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Handbook

Second Edition

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Occupational Safety and Health Law Handbook

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9.0 Judicial Review

Any person who is adversely affected by a standard issued pursuant to the OSH Act may seek review at any time prior to the 60th day after such a standard is promulgated in the United States Court of Appeals for the circuit in which such person resides or has her principal place of business.[55] If the challenge to the standard is based on the failure of OSHA to adhere to a procedural requirement, the issue must be raised in pre-enforcement proceedings within 60 days before the regulation becomes effective.[56] In pre-enforcement proceedings, OSHA will have an affirmative burden to demonstrate the reasonableness of the standard based on "substantial evidence in the record considered as a whole."[57] The burden is also on OSHA to demonstrate by substantial evidence that the standard is feasible, although OSHA does not have the burden of proving feasibility with scientific certainty.[58] If enforcement proceedings have already commenced, the standard is presumed to be valid and the burden of proof is on the petitioning employer.

[55] 29 U.S.C. § 655(6)(f). The petition must be filed by the 59th day after promulgation.

[56] *National Industries Constructors, Inc. v. Occupational Safety & Review Com.*, 583 F.2d 1048 (8th Cir. 1978).

[57] *Id.*

[58] AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992).

Chapter 3

The Duty to Comply with Standards

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1.0 Overview

Section 5(a)(2) of the Occupational Safety and Health (OSH) Act, 29 U.S.C. § 654(a)(2), states that "each employer . . . shall comply with occupational safety and health standards promulgated under this Act." Other sections of the Act impose an implicit duty to comply with the Occupational Health and Safety Administration's (OSHA) regulations.[1] Although the duty to comply with standards and regulations seems unqualified, the courts and the Occupational Safety and Health Review Commission (OSHRC or Commission) have held that the duty is qualified in various ways.

2.0 Applicability of OSHA Standards

2.1 The General Principle of Preemption

The OSHA standards themselves state a general principle—the more specific standard prevails over the more general.[2] For this reason, decisions speak of the defense of preemption—that is, a citation will be vacated if the cited condition is regulated by a more specifically applicable standard.[3] While many factors are relevant to

[1] Section 9(a), 29 U.S.C. § 658(a) (permitting citation to be issued for violation of regulation); Sections 17(a)–(c) and (e), 666(a)–(c) and (e) (permitting civil and criminal penalties to be imposed for violating regulations).

[2] 29 C.F.R. § 1910.5(c).

[3] For example, *McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1886 (Rev. Comm'n 1994), *aff'd and approved*, 71 F.3d 208, 17 BNA OSHC 1412 (6th Cir. 1995).

such an inquiry,[4] the basic question is whether application of the more generally applicable standard would defeat a rulemaking decision implicit in the more specifically applicable standard.[5]

In accordance with this principle, an employer must first determine whether his industry is specially regulated by one of the several industry-specific "parts" in Title 29 of the Code of Federal Regulations (C.F.R.). These industry-specific parts are Part 1913, which applies to shipyards; Part 1917, which applies to marine terminals; Part 1918, which applies to longshoring; Part 1926, which applies to construction; and Part 1928, which applies to agriculture.

If no industry-specific part applies, then an employer must look to Part 1910, which is entitled "General Industry Standards" and which applies to all employers engaged in businesses affecting commerce. The employer must then determine whether a special, industry-specific section within Subpart R of Part 1910 or an industry-specific subpart within Part 1910 regulates both his industry and the particular condition cited. For example, § 1910.261, the first section in Subpart R, regulates the paper industry, while Subpart T of Part 1910 covers commercial diving. If no industry-specific standard in Subpart R of Part 1910 applies, then the employer is regulated by the many generally applicable sub-parts in Part 1910. For example, Subpart O regulates the guarding of machinery generally.

The preemption principle—that is, the principle that the specific standard prevails over the general standard—applies even to standards within an industry-specific part (for example, within Part 1926, the construction part). Thus, the general provisions in Part 1926 governing the use of nonsparking electrical equipment in flammable gas concentrations were held to have been preempted by the specific provisions on the use of such equipment in flammable gas concentrations in tunnels under construction.[6]

2.2 Special Applicability Problems

May a standard in Part 1910 be applied to work regulated by an industry-specific part (e.g., construction work)? It has been held that, if there is no applicable construction standard in Part 1926, OSHA may cite an employer for a violation of a Part 1910 standard.[7] In addition, some Part 1910 standards expressly state that they apply to construction work.[8]

Nevertheless, some Part 1910 standards do not apply to construction work. Some expressly state they do not so apply,[9] and the preamble to at least one other set of standards states that those standards were not intended to so apply.[10] In at least one case, OSHA has refrained from applying a standard to construction work because its proposed version did not give that industry notice and opportunity to comment on its applicability.[11]

3.0 General Principles of the Duty to Comply

Although OSHA must show that a condition violative of a standard existed, OSHA need not always show that the cited employer *himself* violated the standard, that is, that the cited employer created the violative condition.[12]

Unless a standard explicitly or implicitly incorporates hazardousness as an element of a violation, OSHA need not show that a failure to comply with a standard creates a hazard.[13] Whether a hazard exists depends on whether there is a "significant risk," which in turn depends on the severity and probability of harm.[14]

3.1 The Exposure Rule

With respect to many standards,[15] employers must comply only if there is, or reasonably predictably will be, exposure of employees to the violative condition.

4 *See Trinity Industries, Inc.*, 20 BNA OSHC 1051, 1057 (Rev. Comm'n 2003) ("Where a standard provides meaningful protection to employees beyond the protection afforded by another standard, there is no preemption"), *aff'd without published opinion*, 20 BNA OSHC 1873 (5th Cir. July 23, 2004) (No. 03-60511); *Bratton Corp.*, 14 BNA OSHC 1893 (Rev. Comm'n 1990) (steel erection standards do not preempt general fall protection standards) (acceding to view of several circuits); *New England Telephone & Telegraph Co.*, 8 BNA OSHC 1478 (Rev. Comm'n 1980).

5 *Lowe Constr. Co.*, 13 BNA OSHC 2182 (Rev. Comm'n 1989).

6 *McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1886 (Rev. Comm'n 1994), *aff'd and approved*, 71 F.3d 208, 17 BNA OSHC 1412 (6th Cir. 1995).

7 *Western Waterproofing Inc.*, 7 BNA OSHC 1499, 1501-02 (Rev. Comm'n 1979).

8 For example, § 1910.134 (introductory provision).

9 For example, § 1910.147(a)(1)(ii)(A) (lockout standard).

10 For example, the electrical standards in Subpart S of Part 1910. *See* 46 *Fed. Reg.* 4034, 4039 ("the electrical standards of Part 1910 do not apply to construction activities").

11 Thus, OSHA has stated that the Bloodborne Pathogens Standard, § 1910.1030, does not apply to construction work because the construction industry did not receive public notice of, and an advisory committee was not consulted about, such an application when the standard was proposed. Letter from Secretary of Labor Lynn Martin to Robert Georgine, "Construction Activities and Operations and the Bloodborne Pathogens Standard" (Dec. 23, 1992), at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20968>.

12 See § 3.2 of this chapter.

13 *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (Rev. Comm'n 1993); *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 834 (5th Cir. 1981).

14 *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (Rev. Comm'n 2003).

15 See text accompanying note 25 below.

This principle is reflected in the allocation to OSHA of the burden of proving either of the following:

1. Employees are or were in the zone of danger created by a violative condition; or
2. It is reasonably predictable that employees, by "operational necessity" or otherwise (including inadvertence) in the course of their work or associated activities (e.g., going to rest rooms) will be in the zone of danger created by the cited condition.[16]

The term "zone of danger" refers to "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent."[17]

The Commission adopted this "reasonably predictable exposure" test after the courts rejected or suggested disapproval of the Commission's early requirement that OSHA prove actual exposure—that is, that an employee had actually been endangered by a violation.[18] Nevertheless, the mere possibility of exposure is insufficient.[19] That the employer is expected in the future to create a violative condition, but has not yet done so, is insufficient.[20] On the other hand, exposure of just a single employee is sufficient to trigger the employer's duty and to satisfy OSHA's burden of proof.[21]

OSHA need not show that a compliance officer personally witnessed facts supporting an exposure finding.[22] Nor need OSHA show that an employee is, for example, teetering on the edge of an unguarded floor.[23] Brevity of exposure is immaterial.[24] For some standards and regulations—particularly those requir-

16 *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (Rev. Comm'n 1997) (surveying cases); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (Rev. Comm'n 1976).

17 *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (Rev. Comm'n 1995).

18 *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1263-66, 2 BNA OSHC 1243 (4th Cir. 1974) (remanding for reconsideration of actual exposure test); *Brennan v. OSHRC (Underhill Construction Corp.)*, 513 F.2d 1032, 2 BNA OSHC 1641 (2nd Cir. 1975) (rejecting actual exposure test). *See also Adams Steel Erec., Inc.*, 766 F.2d 804, 812, 12 BNA OSHC 1393, 1398 (3rd Cir. 1985) (same).

19 *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 & n.8 (Rev. Comm'n 1997) (rejecting "physically possible" test); *Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (Rev. Comm'n 1980).

20 *Sharon Steel Corp.*, 12 BNA OSHC 1539 (Rev. Comm'n 1985).

21 For example, *Mineral Industries v. OSHRC*, 639 F.2d 1289, 1294-95, 9 BNA OSHC 1387 (5th Cir. 1981).

22 For example, *Brennan v. OSHRC (Underhill Construction Corp.)*, 513 F.2d 1032, 1038, 2 BNA OSHC 1641 (2d Cir. 1975); *see North Berry Concrete Corp.*, 13 BNA OSHC 2055, 2055-56 (Rev. Comm'n 1989).

23 For example, *Underhill Construction*, 513 F.2d at 1038.

24 For example, *Morgan & Culpepper, Inc. v. OSHRC*, 676 F.2d 1065, 1069, 10 BNA OSHC 1629, 1632 (5th Cir. 1982) (short duration of exposure no defense); *Brock v. L.R. Wilson & Sons*, 773 F.2d 1377, 1386, 12 BNA OSHC 1499 (D.C. Cir. 1985); *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074 (Rev. Comm'n 1991); *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1232 (Rev. Comm'n 1981); *see Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (Rev. Comm'n 1992).

ing recordkeeping (e.g., an injury log)—no showing of exposure need be made.[25]

3.2 To Whose Employee Does the Duty Run?

This question was most vexing in the early years of the Act and, in some respects, the answer is only somewhat clearer today. The question first arose on multi-employer worksites, such as construction sites, where employees of Employer A (usually, a subcontractor) may be exposed to a violative condition created or controlled by Employer B (usually, the general contractor or another subcontractor). In its early days, the Review Commission followed a simple rule: The employer of the employees exposed to a violative condition (Employer A) could be cited, regardless of whether the condition had been created by another employer (Employer B) and regardless of whether abatement of the condition was controlled by that employer.[26] Moreover, *only* the employer of the exposed employee (Employer A) could be cited;[27] the employer who created or controlled the violative condition (Employer B) could not be cited unless one of his own employees was exposed to it as well. Complicating the matter was that Employer A may lack the expertise to recognize that the condition is violative or even hazardous.

Subcontractors complained that this policy was highly unfair to them, and they and OSHA complained that it allowed the most guilty to escape liability. Eventually, beginning with a decision by the Second Circuit,[28] the rules of liability changed in two ways: A new, expanded liability rule was developed (see § 3.2.1 below); and a new series of affirmative defenses was established (see § 3.2.2 below). OSHA has issued a directive to its enforcement personnel attempting to explain these rules in detail.[29]

3.2.1 The Multi-Employer Worksite Liability Rules

Although OSHA may satisfy its burden of proving exposure by proving an employment relationship between the exposed employees and the cited employer (i.e., showing that the exposed employees are those of the cited employer),[30] this

25 *Thermal Reduction Corp*, 12 BNA OSHC 1264, 1268 (Rev. Comm'n 1985).

26 *R.H. Bishop Co.*, 1 BNA OSHC 1767, 1769 (Rev. Comm'n 1974).

27 *Martin Iron Works, Inc.*, 2 BNA OSHC 1063 (Rev. Comm'n 1974). *See also Hawkins Constr. Co.*, 1 BNA OSHC 1761 (Rev. Comm'n 1974); *Gilles & Cotting, Inc.*, 1 BNA OSHC 1388 (Rev. Comm'n 1973), *aff'd in relevant part*, 504 F.2d 1255 (4th Cir. 1974).

28 *Brennan v. OSHRC (Underhill Construction Corp.)*, 513 F.2d 1032, 2 BNA OSHC 1641 (2d Cir. 1975).

29 CPL 2-0.124, "Multi-Employer Citation Policy" (Dec. 10, 1999), at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024.

30 For example, *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157 (Rev. Comm'n 1989); *MLB Industries, Inc.*, 12 BNA OSHC 1525, 1528 (Rev. Comm'n 1985).

is not necessary unless a standard or regulation provides otherwise.[31] OSHA may instead—again, unless a standard or regulation provides otherwise—show exposure of an employee of *some* other employer *and* that the cited employer controlled or created the violative condition.[32] The current general statutory principle on which multi-employer liability is based is that "an employer who either creates or controls the cited hazard has a duty . . . to protect not only its own employees, but those of other employers 'engaged in the common undertaking.'"[33] An allegedly controlling or creating employer is not liable if its employees are not present on the construction site and engaged in the construction work.[34]

3.2.1.1 General Construction Contractors

Hence, unless a standard or regulation provides otherwise, OSHA may cite general contractors for violations to which employees of subcontractors are exposed or which subcontractors created.[35] The general contractor is deemed to "have sufficient control over its subcontractors to require them to comply with the safety standards and to abate violations."[36] General contractors must take whatever measures are "commensurate with its degree of supervisory capacity,"[37] which includes some oversight over the work of subcontractors.[38] Hence, a general contractor was expected to detect a problem with a ground fault circuit interrupter installed by a subcontractor even though the condition was by nature latent and hidden from view.[39] On the other hand, a general contractor is responsible for only those violations that "it could reasonably be expected to prevent or detect."[40]

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31 See the discussion of *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (Rev. Comm'n, 2007), *pet. for review filed*, No. 07-2191 (8th Cir., May 15, 2007), in § 3.2.1.2 below.

32 *See* notes 33–41 below.

33 *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (Rev. Comm'n 2000).

34 *United States v. MYR Group, Inc.*, 361 F.3d 364, 20 BNA OSHC 1614 (7th Cir. 2004); *cf. Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 16 BNA OSHC 1313 (1st Cir. 1993) (same holding based on 29 C.F.R. § 1910.12).

35 For example, *Huber, Hunt & Nichols, Inc.*, 4 BNA OSHC 1406, 1407-08 (Rev. Comm'n 1976).

36 *Gil Haugan d/b/a Haugan Construction Co.*, 7 BNA OSHC 2004, 2006 (Rev. Comm'n 1979); *see also Lewis & Lambert Metal Contract, Inc.*, 12 BNA OSHC 1026, 1030 (Rev. Comm'n 1984).

37 *Marshall v. Knutson*, 566 F.2d 596 (8th Cir. 1977).

38 *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (Rev. Comm'n 2000); *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127 (Rev. Comm'n 1994).

39 *Blount International Ltd.*, 15 BNA OSHC 1897, 1899–1900 (Rev. Comm'n 1992). *But see Knutson Construction Co.*, 4 BNA OSHC 1759, 1761 (Rev. Comm'n 1976), aff'd 566 F.2d 596 (8th Cir. 1977) (general contractor not liable for failing to detect a one-inch crack on the underside of a scaffolding platform; unreasonable to expect general contractor to detect such a crack).

40 *David Weekley Homes*, 19 BNA OSHC 1116, 1119 (Rev. Comm'n 2000); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (Rev. Comm'n 1994); *Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1899 (Rev. Comm'n 1992).

As noted in the next section, however, the Commission held in 2007 that an OSHA regulation does not permit such extra-employment liability to be imposed on an employer engaged in construction work on the mere ground that he is a "controlling employer."

3.2.1.2 Legal Status of the Multi-Employer Liability Rules

Several courts have, to one degree or another, held that the wording of the OSH Act permitted this extra-employment liability to be imposed in the construction context.[41] The Fifth Circuit disagreed with the idea of extra-employment liability in a maritime industry case, holding that such liability was foreclosed by the statute and by an OSHA regulation governing maritime work.[42] The D.C. Circuit has twice reserved ruling on whether the imposition of extra-employment liability in the construction context is inconsistent with 29 C.F.R. § 1910.12, which regulates the application of the construction standards in Part 1926.[43] That provision requires a construction employer to protect "*his* employees" (emphasis added) by complying with the construction standards. The Occupational Safety and Health Review Commission held in 2007, however, that § 1910.12(a) foreclosed controlling-employer liability in construction work.[44]

3.2.1.3 Nonconstruction Applications of the Multi-Employer Liability Rules

Outside the construction industry, OSHA has occasionally attempted to hold boat owners[45] and factory owners[46] liable for violations committed by their independent

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41 *Universal Construction Corp.*, 182 F.3d 726, 728-31, 18 BNA OSHC 1769 (10th Cir. 1999); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 18 BNA OSHC 1609 (7th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 18 BNA OSHC 1551 (6th Cir. 1998); *Beatty Equip. Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534, 6 BNA OSHC 1699 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 6 BNA OSHC 1077 (8th Cir. 1977); *Brennan v. OSHRC (Underhill Construction Corp.)*, 513 F.2d 1032, 1038, 2 BNA OSHC 1641 (2d Cir. 1975).

42 *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 10 BNA OSHC 1075 (5th Cir. 1981).

43 *IBP, Inc. v. Herman*, 144 F.3d 861, 865 and n.3, 18 BNA OSHC 1353 (D.C. Cir. 1998); *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306-07, 17 BNA OSHC 1447 (D.C. Cir. 1995) (noting "tension" between wording of § 1910.12 and liability doctrine).

