



607 OSHA Compliance: A Matter of Life or Death?

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Faculty Biographies

Thomas Giller

Thomas Giller is the compliance officer for Kraft's North America operations located in Northfield, Illinois, and director of investigations, part of the company's compliance and integrity function. Until earlier this year, Mr. Giller served as the company's chief environmental and worker safety counsel.

Prior to joining Kraft, Mr. Giller held a number of positions, as an environmental associate and then partner in a Chicago law firm, a trial attorney for the environmental enforcement section of the U.S. Department of Justice, and immediately before coming to Kraft, as environmental, safety, and litigation counsel for Safety-Kleen Corp.

He holds a joint degree in law and energy and resources from the University of California.

Neil H. Wasser

Neil H. Wasser is a partner with Constangy, Brooks & Smith, a law firm representing management, exclusively, in labor and employment law matters. Mr. Wasser is based out of the firm's Atlanta office, one of 13 offices across nine states. He specializes in assisting companies with OSHA compliance obligations and establishing safety and health programs. He represents client companies during OSHA inspections, defends them against OSHA citations, and is widely regarded as a top national expert in OSHA recordkeeping training.

He is a member of the Atlanta Bar Association, ABA, and the State Bar of Georgia. He currently serves on the board of directors of the Atlanta Humane Society.

Mr. Wasser earned his undergraduate degree from Tulane University of Louisiana and his law degree from the University of Georgia in Athens, Georgia.



Session 607 OSHA Compliance: A Matter of Life or Death


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Topics

- I. **Keeping Up With OSHA**
- II. **A Look Back - Statistics, Statistics, and a Few More Statistics From 2004**
- III. **Workplace Fatalities – A Different Approach by the Agency**
- IV. **Focusing On OSHA Compliance**
- V. **Decisions, Decisions – A Few Decisions To Note**
- VI. **Potential OSHA Legislation**
- VII. **Final Thoughts**



I. **Keeping Up With OSHA**

- **Quick Takes** – OSHA bi-monthly e-memos describing what's new. Sign up on the OSHA Home Page. (Over 57,000 subscribers.) www.osha.gov
- 2004 – **Quick Start** is announced – a step-by-step guide to help employers in general manufacturing, wholesale and retail industry identify major OSHA requirements and guidance materials.
www.osha.gov/dcsp/compliance_assistance/quickstarts/index.html
- **My OSHA** – Choose content to personalize your own OSHA Web page. www.osha.gov/pls/myosha/myosha.login
- **2005 OSHA Small Business Handbook**
<http://www.osha.gov/Publications/smallbusiness/small-business.pdf>



Changes at the Top of OSHA

- December 2004 – **John Henshaw**, Assistant Sec. of Labor for OSHA since his confirmation in August 2001, resigns.
- Accomplishments:
 - Exceeded inspection goals.
 - Outreach, education, and compliance assistance.
 - More than 200 Strategic Partnerships and more than 200 Alliances.
- December 2004 – **Jonathan Snare** was named Acting Assistant Secretary of Labor for OSHA.
- 2005 – John Henshaw joined Behavioral Science Technology (BST) as a part-time senior principal consultant.
- Lots of names being floated for top job at OSHA.

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Views of OSHA

- AFL-CIO Director of Safety and Health, **Peg Seminario**, described Henshaw's standard-setting record as “the worst” in OSHA history. Seminario is quoted as saying: “All and all, his tenure has been quite disappointing.”
- **NAM** representative is quoted as saying: “Workplace fatalities have declined to record lows” since Henshaw became Assistant Secretary for OSHA.
- **Am. Society for Safety Engineers and Am. Industrial Hygienists Association** praised Henshaw, particularly for his work in increasing professional certifications, compliance assistance and increasing participation in VPP.

