering controls.

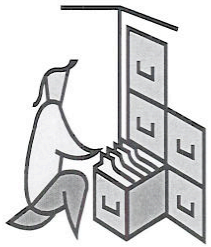
OSHA RECORDKEEPING REQUIREMENTS 101

If your company had ten (10) or fewer employees during the last calendar year, you do not need to keep OSHA injury and illness records unless OSHA or the BLS informs you in writing that you must keep records under Section 1904.41 or Section 1904.42.

However, as required by Section 1904.39, all employers covered by the Act must report to OSHA any workplace incident that results in a fatality or the hospitalization of three or more employees.

Any injury or illness to any employee whether permanent, part time, temporary hourly or salaried must be recorded.

If the injury or illness results solely from voluntary participation in a medical, fitness, or recreational activity such as blood donation, flu shot, sports etc.



Medical records for each employee must be kept for 30 years unless a specific standard requires a different time.

HOW TO AVOID AN INSPECTION

It is OSHA policy that inspections conducted as programmed inspections be primarily in the "high hazard" sectors of employment. In the area of safety, the Agency considers a "high hazard" industry to be one within a Standard Industrial Classification (SIC) code with a National lost workday injury and illness rate among the highest 200 as published for calendar year by the Bureau of Labor Statistics (BLS) at the 4-digit SIC level. These statistics are available in the OSHA web site. For the purpose of scheduling programmed inspections, construction and maritime are considered to be categories of high hazard employment.

Other specific industries, such as logging, and oil and gas extraction, are also high hazard industries and are frequently scheduled for inspection as special emphasis programs.

Know what the industry specific "Hot Buttons" are for your industry. One way to find out is by looking at the citation data for standards relevant to your industry.

The Elements of an Effective Safety and Health Program

Gregory R. Watchman

Safety and Health Programs are widely accepted by safety and health professionals and the employer community as the most effective means of worker protection. Although federal OSHA does not currently require employers to have a safety and health program, several state OSHA agencies do.[1/] In addition, a number of states have required at least some employers to establish such a program under their workers compensation laws. Finally, federal OSHA currently provides substantial "good faith" penalty discounts to employers who have established safety and health programs.

The applicable state safety and health program requirements typically include all or most of the following core elements: management commitment, employee involvement, hazard identification and assessment, hazard prevention and control, employee training, and periodic evaluation of the program. These elements are also included in OSHA's 1989 Safety and Health Program Management Guidelines.[2/] The discussion below identifies the steps needed to establish each of these elements.

1. Management Commitment

1/ In enacting the Occupational Safety and Health Act, Congress allowed the states to set up their own OSHA agencies if they so chose, provided that their efforts were "at least as effective" as Federal OSHA's program. Twenty-one states currently have their own agencies, programs and regulations; Federal OSHA does not enforce the law in those states. The twenty-one states include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

2/ These Guidelines are available on OSHA's web site at www.OSHA.gov.

It is critical for an employer's top management to provide active and vocal support for the company's worker protection efforts. This support includes a strong Statement of Policy, a clear assignment of responsibilities throughout the organization, and provision of appropriate authority and resources to those assigned such responsibilities.

1. Statement of Policy. The principal means of communicating management commitment is through a strong Statement of Policy issued to all employees. A sample is provided below:

> "Protection of employee safety and health is integral to [the employer's] business operations and to the fulfillment of its corporate mission. [The employer] is committed to ensuring a high level of protection of employee safety and health. [The employer's] Safety and Health Program is designed to ensure that employee protection efforts are a top priority as well as a regular, ongoing part of [the employer's] business operations. These efforts shall include hazard. identification and assessment, hazard prevention and control, employee training, provision of necessary protective equipment, and record-keeping."
>
> "The goals of this policy are to prevent occupational fatalities, injuries, and illnesses, and to ensure compliance with all applicable federal and state OSHA requirements. All [the employer] personnel, contractors, and contractor employees must be familiar and in compliance with this policy."

2. Assignment of Responsibilities. The employer should issue a clear assignment of occupational safety and health responsibilities. Guiding principles are that 1) upper management should demonstrate commitment to safety and health, 2) responsibility should be distributed vertically through the organizational hierarchy, and 3) responsibility should also be allocated horizontally to each of the employer's departments, facilities and offices. The most common allocation of responsibilities is as follows:

a. Company President/CEO: Responsible for hiring/designating a Safety and Health Director, ensuring adequate resources to facilitate compliance, and providing a safe and healthful workplace for all employees.

b. Safety and Health Director: Responsible for developing and implementing the Safety and Health Program, establishing safety and health rules, promoting a safety and health culture that fosters safe behavior and compliance with legal requirements and company safety and health rules, conducting safety and health audits of facilities and offices, coordinating regular program of hazard identification and correction, coordinating investigation of work-related injuries and illnesses, preparing regular reports on safety and health performance, developing training materials and programs, and providing overall support to managers and supervisors in carrying out the program.

c. Managers and Supervisors: Responsible for establishing a culture of safety and health among all subordinates, ensuring compliance with all safety and health rules (through the use of training, positive reinforcement, and disciplinary action when appropriate), conducting regular safety and health inspections and investigations of work-related injuries and illnesses, and correcting identified hazards.

d. Employees: Responsible for complying with the corporate statement of policy, and established safety and health rules, and taking adequate steps to prevent harm to themselves or their co-workers.