44 *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (Rev. Comm'n, 2007), *pet. for review filed*, No. 07-2191 (8th Cir., May 15, 2007). The same issue had been litigated in the courts of several states with OSHA-approved state plans, with mixed results. *Compare Davenport v. Summit Contractors, Inc.*, 45 Va. App. 526, 612 S.E.2d 239, 21 BNA OSHC 1392 (Va. App. 2005) (rejecting liability), *rev. denied*, 21 BNA OSHC 1184 (Va. 2005), *with Commissioner of Labor v. Weekley Homes, L.P.*, 609 S.E.2d 407, 21 BNA OSHC 1049 (N.C. App. 2005) (imposing liability), *rev. denied*, 21 BNA OSHC 1184 (N.C. 2005).

45 *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1689 (Rev. Comm'n 1979); *Camden Drilling Co.*, 6 BNA OSHC 1560, 1561 (Rev. Comm'n 1978) (barge owner responsible for compelling subcontractor to have its employees stop using their own defective fan and either repair it or remove it).

46 For example, *IBP, Inc. v. Herman*, 144 F.3d 861, 18 BNA OSHC 1353 (D.C. Cir. 1998), *rev'g* 17 BNA OSHC 2073 (Rev. Comm'n 1997).

contractors and to which only the contractors' employees are exposed. In a recent attempt, the D.C. Circuit held that a factory owner is not liable for a contractor's lockout violation that affected only its own employees when it had no authority over the contractor's employees and its only "control" stemmed from its ownership of the property or its contract with the contractor.[47] See the additional discussion of this point in § 5.3.2 of chapter 11.

3.2.2 Multi-Employer Worksite Defense Rules

As noted above, the liability rule followed in the early days of the Act was that exposure of one's own employee to a violative condition meant that one was liable, even if the cited employer did not create or control the violative condition. This rule has been partially reversed by the creation of a series of affirmative defenses by the Commission,[48] which has been accepted by several courts of appeals.[49] Today, a citation will be vacated if the cited employer on a multiemployer worksite

a. Did not create or control the allegedly violative condition (such that he could not realistically correct the condition); and

b. Either

   1. Took reasonable alternative protective measures; or

   2. Did not know, nor with the exercise of reasonable diligence, could have known of the *hazardousness* of the cited condition.[50]

Element (a) may be established by, for example, showing that the employer was prevented from abating a hazardous working condition due to union jurisdictional rules.[51]

Although these defenses originally arose in the context of construction sites, where there are frequently a number of different employers working at the same time, the Commission later applied them to all multi-employer worksites.[52]

47 *IBP, Inc. v. Herman*, 144 F.3d 861, 18 BNA OSHC 1353 (D.C. Cir. 1998), *rev'g* 17 BNA OSHC 2073 (Rev. Comm'n 1997).

48 *See generally Anning-Johnson Co.*, 4 BNA OSHC 1193 (Rev. Comm'n 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (Rev. Comm'n 1976).

49 *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 10 BNA OSHC 1561 (10th Cir. 1982); *Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267, 10 BNA OSHC 1329 (9th Cir. 1982); *DeTrae Enterprises, Inc. v. Secretary of Labor*, 645 F.2d 103, 9 BNA OSHC 1425 (2d Cir. 1980); *Bratton Corp. v. OSHRC*, 590 F.2d 273, 7 BNA OSHC 1004 (8th Cir. 1979).

50 For example, *LeeRoy Westbrook Construction Co.*, 13 BNA OSHC 2101, 2103 (Rev. Comm'n 1989); *Lewis & Lambert Metal Contractors*, 12 BNA OSHC 1026 (Rev. Comm'n 1984).

51 *See McLean-Behm Steel Erectors, Inc.*, 6 BNA OSHC 1712, 1715 (Rev. Comm'n 1978).

52 *Rockwell International Corp.*, 17 BNA OSHC 1801 n. 11 (Rev. Comm'n 1996).

4.0 Actual or Constructive Knowledge

OSHA must prove that the cited employer actually knew, or could have known with the exercise of reasonable diligence, of the physical circumstances that comprise the violative condition.[53] This element must also be proved in General Duty Clause cases.[54] The element pertains to the physical circumstances that comprise the violative condition, not the violativeness or hazardousness of the condition.[55]

An employer is not reasonably diligent if he neither makes an attempt to become aware of the physical conditions facing his employees, nor trains his employees to recognize hazards arising from them.[56] Reasonable diligence includes "the obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence."[57] A citation will be vacated on this ground if an employer reasonably relies on the expertise of the independent contractor who created the condition to which his employees were exposed.[58]

In general, if a compliance officer can see a physical condition during a normal inspection, it will be inferred that the employer could, with reasonable diligence, have seen it too.[59] However, OSHA must show that the cited condition was present for a sufficient amount of time such that, with the exercise of reasonable diligence, the employer could have discovered its existence.[60]

5.0 Additional Elements That OSHA Must Sometimes Prove

Sometimes a standard is so vague that it deprives employers of fair notice of its requirements, contrary to the Due Process Clause of the Fifth Amendment to the Constitution.[61] To cure this vagueness, OSHA may be required to prove additional

53 For example, *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1939 (Rev. Comm'n 1999); *Continental Electric Co.*, 13 BNA OSHC 2153, 2154 (Rev. Comm'n 1989); *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1870 (Rev. Comm'n 1981).

54 *See U.S. Steel Corp.*, 12 BNA OSHC 1692, 1699 (Rev. Comm'n 1986).

55 *Ormet Corp.*, 14 BNA OSHC 2134, 2138 (Rev. Comm'n 1991); *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091 (Rev. Comm'n 1977) (employer need be shown only to have had knowledge of "physical conditions which constitute a violation," not that condition was prohibited by law).

56 *Beaver Plant Operations, Inc.*, 18 BNA OSHC 1972, 1976 (Rev. Comm'n 1999).

57 *Frank Swidzinski* Co., 9 BNA OSHC 1230, 1233 (Rev. Comm'n 1981).

58 For example, *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC 2133 (Rev. Comm'n 1984), *aff'd*, 12 BNA OSHC 1445 (4th Cir. 1985) (not officially published).

59 *See Green Construction Co.*, 4 BNA OSHC 1808, 1810 (Rev. Comm'n 1976) (Barnako, Chairman, concurring).

60 *David Weekley Homes*, 19 BNA OSHC 1116, 1120-21 (Rev. Comm'n 2000).

61 For example, *Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119, 9 BNA OSHC 2133 (7th Cir. 1981); *Georgia Pacific Corp. v. OSHRC*, 25 F.3d 399, 16 BNA OSHC 1895 (11th Cir. 1994) (standard vague as interpreted by OSHA). *See generally* § 6.4.1 below.

elements. For example, in *Granite City Terminals Corp.*,[62] the Commission held that, if a standard is vague, OSHA must prove that a reasonable person would have recognized a hazard warranting protective measures, and that the sought measures are feasible. A showing that a "reasonable person" would have recognized the hazardousness[63] or violativeness of the cited condition has been required, and held or implied to be sufficient, in a number of circuits and by the Commission; they have not expressly required, or have suggested to be unnecessary, a showing that the employer or its industry follow the practice that OSHA seeks to impose.[64] At least for the generally worded personal protection standards at 29 C.F.R. 1910.132(a) and 1926.28(a), however, the Fifth Circuit has determined that the employer's own conduct or "industry custom and practice will generally establish the conduct of the reasonably prudent employer."[65]

6.0 The Employer's Substantive Affirmative Defenses

This section discusses defenses that an employer may raise to a citation. The burden of pleading and proving these defenses is on the employer. Additional discussion of some of these defenses is in § 5.3.2 of chapter 11.

6.1 Infeasibility

The Commission has created a limited affirmative defense for the employer who finds that compliance is infeasible. A citation may be vacated if the employer proves that

1. [The Infeasibility Element:] the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation; and

62 12 BNA OSHC 1741 (Rev. Comm'n 1986).

63 *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1264 (Rev. Comm'n 2003).

64 For example, *Voegele Company, Inc. v. OSHRC*, 625 F.2d 1075, 1078, 8 BNA OSHC 1631 (3rd Cir. 1980); *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41, 6 BNA OSHC 1691, 1692–1693 (2d Cir. 1978); *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 731-32, 8 BNA OSHC 1271 (6th Cir. 1980); *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 722-23, 7 BNA OSHC 1462 (4th Cir. 1979).

65 *Cotter & Co. v. OSHRC*, 598 F.2d 911, 913, 7 BNA OSHC 1510 (5th Cir. 1979); *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1285, 10 BNA OSHC 1057 (5th Cir. 1981); *Owens-Corning Fiberglas Corp. v. Donovan*, 659 F.2d 1285, 1288, 10 BNA OSHC 1070 (5th Cir. 1981); *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364, 1370, 6 BNA OSHC 2067 (5th Cir. 1978); *Power Plant Div., Brown & Root, Inc. v. OSHRC*, 590 F.2d 1363, 1365, 7 BNA OSHC 1137 (5th Cir. 1979).

2. [The Alternative Measures Element:] either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection."[66]

Element two effectively compels an employer to show that, although strict compliance was necessary, he took whatever steps were feasible. See § 6.1.2 below for more detail on this point. An employer need not show that a variance application was inappropriate,[67] which is an element of the defense of greater hazard. See § 6.2 below.

6.1.1 The Infeasibility Element of the Defense

In the early days of the act, this defense was known as "impossibility."[68] In 1986, in *Dun-Par Engineered Form*,[69] the Commission changed the name of the defense and its first element to "infeasibility" in part because "[s]trict application of an 'impossibility' defense does not accommodate considerations of reasonableness or common sense, or reflect the strong sense of the practical implicit in the standards adopted under § 6(a)" and the feasibility element in § 6(b)(5) of the act.[70]

The defense has often proved difficult to establish. An employer must at least attempt to adapt existing technology and use some creativity to solve the infeasibility problem.[71] An inability to comply because the appropriate equipment was not onsite is insufficient, for "it is the duty of an employer to use equipment that permits him to comply with the Secretary's standard."[72] The defense may also be rejected if it was feasible to preclude employee access to the zone of danger.[73]

Courts that have considered the infeasibility defense have concluded that it encompasses both technological and economic factors.[74] At one time, the

66 *Beaver Plant Operations, Inc.*, 18 BNA OSHC 1972, 1977 (Rev. Comm'n 1999), *citing Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1190 (Rev. Comm'n 1995); *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1219, 1228 (Rev. Comm'n 1991); *Mösser Constr. Co.*, 15 BNA OSHC 1408, 1416 (Rev. Comm'n 1991); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (Rev. Comm'n 1986), *rev'd on another ground*, 843 F.2d 1135, 13 BNA OSHC 1652 (8th Cir. 1988).

67 *Dun-Par Engineered Form*, 12 BNA OSHC at 1956.

68 For example, *M.J. Lee Construction Co.*, 7 BNA OSHC 1140, 1144 (Rev. Comm'n 1979).

69 12 BNA OSHC at 1953–1956.

70 12 BNA OSHC at 1955.

71 *See Pitt-Des Moines Inc.*, 16 BNA OSHC 1429, 1433–1434 (Rev. Comm'n 1993); *Gregory & Cook Inc*, 17 BNA OSHC 1189, 1191 (Rev. Comm'n 1995) (employer should attempt to acquire more suitable guard; commission "expect[s] employers to exercise some creativity in seeking to achieve compliance").

72 *Williams Enterprises Inc.*, 13 BNA OSHC 1249 (Rev. Comm'n 1987).

73 *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075–2076 (Rev. Comm'n 1991).

74 *Quality Stamping Products v. OSHRC*, 709 F.2d 1093, 1099, 11 BNA OSHC 1550 (6th Cir. 1983) (employer must show not "economically practicable" because "prohibitively expensive"); *Donovan v. Williams*

Commission took the position that the economic effect of compliance was irrelevant.[75] However, in *State Sheet Metal Co.*,[76] the Commission stated that "evidence as to the unreasonable economic impact of compliance with a standard may be relevant to the infeasibility defense."[77] In *Peterson Bros. Steel Erec. Co.*,[78] the Commission stated that it would look to the effect that compliance would have on the company's "financial position as a whole" to determine whether the company would be "adversely affected." It is not sufficient that an employer who has failed to use safety measures would be at a competitive disadvantage with others that did not use the measures, for an "employer cannot be excused from compliance with the Act on the basis that everyone else will ignore the law."[79]

6.1.2 The Alternative Measures Element of the Infeasibility Defense

This element—which also appears in the greater hazard and multi-employer defenses—reflects the view that, even if full compliance is not feasible, "an employer [must] comply to the extent feasible."[80] "[B]efore an employer will be excused from ignoring a standard's requirements and leaving its employees unprotected, it must show that it has explored all possible alternate forms of protection."[81] At one time, the Commission in *Dun-Par Engineered Form*[82] shifted the burden of persuasion on

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Enterprises, Inc., 744 F.2d 170, 178, 11 BNA OSHC 2241 (D.C. Cir. 1984); *Faultless Div., Bliss & Laughlin Indus. v. Secretary*, 674 F.2d 1177, 1189, 10 BNA OSHC 1481 (7th Cir. 1982); *Southern Colo. Prestress Co. v. OSHRC*, 586 F.2d 1342, 1351, 6 BNA OSHC 2032 (10th Cir. 1978); *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 4 BNA OSHC 1061 (3rd Cir. 1976)

75 *See, for example, Stan-Best, Inc.*, 11 BNA OSHC 1222, 1231 (Rev. Comm'n 1983); *Research Cottrell, Inc.*, 9 BNA OSHC 1489, 1498 (Rev. Comm'n 1981).

76 16 BNA OSHC 1155 (Rev. Comm'n 1993).

77 In *State Sheet Metal*, the Commission stated that in *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1966 (Rev. Comm'n 1986), it first implied that an infeasibility defense may include economic factors. There, it found that the employer had not demonstrated that the costs were unreasonable in light of the protection afforded and had not shown what effect, if any, the added costs would have on its contract or on its business as a whole. *See also Walker Towing Corp.*, 14 BNA OSHC 2072, 2077 (Rev. Comm'n 1991).

78 16 BNA OSHC 1196, 1203 (Rev. Comm'n 1993), *aff'd*, 26 F.3d 573 (5th Cir.1994).

79 *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1192 (Rev. Comm'n 1995). *Accord, Peterson Bros. Steel Erection Co. v. Secretary of Labor*, 26 F.3d 573, 16 BNA OSHC 1900 (5th Cir. 1994) (employer's claim that it would be disadvantaged as against competitors that did not comply is not relevant because "an employer cannot be excused from non-compliance on the assumption that everyone else will ignore the law"). *See also Peterson Bros.*, 16 BNA OSHC 1196, 1203 (Rev. Comm'n 1993) (evidence that costs, while substantial, could be absorbed on the project negated the employer's claim of economic infeasibility); *State Sheet Metal*, 16 BNA OSHC 1155, 1159, 1160–1161 (Rev. Comm'n 1993).

80 *Donley's Inc.*, 17 BNA OSHC 1227 (Rev. Comm'n 1995). *But see Spancrete Northeast Inc. v. OSHRC*, 905 F.2d 589, 14 BNA OSHC 1585 (2d Cir. 1990), which suggests that the defense does not have a second element. The court held that if compliance with the cited standard is infeasible, the Secretary must plead in the alternative and prove a failure to comply with another standard.

81 *State Sheet Metal Co.*, 16 BNA OSHC 1155 (Rev. Comm'n 1993).

82 12 BNA OSHC at 1956–1959.

this element to OSHA, but the Eighth Circuit held otherwise,[83] and the Commission later followed that holding.[84]

6.2 The Greater Hazard Defense

The Commission has also held that employers need not strictly comply with a standard to the extent that compliance would create greater hazards than noncompliance would. It created an affirmative defense based on the idea that "industry is so diverse that any rule is bound to be counterproductive now and again."[85] The defense has three elements:

1. Compliance with the standard would create greater hazards than noncompliance;
2. Alternative protective measures were taken or were not available; and
3. A variance application is inappropriate.[86]

The defense does not apply to the General Duty Clause because the usefulness of a proposed abatement method is part of the Secretary's burden in General Duty Clause cases.[87]

The first element of the defense requires a showing that compliance would create *greater* hazards than noncompliance—not new or different hazards.[88] It also requires a showing that *all* alternative ways of protection are more dangerous than noncompliance, not just the means of protection mentioned in the standard.[89]

The reason for the third element of the defense—the inappropriateness of a variance—is that "some employers will believe *incorrectly* that their working conditions are safer than those prescribed in the standards. . . . [R]emoving this

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83 *Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135 (8th Cir. 1988), *rev'g* 12 BNA OSHC 1949 (Rev. Comm'n 1986).

84 *Seibel*, 15 BNA OSHC at 1227–1228.

85 *Caterpillar Inc. v. Herman*, 131 F.3d 666, 18 BNA OSHC 1104 (7th Cir. 1997).

86 *Russ Kaller Inc.*, 4 BNA OSHC 1758 (Rev. Comm'n 1976). *See also PBR, Inc. v. Secretary of Labor and OSHRC*, 643 F.2d 890, 9 BNA OSHC 1357 (1st Cir. 1981); *John H. Quinlan*, 17 BNA OSHC 1194 (Rev. Comm'n 1995).

87 *Royal Logging Co.*, 7 BNA OSHC 1744, 1751 (Rev. Comm'n 1979), *aff'd*, 645 F.2d 822, 9 BNA OSHC 1755 (9th Cir. 1981).

88 *See Dun-Par*, 12 BNA OSHC at 1967; *Williams Enterprises Inc.*, 13 BNA OSHC 1249 (Rev. Comm'n 1987).