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II. A Look Back - Statistics, Statistics, and a Few More Statistics From 2004

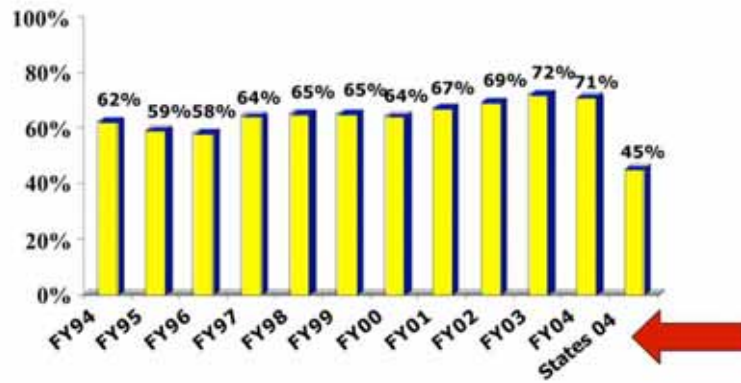


OSHA Statistics

- FY 04 – 39,167 Federal Inspections (57,866 State Plan Inspections)
 - Approximately 30,000 safety inspections vs. approximately 9,000 health inspections.
 - 37,700 Federal Inspections projected for FY 05.
- Percent of contested cases: 8% in FY 03.
 - Down from 10% in FY 99.
- Average number of violations cited per initial inspection in FY 04 – 3.2.
 - About the same as FY 03.



% of Total Violations Cited As Serious

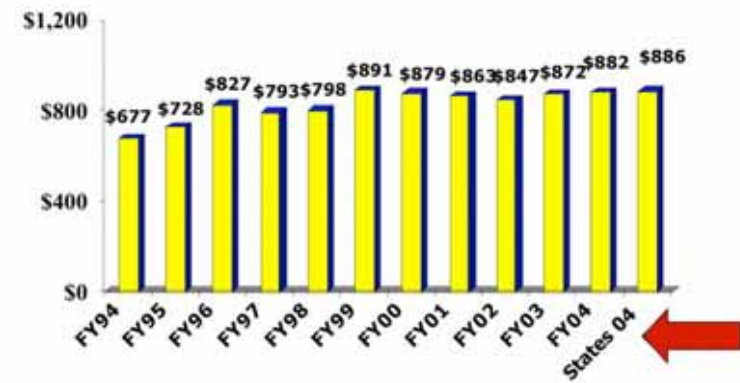


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Average Penalty Per Serious Citation

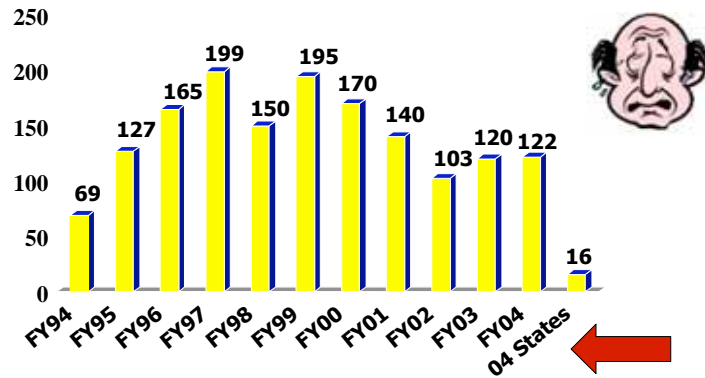


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Federal Significant Cases

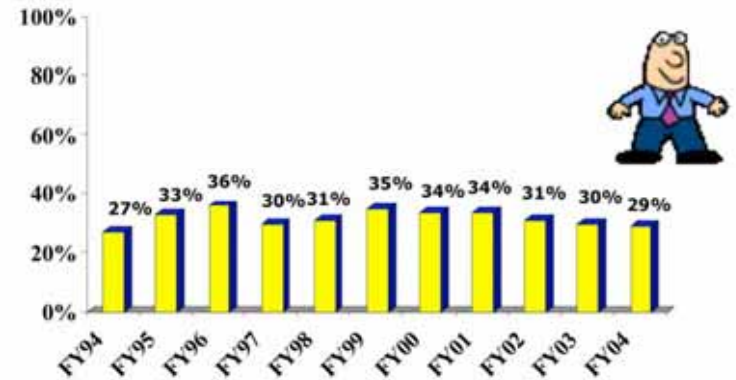


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% of In-Compliance Inspections