This model may be adjusted in a variety of ways to fit the employer's business operations and internal culture.

2. Employee Involvement

Worker participation is an important element of a Safety and Health Program because employees are often in the best position to identify both hazards they may be

exposed to as well as practical means of eliminating the exposure. In addition to carrying out their responsibilities as set forth above, employees should be encouraged to contribute to the corporate safety and health culture, by one or more of the means set forth below:

1. Communication: Managers and supervisors should discuss safety and health issues with employees on a regular basis. Weekly or monthly safety and health meetings are commonly used to hold such discussions.

2. Hazard Report/Complaint Process: The Safety and Health Director should establish a process for employees to report hazards or submit complaints regarding worker protection. Managers and supervisors should implement the process, provide responses to employee complaints and suggestions, and ensure that employees can use the system without fear of retaliation.

3. Safety and Health Surveys: Many employers conduct oral or written surveys of their employees to determine their satisfaction with the Safety and Health Program and help identify areas in which improvement is needed.

4. Safety and Health Teams, Representatives or Committees: Many employers utilize safety and health teams, representatives or committees to involve their workers in the Safety and Health Program.[3/] Through these work site-based employee participation mechanisms, employers can foster a cooperative relationship between managers and employees on safety and health issues. Employees involved in these mechanisms can help conduct training, inspections, and investigations into work-related injuries and illnesses.

3. Hazard Identification and Analysis

3/ The creation of employee involvement mechanisms can raise issues under the National Labor Relations Act (NLRA), which prohibits employers from dominating or interfering with any labor organization.

Safety and Health Programs

In order to identify and assess actual and potential hazards at each of its facilities and offices, the employer should conduct an initial Safety and Health Analysis. This Analysis will help establish a baseline inventory of hazards employees are or may be exposed to on the job, and should include the components described below. Thereafter, a regular program of work site inspections should be conducted, with the frequency determined by the level of risk present at each work site.

1. Inspections. A representative sample of work sites should be physically inspected (including, as appropriate, physical inspection of off-site locations or job sites where the employer's employees perform work) to identify hazards.

2. Employee Survey. As noted above, employees are often in the best position to identify work-related hazards. A survey would assist in compiling a baseline inventory of hazards. Such a survey could be conducted through a written questionnaire, or through oral interviews.

3. Records Review. All relevant safety and health records should be reviewed to identify injury and illness trends and baseline performance. Such records should include workers' compensation data, work-related injury and illness data and records, and safety and health audit information.

4. Investigation of Injuries, Illnesses and Complaints. All incidents resulting in an occupational injury or illness should be investigated, to determine causes and identify means of prevention. In addition, as discussed above employee complaints should be investigated and a response should be provided to the employee.

5. Health Monitoring. Employees who may be exposed to occupational health hazards should be monitored (through area sampling, personal sampling, biological monitoring or other means).

Once a baseline inventory of hazards has been established, it must be analyzed to prioritize the hazards for purposes of 1) prevention and control measures, 2) allocation of time and resources, and 3) provision of employee training. The analysis should include such factors as the potential for, frequency of, and severity of injuries or illnesses.

4. Hazard Prevention and Control

Once hazards have been identified, the employer must take steps to address them. In short, the employer must eliminate or control each hazard, or prevent employee exposure to it. There are a number of ways in which the employer can meet this obligation, including the following:

1. Engineering Techniques. OSHA regulations often require hazards to be addressed through engineering changes or controls. While such efforts may be feasible in many instances, they may be extremely costly or technologically infeasible in others. Notably, the OSHA statute and regulations do not require strict compliance where it would be impossible, economically or technologically infeasible, or where it would create a greater hazard. In such circumstances, the employer should find an alternative means of protecting employees.

2. Safety and Health Policies and Rules. Hazard prevention and control may be effectuated by the adoption of work practices and procedures which are 1) understood and followed by employees, and 2) enforced through correction of unsafe performance and, if necessary, disciplinary action.

3. Personal Protective Equipment. Employees who are or may be exposed to safety and health hazards should be provided with appropriate personal protective equipment (e.g., hard hats, safety glasses, safety shoes, gloves, rubber insulating equipment, protective clothing).

4. Preventive Maintenance. Proper maintenance of both facilities and equipment can help prevent hazards from arising. The employer should design and implement a program for regular maintenance of buildings, machinery, vehicles and equipment.

5. Emergency Action Plan. The employer should design and implement an emergency action plan to address fires and other emergencies. Training and drills should be conducted as necessary.

6. Medical/First Aid. The employer should ensure that first aid materials and expertise are available at each facility and office, and that emergency medical care is available nearby.

7. Off-Site Work. Where the employer's employees are performing work at a facility controlled by another employer, they may be exposed to hazards which the employer lacks authority to correct or control. In such circumstances, the employer employees should report such hazards to their supervisor, and he or she should take all feasible steps to protect the employer's employees. Such steps may include notifying the controlling employer of the hazard, and, where necessary, removal of the employer's employees from the area in which the hazard is located.