89 *John H. Quinlan*, 17 BNA OSHC 1194 (Rev. Comm'n 1995).

incentive to seek variances [by eliminating the element] . . . would be allowing an employer to take chances not only with his money, but with the lives and limbs of his employees."[90] The third element does not apply to regulations because a variance cannot be sought from a regulation.[91]

6.3 Unpreventable Employee Misconduct

This defense has been stated in various ways, but it basically requires an employer to show that he required his employees to take protective measures that comply with the standard and that he enforced that requirement.[92] The Commission has distilled its decisions as requiring four elements of proof:

1. The employer has established work rules designed to prevent the violation;
2. It has adequately communicated those rules to its employees;
3. It has taken steps to discover violations; and
4. It has effectively enforced the rules when violations have been discovered.[93]

Effective enforcement generally must be progressive, that is, it must become increasingly severe as an employee commits additional infractions. Thus, an employer was held to have failed to establish the defense when an employer who broke a safety rule for the second time was given only an oral warning instead of a written reprimand.[94]

Although there is a similar doctrine of supervisory misconduct,[95] some cases characterize it as not an affirmative defense but as a rebuttal of the imputation to

[90] *General Electric Co. v. Secretary*, 576 F.2d 558, 561, 6 BNA OSHC 1541 (3d Cir. 1978) (emphasis in the original). *See also Reich v. Trinity Industries, Inc.*, 16 F.3d 1149, 1154, 16 BNA OSHC 1670 (11th Cir. 1994); *Modern Drop Forge Co. v. Secretary of Labor*, 683 F.2d 1105, 1116, 10 BNA OSHC 1852 (7th Cir. 1982); *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 190 n.7, 14 BNA OSHC 1001 (D.C. Cir. 1989).

[91] *Caterpillar Inc. v. Herman*, 131 F.3d 666, 18 BNA OSHC 1104, 1106 (7th Cir. 1997).

[92] For example, *Secretary of Labor v. L.E. Myers Co.*, 818 F.2d 1270, 13 BNA OSHC 1289 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987); *Texland Drilling Corp.*, 9 BNA OSHC 1023 (Rev. Comm'n 1980).

[93] For example, *Capform, Inc.*, 16 BNA OSHC 2040, 2043 (Rev. Comm'n 1994).

[94] For example, *Gem Industrial, Inc.*, 17 BNA OSHC 1861 (Rev. Comm'n 1996), and particularly note 8 of the lead opinion and note 12 of the dissenting opinion there. *See generally* Arthur G. Sapper, "The Oft-Missed Step: Documentation of Safety Discipline," *Occupational Hazards* (January 2006).

[95] *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552 (Rev. Comm'n 1982).

the employer of the supervisor's knowledge.[96] The Commission has stated that involvement by a supervisor in a violation is "strong evidence that the employer's safety program was lax."[97] "Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision."[98]

The objection has been made that the overlap of this defense with the knowledge element of OSHA's case is confusing, for OSHA must prove knowledge while the employer must prove the defense.[99]

6.4 Invalidity of the Standard

6.4.1 Violation of Statutory Procedural Requirements

A standard is invalid if it was not adopted in accordance with a statutory procedural requirement. *See generally* chapter 2. Two examples of invalidity resulting from violations of such requirements are

1. Making a substantive change in a national consensus or established federal standard adopted under § 6(a) of the OSH Act, 29 U.S.C. § 655(a).[100] This is a special case of failing to give the public notice or an opportunity for comment on the adoption or amendment of a standard.[101]
2. Failing to consult the Advisory Committee on Construction Safety and Health before proposing a standard regulating construction work.[102]

6.4.2 Violation of Constitutional Requirement of Fair Notice of Standard's Requirements

The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that persons subject to penalties be given fair notice of the law's

[96] For example, *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321 (Rev. Comm'n 1991).

[97] *Daniel Construction*, 10 BNA OSHC at 1552.

[98] *Seyforth Roofing Co.*, 16 BNA OSHC 2031 (Rev. Comm'n 1994).

[99] *See, e.g., New York State Gas & Elec. v. Secretary of Labor*, 88 F.3d 98, 17 BNA OSHC 1650, 1655-1657 (2d Cir. 1996) (reviewing confusing state of law and criticizing Commission for inconsistency); *L.E. Myers v. Brock*, 484 U.S. 989 (1987) (White, J., dissenting from denial of certiorari) ("confusing patchwork of conflicting approaches").

[100] *E.g., Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 6 BNA OSHC 1197 (10th Cir. 1977).

[101] *See* 5 U.S.C. § 553(b); OSH Act § 6(b)(2); 29 U.S.C. § 655(b)(2); *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994) (non-OSHA case).

[102] *National Constructors Ass'n v. Marshall*, 581 F.2d 960, 970-71, 6 BNA OSHC 1721 (D.C. Cir. 1978).

requirements.[103] Hence, OSHA standards may not be construed or applied in a way that deprives employers of fair notice of their requirements.[104] This requirement can also be violated when an OSHA interpretation letter available on the Internet is inconsistent with the interpretation implicit in a citation,[105] or when a course of conduct by OSHA induces confusion in the mind of an employer as to the requirements of a standard.[106] To avoid a violation of this requirement, several OSHA standards have been construed narrowly.[107]

6.5 De Minimis

Section 9(a) of the OSH Act, 29 U.S.C. § 658(a), states: "The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to *de minimis* violations which have no direct or immediate relationship to safety or health." The consequence of characterizing a violation as *de minimis* is that the violation carries neither an abatement requirement nor a monetary penalty.[108] The Commission has long asserted that it may characterize a violation as *de minimis.*[109] There is a split in the circuits as to whether the Commission has this authority. The First, Third, Fifth, and Ninth Circuits have held that it does,[110] while the Seventh Circuit disagrees.[111]

As to what a *de minimis* violation is, the Commission has formulated the test in various ways, including asking whether the violation is "trifling."[112] In another case, it stated: "A *de minimis* violation is one in which there is technical noncompliance with a standard but the departure from the standard bears such a negligible relationship to employee safety and health as to render inappropriate the assessment of a penalty or the entry of an abatement order."[113] One circuit has held that a violation is *de minimis* if the employer's safety measures are as safe as those required by a standard.[114] The Commission has in effect held that the employer bears the burden of proof on the *de minimis* issue.[115]

103 *E.g., Gen. Elec. Co. v. EPA,* 53 F.3d 1324, 1328 (D.C. Cir. 1995) (non-OSHA case).

104 *Beaver Plant Operations, Inc. v. Herman,* 223 F.3d 25, 19 BNA OSHC 1053 (1st Cir. 2000) ("The burden is on the Secretary to establish that [the employer] had actual or constructive notice" of the standard's requirement); *Diebold, Inc. v. Marshall,* 585 F.2d 1327, 6 BNA OSHC 2002 (6th Cir. 1978). See also the cases cited in note 61 above.

105 *Oberdorfer Indus. Inc.,* 20 BNA OSHC 1321, 1329 (Rev. Comm'n 2003).

106 *Latite Roofing & Sheet Metal Co.,* 21 BNA OSHC 1282 (Rev. Comm'n 2005); *Trinity Marine Nashville Inc. v. OSHRC,* 275 F.3d 423, 430-31, 19 BNA OSHC 1673, 1676-77 (5th Cir. 2001).

107 See the cases cited in note 62-65 above.

108 For example, *Keco Indus., Inc.,* 11 BNA OSHC 1832, 1834 (Rev. Comm'n 1984).

109 For example, *General Electric Co.,* 3 BNA OSHC 1031, 1040 (Rev. Comm'n 1975).

110 *Donovan v. Daniel Constr. Co.,* 692 F.2d 818, 10 BNA OSHC 2188 (1st Cir. 1982); *Secretary of Labor v. OSHRC (Erie Coke Corp.),* 998 F.2d 134, 16 BNA OSHC 1241 (3d Cir. 1993); *Phoenix Roofing, Inc. v. Dole,* 874 F.2d 1027, 14 BNA OSHC 1036 (5th Cir. 1989); *Chao v. Symms Fruit Ranch, Inc.,* 242 F.3d 894, 19 BNA OSHC 1337 (9th Cir. 2001).

111 *Caterpillar Inc. v. Herman,* 131 F.3d 666, 18 BNA OSHC 1104 (5th Cir. 1989).

112 *El Paso Crane & Rigging Co.,* 16 BNA OSHC 1419, 1429 (Rev. Comm'n 1993) (failure to attest and sign OSHA injury log "trifling").

113 *Keco Indus., Inc.,* 11 BNA OSHC 1832, 1834 (Rev. Comm'n 1984).

114 *Phoenix Roofing, Inc. v. Dole,* 874 F.2d 1027, 14 BNA OSHC 1036 (5th Cir. 1989).

115 *See Holly Springs Brick & Tile Co.,* 16 BNA OSHC 1856 (Rev. Comm'n 1994) (rejecting *de minimis* argument for lack of evidence).

Chapter 4

The General Duty Clause

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1.0 Overview

Section 5 of the Occupational Safety and Health Act (OSH Act), commonly referred to as the "General Duty Clause," was designed by Congress to be "an enforcement tool of last resort."[1] It places nonspecific, broad safety requirements on employers when more specific standards or regulations are not applicable. The general duty clause, as it pertains to employers, states that:

> (a) Each employer—
>
> > (1) 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[2]

In recent years the General Duty Clause has been utilized as a sometimes controversial mechanism for enforcement of safety guidelines that have not yet been specifically addressed by statute or regulation. The most notable example of this was the Occupational Safety and Health Review Commission's (Review Commission, OSHRC) application of the general duty clause to ergonomic hazards in the *Pepperidge Farm* case.[3] Similarly, the clause is relied upon by the Occupational Safety and Health Administration (OSHA) to address issues such as bloodborne

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1 *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199, *corrected sub nom. Metzler v. Arcadian Corp.*, No. 96-60126, 1997 U.S. App. LEXIS 12693, at *20 (5th Cir. April 28, 1997).

2 29 U.S.C. § 654(a).

3 *Pepperidge Farm, Inc.*, 17 OSH Cas. (BNA) 1993 (OSHRC 1997).

pathogen hazards in industries not covered by the general industry regulation at 29 C.F.R. § 1910.1030 and reactive chemical process safety.[4]

As noted above, the general duty clause is not applicable "if a standard specifically addresses the hazard cited."[5] This specificity can extend to the type of industry for which the standard was promulgated.[6] As noted in the legislative history of the general duty clause: "The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted."[7]

The courts and the Review Commission have precisely laid out the Secretary of Labor's (Secretary) burden of proof under the general duty clause. In order to demonstrate a violation, the Secretary must show that:

> (1) a workplace condition presented a hazard, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause serious physical harm, and (4) there was a feasible and useful means of abatement that would eliminate or materially reduce the hazard.[8]

These criteria were originally set down in 1973 by the D.C. Circuit in *National Realty*.[9] In *National Realty*, a case involving the workplace death of an em-

4 *See* OSHA Directive CPL 02-02-069, *Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens*, at Section XIII(A)(3)(e) (November 27, 2001) ("The General Duty Clause should not be used to cite for violations of the bloodborne pathogens rule, but may be used to cite for failure to provide a workplace free from exposure to bloodborne pathogens."); Assistant Secretary John L. Henshaw, speech to the Center for Chemical Process Safety 18th International Conference, (September 23, 2003) ("OSHA's strategy for reactives includes an enforcement component. We expect to rely on the general duty clause to address reactive hazards not covered by the PSM standards"); *see also* OSHA Interpretation Letter, *OSHA Policy on Indoor Air Quality: Office Temperature / Humidity and Environmental Tobacco Smoke* (February 24, 2003) (hereinafter, "Feb. 24, 2003 OSHA Interpretation Letter") ("As a matter of prosecutorial discretion, OSHA will not apply the General Duty Clause to [environmental tobacco smoke].").

5 *Active Oil Service, Inc.*, 21 OSH Cas. (BNA) 1184, 1185 (OSHRC 2005) (citing *New York State Elec. & Gas Corp.*, 17 OSH Cas. [BNA] 1129 [OSHRC 1995], aff'd in pertinent part, 88 F.3d 98 [2d Cir. 1996]; *Ted Wilkerson, Inc.*, 9 OSH Cas. [BNA] 2012 [OSHRC 1981]; *Sun Shipbuilding & Drydock Co.*, 1 OSH Cas. [BNA] 1381 [OSHRC 1973]). *See National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1261 n.9 (D.C. Cir. 1973) ("Specific, promulgated standards preempt the general duty clause, but only with respect to hazards expressly covered by the specific standards."); *Cf Sun Shipbuilding*, 1 OSH Cas. (BNA) 1381–1382 ("Citing a respondent under the general duty requirement of the Act is not appropriate where there exists a specific occupational safety and health standard covering the conduct at issue").

6 *Active Oil Service*, 21 OSH Cas. (BNA) at 1186 (general industry confined space standard does not preempt 5(a)(1) application to construction confined space hazard).

7 S. Rep. No. 91-1282, at 10 (1970).

8 *Active Oil Service*, 21 OSH Cas. (BNA) at 1186 (citing *Kokosing Constr. Co.*, 17 OSH Cas. [BNA] 1869, 1872 [OSHRC 1996]).

9 *National Realty*, 489 F.2d at 1265; *see also Pelron Corp.*, 12 OSH Cas. (BNA) 1833, 1835 (OSHRC 1986); *Brennan v. OSHRC*, 502 F.2d 946, 952 (3d Cir. 1974) ("Thus the *[National Realty]*court interpreted the general duty clause, as a matter of law, as imposing the duty of adopting demonstrably feasible measures for materially reducing the likelihood of a particular employee misconduct.").

ployee riding on the running board of a loader, the D.C. Circuit reversed a decision of the Review Commission that a company had committed a "serious violation" of the general duty clause. The appellate court held that Congress did not intend for the general duty clause to impose strict liability on employers. Instead, the court held that the employer is obligated only to protect its employees from "preventable hazards." The court found that a specific instance of equipment riding does not qualify as "recognized" or "preventable" under the general duty clause.

Although the general duty clause is cited against employers for workplace hazards, the Act does not absolve employees of all responsibility. In fact, Section 105(b), 29 U.S.C. § 654(b), places a duty upon employees to "comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this Act which are applicable to his own actions and conduct."

This employee responsibility to "comply" with all safety and health standards and rules is significant, but it does not release the employer from its obligations to provide a safe workplace.[10] The legislative history of the Act specifically states that "final responsibility for compliance with the requirements of this act remains with the employer."[11] The Review Commission has reinforced this proposition.[12]

However, in demonstrating the elements of a general duty clause violation, "the Secretary must define the alleged recognized hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices which are within the employer's control."[13] For instance, in a fatal accident case in which an employee was struck by an unloaded truck that was backing up, OSHA issued the following general duty clause citation:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause

10 *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011 (7th Cir. 1975) ("If an employee is negligent or creates a violation of a safety standard, that does not necessarily prevent the employer from being held responsible for the violation. True, an employer is not an insurer under the Act. But an employer is responsible if it knew or, with the exercise of reasonable diligence, should have known of the existence of a serious violation.") (citations omitted), appeal after remand, 658 F.2d 544 (7th Cir. 1981).

11 S. Rep. No. 91-1282, at 9.

12 *See Pride Oil Well Service*, 15 OSH Cas. (BNA) 1809, 1815 (OSHRC 1992) ("The Act places final responsibility for compliance with its requirements on the employer. An employer who has failed to address a hazard by implementing and enforcing an effective work rule cannot shift to its employees the responsibility for assuring safe working procedures.") (citation omitted).

13 *Beverly Enterprises, Inc.*, 19 OSH Cas. (BNA) 1161, 1168 (OSHRC 2000) (citing *Inland Steel Co.*, 12 OSH Cas. [BNA] 1968, 1970 [OSHRC 1986]; *Pelron Corp.*, 12 OSH Cas. [BNA] at 1835).

death or serious physical harm to employees in that employees were exposed to a struck by and run over by a winch truck hazard:

> At the rig site, the employee(s) toolpusher was exposed to a struck by hazard from a winch truck which was not equipped with a reverse audible warning device.
>
> * * *
>
> Some feasible and acceptable means of abatement, among others, are:
>
> a. Install reverse audible warning devices (back-up alarms) on all winch trucks (vehicles) which are operated in reverse.
>
> b. Have the [flagman] guide the trucks traveling in reverse at the rig site.
>
> c. Have all trucks travel in a forward motion if at all possible.[14]

Only one of the proposed abatement measures need ultimately be proved to be feasible.

2.0 Who Is Protected by the General Duty Clause?

Unlike under specific OSHA safety and health standards, the employer's obligations under the general duty clause extend only to its own employees.[15] OSHA will not cite an employer for a Section 5(a)(1) violation unless the employer's own employees are exposed to a hazard created or controlled by the employer.[16] A common employer defense in a general duty clause case is that it is not an employer of the employees exposed to a particular hazard, and thus owes them no general duty under Section 105(a). The Sixth Circuit in *Stein, Inc.* explained that "the most important factor in determining whether an entity is an employer is 'who has control over the work environment such that abatement of the hazards can be obtained.'"[17]

The court in *Stein, Inc.* also cited the usefulness of the Review Commission's "economic realities test."[18] This test evaluates whether an employment relationship exists by considering the following factors:

[14] *Grey Wolf Drilling Co. L.P.*, 20 OSH Cas. (BNA) 1293, 1293–1294 (Yetman, A.L.J. 2003), aff'd, *Grey Wolf Drilling Co. L. P. v. OSHRC*, 20 OSH Cas. (BNA) 1623 (5th Cir. 2004) (unpublished).

[15] *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1305 (D.C. Cir. 1995) ("The language of 29 U.S.C. § 654(a)(1) is specifically limited to situations where an employer's own employees are exposed to hazards.") (footnote omitted).

[16] *Centex Constr. Co., Inc.*, OSHRC No. 97-0594, 1999 OSAHRC LEXIS 93, at *12 (OSHRC 1999) ("Thus the employer is not liable under the general duty clause when its own employees are exposed to hazards beyond its reasonable control").

[17] *See Stein, Inc. v. OSHRC*, No. 95-3686, 1996 U.S. App. LEXIS 25351, at *14 (6th Cir. 1996) (unpublished) (citing *MLB Industries, Inc.*, 12 OSH Cas. [BNA] 1525, 1527 [OSHRC 1985]).

[18] *Stein, Inc.*, 1996 U.S. App. LEXIS 25351, at *14–15 (citing *Loomis Cabinet Co.*, 15 OSH Cas. [BNA] 1635, 1637 [OSHRC 1992]).