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Injury and Illness Rates

- 1998 – I/I rate of 6.7 cases per 100 FTEs.
 - > **LWDII = 3.1**
- 1999 – I/I rate of 6.3 cases per 100 FTEs.
 - > **LWDII = 3.0**
- 2000 – I/I rate of 6.1 cases per 100 FTEs.
 - > **LWDII = 3.0**
- 2001 – I/I rate of 5.7 cases per 100 FTEs.
 - > **LWDII = 2.8**
- 2002 – I/I rate of 5.3 cases per 100 FTEs.
 - > **LWDII = 2.8 (new recordkeeping rules)**
- 2003 – I/I rate of 5.0 cases per 100 FTEs.
 - > **LWDII = 2.6**

Each year, these rates reflect the lowest levels since BLS began reporting data.

www.bls.gov/iif/oshwc/osh/os/osnr0021.txt



Widespread Recordkeeping Violations Lead to \$42,000 in OSHA Fines for Lockport, N.Y., Automotive Parts Plant

Region 2 News Release: 05-897-NEW/BOS 2005-124
Thursday, May 19, 2005

- **BUFFALO, N.Y.** -- A Lockport, N.Y., automotive parts manufacturer's failure to keep proper records of hundreds of workplace injuries and illnesses has resulted in \$42,000 in proposed penalties from the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA).
- Delphi Thermal & Interior was cited . . . OSHA's inspection identified 117 instances of unrecorded injuries or illnesses that resulted in days away from work or restricted duty for workers; 20 instances of unrecorded standard threshold shifts in employees' hearing; and 153 instances where injuries and illnesses were either not recorded at all or not recorded within seven days, as required.

■ http://www.osha.gov/pls/oshweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=11385



OSHA Fines Massena, N.Y., Automobile Parts Manufacturer \$160,000 for Failing to Record Workplace Injuries and Illnesses

Region 2 News Release: 04-2004-NEW / BOS 2004-244
Tuesday, October 12, 2004

- General Motors Powertrain Corp. has been cited for alleged willful, serious, and other violations of health and safety standards at its Route 37 East plant.
- OSHA's inspection identified 98 instances where the company did not record on the OSHA 300 Log work-related noise-induced hearing losses and other injuries and illnesses suffered by employees at the plant.
- The Massena plant's failure to record work-related injuries led to the issuance of two willful citations, carrying \$140,000 in fines.
 - www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=11075



Ergonomics – Down But Not Out

- In FY 04, OSHA conducted 1900 ergonomics inspections resulting in 16 citations.
 - General Duty Clause – Sec. 5(a)(1) - Each 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.
 - http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=818



Site Specific Targeting - 2004/05?

April 19, 2004 – Plan – based on 2003 Data Initiative (2002 data). **Extended on June 6, 2005 until July 25, 2005 or until superseded by a new Directive.**

• www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3123

- **Primary Inspection List: All worksites with DART rate \geq 15 or, a DAFWII rate of 10 or more.**
- **Secondary Inspection List: All workplaces with DART rate \geq 8 but below 15 or a DAFWII rate of between 4 and 10.**
- **200 workplaces randomly selected for inspection with DART rates between 0 and 8.**
- **Failed to respond to the 2003 Data Initiative by 3/3/04? Added to the Primary Inspection List.**
- **Exception – facilities that received comprehensive S&H inspection within last 24 months.**
- **2449 SST Inspections in FY 04.**

• www.osha-slc.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3123

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Competitive Advantage? – Your Company's OSHA Compliance History

- Your company's OSHA compliance history is available for the public to view:
 - Go to: www.osha.gov/pls/imis/establishment.html
 - Enter the establishment name and see all State and Federal OSHA inspections, citations, and penalties paid.
- All of OSHA's VPP sites can be viewed at:
 - www.osha.gov/desp/vpp/sitebysic.html

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III. Workplace Fatalities – A Different Approach by the Agency

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Reporting Fatalities to OSHA

- **29 C.F.R. Part 1904.39(a) Basic requirement.** Within eight (8) hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, you must orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident. You may also use the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742).
 - Motor Vehicle Accidents and Commercial or Public Transportation Systems – record, but do not report.
- **SEE YOUR STATE LAW IF THERE IS A STATE OSHA**