5. Safety and Health Training

The employer should conduct a training program with several goals in mind:

1. The Safety and Health Program. All employees should be familiar with the company's Safety and Health Program and their responsibilities under it.

2. Emergency Action Plan. All employees should be informed about the company's emergency action plan.

3. Hazards. All employees who are or may be exposed to hazards should be trained as to how to recognize such hazards, corrective measures the employer has taken or is taking to address such hazards, and safe work practices they must follow to avoid such hazards.

4. Frequency. The employer should provide both initial and refresher training as necessary. Upon the completion of safety and health training sessions, participating employees should sign a certification that they have received the training.

5. Managers and Supervisors. Managers and supervisors should be informed and trained as to their responsibilities under the Safety and Health Program.

6. Periodic Evaluation

The Safety and Health Program should be evaluated periodically to assess performance and identify areas for improvement. Many employers use annual evaluations.

EMPLOYEE MEDICAL INFORMATION:

THE EMPLOYEE'S RIGHT TO PRIVACY VS. OSHA RIGHTS OF ACCESS

JOSE M. CHANFRAU
GENERAL COUNSEL
DOWNRITE ENGINEERING CORPORATION

EMPLOYEE MEDICAL INFORMATION
The Employees' Rights to Privacy vs OSHA Rights of Access

I. Introduction

During the course of their employment, employees routinely provide personal information to their employers, including health information about themselves and their families. And if an employee is injured or becomes ill on the job, an employer will create and/or obtain copies of a variety of additional medical information. Some of this information is required to be created and/or maintained by the federal Occupational Safety and Health Administration (OSHA). To help promote improvement to worker safety, OSHA requires relatively open access to safety information, including information on employee exposures, injuries, and illnesses. Furthermore, state law may also give employees the some rights to view their personal employment file.

The OSHA regulations contain some basic rules for balancing an employee's right of privacy against the right of access to safety records. But, as this article will point out, there are a number of other federal and state laws and regulations that provide privacy protections to employee health information and, to a lesser degree, rights of access to that information.

The dilemma and confusion is determining what employee health information[1] is subject to privacy protections and what must be done to manage such records to ensure these laws are followed. And this cannot be done by reading the OSHA regulations alone. For example, while OSHA does require inspectors to obtain access orders to view employee medical records, its inspectors regularly view employee health information that is arguably a medical record[2]. In addition, the federal medical privacy regulations enacted under the Health Insurance Portability and Accountability Act (HIPAA)[3] are often cited as the basis to protect the privacy of employee medical information. For the most part, this is incorrect – HIPAA does not apply to basic employment records.

This article is intended to help health and safety professionals[4] better understand two basic elements of protecting the privacy of employee health information. First, what health information is protected and open for access under the OSHA regulations. Second, what other privacy requirements apply to employee health information to expand or contract the protections or access provided by OSHA. It concludes by suggesting guidelines for keeping records of employee health information to avoid running afoul of any applicable employee privacy requirements.

[Some info on recent OSHA recordkeeping enforcement activity and/or recordkeeping issues.]

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[1] Since the variety of privacy requirements discussed in this article used slightly different terms for the information to be protected, this article uses "employee health information" as a generic term for information that may be subject to any number of privacy protections.

[2] Compounding this issue is a general lack of law on the limits of access to employee medical information and what appears to be a general lack of attention to how employers create files for employee medical records.

[3] 45 CFR Part 164.

[4] Thus, this article will not discuss the privacy requirements for social security numbers or an employee's financial information (unless these are mixed with medical information).

II. The Typical Employee File

A typical employee record that contains health information could be any of those listed in the following Table.

RECORD TYPE	TYPICALLY CREATED OR MAINTAINED BY			
	EHS	HR	MEDICAL[5]	WC ADMIN.[6]
Pre-employment, post-offer physical		X		
Pre-employment or on-the-job drug tests (including DOT testing)		X		
Illness, sick leave and medically-based absences		X		
Applications/questionnaires for health coverage		X		
Employee Assistance Program		X		
First-aid records	X		X	
Accident reports and incident evaluations	X			X
Medical evaluations and reports			X	X
Exams, tests, and/or vaccinations pursuant to OSHA	X		X	
Exams related to fitness for duty	X	X	X	X
Medical screening, monitoring or surveillance	X	X	X	
OSHA Forms 300, 300A, and 301	X			X
OSHA Sharps Injury Log	X			
Employee Exposure Records	X			
WC first report of injury and other claims information	X			X
WC reviews				X
Other claims for short or long term disability		X		
Life insurance application		X		
Requests for accommodation under the ADA		X		
FMLA requests and certifications (for leave)		X		

[5] Either on-site medical facility, employed health professional, or contracted health professionals.
[6] This function may be a discrete function or part of EHS or HR.

III. OSHA's Recordkeeping Requirements for Employee Information (Access v Privacy)

A. Recordkeeping.

OSHA requires employers to maintain a system of records designed to identify and track and help eliminate work place hazards. The type of OSHA records that could contain employee health information include the following:

1. Injuries and illnesses (Parts 1904);
   - Forms 300, 300A, and 301
2. Injuries from or exposure to bloodborne pathogens (Part 1910.1030);
   - Sharps injury log
3. Exposure monitoring (Part 1910.1020)[7];
4. Medical records (Parts 1910.1020 and 1910.1030);
5. Surveillance and testing for specific hazards (e.g., Part 1910.1048(o) for formaldehyde).