1. Whom do the workers consider their employer?
2. Who pays the workers' wages?
3. Who has the responsibility to control the workers?
4. Does the alleged employer have the power to control the workers?
5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
6. Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7. How are the workers' wages established?[19]

Thus, in *Stein, Inc.*, a company was deemed to be an employer because it paid the specific workers, had the power to hire, fire, or modify their employment, made their job assignments, and had "sufficient control" over the job.[20]

In a multi-employer setting, OSHA will only cite the "exposing employer" for a general duty clause violation.[21] An exposing employer is "an employer whose own employees were exposed to a hazard."[22]

If the employer-employee relationship is demonstrated, that employer is obligated to protect each of his employees from hazards. With that said, the courts have clarified that "the phrase 'each of his employees' in the general duty clause is an inclusive expression which 'means that an employer's duty extends to all employees regardless of their individual susceptibilities.'"[23]

3.0 The Existence of a Hazard

The threshold inquiry in evaluating whether a general duty clause obligation exists is whether there is a hazard. A hazard "is not defined in terms of the absence

[19] *Stein, Inc.*, 1996 U.S. App. LEXIS 25351, at *14–15.

[20] *Id.*

[21] OSHA Directive CPL 02-00-124, *Multi-Employer Citation Policy*, at Section X(a)(1) (Dec. 10, 1999).

[22] *Id.*; *see also* OSHA Interpretation Letter, *General Duty Clause Citations on Multi-employer Worksites; NFPA 70E Electrical Safety Requirements and Personal Protective Equipment* (July 25, 2005) ("An employer cannot be cited in its role as a 'controlling employer' for exposure of subcontractor employees to a General Duty Clause Violation.").

[23] *See, for example*, *Ho*, 20 OSH Cas. (BNA) 1361, 1374 (OSHRC 2003) (quoting *Reich*, 110 F.3d at 1198, corrected sub nom. *Metzler*, 1997 U.S. App. LEXIS 12693, at *16 [upholding a general duty clause violation where a fertilizer plant explosion exposed 87 employees to the hazardous condition and holding that the employer's duty to protect extended to all employees as a group, regardless of age, pregnancy, or other infirmity]).

of a particular abatement method."[24] Rather, it is defined "in terms of the physical agents that could injure employees."[25] Matters of "human comfort," as opposed to hazards that could cause death or serious physical harm, are not covered by the general duty clause.[26]

An employer may be cited for a general duty clause violation despite the lack of an accident or incident causing injury.[27] Further, hazardous conduct need not actually have occurred.[28] If the hazardous condition was preventable, the fact that no injuries occurred will not insulate the employer from enforcement action.[29] Conversely, an accident in the workplace does not conclusively prove a violation. If the hazard was not preventable, then regardless of injury, the general duty clause has not been violated.[30]

The Review Commission and the courts have not provided a firm standard for determining the existence of a hazard. In large part, this is due to disagreements over the applicability of a "significant risk" standard to "harm that has already occurred," as opposed to "prospective harm."[31] In *Kastalon, Inc.*, for example, the Review Commission determined that the Secretary had the burden of establishing a significant risk of harm in a case involving a possible human carcinogen in the workplace that was suspected on the basis of extrapolation from animal tests.[32]

In circumstances involving harm that has already occurred, such as repetitive motion and lifting injuries, the Review Commission has not required the Secretary to demonstrate significant risk. The Review Commission explained that "under section 5(a)(1), the Secretary need only show that the alleged hazards [in the workplace] were causing or likely to cause serious physical harm to employees there."[33]

A significant number of decisions have rejected outright the application of the "significant risk" test in a general duty clause case. In *Kelly Springfield Tire Co. v. Donovan*, the Fifth Circuit argued that the "extension of the significant risk standard to enforcements of the general duty clause would constitute an abandonment of the *National Realty* standard."[34]

4.0 Recognized Hazard

In defining the second element underlying the general duty clause, that there be a "recognized hazard," the D.C. Circuit in *National Realty* focused on a floor speech by Representative Dominick V. Daniels.

> A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective determination; it does not depend on whether the particular employer is aware of it.[35]

In order to meet its burden of proof, OSHA must demonstrate that a hazard was recognized either by the individual employer or the employer's industry.[36] An employer need not be specifically aware of a hazard to be cited under the general duty clause.[37] Individual employer knowledge of the hazard will, however, be sufficient to prove that the hazard was recognizable.[38] In the absence of individual

24 *Arcadian Corp.*, 20 OSH Cas. (BNA) 2001, 2007 (OSHRC 2004) (citing *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 OSH Cas. [BNA] 1105, 1121–1122 [OSHRC 1993] [hazard was high levels of airborne lead produced by bridge demolition, not absence of protective clothing.]).

25 *Chevron Oil Co.*, 11 OSH Cas. (BNA) 1329, 1331 n.6 (OSHRC 1983).

26 Feb. 24, 2003 OSHA Interpretation Letter, *supra* note 4 (Office temperature and humidity generally not encompassed under general duty clause).

27 *Brennan v. OSHRC*, 494 F.2d 460, 463 (8th Cir. 1974) ("Neither the general duty clause nor section 17(k) requires any actual death or physical injury for a violation to occur.").

28 *Empire-Detroit Steel Div., Detroit Steel Corp. v. OSHRC*, 579 F.2d 378, 384 (6th Cir. 1978) (holding that an employer's awareness of the *potential* for explosion satisfies the recognized hazard requirement and stating, "hazardous conduct need not actually have occurred to establish a violation of the general duty clause.")

29 *Con Agra, Inc.*, 11 OSH Cas. (BNA) 1141 (OSHRC 1983) (reversing the Commission's decision and remanding, despite the fact that no injury or accident had yet occurred, with instructions to determine the degree of danger posed by employer's inadequate pesticide testing procedures).

30 *National Realty*, 489 F.2d at 1267.

31 *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1170 n.25.

32 *Kastalon, Inc.*, 12 OSH Cas. (BNA) 1928, 1986, 1987 (OSHRC 1986) (applying "significant risk" test introduced by Supreme Court in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 [1980] [the "Benzene case"])

33 *Pepperidge Farm*, 17 OSH Cas. (BNA) at 2013 n.50; *see also Beverly Enterprises*, 19 OSH Cas. (BNA) at 1170 n.25 (declining to establish definitive standard but finding an ergonomic hazard under either "significant risk" or non-significant risk evaluation).

34 *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 323 (5th Cir. 1984); *see also Waldon Healthcare Center*, 16 OSH Cas. (BNA) 1052, 1060 (OSHRC 1993) ("[T]he existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances.").

35 *National Realty*, 489 F.2d at 1267 (citing 116 Cong. Rec. (Part 28) 38377 (1970)).

36 *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1185 (citing *Inland Steel Co.*, 12 OSH Cas. [BNA] 1968, 1970 [OSHRC 1986]).

37 *Tri-State Roofing & Sheet Metal, Inc., v. OSHRC*, 685 F.2d 878, 880 (4th Cir. 1982) (upholding general duty clause violation because a "reasonably prudent individual familiar with the circumstances of the industry" would recognize that working 40 feet above a concrete floor without fall protection constitutes a hazard).

38 *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1195 (10th Cir. 2004) (the use of a 40 pound portable propane tank to operate an ordinary barbeque grill constitutes an obvious hazard and violates the general duty clause even though the hazard is not generally recognized by the bread baking industry); *See also Peter*

employer knowledge, OSHA will evaluate the hazard to determine if it is generally "recognized" within that employer's industry or if common sense would make the hazard recognizable.[39]

It is important to note that in evaluating employer or industry recognition, knowledge of the condition presenting the hazard is not sufficient. Rather, "it is the dangerous potential of the condition or activity being scrutinized that must be known specifically by the employer or known generally in the industry."[40]

4.1 Industry Recognition

If a particular hazard is well known or documented within an industry, an employer in that industry has an obligation under the general duty clause to keep its workplace free of that hazard.[41] In determining industry recognition of a hazard, the Review Commission and the courts have relied on a variety of indices. For instance, it has been "consistently held that voluntary industry codes and guidelines are evidence of industry recognition."[2] Similarly, the opinion of "safety experts familiar with the workplace conditions or the hazard in question" is also pertinent.[43] It is not necessary that the experts be employed in the industry.[44]

Cooper Corporations, 10 OSH Cas. (BNA) 1203, 1210 (OSHRC 1981) (holding that the general manager's awareness of an anthrax hazard may be imputed to the employer and stating, "when the Secretary proves that the cited employer has actual knowledge of a particular hazard, the recognition element of a section 5(a)(1) violation is satisfied and industry recognition need not be shown"); *International Union, UAW v. General Dynamics Land Systems Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) ("The duty to protect employees is imposed on the employer, and the hazards against which he has the obligation to protect necessarily include those of which he has specific knowledge."), cert. denied, 484 U.S. 976 (1987).

39 *Kelly Springfield Tire Co.*, 729 F.2d at 321 ("Where a hazard is 'obvious and glaring,' the Commission may determine that the hazard was recognized without reference to industry practice or safety expert testimony."); *see also Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor*, 649 F.2d 96, 101 (2d Cir. 1981) ("To be a recognized hazard, the dangerous potential of the condition or activity being scrutinized either must be known by the employer or known generally in the industry.").

40 *Con-Agra, Inc.*, 11 OSH Cas. (BNA) 1141, 1144 (OSHRC 1983).

41 *See Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) ("To constitute a recognized hazard, the dangerous potential of a condition or activity must actually be known either to the particular employer or generally in the industry"); *Pratt & Whitney Aircraft*, 649 F.2d at 100.

42 *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1188 (finding NIOSH Lifting Guidelines to be persuasive in demonstrating industry recognition of patient lifting hazard in nursing home industry ergonomics case) (citing *Kokosing Constr. Co.*, 17 OSH Cas. [BNA] at 1873; *Kansas City Pwr. & Light Co.*, 10 OSH Cas. [BNA] 1417, 1422 [OSHRC 1982]; *Cargill, Inc.*, 10 OSH Cas. [BNA] 1398, 1402 [OSHRC 1982]).

43 *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1187 (citing *Waste Management of Palm Beach, Div. of Waste Management, Inc. of Florida*, 17 OSH Cas. [BNA] 1308, 1310–1311 [OSHRC 1995]).

44 *Kelly Springfield Tire Co.*, 10 OSH Cas. (BNA) 1970, 1973 (OSHRC 1982), *aff'd*, 729 F.2d 317 (5th Cir. 1984).

Additional bases for finding industry recognition of a hazard include "evidence of industry safety practices,"[45] proposed OSHA regulations,[46] and warnings provided by manufacturers.[47] Thus, in *Cormier Well Serv.*, the Review Commission relied on an OSHA compliance officer's testimony regarding oil derrick fall protection practices to conclude that the hazard of standing on the platform without being protected by a safety belt secured to a lifeline was recognized in the industry.[48] The decision further noted that the compliance officer had "a degree in petroleum engineering and five years of oil industry experience."[49]

This list is not exhaustive. OSHA will use any available evidence to determine whether the hazard is generally recognized.

4.2 Employer Recognition

As set out above, an employer's actual knowledge of a hazard in the workplace is not required to prove that a hazard was recognizable. However, if it can be demonstrated that the employer *was* aware of the hazard, the hazard will be deemed recognizable despite a lack of industry recognition or common sense recognition.[50] The Review Commission has expressed a reluctance to rely solely on voluntary safety efforts by an employer in determining recognition of a hazard.[51]

OSHA has demonstrated employer recognition of hazards in a number of ways. For instance, recognition has been imputed from the knowledge and expertise of safety personnel.[52] In *Pegasus Tower*, 21 OSHC BNA 1190, 1191 (2005), the Review Commission found that the potential 400-foot-fall hazard produced by employees riding a base-mounted dual-drum hoist line at a tower erection construction site was recognized by the employer. The Review Commission based its finding on the testimony of the employer's experienced safety

45 *Cormier Well Serv.*, 4 OSH Cas. (BNA) 1085, 1087 (OSHRC 1976).

46 *Kokosing Construction Co.*, 17 OSH Cas. (BNA) at 1874 ("We also find that the OSHA standard itself, which was proposed prior to the inspection in this case and which advocated protection for all employees on formwork, is evidence that safety officials and other individuals familiar with the industry recognized the hazard at that time.").

47 *Young Sales Corp.*, 7 OSH Cas. (BNA) 1297 (OSHRC 1979) (manufacturer's warning, in conjunction with the fact that supervisors read the warnings and instructed employees of the danger, is sufficient to prove that the employer had actual knowledge of the hazard).

48 *Cormier Well Serv.*, 4 OSH Cas. (BNA) at 1087.

49 *Id.* at 1087 n.6.

50 *Brennan*, 494 F.2d at 464.

51 *See, for example, Pepperidge Farm*, 17 OSH Cas. (BNA) at 2006–2007 ("The rationale is that such reliance would 'dissuade employers from taking voluntary protective measures beyond those the law requires'").

52 *Pegasus Tower*, 21 OSH Cas. (BNA) 1190, 1191 (OSHRC 2005).

instructor, which indicated recognition of "the dangers associated with raising and lowering employees on the hoist line."[53]

Similarly, in *Arcadian Corporation*, the Review Commission found that a urea manufacturer recognized the hazard of an explosion caused by leaks that could erode the lining of the reactor.[54] Specifically, the Review Commission pointed to testimony regarding the statement of a supervisor regarding the potential for explosion:

> The only thing you have to worry about is if that reactor ever leaks or if it ever blows up. You won't be here to tell about it.[55]

Other circumstances demonstrating employer knowledge include the existence of voluntary employer safety rules and procedures (in combination with other factors),[56] specific warnings given by company management,[57] manufacturers' warnings,[58] complaints by employees,[59] and past accidents and injuries.[60]

It is important to note that the fact that an employer's work practices are consistent with those in the industry does not necessarily demonstrate that the employer could not recognize that the practices are hazardous.[61] In *Beverly Industries*, for instance, the hazards related to patient lifting practices that were standard in the nursing home industry were deemed by the Review Commission to be recognized by the employer because, among other things, management implemented a back belt program to address the hazard, specifically warned personnel of the hazard, and distributed a manufacturer's warning to personnel.[62]

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53 *Id.*

54 *Arcadian Corp.*, 20 OSH Cas. (BNA) at 2010.

55 *Id.* (Employer recognition was also interpreted from supervisor discussions and knowledge of reactor failures and explosions overseas and at other operations in the United States).

56 *See Waldon Healthcare Center*, 16 OSH Cas. (BNA) at 1061-1062 (precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence); *Trinity Industries*, 15 OSH Cas. (BNA) 1481, 1485 (OSHRC 1992) (Independent evidence of recognition is required before evidence of voluntary protective measures can be relied upon).

57 *See Pepperidge Farm*, 17 OSH Cas. (BNA) at 2007.

58 *See Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1195 (10th Cir. 2004) (manufacturer's language on propane grill and in instructions warned against using large propane tank); *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1186.

59 *See Empire-Detroit Steel Div., Detroit Steel Corp. v. OSHRC*, 579 F.2d 378, 381–382 (6th Cir. 1978) (employer's refusal to correct hazardous condition despite more than a dozen employee complaints indicates employer recognition and may lead to a finding that the violation was willful); *See also Carlyle Compressor Co., Div. of Carrier Corp. v. OSHRC*, 683 F.2d 673, 676 (2nd Cir. 1982) (employee complaint indicates that the employer and/or the industry must recognize the hazard).

60 *See, for example, Titanium Metals Corp. v. Usery*, 579 F.2d 536 (9th Cir. 1978) (company's experience, marred by numerous fires and minor explosions, was sufficient proof that titanium dust posed a serious fire hazard that was "recognized" by the company); *see also ConAgra Flour Milling Co.*, 16 OSH Cas. (BNA) 1137, 1150 (OSHRC 1993) (absence of injuries is not dispositive of whether employees are exposed to a hazard).

61 *See Beverly Enterprise.*

62 *Id.*

4.3 Obvious Hazard Recognition

Even if industry or specific employer recognition can not be established, recognition can nonetheless be demonstrated if the hazard is deemed to be "obvious."[63] OSHA refers to such hazard recognition as "common sense recognition."[64] OSHA enforcement policy restricts the application of this theory of recognition to "flagrant cases."[65]

Thus, in *Safeway*, the Tenth Circuit found that the recognized hazard element of the general duty clause criteria was met where a bread-baking plant employer utilized a forty-pound propane tank on an outdoor gas grill designed for twenty-pound tanks. The court rejected the employer's argument that the bread-baking industry had never recognized this type of hazard, explaining that "Safeway cannot ignore the presence of an obviously hazardous condition by asserting that its industry is ignorant of such hazards."[66]

The courts and the Review Commission sometimes apply a reasonable person standard in evaluating the obviousness of a hazard. If a reasonable person would have recognized the existence of a hazard in the workplace, that hazard will be deemed recognizable.[67]

5.0 Causing or Likely to Cause Death or Serious Physical Harm

Not all workplace hazards are prohibited by the general duty clause. Employers are liable only for preventing hazards that are "causing or are likely to cause death or serious physical harm."[68] This language has been interpreted as applying the same standard as that applied to a "serious" violation.[69] Specifically, there must be

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63 *Safeway*, 382 F.3d at 1195 (citing *Tri-State Roofing & Sheet Metal, Inc. v. OSHRC*, 685 F.2d 878 [4th Cir. 1982] [working on an unguarded platform 40 feet above a concrete floor without fall protection is clearly a hazard for unprotected workers]); *see also Kelly Springfield Tire Co*, 729 F.2d at 321 (upholding a violation of the general duty clause despite the fact that neither the employer nor the tire industry in general recognized an explosion hazard from the operation of a dust collection system).

64 Occupational Safety and Health Administration, *OSHA Field Inspection Reference Manual* (hereinafter, *FIRM*), Section 7, Chapter III (C)(2)(c)(2)(b)(3) (1994), available at http://www.osha.gov/Firm_osha_data/100007.html.

65 *Id.*

66 *Safeway*, 382 F.3d at 1195 n.4.*s*, 19 OSH Cas. (BNA) at 1186.

67 *See Usery*, 568 F.2d at 910 ("It scarcely requires expertise in the industry to recognize that it is hazardous to dump bricks from an unenclosed chute into an unbarricaded alleyway, twenty-six feet below, between buildings in which unwarned employees work").

68 29 U.S.C. § 654(a)(1); *See General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC*, 599 F.2d 453, 458 (1st Cir. 1979).