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The New York Times and OSHA

- Three part series written by New York Times writer David Barstow: When Workers Die
 - 12/21/03 - **A Trench Caves In; a Young Worker Is Dead. Is It a Crime?**
 - www.nytimes.com/2003/12/21/national/21OSHA.html?ex=1122350400&en=4d3caeb217dbb336&ei=5070
 - 12/22/03 - **U.S. Rarely Seeks Charges for Deaths in Workplace**
 - www.nytimes.com/2003/12/22/national/22OSHA.html?ex=1122350400&en=ce726add77168ca6&ei=5070
 - 12/23/03 - **California Leads in Making Employer Pay for Job Deaths**
 - www.nytimes.com/2003/12/23/national/23OSHA.html?ex=1122350400&en=0cb887384c686539&ei=5070



WHEN WORKERS DIE U.S. Rarely Seeks Charges for Deaths in Workplace - Excerpts

- “. . . from 1982 to 2002, OSHA investigated 1,242 . . . instances in which the agency itself concluded that workers had died because of their employer's "willful" safety violations. Yet in 93 percent of those cases, OSHA declined to seek prosecution”
- “Since 1990, the agency has quietly downgraded 202 fatality cases from "willful" to "unclassified," a vague term favored by defense lawyers in part because it virtually forecloses the possibility of prosecution.”
- “For those 2,197 deaths, employers faced \$106 million in civil OSHA fines and jail sentences totaling less than 30 years, Twenty of those years were from one case, a chicken-plant fire in North Carolina that killed 25 workers in 1991. . . . The Environmental Protection Agency, in 2001 alone, obtained prison sentences totaling 256 years.”



Bad Actors – A Focus in 2004 and Beyond

- OSHA referred a total of 18 cases to the Department of Justice (DOJ) for criminal prosecution during 2003 and 2004, a level not seen since 1990-1991.
 - www.occupationalhazards.com/articles/13396
- Special training courses have been developed for compliance officers so that they can investigate and build better cases for criminal prosecution.
- Regional solicitors more likely to contact Justice Department to review fatality cases.
- Obstruction of justice laws are going to be used against any company official found to have knowingly altered, concealed or destroyed evidence or documents.



4/14/05 - CPL 02-00-137 - Fatality/Catastrophe Investigation Procedures

- Early in the investigation, the Area Director, in consultation with the investigator, should make an **initial determination as to whether there is potential for a criminal violation**. The decision will be based on consideration of the following:
 - A fatality has occurred.
 - There is evidence that an OSHA standard has been violated and that the violation contributed to the death.
 - There is reason to believe that the employer was aware of the requirements of the standard and knew that he was in violation of the standard, or that the employer was plainly indifferent to employee safety.
 - If the Regional Administrator agrees with the Area Director's assessment of the case, the Regional Administrator will notify the Regional Solicitor.
 - www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3245



Fatalities

- **5,559 fatal work injuries in 2003.**
 - www.osha.gov/pls/oshaweb/owadis.show_document?p_table=SPEECHES&p_id=818
- **Over 15 fatalities per day in 2003.**
 - Fatal highway accidents (42%)
 - Contact with objects and equipment (16%)
 - Workplace homicides (16%)
 - Falls (12%)
 - Exposure to harmful substances or equipment (9%)
 - Fires and explosions (4%)
 - <http://stats.bls.gov/news.release/cfoi.t01.htm>
- **Fatal work injuries for 2002 and 2003 were the lowest ever recorded by the fatality census which has been conducted since 1992.**

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Workplace Homicides - Hansen v. AOL (Utah Supreme Court, July 20, 2004)

- AOL posts policy prohibiting firearms in its building and parking lot.
- Three employees brought guns into the parking lot as they had planned to go target shooting at a local firing range. AOL security camera recorded the men moving the guns from two cars into a third that also had a gun. All three were fired and filed suit.
- Utah Supreme Court held that the Company's policy and the State's employment-at-will law outweighed the individuals' rights to bear arms.

2005 Univ. N.C. Study: Workplaces that did not prohibit weapons were 3 times more likely to experience a worker homicide. BNA, Daily Labor Report, 5/4/05.