OSHA defines a "medical record" as containing information on the health status of an employee which is the type either made by or maintained by a physician, nurse, technician, or other health care professional and that contains treatment and diagnosis information[8]. Medical Records includes the following types of information:

1. Medical and employment questionnaires or histories
2. Results of medical examinations and lab tests and all biological monitoring not defined as Exposure Record
3. Medical opinions and diagnosis
4. First aid records
5. Description of treatments and prescriptions
6. Employee medical complaints (1910.1020(c)(6)(i))

And do NOT include:

1. Physical specimens which are routinely discarded
2. Health insurance claims if kept apart from employer's medical records and not accessible by employee name or personal identifiers
3. Employee Assistance Program records, including drug test results, that are kept apart from Medical Records
4. Non-occupational evaluation results, including any drug policy test results, that are not part of employer's overall medical program, but only if maintained separately from the employee's Medical Record.
5. Records created solely for litigation which are legally privileged under applicable rules of evidence.

If the health condition relates to exposure to toxic substances or harmful physical agents in the workplace, any exposure record created by the employer may include employee health or other personal information. An Exposure Record is defined as:

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[7] Employee exposure monitoring for specific hazards is required by other specific sections of the OSHA regulations, e.g., Part 1910.1048(d) for formaldehyde.

[8] 29 CFR 1910.1020(c)(6)(i).

1. Environmental (workplace) monitoring or measuring of a toxic substance or harmful physical agent, as well as related methodologies, calculations and other background data relevant to interpretation of results (1910.1020(c)(5));
2. Biological monitoring results (e.g., blood, urine) which directly assess the absorption of a toxic substance or harmful physical agent by body systems, but not including results from employee's use of alcohol or drugs
3. MSDS information indicating that material may pose hazard to human health
4. In absence of above, a chemical inventory or any other record which reveals where and when chemicals used and the identify of a toxic substance or harmful physical agent

B. Rights of Access.

The OSHA regulations establish several distinct rights of access to OSHA required records.

1. An OSHA Representative (federal or state)[9] has a right to records maintained under or demonstrating compliance with Part 1904. This includes a right to employee-specific information in Form 300 or Form 301 and related supporting documentation (including the employee name for any privacy concern cases indicated on the Forms 300/301 or the Sharps Injury Log).

2. Current or former employees[10] have a right of access to Forms 300 and 300A (except for confidential list of privacy concern cases), to his/her own medical record, to his/her own exposure record (if none for specific employee, employee still has right to access any sanitized exposure records of other employees in similar work conditions), and to sanitized analysis or compilations of employees' exposure or medical records that concern the workplace (this includes sanitized information from health insurance claims records).

3. Employee Representatives[11] have certain access rights depending upon the type of representation. A personal representative is anyone, such as a friend or relative, with written consent from employee (or can include someone appointed by a court). A labor representative is an agent from the collective bargaining unit at that work location (no written consent from employee necessary).

Both types of representatives may see the Forms 300 and 300A (except for confidential list of privacy concern cases) and the sanitized analysis or compilations of exposure or medical records, including sanitized information from health insurance claim records. A personal representative may see all other OSHA records that the employee who provided the written consent has a right to see (unless restrictions added to terms of the written consent). A labor representative may also see the right-hand portion of Form 301 (that contains no personal information) and employee exposure records as long as they submit written request justifying occupational health need for access.

4. If an employer chooses to provide OSHA records to persons other than an OSHA representative, employee or employee representative (see above) [12], the employer must first remove employee personal identifiers. However, for voluntary disclosures of the following types, the employer may disclose OSHA records with personally identifiable information: (i) to the

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[9] [citation]
[10] 29 CFR Part 1904.35; Part 1910.1020(e).
[11] 29 CFR Part 1904.35; Part 1910.1020(e).
[12] 29 CFR Part 1904.29(b)(10).

employer's H&S auditor or consultant; (ii) to the extent necessary to process WC or other insurance benefits; or (iii) to public health or law enforcement authority for uses and disclosures for which consent or an authorization is not required under HIPAA Privacy Rules.

C. Employee Privacy.

OSHA regulations create privacy protections for employee "medical records"[13]. If for some reason OSHA does need to review a "medical record" it has procedures to do so after it issues a medical records access order[14].

OSHA also has requirements for privacy concern cases. In the following situations, an employee's name may not be entered on Forms 300 and 301 (1904.29(b)(6) - (8)):

1. Injury or illness to intimate body part or to the reproductive system
2. Injury or illness involving sexual assault
3. Mental illness
4. HIV infection, hepatitis or TB
5. A needlestick injury or cut from sharp object contaminated with blood or other potentially infectious material (also 1910.1030 (h)(5)(i))
6. Other illnesses, if employee requests their name not be entered into log

For privacy concern cases the name and case # is kept on separate, confidential list (such list must be available to OSHA representatives upon request), the employer has discretion to edit description of injury/illness on Forms 300 and 301, as appropriate, to avoid having case identified with particular employee -- even if employer name has already been deleted (1904.29(b)(9)), and on Form 301, the employee and treatment information (left side) can be withheld for disclosures to labor representatives or to employees (other than employee named on the Form).