69 29 U.S.C. § 666(k).

a "substantial probability that death or serious physical harm could result from a condition which exists."[70] The occurrence of a death "constitutes at least prima facie evidence of likelihood."[71]

In evaluating likelihood, the Review Commission has determined that the general duty clause does not require the Secretary of Labor to prove that an accident is likely.[72] Rather, the Secretary need only establish that, *if an accident occurs*, death or serious physical harm would be the likely result.[73] Similarly, in evaluating likelihood with respect to an occupational illness caused by a substance in the workplace, the Secretary must only prove that death or serious harm is likely if an employee contracts the illness.[74]

Injuries and illnesses that the courts and the Review Commission have indicated provide a sufficient basis for a finding that death or serious physical harm could result include "physical disorders that so adversely affect employees that they are disabled from doing their jobs"[75] or from performing their normal activities.[76] The Review Commission has also noted that serious physical harm can be demonstrated even in circumstances where there is no evidence of "pathological anatomic change or injury"[77]—a condition "which cannot be linked to any detectable tissue or body damage or injury."[78]

Further, this is true "even if the disability is not permanent."[79] In *Consolidated Freightways Corp.*, for instance, the Review Commission found that temporary nausea, vomiting, light sensitivity, and the potential for temporary loss of vision, which caused employees to miss up to seven and a half weeks of work, constituted serious physical harm.[80] According to the Review Commission, these

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70 *Id.*

71 *Usery*, 568 F.2d at 910.

72 *Beverly Enterprise*, 19 OSH Cas. (BNA) at 1188 (citing *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160 (3rd Cir. 1980)).

73 *Id.*

74 *See Kaiser Aluminum & Chemical Co.*, 10 OSH Cas. (BNA) 1893, 1896-97 (OSHRC 1982).

75 *Pepperidge Farm*, 17 OSH Cas. (BNA) at 2032 (Focusing on upper extremity musculoskeletal disorders caused by repetitive motion, the Review Commission noted that a finding of serious physical harm is appropriate "even if the disability is not permanent."); *see also Miniature Nut & Screw Corp.*, 17 OSH Cas. (BNA) 1557, 1559 (OSHRC 1996) (hearing loss is serious physical harm even if employee not disabled from working).

76 *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1190.

77 *Id.* (citing *GAF Corp.*, 9 OSH Cas. [BNA] 1451, 1456, 1457 [OSHRC 1981] [although no systemic implication demonstrated, serious violation proven based on skin and eye discoloration caused by exposure to airborne silver]).

78 *Beverly Enterprises* at 1189.

79 *Id.* at 1190 (The Review Commission in *Pepperidge Farm* "found serious physical harm based on the existence of a physically detectable and identifiable injury that can be treated by surgery").

80 *Consolidated Freightways Corp.*, 15 OSH Cas. (BNA) 1317, 1324 (OSHRC 1991).

conditions, caused by exposure to toxic dye, were indicative of substantial impairment to functions of the body.[81]

6.0 Feasible Measures to Correct the Hazard

The general duty clause has not been interpreted as imposing an impossible responsibility on employers. The *National Realty* court explained that "Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one."[82] Further, the D.C. Circuit acknowledged that a "demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime."[83] Each employer, therefore, is required by the general duty clause to keep its workplace free of all *preventable* hazards.[84]

Determining whether a hazard is preventable is essentially dictated by an evaluation of the feasibility of abating it. Feasibility "means economically and technologically capable of being done."[85] The Secretary of Labor must set out the proposed abatement measures and "demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard."[86] The Secretary must also establish that a proposed measure of abatement is not cost prohibitive.[87]

Feasibility can, in some cases, be determined by common sense.[88] OSHA can also point to employer or general industry practices to prove that a feasible method of abatement exists.[89] Alternatively, an employer may use evidence of its

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81 *Id.*

82 *National Realty*, 489 F.2d at 1265-1266; *see also General Dynamics Corp.*, 599 F.2d at 458 ("An employer is not an insurer, and need not take steps to prevent hazards which are not generally foreseeable, including idiosyncratic behavior of an employee, but at the same time an employer must do all it feasibly can to prevent foreseeable hazards, including dangerous conduct by its employees.").

83 *National Realty*, 489 F.2d at 1265–1266.

84 See *Morrison-Knudson Co.*, 16 OSH Cas. (BNA) at 1121–1122; *Babcock & Wilcox Co.*, 622 F.2d at 1164; *Marshall v. L. E. Myers Co.*, 589 F.2d 270, 272 (7th Cir. 1978).

85 *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1191 (citing *Baroid Div. of NL Industries, Inc. v. OSHRC*, 660 F.2d 439, 447 (10th Cir. 1981)).

86 *Beverly Enterprises*, 19 OSH Cas. (BNA) at 1190 (citing *National Realty*, 489 F.2d at 1267; *Waldon*, 16 OSH Cas. [BNA] at 1062) (further citations omitted).

87 *Waldon*, 16 OSH Cas. (BNA) at 1063.

88 *Carlyle Compressor Co.*, 683 F.2d at 677 ("Courts are entitled to base conclusions upon common sense where the facts so warrant").

89 *See Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 19 (1st Cir. 1984) (ANSI Standards and common usage of safety mechanism by other elevator owners proves the feasibility of the abatement method); *see also Young Sales Corp.*, 7 OSH Cas. (BNA) at 1297 (manufacturer's suggested safety precautions prove the feasibility of abatement).

own abatement efforts or standard industry abatement methods in demonstrating that "it took all necessary precautions to prevent the occurrence of the violation."[90] However, the courts and the Review Commission have made it clear that a safety precaution does not have to have "general usage" in an industry in order to be deemed feasible.[91] As explained by the D.C. Circuit in *National Realty*, "the question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary."[92]

In essence, the basic focus in evaluating feasibility is whether the measure is "reasonable and practical."[93] A key component of this inquiry is whether the measure will "materially reduce the hazard."[94] In *Waldon Healthcare Center*, the Review Commission found that the Secretary's proposed pre-exposure vaccination measure for Hepatitis provided "virtually the same effectiveness rate" as the postexposure treatment measure offered by the employer.[95] Consequently, the Review Commission determined that the Secretary had failed to demonstrate that the abatement measure would result in a material reduction of the hazard.[96]

In *Arcadian Corp.*, the Review Commission found that three specific abatement methods proposed by the Secretary would materially reduce the reactor explosion hazard caused by the leakage of a corrosive chemical (urea).[97] Based on the abatement practices in the fertilizer industry and the employer's own policy for dealing with urea leaks, the Review Commission specifically identified the following abatement methods: (1) shutting down the urea reactor upon detection of the leak; (2) inspection of the leak detection system; and (3) regular inspections of the reactor.[98]

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90 *General Dynamics Corp.*, 599 F.2d at 458; *see also Brown & Root, Inc.*, 8 OSH Cas. (BNA) 2140, 2144 (OSHRC 1980) (Employer abatement measure which provides protection that is just as effective as Secretary's proposed abatement is defense to alleged general duty clause violation).

91 *National Realty*, 489 F.2d at 1267, n.37; *see also General Motors Corp.*, OSHRC No. 77-3790, 1982 OSHARC LEXIS 116, at *11 (OSHRC August 30, 1982) ("Abatement requirements are based on feasibility and an abatement order may require practices that are of a higher standard than the industry considers appropriate").

92 *National Realty*, 489 F.2d at 1266, n.37.

93 *Waldon*, 16 OSH Cas. (BNA) at 1064; *see also Beverly Enterprises*, 19 OSH Cas. (BNA) at 1191 (Review Commission evaluates proposed abatement efforts based on "whether conscientious experts in the industry" would include such measures in developing a safety program) (citing *National Realty*, 489 F.2d at 1266).

94 *Waldon*, 16 OSH Cas. (BNA) at 1062 (citing *Baroid Div. of N.L. Industries, Inc. v. OSHRC*, 660 F.2d 439 [10th Cir. 1981]).

95 *Waldon*, 16 BNA OSHA at 1063.

96 *Id.*

97 *Arcadian Corp.*, 20 OSH Cas. (BNA) at 2011–2013.

98 *Id.*; *see also Grey Wolf Drilling Co. L. P.*, 20 OSH Cas. (BNA) at 1623 (affirming Review Commission final order finding that obstructed view flagman procedure for backing up loaded trucks was feasible abatement procedure for hazard created when backing up unloaded trucks).

An equally important component of the feasibility determination is whether the employer can absorb the costs of the proposed abatement measures without threatening its "economic viability."[99] In this regard, two issues that courts and the Review Commission generally consider are: (1) whether the costs of a proposed abatement method will "jeopardize a company's long-term profitability and competitiveness," and/or (2) whether those costs can be passed on to the customer.[100] In *Sun Ship, Inc.*, the Review Commission found that the Secretary had made a *prima facie* case of economic feasibility because the proposed $2,500 noise abatement control would not adversely impact an employer with annual sales of $100 million.[101]

7.0 Practical Enforcement of the General Duty Clause

The mechanics of general duty clause enforcement derive from the central tenet that the clause can only be used when there is no safety standard applicable to the particular hazard involved.[102] With this said, agency policy, consistent with court and Review Commission decisions, allows enforcement personnel to cite the general duty clause, along with a standard, when there is doubt as to the application of the standard.[103] OSHA's *Field Inspection Reference Manual* provides the OSHA area manager and assistant area manager discretion to conduct a precitation review when section 105(a)(1) is contemplated.[104]

Upon a determination that no standard applies to an identified hazard, OSHA policy directs its enforcement personnel to evaluate whether the four elements of a general duty clause violation, laid out by the courts and the Review

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99 *Waldon*, 16 OSH Cas. (BNA) at 1063.

100 *Id.* (Review Commission found that the Secretary had failed to demonstrate either of these issues).

101 *Sun Ship, Inc.*, 11 OSH Cas. (BNA) 1028, 1036 (OSHRC 1982) (denying employer's argument that Secretary's burden on economic feasibility be based on calculation of cost of plant-wide abatement as opposed to specific violation abatement); *see also Walker Towing Corp.*, 14 OSH Cas. (BNA) 2072, 2077–2078 (OSHR.C 1991) (The cost of installing limited guardrails on barges was insignificant to barge repair employer because such costs "fall within the usual range of charges to barge customers requiring major repairs").

102 *FIRM*, *supra* note 60, at Section 7, Chapter III(C)(2)(c)(1). The *Field Inspection Reference Manual* does not establish any substantive rights, duties, or benefits. *See FIRM*, *supra* note 60, at Section 3, available at http://www.osha.gov/Firm_osha_data/100002.html.

103 *FIRM*, *supra* note 60, at Section 7, Chapter III(C)(2)(c)(3)(a); *see Safeway*, 382 F.3d at 1191 (citation for general duty clause violation properly amended to allege, in the alternative, violation of a specific standard); *see also Carlyle Compressor Co.*, 683 F.2d at 674 (Secretary may file a complaint alleging violations of the general duty clause while simultaneously alleging violations of a specific standard).

104 *FIRM*, *supra* note 60, at Section 7, Chapter III(C)(2)(c)(4); *but see FIRM*, *supra* note 60, at Section 7, Chapter III (C)(2)(c)(3)(c) (Precitation review must be conducted "if it can be documented that 'an employer knows a particular safety or health standard is inadequate to protect his workers against the specific hazard it is intended to address'" (citing *International Union, U.A.W. v. General Dynamics Land Systems Division*, 815 F.2d 1570, [D.C. Cir 1987]).

Commission, are met (hazard in the workplace, recognition of hazard, hazard causing or likely to cause death or serious physical harm, and feasible abatement).[105] Under this policy, if no standard exists and all four elements can not be demonstrated, the area office must forward a letter "to the employer and the employee representative describing the hazard and suggesting corrective action."[106]

The agency also acknowledges a number of limitations on its ability to cite the general duty clause. The policy specifically states that Section 5(a)(1):

1. Shall not group violations together (can be grouped with related violation of a specific standard);
2. Shall not normally be used to impose a stricter requirement than that required by the standard (unless it can be documented the employer knows that the standard is ineffective in protecting the employees from the specific hazard);
3. Shall normally not require an abatement method not set forth in a standard;
4. Shall not be used to enforce 'should' standards;
5. Shall not normally be used to cover categories of hazards exempted by a standard (unless exemption was based on something other than lack of a hazard).[107]

In proposing civil penalties for general duty clause violations, OSHA has, in the past, attempted to issue penalties based on the number of employees affected by the hazardous condition rather than the condition itself. This, of course, had the effect of greatly increasing the overall civil penalty directed to the employer. In *Arcadian Corp.*, the Fifth Circuit affirmed the Review Commission's rejection of this position. The court noted that the Act focuses civil penalties on conditions, practices, and violations, and not on employees.[108] With this stated, the court acknowledged that the number of employees affected by a hazardous condition can be considered by the Review Commission in carrying out its "exclusive role" of

[105] *FIRM, supra* note 60, Section 7, Chapter III(C)(2)(c)(1).

[106] *FIRM, supra* note 60, Section 7, Chapter III(C)(2)(c)(4).

[107] *FIRM, supra* note 60, Section 7, Chapter III(C)(2)(c)(3).

[108] *Reich*, 110 F.3d at 1198–1199, *corrected sub nom. Metzler*, 1997 U.S. App. LEXIS 12693, at *19 (employee could only be unit of violation "if regulated condition or practice was unique to the employee"); *see also C.T. Taylor Company, Inc*, 20 OSH Cas. (BNA) 1083, 1085 (2002) (Review Commission declining Secretary's request to overturn *Arcadian Corp*).

assessing a civil penalty that has been proposed by the Secretary and contested by an employer.[109]

8.0 Conclusion

The primary purpose of the general duty clause is to offer an extra measure of protection to employees in the workplace. Most standards implemented under OSHA are targeted at a specific hazard. The general duty clause, however, allows inspectors to cite employers for exposing its employees to a recognized hazard that has not been specifically addressed in the regulations.

[109] *Reich*, 110 F.3d at 1199, *corrected sub nom. Metzler*, 1997 U.S. App. LEXIS 12693, at *21 (proper to consider number of affected employees in evaluating assessment criteria at 29 C.F.R. § 666(j)); *see also FIRM, supra* at note 60, Section 8, Chapter IV(C)(2), available at http://www.osha.gov/Firm_osha_data/100008.html.

Chapter 5

Recordkeeping

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1.0 Overview

The Occupational Safety and Health Administration (OSHA) requires employers to maintain several different types of records. First, the Recording and Reporting Occupational Injuries and Illnesses regulation requires employers to record work-related injuries and illnesses that meet certain criteria on the OSHA 300 Log.[1] Employers must also develop and maintain an OSHA 301 Form describing each individual injury and illness and must certify and post an annual summary of injuries and illnesses on the OSHA 300-A Form by February 1 of the year after the injuries and illnesses occurred. The recordkeeping regulation also requires employers to report each fatality or in-patient hospitalization of three or more employees to the local OSHA area office within eight hours.

Second, OSHA safety standards, which are generally intended to prevent physical hazards in the workplace, require a variety of different types of records. For example, OSHA safety standards may require documentation of employee training, written compliance programs, inspection reports and hazard assessments.

Third, OSHA's health standards, which are generally intended to limit exposure to substances that may be hazardous to employee health, typically require the employer to prepare and maintain records of employee exposure levels as well as employee medical records. For example, certain substance-specific standards, such as the lead,[2] cadmium,[3] and benzene[4] standards, require employers to perform monitoring to determine employee exposure levels and to provide medical

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1 29 C.F.R. Part 1904.
2 29 C.F.R. Section 1910.1025
3 29 C.F.R. Section 1910.1027
4 29 C.F.R. Section 1910.1028

surveillance for certain employees. OSHA's Access to Employee and Medical Records standard mandates that employers maintain the types of records required by these types of health standards.[5]

Finally, employers often maintain certain records to prove compliance with a standard even if OSHA does not require the records to be retained. For example, Subpart L contains requirements for fire protection, including maintenance and testing provisions for fire suppression systems such as portable fire extinguishers, standpipe and hose systems, and sprinkler systems.[6] Although the Subpart L standards do not require employers to maintain records of tests and inspections, the employer may, as a practical matter, be unable to show compliance in the event of an inspection in the absence of testing and inspection records. Many other OSHA standards essentially require employers to keep records to prove compliance in the event of an enforcement action.

2.0 Statutory Authority

When the Occupational Safety and Health Act (OSH Act) was enacted, Congress recognized that data about injuries, illnesses, and hazards would assist OSHA in developing standards to address hazards and in concentrating enforcement resources on workplaces with employees experiencing injuries and illnesses. As such, Congress sought to "assure so far as possible every working man and woman in the National safe and healthful working conditions."[7] To achieve this goal, Congress authorized "research in the field of occupational safety and health," the "development and promulgation of occupational safety and health standards," and "appropriate reporting procedures with respect to occupational safety and health" to "accurately describe the nature of the occupational safety and health problem."[8]

Section 8 of the OSH Act includes several recordkeeping provisions. Section 8(c)(1) requires each employer to "make, keep and preserve" any records OSHA "may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses."[9] Section 8(c)(2) authorizes OSHA to "prescribe regulations requiring employers to maintain accurate records of, and make periodic reports on, work-related deaths, injuries and illnesses other than minor

5 29 C.F.R. Section 1910.1020

6 29 C.F.R. Subpart L, 1910.155 et seq.

7 29 U.S.C. Section 651.

8 *Id.*

9 29 U.S.C. Section 657(c)(1).

injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job."[10] Section 8(c)(3) requires OSHA to "issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents."[11]

The remainder of this chapter describes the recordkeeping and documentation provisions OSHA has instituted pursuant to these congressional directives.

3.0 Injury and Illness Recordkeeping

As discussed further below, the Recording and Reporting Occupational Injuries and Illnesses regulation, commonly known as the recordkeeping regulation, requires employers to record certain work-related injuries and illnesses on the OSHA 300 Log, to keep other data concerning these injuries, and to post a summary of injuries and illnesses each February. In addition, employers must report a fatality or in-patient hospitalization of three or more employees within eight hours to the local OSHA area office. The regulation also requires employers to respond to requests from OSHA or the Bureau of Labor Statistics (BLS) for injury and illness data.