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IV. Focusing On OSHA Compliance

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Most Frequently Cited Standards – 2004

www.osha.gov/pls/imis/citedstandard.html

**Meat Packing
– SIC 2011**

General Industry

1910.1200(e)(1)	Haz Com / Written Program	1910.119	Process Safety Mgm.
1910.212(a)(1)	Machine Guarding	1910.305	Electrical Wiring Methods
Section 5(a)(1)	Safe / Healthful Conditions	1910.212	Machine Guarding
1910.1200(h)(1)	Haz / Com Info/Training	1910.1200	Haz Com
1910.147	LOTO / Energy Control Program	1910.147	LOTO
1910.151(c)	Medical Services /First Aid	1910.219	Mechanical Power Trans.
1910.23(c)(1)	Guard Floor/Wall Openings	1910.303	Electrical System Design

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Identifying the Most Frequently Cited Standards Applicable to Your Company

- Step 1: Determine your company's SIC.
 - SIC Manual www.osha.gov/pls/imis/sicsearch.html?p_sic=&p_search=real+estate
 - Establishment Name www.osha.gov/pls/imis/establishment.html
- Step 2: Enter your SIC in a search program on the OSHA web site.
 - www.osha.gov/pls/imis/citedstandard.html
- Step 3: Identify the most frequently cited standards for your company.
- Step 4: Consider programs to assess compliance against those Standards.



Complaint-Based Inspections

- Complaint inspections FY 04 – approximately **1/5th of all inspections.**
- Remember – In April 2000, OSHA began allowing employees to fill out OSHA complaints on-line. A 19 question form – 10 minutes.
 - **OSHA receives approximately 5,000 electronic complaints per year.**
 - www.osha.gov/as/opa/spanish/complaintform-sp.html
 - www.osha.gov/pls/oshaweb/eComplaintForm.html
- OSHA's web site receives between 3 and 4 million visits per month.



Avoiding Your Next Complaint Inspection

- Review your company's procedures for employees to raise safety and health concerns.
 - Are they well publicized, easy to use, confidential, credible? Is there any fear of reprisal?
- Are supervisors trained so that they understand "complaints are good?"
- Review your work order system. Are safety issues given priority? Are work orders timely processed? Is feedback provided?

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Repeat Violations

- Repeat violation = When a new citation is issued to an employer:
 - who has been previously cited for a substantially similar condition; and
 - the new citation must be issued within 3 years of the date of the final order or the final date of abatement (whichever is later) of the previous citation. OSHA Field Inspection Reference Manual, Chapt. III.
- The penalty for a repeat violation is not more than \$70,000 and not less than \$5,000.
- **NOTE:** *There is no statutory limitation on the length of time that a citation may serve as the basis for a repeat. Hackensack Steel Corp., OSHA Rev. Comm., 2003.*

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Willful Violations

- Willful violation = Awareness of a violation or plain indifference to a known hazardous condition. (Supervisor Knowledge = Your Knowledge).
 - Penalty of not more than \$70,000 and not less than \$5,000.
- Willful violation prevention:
 - Verify that all internal and external audits / inspections have been closed out. (For example, workers' compensation carrier audits, workplace inspections, fire safety audits.)

www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=16434&p_text_version=FALSE

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OSHA's Enhanced Enforcement Policy



- Fatality inspections in which OSHA finds high gravity serious, willful, or repeat violations related to the death;
- Inspections that result in three or more willful or repeat violations; and
- Inspection that results in two failure-to-abate notices where the underlying violations were classified as high gravity serious.

NOTE: In FY 2004, there were 313 inspections classified as EEP cases. **80% of all EEP cases involved fatalities.**

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Enhanced Enforcement (continued)

Five aspects of enhanced enforcement:

1. On-site **follow-up inspections** at employers who have Priority Enforcement Cases.
2. **Public Awareness** – OSHA will mail a copy of the citation/penalty to corporate headquarters, may meet with company officials, etc.
3. OSHA will use its SST inspection list to prioritize other facilities under the corporate entity. OSHA may **treat secondary list facilities on SST program as primary list facilities.**



Enhanced Enforcement (continued)

4. HGV Settlement agreements will:

- **Require employers to hire consultants to develop a process to change the safety and health culture in the facility.**
- **Apply the agreement corporate-wide.**
- **Require employers to submit 300 Logs to OSHA for review.**

5. **11(b)** – OSHA will seek Section 11(b) orders to enforce citations that have been settled or have become final orders. **Section 11(b) of the OSH Act provides federal courts with more sanctions to deal with non-compliant employers – fines, court costs, incarceration.**

Prior to 2003, Sec. 11(b) was not used – since then 13 summary enforcement cases have been



V. Decisions, Decisions – A Few Decisions To Note

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Notice of Contest

- Notice of Contest.
- 29 U.S.C. § 659(a) provides that employers have **15 working days** (from citation receipt) to file a **Notice of Contest**. Failure to file within such time means that “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.”