D. Discussion.

[Key points to cover: 1. What health information is or is not a medical record. 2. Are routine requests by OSHA inspectors to see Part 1904 and other records including medical records. 3. Does OSHA use a medical records access order when they should.]

OSHA considers that it has a right of access to most of the information used by an employer to complete the Forms 300 and 301 for OSHA required recordkeeping. This is because OSHA considers the above type of documents as containing basic information no more detailed than the required Forms 300 and 301[15]. Typically, to check on injury/illness log compliance, OSHA will ask to see copies of the following employer documents:

- employee rosters or payroll records
- daily reports of new injury or illness cases
- first-aid records
- company accident or incident reports
- Worker's Compensation First Report of Injury or insurer's accident reports
- nurse/physician on-site clinic logs

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[13] 29 CFR Part 1310.
[14] 29 CFR Part 1913.10, 1910.1020(e)(3) (and part 1926.33).
[15] See 29 CFR Part 1913.10(b)(3) & (4).

- sanitized medical and exposure records (or compilations/summaries) that are available to employer non-medical personnel because they are not subject to other privacy laws.

While it can be argued that a medical record typically contains detail that goes beyond the initial information on an injury or illness referenced above and addresses specifics on diagnosis, evaluation, medication, and/or treatment, the extent to which anyone with a right of access sees an employee medical record depends on how well the employer separates a "medical record" from other OSHA required documentation.

IV. Privacy (Access) Rights Under Other Federal or State Law

A. HIPAA

HIPAA Privacy Rules do not apply to employers and employment records per se. The Privacy Rule, may apply, however, to employer self-sponsored health plans[16].

HIPAA does not apply to WC insurers, WC administrators, or employers[17].

HIPAA will apply to disclosures of an employee's PHI by a health care provider who is covered by HIPAA.

If HIPAA applies to someone holding protected health information (PHI), use and disclosure is permitted without an authorization if required by law[18], such as for OSHA[19], WC[20], or DOT purposes[21], or some other exception applies). Any HIPAA covered entity is to only disclose the minimum amount of information necessary to accomplish the purpose of the disclosure.

When asked to clarify an apparent conflict between the Part 1904 recordkeeping requirements (having name on OSHA 300 log) and HIPAA's Privacy rule, OSHA stated that first it didn't

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[16] The HIPAA privacy rule applies to "covered entities", generally, healthcare providers, health plans and healthcare clearinghouses. However, if an employer has any kind of health clinic operations available to employees, or sponsors a self-insured group health plan for employees, or acts as the intermediary between its employees and health care providers, it will find itself subject to the regulations. HIPAA also only applies to "personally-identifiable health information". PHI does not include employment records held by a covered entity in its role as an employer.

[17] The Privacy Rule does not apply to entities that are WC insurers, WC administrative agencies, or employers, except to the extent they may otherwise be covered entities.

[18] 45 CFR Part 164.512(a).

[19] [citation] (only for purposes of evaluating workplace illness or injury or medical surveillance).

[20] 45 CFR 164.512(l) ("as authorized by and to the extent necessary to comply with laws relating to workers' compensation").

[21] 45 CFR §164.512 enables any employer or service agent in the DOT program to disclose information (without employee authorization) such as DOT urine tests or DOT saliva or breath alcohol tests (as appropriate). Such tests are required by the Omnibus Transportation Employees Testing Act of 1991, 49 CFR Part 40, and DOT agency drug and alcohol testing regulations, unless otherwise stipulated by 49 CFR Part 40. Also, DOT required drug and alcohol testing information differs significantly from health information covered by HIPAA rules. The DOT program is concerned only with employees' compliance with DOT safety regulations, and not with preventative, diagnostic, rehabilitative, maintenance, or palliative care of the past, present, or future physician or mental health or condition of the individual.

believe the OSHA log would be subject to HIPAA, and secondly, even if it were, the disclosure (including names) is required by law (29 CFR 1904.35(b)(2)(iv)).

In the Preamble to the Privacy Rule[22], HHS states that there should be few instances of conflict between HIPAA regulations and other federal laws because HIPAA permits but does not require many disclosures. Therefore, when disclosures are required under other federal law, PHI may be disclosed as required by other law. If a disclosure is not required but only permitted under other law, an entity must determine whether the disclosure is permissible under HIPAA and then follow HIPAA requirements for making such a disclosure. If another federal or state law prohibits disclosure that is permitted but not required under HIPAA, entities must comply with the other federal law.

Thus, employers may use and disclosure the following types of employee health information outside of HIPAA:

- Employee drug testing
- OSHA testing
- FMLA requests and certifications
- ADA disability/accommodation records
- Attendance/sick leave records
- Pre-employment, post-offer physicals
- WC claims and records (to the extent authorized under State WC laws.)
- Short or long-term disability claims
- Enrollment/disenrollment/COBRA records

B. Federal Privacy Act

Any employer who participates in federal health programs or federal funds in any form, must meet the privacy requirements for information related to substance abuse and chemical dependency treatment.[23] The Privacy Act regulations supercede both the HIPAA Privacy Regulation and all more permissive state laws, requiring that any disclosure of information related to substance abuse and chemical dependency treatment be accompanied by the individual's signed authorization. Unlike HIPAA, there are no exceptions for disclosures related to treatment, payment or health care operations. Although the regulation applies only to "federally-assisted" specialized alcohol or drug abuse program, it is widely interpreted as applying to any federally conducted or funded program, any federally licensed or certified program, programs that are tax exempt, and programs that receive federal funds in any form, e.g., via the Medicaid program.