3.1 History of the Recordkeeping Requirements

OSHA has required employers to keep injury and illness records since shortly after the OSH Act was enacted in 1971. From 1971 to 1990, OSHA and the Bureau of Labor Statistics jointly administered the injury and illness recordkeeping system. In a Memorandum of Understanding executed in 1990, BLS agreed to conduct annual surveys of occupational injuries and illnesses and compile the data, and OSHA agreed to administer the enforcement and rulemaking aspects of recordkeeping.

On January 19, 2001, OSHA issued a revised recordkeeping regulation.[12] Prior to these revisions, OSHA's recordkeeping regulation was considered by many employers to be confusing, and employers often had difficulty determining when an injury or illness had to be recorded. Most provisions of the revised recordkeeping regulation became effective on January 19, 2002.[13]

10 29 U.S.C. Section 657(c)(2).

11 29 U.S.C. Section 657(c)(3).

12 Occupational Injury and Illness Recording and Reporting Requirements: Final Rule, 66 *Fed Reg.* 5916 (January 19, 2001). Most parts of the revised regulation became effective on January 19, 2002.

13 *Id.*

3.2 OSHA's Authority for Requiring Employers to Keep Records

OSHA's authority to require employers to keep injury and illness records derives from Section 8(c) of the OSH Act. Also, Section 24(a) requires the Secretary to develop and implement a program to "compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job."

3.3 Identifying Injuries and Illnesses that Must be Recorded

OSHA's recordkeeping regulation generally requires employers to record each "non-minor" work-related injury or illness on the establishment's OSHA 300 Log. The regulation sets out a series of criteria that must be met for an injury or illness to be recorded. These criteria are:

- Has an "injury" or "illness" occurred?
- Is the injury or illness "work-related"?
- Is the work-related injury or illness a "new case"?
- Does the injury or illness meet the general recording criteria, such as days away from work, restricted work or job transfer, or the provision of medical treatment?
- Is the injury or illness in a special category, such as an occupational hearing loss or tuberculosis, a "significant" injury or illness, or a sharps/needlestick injury that requires recording?[14]

Each recordable injury and illness must also be described on an OSHA 301 Incident Report. The OSHA 301 report requires information about the employee, where the employee was treated, how the injury or illness occurred, and the extent of the injury or illness.[15] The employer is also required to execute and post an annual summary of illnesses and injuries on the Form 300-A, which describes the injuries and illnesses from the previous year, and must be posted each February.[16]

[14] The recordkeeping regulation contains a flowchart to assist employers in determining whether an injury or illness is recordable. *See* 29 C.F.R. Section 1904.5(b)(2).

[15] 29 C.F.R. Section 1904.29(b).

[16] 29 C.F.R. Section 1904.32.

3.3.1 Determining Whether an Injury or Illness Has Occurred

In the majority of cases, it is obvious whether an injury or illness has occurred. For example, an employee who trips and breaks his ankle has clearly experienced an injury, and an employee who contracts tuberculosis clearly has an illness.[17]

Section 1904.46 defines an injury or illness as an "abnormal condition," including but not limited to a "cut, fracture, sprain, or amputation," or "a skin disease, respiratory disorder, or poisoning."[18] OSHA intentionally defined "injury or illness" very broadly because the "series of screening mechanisms for recording," such as the work-related requirement and the various recording criteria, are intended to weed out what OSHA considers to be minor injuries and illnesses. Nevertheless, an injury or illness has to constitute an abnormal condition and includes only "those changes that reflect an adverse change in the employee's condition that is of some significance." Although *injury* and *illness* are broadly defined, a "mere change in mood or experiencing normal end-of-the-day tiredness" do not meet the definition.[19]

3.3.2 Defining "Work-Related": The Geographic Presumption

Employers are required to record only those injuries and illnesses that are work-related. While this determination may seem simple on its face, the question of whether an injury or illness is work-related often presents difficult and complex issues. The recordkeeping regulation is not intended to require recording of only those injuries that result from a hazard in the workplace. Instead, the regulation is designed to capture the vast majority of significant injuries or illnesses that occur or surface at the workplace on a "no fault" basis. The OSHA 300 Log itself states that recording "does not mean that the employer or a worker was at fault or that an OSHA standard was violated."

The regulation also requires employers to presume that any injury or illness that occurs or surfaces in the workplace is "work-related." The only exceptions to this geographic presumption are set out in the regulation. This geographic presumption may lead to counterintuitive results. For example, an employee may slip in the company parking lot and suffer an injury. This injury would be considered work-related even though it did not occur because of a hazard in the workplace; the employee was simply clumsy. [20]

[17] Prior to the revision of the recordkeeping regulation in 2001, the recording criteria for injuries and illnesses were different. In the revision, OSHA simplified the regulation by treating the recording of injuries and illnesses the same.

[18] 29 C.F.R. Section 1904.46.

[19] 66 *Fed Reg.* 5916, 6080 (January 19, 2001).

[20] *See generally* 66 *Fed. Reg.* 5916, 5928 (January 19, 2001).

Section 1904.5(a) of the regulation states that an injury or illness is "work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." Section 1904.5(b) defines *work environment* as "the establishment and other locations where one or more employees are working or are present as a condition of their employment," and the term "includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work."

The "geographic presumption" is described as follows: "Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in § 1904.5(b)(2) specifically applies."[21] As such, an injury or illness is work-related if the injury or illness would not have happened but for the presence of the employee in the workplace. The fact that the employer could not have prevented the injury or illness through measures such as a better safety program or machine guards is irrelevant.

OSHA illustrated this concept during the rulemaking by giving several examples, including the following:

> Injuries and illnesses also occur at work that do not have a clear connection to specific work activity, condition or substance that is peculiar to the employment environment. For example, an employee may trip for no apparent reason while walking across a level factory floor; be sexually assaulted by a co-worker; or be injured accidentally as a result of violence perpetrated by one co-worker against a third party. In these and similar cases, the employee's job-related tasks or exposures did not create or contribute to the risk that such an injury would occur. *Instead, a casual connection is established by the fact that the injury would not have occurred but for the conditions and obligations of employment that placed the employee in the position in which he or she was injured or made ill.*[22]
>
> Similarly, OSHA stated:
>
> If an event, such as a fall, an awkward motion or lift, an assault or an instance of horseplay, occurs at work, the geographic presumption applies and the case is work-related unless it otherwise falls within an exception. Thus, if an employee trips while walking across a level factory floor, the resulting injury is considered work-related under the geographic presumption because the precipitating event—the tripping accident—occurred in the workplace. The case is work-related even if the employer cannot determine why the employee tripped, or whether any particular workplace hazard caused the accident to occur.[23]

[21] 29 C.F.R. Section 1904.5(a). The exceptions in Section 1904.5(b)(2) are discussed later in this section.

[22] 66 *Fed Reg.* 5916, 5946 (January 19, 2001) (emphasis added).

OSHA provides additional guidance about determining whether an injury or illness is work-related in the Recordkeeping Policies and Procedures ("Compliance Directive").[24] The guidance states that "a case is presumed work-related if, and only if, an event or exposure in the work environment is the discernable cause of the injury or illness or of a significant aggravation to a pre-existing condition," and notes that the "work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause."

3.3.3 Preexisting Conditions

An injury or illness is also considered work-related if an "event or exposure . . . significantly aggravated a pre-existing injury or illness."[25] A condition is preexisting if "it resulted solely from a non-work-related event or exposure that occurred outside the work environment."[26] A preexisting condition is considered aggravated, and therefore work-related, only if the workplace event or exposure worsens the preexisting condition such that one of the following conditions occurs:

(i) Death, provided that the preexisting injury or illness would likely not have resulted in death but for the occupational event or exposure;

(ii) Loss of consciousness, provided that the preexisting injury or illness would likely not have resulted in death but for the occupational event or exposure;

(iii) One or more days away from work, or days or restricted work, or days of job transfer that otherwise would not have occurred but for the occupational event or exposure;

(iv) Medical treatment in a case where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in medical treatment was necessitated by the workplace event or exposure.[27]

[23] 66 *Fed Reg.* 5916, 5959 (January 19, 2001).

[24] Compliance Directive 02-00-135, December 30, 2004, available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3205. OSHA also published a Recordkeeping Handbook in 2005, available at http://www.osha.gov/recordkeeping/handbook/index.html.

[25] 29 C.F.R. Section 1904.5(a).

[26] 29 C.F.R. Section 1904.5(b)(5).

[27] 29 C.F.R. Section 1904.5(b)(4).

For example, an employee may have preexisting asthma that is not work-related. If the employee inhales dust while at work, and the dust aggravates his asthma such that he loses consciousness, the incident is considered work-related.

3.3.4 The Employer's Obligation to Determine Work-Relatedness

Although the employer may rely upon the opinion of a physician in determining whether an injury or illness is work-related, the employer is ultimately responsible for making the decision. OSHA commented during the rulemaking that "the employer is in the best position to obtain the information, both from the employee and the workplace, that is necessary to make the determination" of whether an injury or illness is work-related.[28] Further, "although expert advice may occasionally be sought by employers in particularly complex cases, the final rule provides that the determination of work-relatedness ultimately rests with the employer."[29]

Accordingly, Section 1904.5(b)(3) instructs that "if it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work," the employer must "evaluate the employee's work duties and environment and decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition."

3.3.5 Exceptions to Work-Relatedness

Section 19054.5(b)(2) lists nine situations in which an injury or illness will not be considered work-related even though it occurs in the work environment. These nine exceptions essentially invalidate the geographic presumption for injuries and illnesses that occur in the workplace.

The broadest and most complex exception applies to injuries and illnesses that "involve signs or symptoms that surface at work, but result solely from a non-work-related event or exposure that occurs outside the work environment." As stated, Section 1904.5(b)(3) requires the employer to evaluate the employee's work duties and determine whether an event or exposure in the workplace caused the injury or illness.

In the rulemaking, OSHA explained this exception as follows:

> This exception is consistent with the position followed by OSHA for many years and reiterated in the final rule: that any job-related contribution to the injury or illness makes the incident work-related, and its corollary—that any injury or illness in which work makes no actual contribution is not work-related.[30]

[28] 66 *Fed Reg.* 5916, 5965 (January 19, 2001).

[29] 66 *Fed Reg.* 5916, 5950 (January 19, 2001).

OSHA uses the following example in the Compliance Directive to illustrate this example:

> Question 5-8: If an employee's pre-existing medical condition causes an incident which results in a subsequent injury, is the case work-related? For example, if an employee suffers an epileptic seizure, falls, and breaks his arm, is the case covered by the exception in section 1904.5(b)(2)(ii)?
>
> Neither the seizures nor the broken arm are recordable. Injuries and illnesses that result solely from non-work-related events or exposures are not recordable under the exception in section 1904.5(b)(2)(ii). Epileptic seizures are a symptom of a disease of non-occupational origin, and the fact that they occur at work does not make them work-related. Because epileptic seizures are not work-related, injuries resulting solely from the seizures, such as the broken arm in the case in question, are not recordable.

The other exceptions to the geographic presumption are much more narrow, and are strictly interpreted by OSHA.

General Public

An injury or illness that occurs while the employee is at the workplace as a member of the general public are not considered work-related.[31] For example, a worker employed at a restaurant who stays after his shift to eat with friends has not suffered a work-related injury if he slips on the floor.

Voluntary Participation in Wellness Program

An employee who is injured during voluntary participation in a "wellness program or in a medical, fitness or recreational activity such as blood donation, physical examination, flu shot, exercise class, racquetball, or baseball" has not suffered a work-related injury or illness. For example, no work-related injury occurs when an employee voluntarily gives blood and faints. The participation must be voluntary. For example, some employers are required to have employees trained to

[30] 66 *Fed Reg.* 5916, 5950 (January 19, 2001).

[31] 29 C.F.R. Section 1904.5(b)(2)(i).

provide first aid in the event of a medical emergency.[32] Employees who provide first aid are required to receive hepatitis vaccinations pursuant to OSHA's Bloodborne Parthogens standard.[33] An employee who suffers a reaction to the vaccination has experienced a work-related injury or illness because his participation on the emergency response team is not voluntary. Similarly, an employee who is required to wear a respirator is required to undergo a medical examination that includes a pulmonary function test, and any injury experienced during the test would also be work-related.[34]

Injury from Eating or Drinking

An injury or illness that is "solely the result of employee eating, drinking or preparing food or drink for personal consumption" is not work-related. For example, an employee who is drinking a can of soda has not experienced a work-related illness when a bee comes out of the can and stings him on the lip. If, however, an employee becomes ill from eating food from the company cafeteria, then the illness is work-related. For example, an employee who eats food prepared by the employer that is contaminated with lead has experienced a work-related illness.

Injury from Performing Personal Tasks Outside of Working Hours

This exception applies to an injury or illness that occurs when an employee comes to the workplace outside of his or her working hours to perform personal tasks. For example, an injury that occurs when an employee comes to the establishment over the weekend to photocopy personal materials is not work-related. The injury must, however, occur outside of normal working hours. As such, an injury that occurs while an employee is photocopying personal materials during normal working hours is work-related. Similarly, an employee who falls on a sidewalk during a smoking break has experienced a work-related injury.

Personal Grooming, Self-Medication for Non-Work-Related Condition, or Self-Inflicted Injury

This exception covers situations such as an injury that occurs while an employee is brushing her hair, putting in contact lenses, or applying make-up. Similarly, an

[32] OSHA's Medical Service and First Aid standard requires the employer to ensure the "ready availability" of medical services and states that if there is not an "infirmary, clinic or hospital in near proximity," the employer must train employees to provide first aid.

[33] 29 C.F.R. Section 1910.1030.

[34] 29 C.F.R. Section 1910.134.

illness that occurs when an employee reacts to two aspirin he took to alleviate a headache is not work-related.

Common Cold or Flu

Cold or flu, regardless of severity or where the employee contracted it, are not work-related illnesses. However, an employee who contracts a contagious disease, such as tuberculosis, brucellosis, or hepatitis at work has experienced a work-related illness. For example, an employee who works with animals and contracts brucellosis, a flu-like illness that is transmitted by infected animals, has experienced a work-related illness.

Car Accidents

An injury caused by a motor vehicle accident that "occurs on a company parking lot or company access road while the employee is commuting to or from work" is not work related. If, however, an employee on a public road on his way to the bank to make a deposit on behalf of the employer is hit by a car, any injury is work-related.

Mental Illness

Mental illnesses are not considered work-related unless the "employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related."

3.3.6 Injuries or Illnesses that Occur While Traveling

Injuries or illnesses that occur while an employee is on travel status are generally considered work-related if the employee is acting in the interest of the employer. Section 1904.5(b)(6) states:

> Injuries or illnesses that occur while an employee is on travel status are work-related if, at the time of the injury or illness, the employee was engaged in work activities "in the interest of the employer." Examples of such activities include travel to and from customer contacts, conducting job tasks, and entertaining or being entertained to transact, discuss or promote business (work-related entertainment includes only entertainment activities being engaged in at the direction of the employer).

The definition of "work environment" also establishes that injuries or illnesses that occur during business travel are "work-related." The work environment includes any location "where one or more employees are working or are present as a condition of their employment."[35] As such, the work environment of a traveling employee is essentially wherever he or she is traveling.

As such, an injury that occurs while an employee is driving to the airport to return from a business trip is work-related. If the employee takes a side trip to visit relatives and is in a car accident during that trip, any injury is not work-related. Similarly, a bad reaction to food eaten at a sporting event attended by an employee and business associates would be considered work-related, while the same situation at a sporting event the employee attends with personal friends during a business trip would not be work-related.

3.3.7 Injuries and Illnesses Resulting from Work at Home

Section 1904.5(b)(7) states that "injuries and illnesses that occur while an employee is working from home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting." Section 1904.5(b)(7) also offers the following examples:

> For example, if an employee drops a box of work documents and injures his or her foot, the case is considered work-related. If an employee's fingernail is punctured by a needle from a sewing machine used to perform garment work at home, becomes infected and requires medical treatment, the injury is considered work-related. If the employee is injured because he or she trips on the family dog while rushing to answer a work phone call, the case is not considered work-related. If an employee working at home is electrocuted because of faulty home wiring, the injury is not considered work-related.

3.3.8 New Cases

Employers are only required to record work-related injuries and illnesses that are new cases on the OSHA 300 Log. Section 1904.6 states that an injury or illness is a new case if: "the employee has not previously experienced an injury or illness of the same type that affects the same part of the body," or "the employee previously experienced a recorded injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and symptoms had

[35] 29 C.F.R. Section 1904.5(b).

disappeared) from the previous injury or illness and an event of exposure in the work environment caused the signs or symptoms to reappear." OSHA requires employers to record only new cases to prevent double counting when a previously recorded injury or illness failed to heal.

Section 1904.6(b) distinguishes between symptoms of chronic illnesses that surface at work regardless of workplace exposures or events, and chronic illnesses that are aggravated by workplace exposures. Symptoms of some chronic work-related illnesses like occupational cancer may surface at work, but are not considered new cases because no new work-related exposure has occurred. These types of chronic illnesses are only recorded once.[36] Employees with other types of chronic work-related illnesses, like occupational asthma, may experience symptoms when a new workplace exposure occurs.[37] If these symptoms are the result of a workplace event or exposure, a new injury or illness has occurred. Employers are not required to consult a physician or other licensed healthcare professional in determining whether a new case has occurred. If the employer does rely upon a medical professional, then it must follow the advice given.[38]

During the rulemaking, OSHA observed that employers "may occasionally have difficulty in determining whether new signs or symptoms are due to a new event or exposure in the workplace or whether they are the continuation of an existing workplace injury or illness."[39] In most cases, it will be obvious whether a new case has occurred because a workplace exposure will be the cause of the injury or illness. For example, a "worker may suffer cut, bruise or rash from a clearly recognized event in the workplace, receive treatment, and recover fully within a few weeks." Then, "at some future time, the worker may suffer another cut, bruise or rash from another workplace event." These two events are unrelated and both are considered "new cases."[40]

The difficulty in determining whether a new case has occurred typically arises with chronic illnesses. According to OSHA, the key distinction is between chronic illnesses that continue regardless of workplace exposures and those that recur because of workplace exposures. Occupational cancer, asbestosis, and similar illnesses are diseases that are never cured or completely resolved. Such cases are never closed under the OSHA recordkeeping system, even though the signs and symptoms of the condition may alternate between remission and active disease."[41]

[36] 29 C.F.R. Section 1904.6(b)(1).