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Late Filing of Notice of Contest

- Sec. of Labor v. Well Rise Fashion (ALJ Decision, March 4, 2004) - Employer argued that it's untimely Notice of Contest should be excused due to its failure to understand English. ALJ rejected the argument finding that this did not constitute excusable neglect. www.oshrc.gov/decisions/pdf_2004/03-1363.pdf
- Do you have orderly mailroom procedures for handling important mail – are they communicated and enforced?



Secretary of Labor v. Ho

- Company cited on per employee basis under the training provisions of the asbestos standard - \$1.14 million proposed penalty.
- September 23, 2003, Review Commission rejects egregious policy in this case and reduces penalties from \$1.14 million to \$658,000.
- Test - Does the language of the standard deal with a single work practice or prescribe conduct that is unique and specific to each employee?
- Feb. 21, 2005 – The 5th Circuit Court of Appeals ruled that the plain language of the *asbestos standard* did not allow for per-employee citations in this case.
- Narrowly written opinion.



Secretary of Labor v. Froedtert Memorial Lutheran Hospital

- Hospital failed to comply with the BBP, HAZCOM, and Recordkeeping rules regarding *temporary housekeepers* from a temp agency.
- January 15, 2004, Review Commission held that the Hospital violated the Act. Factors considered included:
 - Host employer's right to control manner and means by which product is accomplished;
 - Skill required;
 - Source of tools;
 - Whether host can assign additional projects; and
 - Extent of hired party's discretion over when and how long to work.

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VI. Potential OSHA Legislation

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Potential OSHA Reform Legislation - Rep. Charlie Norwood (R-Ga.)

- OSH Small Business Day in Court Act of 2005 – would give Rev. Comm. flexibility in making exceptions to 15-day notice of contest period.
- OSH Review Commission Efficiency Act of 2005 – would increase OSHRC from 3 to 5 members.
- OSH Small Employer Access to Justice Act of 2005 – would allow small employers to be awarded attorneys fees for contesting OSHA citations and prevailing.



Potential Legislation – Sen. Michael Enzi (R-Wyo.)

- Section 17(e) of OSH Act – Conviction of a willful violation of standard that causes the death of an employee – punishable “by a fine of not more than \$10,000 or by imprisonment for not more than six months or both.”
- Sen. Michael Enzi (R-Wyo.) will likely propose raising criminal penalties for willful violations from 6 to 18 months.
- Sen. Ted Kennedy (D-Mass.) and other Democrats have introduced OSHA Reform packages that would raise criminal penalties to a maximum of 10 years.



Argument for Increased Penalties

- Did You Know that the penalty for:
 - knowing and for profit reproduction of the character “Smokey Bear” - (18 U.S.C. § 711);
 - knowingly and for profit reproducing the character “Woodsy Owl” or the slogan “Give a Hoot, Don’t Pollute” (18 U.S.C. § 711a);
 - using an aircraft or motor vehicle to hunt, for the purpose of capturing or killing, any wild, unbranded . . . burro running at large on any public land (18 U.S.C. § 47); and
 - wearing the 4-H Club logo with intent to defraud for the purpose of inducing belief that one is a member of the 4-H Club (18 U.S.C. § 707).
- Is a fine and/or “imprisoned for not more than six months.”



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VII. Final Thoughts

Now is the time to:

- Stay current on “what’s going on at OSHA.”
- Use the OSHA Web Site as a tool in enhancing your company’s safety and health compliance.
- Ensure that your company has effective mechanisms for employees to raise safety concerns.
- Practice accurate recordkeeping and analyze trends to reduce injuries and illnesses.
- Participate in the debate regarding safety- and health-related legislation.

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