DOT rules[24]. For those companies that perform drug/alcohol testing under the DOT regulations, records relating to such testing "shall be maintained in a secure location with controlled access" and individual records are to be kept in employee medical files.

C. ADA

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[22] 45 CFR Part 164. 65 Federal Register 82593-94; December 28, 2000.
[23] Section 543 of the Public Health Service Act, and its implementing regulation, 42 CFR Part 2.
[24] [Include here is based on Privacy Act requirements – otherwise put in separate section.]

Employers who are covered by the ADA must keep employee and applicant's medical information for purposes of determining how to accommodate an individual's disability or to determine whether an individual can perform a job function. On return to work, the ADA permits employers to require appropriate fitness for duty certifications[25].

Any employee information must be kept as confidential medical record and in a file separate from other personnel records and not used for any purposes inconsistent with the ADA. The information obtained under the ADA must not be used for any purposes inconsistent with the ADA.

The ADA does allow disclosures of employee health information to specific individuals for limited purposes on a need to know basis. Information may be revealed to supervisors and managers about the necessity and effectiveness of work restrictions or accommodations; to safety and first aid workers, if necessary, to treat the employee or provide for evacuation procedures; to government officials as required by law; as required by WC laws; and for insurance related purposes.[26]

Since OSHA inspectors do not investigate compliance with ADA, they are not among the individuals identified in the ADA as being authorized to obtain information about an individual's possible disabilities. Since the inspectors also do not typically present signed authorization forms from employees, the employer is faced with the possibility of violating the ADA unless some specific OSHA standard requires the release of such information so that the employer obtains the benefit of the ADA defense[27]

OSHA's regulations on access to employee exposure and medical records provides: "each employer shall, upon request … assure the prompt access of [compliance officers] to employee exposure in medical records and to analyses using exposure in medical records." It is unclear whether this language could provide an ADA defense to an employer providing medical information on a disability to OSHA[28] It may be a best practice to consider requesting OSHA to subpoena the records and, even then, ensure that the disclosure is strictly limited to what is requested.

D. FMLA.

The Family and Medical Leave Act of 1993 provides eligible employees with up to 12 weeks of leave within a 12 month period, for among other conditions, a serious health condition. Employers may request an employee to provide a medical certification (typically by a doctor) to establish FMLA eligibility for the leave, with some specific limitations on the subject and nature of the inquiries. On return to work, employers may require fitness for duty certifications regarding the health condition that caused the need for the leave, as long as the process is uniformly applied.

Employers are required to keep FMLA related medical information separate from personnel files.

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[25] Jeffrey P. Ayres, Venable LLP, "Medical Records", April 1, 1999 (on the grounds that such certifications are job related and consistent with business necessity). The ADA return to work examination is allowed to be broader than an FMLA fitness for duty certification.
[26] 42 USC Sec. 12112(d)(3).
[27] Jeffrey P. Ayres, Venable LLP, "Medical Records", April 1, 1999.
[28] Id.

Employers are required to provide employee health plan info to officials investigating compliance with FMLA.

E. State Workers' Compensation

Workers compensation laws provide benefits to employees injured on the job, including medical benefits, disability benefits for lost wages, death benefits for dependents, and in some circumstances, job retraining necessitated by the work related injury. WC premiums are paid by the employer. Both the employee and the employer must promptly report injuries by completing and submitting a WC form.

F. State Law

CT: Connecticut law places numerous restrictions on the release of information from an employee's personnel and medical records[29] Such information can only be disclosed without the written authorization of the employee when the disclosure is made: 1) to a third party that maintains or prepared employment records or performs other employment related services for the employer; 2) pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena, or in response to a government audit or the investigation or defense of personnel-related complaints against the employer; 3) pursuant to a request by a law enforcement agency for an employee's home address and dates of his attendance at work; 4) in response to an apparent medical emergency or to apprise the employee's physician of a medical condition of which the employee may not be aware; 5) to comply with federal, state or local laws or regulations; or 6) where the information is disseminated pursuant to the terms of a collective bargaining agreement.

V. Suggested Best Practices

[29] Connecticut General Statutes Section 31-128a et seq.

ACC 2008 Annual Meeting Program 004

UNDERSTANDING & SURVIVING OSHA

HANDOUT: OSHA BASICS FOR WHITE COLLAR & SERVICE BUSINESSES

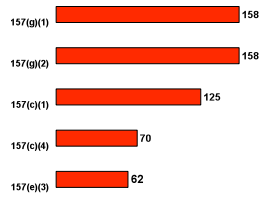
Every year OSHA inspects a host of white collar workplaces and service establishments due to worker complaints or safety incidents. The attached slides detail some of the most frequent sources of citations and penalties for these establishments.