[37] 29 C.F.R. Section 1904.6(b)(2).

[38] 29 C.F.R. Section 1904.6(b)(3).

[39] 66 *Fed Reg.* 5916, 5962-63 (January 19, 2001).

[40] *Id.*

[41] *Id.*

Other chronic illnesses like reactive airways dysfunction syndrome (RADS) or sensitization to certain workplace chemicals "recur if the ill individual is exposed to the agent . . . that triggers the illness again." Each time symptoms of these types of diseases appear, a separate recordable incident has occurred.[42]

The Compliance Directive provides some additional guidance on how to determine whether an employee has recovered completely from a previous injury such that an injury or illness would be a new case. The directive states:

> An employee has "recovered completely" from a previous injury or illness . . . when he or she is fully healed or cured. The employer must use his best judgment based on factors such as the passage of time since the symptoms last occurred and the physical appearance of affected part of the body. If the signs and symptoms of a previous injury disappear for a day only to reappear the following day, that is strong evidence that the injury has not properly healed.

3.3.9 Recording Criteria

Even if an injury or illness is work-related and a new case, the employer is only required to record it on the OSHA 300 Log if it meets one of the recording criteria. Specifically, the injury or illness must result in one of the following to be recordable:

- Death
- Days away from work
- Restricted work or transfer to another job
- Medical treatment beyond first aid
- Loss of consciousness
- A "significant injury or illness diagnosed by a physician or other licensed health care provider"[43]

The OSHA 300 Log contains columns that are marked by the employer to designate which of the recording criteria are met.

[42] *Id.* at 5963.

[43] 29 C.F.R. Section 1904.7(b).

Death

The requirement to record an injury or illness resulting in death is typically fairly clear. In the Compliance Guide, however, OSHA does discuss one unusual example. If an employee dies during surgery necessitated by the workplace injury or illness, then the injury or illness is recordable. For example, if an employee dies as a result of work-related knee surgery because he contracts a *Staphylococcus* infection or the physician commits gross medical malpractice, then the employer must record the original injury as resulting in death.

Days Away from Work

If an injury or illness requires the employee to miss work, the employer must record it on the OSHA 300 Log. The box on the OSHA 300 log for "days away from work" is marked, and the employer must also record the exact number of days the employee misses. The day that the injury or illness actually occurs is not counted.[44] For example, if an employee hurts his ankle on Monday and misses the remainder of that day, but comes to work on Tuesday, then no recordable injury has occurred.

The employer is required to record days away from work even if the employee ignores the recommendations of a physician or other licensed health care professional and comes to work. If, for example, a physician recommends that an employee take five days off, and the employee comes to work on the fourth day and says he is feeling better and is able to work, the employer must nevertheless record each day the physician found that the employee should not work.[45] Similarly, if the employee does not return to work even though the physician states that he is capable of working, the employer is not required to record the extra days the employee does not work.[46] OSHA stated during the rulemaking that the "employer is the ultimate recordkeeping decision-maker and must resolve the differences in opinion" that may arise between the employer's physician and the employee's physician.[47]

Employers are required to record calendar days away from work. Specifically, each day the employee would not have been able to work but for the injury or illness, including holidays, weekends, and vacation days, must be recorded.[48] The regulation contains two exceptions to this general rule. First,

[44] 29 C.F.R. Section 1904.7(b)(3).

[45] 29 C.F.R. Section 1904.7(b)(3)(ii).

[46] 29 C.F.R. Section 1904.7(b)(3)(iii)

[47] 66 *Fed Reg.* 5916, 5969 (January 19, 2001).

[48] 29 C.F.R. Section 1904.7(b)(3)(iv)

if an employee is injured or becomes ill on a Friday, reports to work on Monday, and was not scheduled to work on Saturday and Sunday, then the employer is not required to record the case on the OSHA 300 Log, unless the employer receives information from the physician or other licensed health care professional that the employee should not have worked on Saturday and Sunday.[49]

Second, the employer is not required to record an injury or illness that occurs on the day before scheduled time off, such as a vacation or temporary plant closing, unless the employer receives information from the physician or other licensed health care professional that the employee should not have worked for some period of time during the scheduled time off.[50]

The maximum number of days away from work that must be recorded is 180.[51] If, for example, an employee is away from work for 200 days because of a work-related injury or illness, the employer is only required to record 180 days away from work. Also, the employer is permitted to stop counting days away from work if the employee retires or leaves the company for a reason unrelated to the injury or illness. If, however, the employee leaves the company because of his injury or illness, then the employer must record the number of days the employee would not have been able to work.[52] For example, if an employee breaks his arm and is projected to be away from work for 30 days, but retires ten days later, the employer would be required to record only ten days away from work. If the employee cannot afford financially to be away from work drawing workers' compensation pay for 30 days and takes a new job ten days after the injury, the employer would have to record 30 days away from work because the employee left the company because of his injury. Similarly, if an employee is terminated because of drug use revealed during a post-accident investigation, the employer must record all of the days the employee would not have been able to work, even after the termination, because the termination is related to the injury.

Finally, Section 1904.7(b)(3)(viii) addresses cases that span more than one year. For example, an employee may be injured in December 2006 and unable to return to work until January 2007. The employer must record all of the days away from work on the 2006 log.[53]

49 29 C.F.R. Section 1904.7(b)(3)(v).

50 29 C.F.R. Section 1904.7(b)(3)(vi).

51 29 C.F.R. Section 1904.7(b)(3)(vii).

52 29 C.F.R. Section 1904.7(b)(3)(viii).

53 29 C.F.R. Section 1904.7(b)(3)(viii).

Restricted Work or Job Transfer

The employer must record each day the employee is unable to perform the routine functions of his normal job and performs restricted work or transfers to a different job.[54]

A work-related injury or illness results in "restricted work" when the employer keeps "the employee from performing one or more of the routine functions of his or her job, or from working the full workday that he or she would otherwise have been scheduled to work"; or "a physician or other licensed health care professional recommends that the employee not perform one or more of the routine job functions of his or her job, or not work the full workday that he or she would otherwise have been scheduled to work."[55] A "routine function" means "those work activities the employee regularly performs at least once per week."[56]

The regulation addresses vague restrictions from physicians, such as instructions to perform only "light duty" or to "take it easy" for some period of time. Section 1904.7(4)(vii) states that if a physician's recommendation is not clear, the employer should ask "whether the employee can do all of his or her routine job functions and work all of his or her normally assigned work shift." If the physician concludes that the employee can perform routine job functions for a normal work shift, then the employee's work is not restricted, and the injury or illness is not recordable. The regulation also states that if the employer is "unable to obtain this additional information from the physician or other licensed health care professional who recommended the restriction," the injury or illnesses should be recorded "as a case involving restricted work."[57]

A job restriction ordered by a physician does not necessarily result in a recordable injury or illness. For example, a physician may recommend that an employee not lift over 20 pounds for one week. If the employee does not lift 20 pounds or more at least once each week as part of his job, then the employee's routine functions are not restricted, and the employer is not required to record the injury or illness. Similarly, OSHA states in the Compliance Directive that if a physician instructs the employee not to use his left arm for one week, and "the employee is able to perform *all* of his or her routine job functions using only the right arm (though at a slower pace)," the injury has not resulted in restricted work because "loss of productivity is not considered restricted work."[58]

54 29 C.F.R. Section 1904.7(b)(4).

55 29 C.F.R. Section 1904.7(b)(4)(i).

56 29 C.F.R. Section 1904.7(b)(4)(ii).

57 29 C.F.R. Section 1904.7(b)(4)(vii).

58 Compliance Guide at Question 7-4.

The "employer has the ultimate authority to restrict an employee's work, so the definition is clear that, although a health care professional may recommend the restriction, the employer makes the final determination of whether or not the health care professional's recommended restriction involves the employee's routine functions."[59] As such, "restricted work assignments may involve several steps: an HCP's recommendation, or employer's determination to restrict the employee's work, the employer's analysis of whether a suitable job is available, and assignment of the employee to that job."[60]

If the employee refuses to follow the work restriction, the employer must nevertheless record the injury or illness. Section 1904.7(b)(4)(viii) states that employers must "ensure that the employee complies with [the] restriction."[61] The employer may also "receive recommendations from two or more physicians or other licensed health care professionals" and decide "which recommendation is more authoritative and record the case based upon that recommendation."[62]

As with days away from work, the employer is not required to record a day of restricted work or job transfer if it only applies to the day the injury or illness occurred.[63]

Medical Treatment beyond First Aid

Any injury or illness that requires medical treatment must be recorded. *Medical treatment* is defined as "the management and care of a patient to combat disease and disorder," and does not include: "visits to a physician or other licensed health care professional solely for observation or counseling," or "the conduct of diagnostic procedures, such as x-rays and blood tests, including the administration of prescription medications used solely for diagnostic purposes (e.g. eye drops to dilate pupils)."[64]

The definition of *medical treatment* also explicitly excludes any treatment meeting the definition of *first aid*. Section 1904.7(b)(5)(i) provides the following comprehensive list of treatments qualifying as first aid:

[59] 66 *Fed.Reg.* 5916, 5980 (January 19, 2001).

[60] *Id.*

[61] 29 C.F.R. Section 1904.7(b)(4)(viii).

[62] 29 C.F.R. Section 1904.7(b)(4)(viii).

[63] 29 C.F.R. Section 1904.7(b)(4)(iii).

[64] 29 C.F.R. Section 1904.7(b)(5)(i).

- Using a nonprescription medication at nonprescription strength (for medications available in both prescription and nonprescription form, a recommendation by a physician or other licensed health care professional to use a nonprescription medication at prescription strength is considered medical treatment for recordkeeping purposes);
- Administering tetanus immunizations (other immunizations, such as Hepatitis B vaccine or rabies vaccine, are considered medical treatment);
- Cleaning, flushing or soaking wounds on the surface of the skin;
- Using wound coverings such as bandages, Band-Aids™, gauze pads, etc.; or using butterfly bandages or Steri-Strips™ (other wound closing devices such as sutures, staples, etc., are considered medical treatment);
- Using hot or cold therapy;
- Using any non-rigid means of support, such as elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes);
- Using temporary immobilization devices while transporting an accident victim (e. g., splints, slings, neck collars, back boards, etc.);
- Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;
- Using eye patches;
- Removing foreign bodies from the eye using only irrigation or a cotton swab;
- Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs, or other simple means;
- Using finger guards;
- Using massages (physical therapy or chiropractic treatment are considered medical treatment for recordkeeping purposes); or
- Drinking fluids for relief of heat stress.[65]

[65] 29 C.F.R. 1904.7(b)(5)(ii).

Any treatment not listed in the definition of first aid is considered medical treatment that triggers a recordable incident. The listed treatments are also considered first aid regardless of whether a physician, licensed health care professional, or another person, like a member of the employer's first aid team or a "Good Samaritan," provides them.[66]

The Compliance Directive provides some additional information about first aid and medical treatment. The use of surgical glue is considered medical treatment because, "all wound closing devices except for butterfly and steri strip are by definition 'medical treatment' because they are not included on the first aid list."[67] Although "drinking fluids for relief from heat stress" is first aid, "intravenous administration of fluids to treat work-related heat stress is medical treatment."[68] Finally, the administration of oxygen as a "purely precautionary measure" when an employee is exposed to "chlorine or some other substance" is first aid, but the administration of oxygen to an exposed employee who "exhibits symptoms of an injury or illness" is medical treatment.[69]

Loss of Consciousness

Every work-related injury or illness that results in a loss of consciousness must be recorded, "regardless of the length of time the employee is unconscious."[70] The loss of consciousness must result from a workplace exposure rather than a condition that is unrelated to work, such as pregnancy or epilepsy. In addition, the employee must actually be unconscious for this provision to apply. Feelings of wooziness or dizziness are not recordable unless one of the other recording criteria is met.[71]

"Significant" Diagnosed Injury or Illness

Section 1904.7(b)(7) states that "work-related cases involving cancer, chronic irreversible disease, a fractured or cracked bone, or a punctured eardrum must always be recorded under the general criteria at the time of diagnosis by a physician or other licensed health care professional." OSHA considers this a "catch-all" provision to record those rare significant injuries or illnesses that are not required to be recorded under the other criteria. "There are some significant injuries, such as a punctured eardrum or fractured toe or rib, for which neither medical treatment nor work restrictions may be recommended," and "significant progressive diseases, such as byssinosis, silicosis, and some types of cancers" may also not meet the other recording criteria.[72]

66 29 C.F.R. 1904.7(b)(5)(iv).

67 Compliance Directive at Question 7-5.

68 Compliance Directive at Question 7-6.

69 Compliance Directive at Question 7-15.

70 29 C.F.R. 1904.7(b)(6).

71 66 *Fed. Reg.* 5616, 5994 (January 19, 2001)

Section 1904.7(b)(7) is designed to capture two categories of injuries and illnesses. First, the provision requires recording of "significant injuries and illnesses" that "are not amenable to medical treatment" at the time of initial diagnosis, such as "a fractured rib, a broken toe, or a punctured eardrum," which are often "left to heal on their own," or "untreatable occupational cancer." Second, "chronic irreversible diseases" are "cases that would clearly become recordable at some point in the future (unless the employee leaves employment before medical treatment is provided), when the employee's condition worsens to a point where medical treatment, time away from work, or restricted work are needed." Injuries and illnesses in the second category are "expected to progressively worsen and become serious over time (chronic irreversible diseases)."[73]

3.4 Special Cases

The recordkeeping regulation has special recording criteria for certain types of injuries or illnesses.

3.4.1 Hearing Losses

Section 1904.10 sets out a two-part test for determining whether a hearing loss must be recorded. First, the employer must determine whether an employee has experienced a Standard Threshold Shift (STS) in one or both ears since his last audiogram. Pursuant to OSHA's Occupational Noise Exposure standard, 29 C.F.R. Section 1910.95, an STS is defined as a change in hearing threshold of an average of 10 decibels (dB). The employer determines whether an STS has occurred by comparing the annual audiogram to the employee's baseline audiogram, which is performed before or soon after the employee begins work. If the employee has previously experienced a recordable hearing loss, then the employer must compare the new audiogram with the revised baseline audiogram, which will reflect the employee's previous recordable hearing loss.

Second, the employer must determine whether the STS represents an overall hearing level of 25 dB or more. As explained in Section 1904.10(b)(2)(ii), "audiometric test results reflect the employee's overall hearing ability in comparison to audiometric zero." Using the current audiogram, the employer "must use the average hearing level at 2000, 3000 and 4000 Hz [hertz]to determine whether or not the employee's total hearing level is 25 dB or more."

72 29 C.F.R. Section 1904.7(b)(7).

73 66 *Fed. Reg.* 5916, 5996 (January 19, 2001).

If both of these conditions are met, then the hearing loss is recorded in the hearing loss column on the OSHA 300 Log.

In determining whether an STS has occurred, Section 1904.10(b)(3) allows the employer to adjust for age using Table F-1 or F-2 in the Occupational Noise Exposure standard. In addition, the employer may retest the employee's hearing within 30 days of the first test, and if the retest does not confirm the recordable hearing loss, it does not have to be recorded.[74]

3.4.2 Needlestick Injuries

Section 1904.8 requires "all work-related needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material" to be recorded. The term *other potentially infectious material* is defined in OSHA's Bloodborne Pathogens standard as including human body fluids, such as semen or spinal fluid, "any body fluid that is visibly contaminated with blood," and "all body fluid in situations where it is difficult or impossible to differentiate between body fluids," and "any unfixed tissue or organ."[75] The incident is recorded on the OSHA 300 Log as an injury regardless of whether one of the other recording criteria, such as medical treatment, days away from work, or job transfer, is met.

Employers are only required to record needlestick or sharps injuries that "bring an employee into contact with another person's blood or other potentially infectious materials."[76] If an employee has contact with a "clean object" or "a contaminant other than blood or other potentially infectious material," the injury is recordable only if it meets one of the other recording criteria, such as medical treatment or restricted work. Similarly, no recordable injury has occurred if an employee is splashed or exposed to blood or other potentially infectious materials, but is not cut or scratched.[77]

Employers are also required to update the OSHA 300 Log if the employee is later diagnosed with an infectious disease, such as hepatitis or human immunodeficiency virus (HIV), resulting from the sharps or needlestick injury. In addition, the classification of the case must be updated if the case results in death, days away from work, restricted work, or job transfer.[78]

[74] 29 C.F.R. 1904.10(b)(4). The Occupational Noise Exposure standard allows the employer to substitute an annual audiogram for the baseline audiogram if a physician, otolaryngologist, or audiologist determines that the STS is persistent or that the "hearing threshold shown in the annual audiogram indicates significant improvement over the baseline audiogram." 29 C.F.R. 1910.95(g)(9).

[75] 29 C.F.R. 1910.1030(b).

[76] 29 C.F.R. Section 1904.8(b)(2).

[77] *Id.*

[78] 29 C.F.R. Section 1904.8(b)(3) and (b)(4).

The Bloodborne Pathogens standard applies to all employers with employees who have "occupational exposure to blood or other potentially infectious material."[79] These employees typically include health care workers and employees who are designated to provide first aid or to clean up blood or other infectious material after an accident. The Bloodborne Pathogens standard requires all employers who are required to keep injury and illness records under the recordkeeping regulations to keep a sharps injury log that includes: "the type and brand of device involved," "the department or work area where the exposure incident occurred," and "an explanation of how the incident occurred."[80] According to the Compliance Directive, an employer may use the OSHA 300 Log to meet the requirements for a sharps injury log as long as "the type and brand of device" is listed, if applicable, and the records are maintained such that sharps injuries are segregated from other types of injuries.[81]

3.4.3 Medical Removal

Certain OSHA standards addressing exposure to hazardous substances, such as lead, cadmium, benzene, methylene chloride, and formaldehyde, require employers to remove employees from the work area if certain criteria are met. For example, OSHA's Lead standard requires employees to be removed from work resulting in lead exposure if the required periodic blood tests show a certain level of lead.[82] These types of provisions are known as "medical removal" and typically require that an employee be moved to an alternate job without exposure or, if there is no alternate job, given paid time off.