Jose Chanfrau, IV

Do you have a fire extinguisher?

- OSHA requires **ALL** businesses to have portable fire extinguishers.
- All businesses that have a portable fire extinguisher must have a Emergency Action Plan (EAP) that meets certain minimum requirements.

Subpart L - Fire Protection
(1910.155 - 165)- FY 2006 Serious Violations



Top Eight Standards Cited for SIC 8700 in 2007: Engineering, Accounting, Research, Management, And Related Services

Source: OSHA http://www.osha.gov/pls/imis/citedstandard.sic?p_sic=87&p_esize=&p_state=FEFederal

Standard	#Cited	#Insp	$Penalty	Description
Total	396	101	212387	
19100134	32	13	10485	Respiratory Protection.
19100305	25	14	5900	Wiring methods, components, and equipment for general use.
19100132	23	18	10323	General requirements.
19100037	21	14	4925	Maintenance, safeguards, and operational features for exit routes.
19101200	21	10	3715	Hazard Communication.
19100303	18	10	4725	General requirements.
19261101	17	2	4500	Asbestos
19100157	15	12	1475	Portable fire extinguishers.

Minimum Requirements For An Emergency Action Plan

- Means of reporting fires and other emergencies.
- Evacuation procedures and emergency escape route assignments.
- Procedures to be followed by employees who remain to operate critical plant operations before they evacuate.
- Procedures to account for all employees after an emergency evacuation has been completed.
- Rescue and medical duties for those employees who are to perform them.
- Names or job titles of persons who can be contacted for further information or explanation of duties under the plan.
- Management of safety & health.

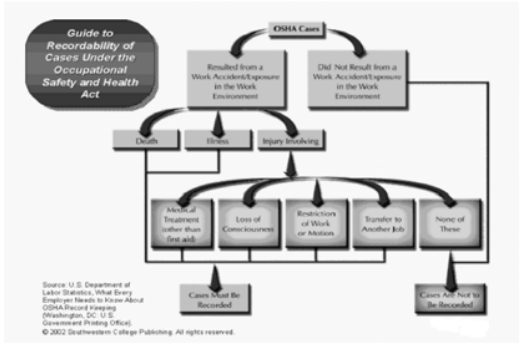
Subpart E – Exit Routes, Emergency Action Plans, and Fire Prevention Plans (1910.33 - 39)-FY 2006 Serious Violations

OSHA Recordkeeping Requirements What Forms Must Be Kept?

- OSHA Form 300 Log of Work Related Injuries and Illnesses.
- OSHA Form 300A Summary of Work Related Injuries and Illnesses.
- OSHA Form 301 Injury and Illness Incident Report.

OSHA Recordkeeping Requirements 101

- **Who must complete and maintain the OSHA forms?**
  - Companies with ten (10) or more employees during the last calendar year
- **What must be recorded?** Injury or illness to any employee whether permanent, part time, temporary hourly or salaried.
- **When must OSHA be notified?**
  - Any workplace incident that results in a fatality or the hospitalization of three or more employees.



Recordation of Injuries or Illness Are Not Required If:

- At the time of the injury or illness the person was present as a member of the general public.
- The injury or illness involves signs or symptoms that surface at work but result solely from a non-work related event or exposure that occurs outside the work environment.
- The injury or illness results solely from voluntary participation in a medical,fitness, or recreational activity such as blood donation, flu shot, sports etc.

The Illness Log

The medical record for each employee must be preserved and maintained for at least the duration of employment plus 30 years, unless a specific occupational safety and health standard provides a different period of time.

Hazard Communications

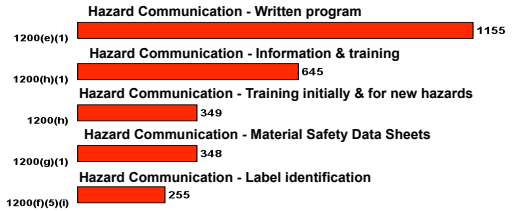
- The maintenance of material safety data sheets (MSDS) is required under OSHA's Hazard Communication Standard, and is the single largest source of OSHA violations by employers.

29 CFR 1910.1200.

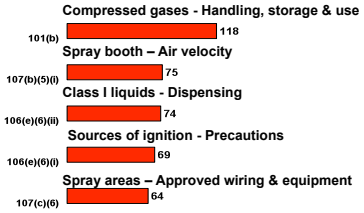
The Top Ten Most Frequently Cited Standards by OSHA

Fiscal Year 2007 (October 2006 through September 2007) Source: OSHA
Scaffolding, general requirements, construction (29 CFR 1926.451)
Fall protection, construction (29 CFR 1926.501)
Hazard communication standard, general industry (29 CFR 1910.1200)
Control of hazardous energy (lockout/tagout), general industry (29 CFR 1910.147)
Respiratory protection, general industry (29 CFR 1910.134)
Powered industrial trucks, general industry (29 CFR 1910.178)
Electrical, wiring methods, components and equipment, general industry (29 CFR 1910.305)
Ladders, construction (29 CFR 1926.1053)
Machines, general requirements, general industry (29 CFR 1910.212)
Electrical systems design, general requirements, general industry (29 CFR 1910.303)

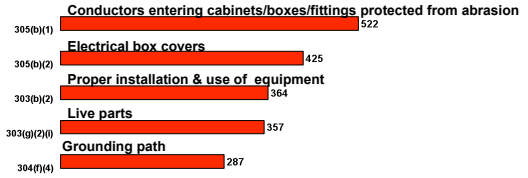
Subpart Z - Toxic & Hazardous Substances (1910.1000 - 1450)-FY 2006 Serious Violations



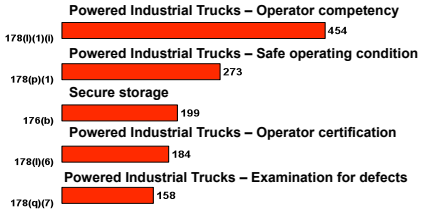
Subpart H - Hazardous Materials (1910.101 - 126)-FY 2006 Serious Violations



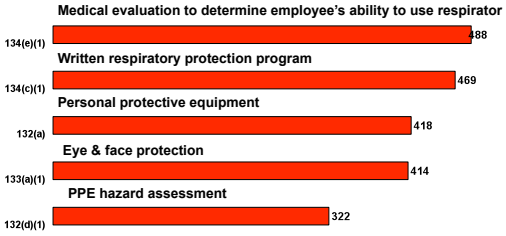
Subpart S - Electrical (1910.301 - 399)-FY 2006 Serious Violations



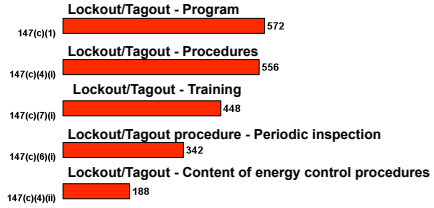
Subpart N - Materials Handling & Storage (1910.176 - 184) FY 2006 Serious Violations



Subpart I - Personal Protective Equipment (1910.132 - 139)-FY 2006 Serious Violations



Subpart J - General Environmental Controls (1910.141 - 147)-FY 2006 Serious Violations



Mandatory Training Programs

- There are currently 76 standards that require training.
- Mandatory training programs predictably involve issues such as energized equipment/lock out-tag out.
- Others are less obvious such as the first aid training standard.

Typical Occupational Categories of Employees Facing a Higher Than Normal Risk of Electrical Accident

	Occupation
1.	Blue collar supervisors(1)
2.	Electrical and electronic engineers(1)
3.	Electrical and electronic equipment assemblers(1)
4.	Electrical and electronic technicians(1)
5.	Electricians
6.	Industrial machine operators(1)
7.	Material handling equipment operators(1)
8.	Mechanics and repairers(1)
9.	Painters(1)
10.	Riggers and roustabouts(1)
11.	Stationary engineers(1)
12.	Welders

Footnote (1) Workers in these groups do not need to be trained if their work or the work of those they supervise does not bring them or the employees they supervise close enough to exposed parts of electric circuits operating at 50 volts or more to ground for a hazard to exist.

[55 FR 32016, Aug. 6, 1990]

OSHA's Training Guidelines

- Determining if Training is Needed.
- Identifying Training Needs.
- Identifying Goals and Objectives.
- Developing Learning Activities.
- Conducting the Training.
- Evaluating Program Effectiveness.
- Improving the Program

Electrical Hazard Training

Type of Training	Scope of Training	Content of Training	Additional Require-ments for Unqualified Persons	Additional Require-ments for Qualified Persons
Classroom or on-the-job type depending on the nature of hazard.	Apply to employees who face a risk of electric shock that is not reduced to a safe level by the electrical installation requirements	Employees shall be trained in and familiar with the safety-related work practices required by 1910.331 through 1910.335 that pertain to their respective job assignments.	Trained in and familiar with any electrically related safety practices not specifically addressed by 1910.331 through 1910.335 but which are necessary for their safety.	1) Skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment. 2) The skills and techniques necessary to determine the nominal voltage of exposed live parts. 3) The clearance distances specified in 1910.333(c) and the corresponding voltages to which the qualified person will be exposed.

First-aid and CPR Training (Mandatory). - 1910.266 App B Minimum Requirements

- The definition of first aid.
- Legal issues of applying first aid (Good Samaritan Laws).
- Basic anatomy.
- CPR.
- Application of dressings and slings.
- Treatment of strains, sprains, and fractures.
- Immobilization of injured persons.
- Handling and transporting injured persons.
- Treatment of bites, stings, or contact with poisonous plants or animals.
- Patient assessment and first aid for the following named conditions: (See List)

Patient Assessment and First Aid for:

- Respiratory arrest.
- Cardiac arrest.
- Hemorrhage.
- Lacerations/abrasions.
- Amputations.
- Musculoskeletal injuries.
- Shock.
- Eye injuries.
- Burns.
- Loss of consciousness.
- Extreme temperature exposure (hypothermia/hyperthermia)
- Paralysis
- Poisoning.
- Loss of mental functioning (psychosis/hallucinations, etc.).
- Artificial ventilation.
- Drug overdose.

Subpart K - Medical & First Aid (1910.151 - 152)-FY 2006 Serious Violations