Section 1904.9 addresses cases involving required medical removal under these types of OSHA standards. Medical removal cases are recorded as either days away from work if the employee is not offered a different job without exposure, or days of restricted work if the employee is moved to a different job.[83] If the medical removal is required by a standard addressing chemical exposure, the case is recorded by checking the "poisoning" column on the OSHA 300 Log.[84]

Employers may voluntarily remove an employee from a particular job before the criteria for medical removal are applicable. For example, an employer may move an employee to another job even though his blood lead levels are below the threshold. The recordkeeping regulation states that if "the case involves voluntary

[79] 29 C.F.R. Section 1910.1030.

[80] 29 C.F.R. 1910.1030(h)(5).

[81] Compliance Guide at Question 8-2.

[82] 29 C.F.R. Section 1910.1025(k).

[83] 29 C.F.R. Section 1904.9.

[84] 29 C.F.R. 1904.9(b)(1).

medical removal before the medical removal levels required by an OSHA standard," the employer is not required to record the case unless or until one of the other recording criteria is met.[85]

Medical removal may be applicable even if no specific standard applies. For example, an employer may temporarily transfer an employee from a particular job for preventive purposes to prevent a work-related injury from occurring. The rulemaking record states:

> Transfers or restrictions taken before the employee has experienced an injury or illness do not meet the first recording requirement of the recordkeeping rule, i.e. that a work-related injury or illness must have occurred for recording to be considered at all. . . . However, transfers or restrictions whose purpose is to allow an employee to recover from an injury or illness as well as to keep the injury or illness from becoming worse are recordable because they involve restriction or work transfer caused by the injury or illness. . . . A work restriction that is made for another reason, such as to meet reduced production demands, is not a recordable restricted work case. For example, an employer might "restrict" employees from entering an area in which a toxic chemical spill has occurred or make an accommodation for an employee who is disabled as a result of a non-work-related injury or illness. These cases would not be recordable as restricted work cases because they are not associated with a work-related injury or illness.[86]

3.4.4 Tuberculosis

If an employee is occupationally exposed to a "known case of active tuberculosis," and the employee "subsequently develops a tuberculosis infection, as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional," then a recordable "respiratory condition" has occurred.[87]

Tuberculosis (TB) may be work-related if it is contracted by a health care worker or if an employee infects other employees. OSHA specifically addressed employee-to-employee transmission of tuberculosis during the rulemaking. First, OSHA pointed out that tuberculosis is "clearly a non-minor" illness that should be recorded if it is work-related even though it is likely impossible for an employer to prevent an employee from contracting TB from a coworker. Under the geographic presumption OSHA set out for work-relatedness, an employee-to-employee transmission is work-related because the employee would not have con-

85 29 C.F.R. Section 1904.9(b)(3).

86 66 *Fed. Reg.* 5916, 5981 (January 19, 2001).

87 29 C.F.R. 1904.11(a).

tracted TB but for his presence in the workplace. Second, for the case to be recordable, the employee must have been exposed to someone at work that has a known case of active TB. As such, the fact that an employee contracts TB and the source cannot be identified is not enough to result in a recordable illness.[88]

The regulation states that employers may "line out or erase a recorded TB case from the OSHA 300 Log under the following circumstances: (i) The worker is living in a household with a person who has been diagnosed with active TB; (ii) The Public Health Department has identified the worker as a contact of an individual with a case of active TB unrelated to the workplace; or (iii) A medical investigation shows that the employee's infection was caused by exposure to TB away from work, or proves that the case was not related to the workplace TB exposure."[89]

3.5 Recordkeeping Forms and Retention Periods

The regulation requires employers to use three forms: the OSHA 300 Log, the OSHA 301 report, and the OSHA 300-A form.[90] The OSHA 300 Log is the document on which each work-related injury or illness that meets one of the general recording criteria is recorded. An OSHA 301 report is executed for each recordable injury and illness, and describes the injury or illness in greater detail than the OSHA 300 Log. Each recordable injury or illness must be recorded on the OSHA 300 Log and on an OSHA 301 form within seven calendar days of the employer "receiving information that a recordable injury or illness has occurred."[91]

The OSHA 300-A form is an annual summary of recordable injuries and illnesses. The 300-A must be posted each February 1, remain posted until April 30, and include the recordable injuries and illnesses from the previous year.[92] To prepare the OSHA 300-A, the employer must "review the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified," and then record the following information on the OSHA 300-A: the total for each column on the OSHA 300 Log, the year covered by the annual summary, the name and address of the employer's establishment, the average number of employees at the establishment during the covered year, and the total hours worked by the employees during that year.[93] A "company executive must certify that he or she has examined the OSHA 300 Log and that he or she reasonably

88 66 *Fed. Reg.* 5916, 6013 (January 19, 2001).

89 29 C.F.R. 1904.11(b)(2).

90 29 C.F.R. 1904.29. The regulation allows employers to use "equivalent forms" that have the "same information" as the OSHA forms, are "readable and understandable," and are "completed using the same instructions as the OSHA form [they] replace." 29 C.F.R. 1904.29(b)(4).

91 29 C.F.R. 1904.29(b)(3).

92 29 C.F.R. 1904.32(a) and (b)(2)(6).

93 29 C.F.R. Section 1904.32(a) and (b)(2).

believes, based on his or her knowledge of the process by which the information was recorded, that the annual summary is correct and complete."[94] The company executive who certifies the OSHA 300-A must be an owner, an officer of the corporation, the "highest ranking company official working at the establishment," or the "immediate supervisor of the highest ranking company official working at the establishment."[95]

The OSHA 300 Log, OSHA 300-A, and OSHA 301 forms must be retained for five years.[96] During the five-year period, the employer must update the OSHA 300 Log to include "newly discovered recordable injuries and illnesses" and must update the "classification of previously recorded injuries and illnesses."[97] If, for example, an employee experiences a recordable injury in 2006 that steadily worsens until surgery is required in 2007, and the employee is completely unable to work after the surgery, then the employer must update the 2006 OSHA 300 Log to reflect this. Employers are not required to update the OSHA 301 forms and OSHA 300-A.[98]

3.6 Employee Involvement and Access to Records

Employers have several recordkeeping obligations to employees. First, employers must "inform each employee of how he or she is to report an injury or illness."[99] To meet this requirement, employers typically establish a work rule requiring employees to report all work-related injuries to supervisors immediately.

Second, employers must provide access to the OSHA 300 Log to employees, former employees, and certain employee representatives. The regulation defines two types of representatives. A "personal representative" is any person designated in writing by an employee or former employee as a representative, or the legal representative of a deceased or legally incapacitated employee or former employee.[100] An "authorized employee representative" is the "authorized collective bargaining agent of employees."[101] The employer must provide access to the current or retained OSHA 300 Log to employees, former employees, personal representatives, and authorized employee representatives the next business day after a request is made.[102]

94 29 C.F.R. Section 1904.32(b)(3).
95 29 C.F.R. Section 1904.32(b)(4).
96 29 C.F.R. Section 1904.33(a).
97 29 C.F.R. Section 1904.33(b).
98 29 C.F.R. Section 1904.33(b).
99 29 C.F.R. Section 1904.35(a).
100 29 C.F.R. Section 1904.35(b)(2)(ii).
101 29 C.F.R. Section 1904.35(b)(2)(i).
102 29 C.F.R. Section 1904.35(b)(2).

Third, employers must provide access to certain OSHA 301 forms. An employee, former employee, or personal representative is entitled to the OSHA 301 form describing the injury or illness experienced by the employee or former employee. The form must be provided the next business day after the request.[103] An authorized employee representative is entitled to certain portions of OSHA 301 forms for employees at the establishment. The employer must only provide the information under the section on the OSHA 301 form entitled "Tell us about the case," which describes how the injury or illness occurred. All other information must be redacted.[104]

Employers are also required to provide records to OSHA compliance officers conducting an inspection, representatives of the National Institute of Occupational Safety and Health who are conducting a health hazard evaluation, and state agencies administering an OSHA state plan.[105] The records must be provided within four hours of the request.[106]

3.7 Privacy Cases

Employers are not permitted to include the name of the employee on the OSHA 300 Log if the injury or illness is a "privacy concern case." A *privacy concern case* is defined as an "injury or illness to an intimate part of the body or reproductive system," an "injury or illness resulting from a sexual assault," a "mental illness," "HIV infection, hepatitis, or tuberculosis," "needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious materials," and "other illnesses, if the employee voluntarily requests that his or her name not be entered on the log." No other situations are considered "privacy concern cases," and the employer must therefore include the names of employees on the OSHA 300 Log.[107] The employer may also redact other information on the OSHA 300 Log if it would identify an employee who has experienced a privacy case injury or illness but must "enter enough information to identify the cause of the incident and the general severity of the injury or illness."[108]

The name of the employee and other identifying information in a privacy case must not be disclosed on the OSHA 300 Log that may be provided to employees, former employees, or representatives. If the employer decides to share the

103 29 C.F.R. Section 1904.35(b)(v)(A).
104 29 C.F.R. Section 1904.35(b)(v)(B).
105 29 C.F.R. Section 1904.40(b)(1).
106 29 C.F.R. Section 1904.40(b).
107 29 C.F.R. Section 1904.29(b)(8).
108 29 C.F.R. Section 1904.29(b)(9).

recordkeeping forms with third parties voluntarily, identifying information for privacy cases must be redacted unless the forms are disclosed to "an auditor or consultant hired by the employer to evaluate the safety and health program," a "public health authority or law enforcement agency," or "to the extent necessary for processing a claim for workers' compensation or other insurance benefits."[109]

The employer must keep a "separate, confidential list of the case numbers and employee names" for "privacy concern cases," and must update the list when changes occur. Government representatives are entitled to this information.

3.8 Reporting Injuries and Fatalities

Section 1904.39 requires employers to report a work-related fatality or the in-patient hospitalization of three or more employees to the local OSHA area office nearest to where the incident occurred.[110] Employer may also call 1-800/321-OSHA to report the fatality or hospitalizations.[111] The information provided to OSHA must include: the establishment name; the location of the incident; the time of the incident; the number of fatalities or hospitalized employees; the names of any injured employees; the contact person at the facility and his or her telephone number; and a brief description of the incident.[112] If the local OSHA area office is closed at the time of the notification, the employer must call the toll-free number; a message left or facsimile sent to the local office is insufficient.[113]

The fatality or hospitalizations must be reported within 8 hours of their occurrence.[114] If the employer does not learn of the fatality or hospitalizations until more than 8 hours after they occur, then the employer must report within 8 hours of learning of the incident.[115]

Two types of fatalities and hospitalizations are exempt from the reporting requirements. First, fatalities and hospitalizations that result from motor vehicle accidents on public streets or highways or on a public transportation system, such as a subway or commercial airplane, do not have to be reported.[116] Fatalities or hospitalizations that result from motor vehicle accidents that occur in road construction work zones must be reported to OSHA.[117] Second, a fatality or hospitalization must only be reported if it occurs within 30 days of an incident.[118] For example, if an employee is in an accident, but does not die until more than 30 days later, the employer is not required to report the fatality.

The recordkeeping regulation requires employers to report all heart attacks that occur at work even though they may not be considered work-related.[119] OSHA will investigate and determine whether the heart attack is work-related.

Some states with state OSHA plans have different reporting requirements. For example, employers in California are required to report any "serious injury or illness" or death.[120] A "serious injury or illness" is defined as requiring inpatient hospitalization for over 24 hours for treatment other than observation, loss of a "member of the body," or a "serious degree of permanent disfigurement."[121] Injuries or illnesses meeting the criteria or deaths must be reported "immediately," which is defined as "as soon as practically possible, but not longer than 8 hours after the employer knows or with diligent inquiry should have known" of the incident.[122]

3.9 Exemptions from Recordkeeping Requirements

The recordkeeping regulation contains two partial exemptions. First, Section 1904.1 exempts employers with ten or fewer employees during the last calendar year from the requirement to keep OSHA 300 logs and prepare OSHA 301 forms and the OSHA 300-A summary. These employers are required to respond to BLS surveys and must report workplace fatalities or hospitalizations in accordance with Section 1904.39.

Second, Non-Mandatory Appendix A to the recordkeeping regulation provides a partial recordkeeping exemption for certain industries, including retail stores (*e.g.* hardware stores, retail bakeries, car dealerships, service stations, apparel stores, drug stores), certain health care offices (*e.g.*, offices of doctors and dentists, medical and dental laboratories, offices of other health care practitioners), recreational facilities (*e.g.*, dance studies, orchestras or entertainers, museums and art galleries, bowing centers), and traditional offices (*e.g.* law, engineering, accounting, and research offices, computer and data processing services, mailing, production and stenographic services).[123] Facilities that are partially exempt pursuant to

[109] 29 C.F.R. Section 1904.29(b)(10).
[110] 29 C.F.R. Section 1904.39(a).
[111] *Id.*
[112] 29 C.F.R. Section 1904.39(b)(2).
[113] 29 C.F.R. Section 1904.30(b)(1).
[114] 29 C.F.R. Section 1904.39(a).
[115] 29 C.F.R. Section 1904.39(b)(7).
[116] 29 C.F.R. Sections 1904.39(b)(3) and (b)(4). If these injuries or illnesses are work-related, they must be recorded on the OSHA 300 Log.
[117] *Id.*

[118] 29 C.F.R. Section 1904.39(b)(6).
[119] 29 C.F.R. Section 1904.39(b)(5).
[120] 8 CCR Section 342(a).
[121] 8 CCR Section 330(h).
[122] 8 CCR Section 342(a).
[123] 29 C.F.R. Section 1904, Non-Mandatory Appendix to Subpart B.

Appendix A must respond to a BLS survey, and must report deaths and hospitalizations of three or more employees pursuant to Section 1904.39.

4.0 OSHA Standards Requiring Written Documents

OSHA issues two types of standards—health standards and safety standards—and the types of records required generally depend upon the type of standard at issue. Safety standards generally address physical conditions. For example, the standards in Subpart J (Sections 1910.141 through 1910.147) contain requirements for addressing general work hazards such as hazardous conditions in confined spaces like tanks, sewers, storage bins, and silos (Section 1910.146) and hazards that may result from servicing and maintenance work on equipment (Section 1910.147). Similarly, the Subpart I (Section 1910.132 through 1910.138) standards address personal protective equipment, the Subpart D (Section 1910.21 through 1910.130) standards are intended to protect employees from hazards such as falls, and the Subpart E (Section 1910.33 through 1910.39) standards apply to emergency situations such as fires. The standards applicable to construction that are in Part 1926 also include many safety standards, such as requirements for materials handling, storage, use and disposal (Subpart H), fall protection systems (Subpart M), and crane and similar equipment (Subpart N).

Health standards typically address exposure to a substance or condition in the workplace. The standards in Subpart Z (Section 1910.1000 through 1910.1450) contain requirements for controlling exposure to toxic and hazardous substances. Some of the Subpart Z standards have permissible exposure limits ("PEL") for exposure to various hazardous substances. Other Subpart Z standards address chemical exposure in broader ways. For example, the Hazard Communication standard (Section 1910.1200) requires employers to provide information about all hazardous substances in the workplace to employees.

4.1 Safety Standard Recordkeeping Requirements

OSHA's safety standards contain many recordkeeping requirements. The types of records that must be kept fall into three general categories. First, certain standards require the employer to develop a written plan describing how a particular hazard will be addressed. For example, the Respiratory Protection standard (Section 1910.134) requires employers with employees that use respirators to develop a written program. Similarly, the Control of Hazardous Energy (Lockout/Tagout) (Section 1910.147) standard requires employers with employees who perform servicing or maintenance on equipment to develop a written lockout/tagout program.

Second, some standards require the employer to maintain written training records. For example, the general Personal Protective Equipment ("PPE") standard (Section 1910.132) requires the employer to "verify" that employees who are required to wear PPE have "received and understood the required training through a written certification that contains the name of each employee trained, the date(s) of training, and that identifies the subject of the certification."[124] The Process Safety Management standard (Section 1910.119), which applies to facilities that manufacture or handle certain quantities of hazardous chemicals, requires employers to "prepare a record" that includes "the identity of the employee, the date of the training, and the means used to verify that the employee understood the training."[125]

Third, some standards require the employer to maintain written inspection or preventative maintenance programs. For example, the Powered Platforms for Building Maintenance standard (Section 1910.66) requires employers to perform periodic inspections and keep a certification record of each inspection or test.[126] The Portable Fire Extinguisher standard (Section 1910.157) requires an annual inspection that must be documented.[127]

The following table provides a list of safety standards that have recordkeeping requirements. The list is not exhaustive, and is intended to provide a sample of safety standard recordkeeping requirements.

Topic	*Standard*	*Recordkeeping Required*
General Industry		
Fire Prevention/ Emergency Action	1910.38	Written Compliance Plans
Powered Platforms	1910.66	Log of Maintenance Inspections and Tests
Manlifts	1910.68	Inspection Records
Noise	1910.95	Hearing Conservation Program
		Report Results of Noise Monitoring to Employees
		Audiometric Testing Program and Reporting Requirements
		Records of Employee Noise Exposure

124 29 C.F.R. Section 1910.132(f)(4).

125 29 C.F.R. Section 1910.119(g)(3).

126 29 C.F.R. Section 1910.66(h).

127 29 C.F.R. Section 1910.157(e). The standard also requires monthly inspections, but does not explicitly require the inspections to be documented.

Topic	*Standard*	*Recordkeeping Required*
Respirators	1910.134	Respiratory Protection Program Medical examination and fit-testing records
Permit-Required Confined Spaces	1910.146	Permit System Training Records
Lockout/Tagout	1910.147	Lockout/Tagout Program Periodic Inspection Reports Training Records
Fire Protection	1910.156	Fire Brigade Program
Fixed Fire Extinguishing Systems	1910.160	Records of Inspection and Maintenance
Portable Fire Extinguishers	1910.157	Records of Annual Inspections
Automatic Fire Sprinklers	1910.159	Records of Tests
Overhead and Gantry Cranes	1910.179	Certification and Inspection Records
Crawler, Locomotive and Truck Cranes	1910.180	Certification and Inspection Records
Derricks	1910.181	Preventive Maintenance Program Certification and Inspection Records
Industrial Slings	1910.184	Records of Inspections and Repairs
Mechanical Power Presses	1910.217	Certification, Maintenance, Injury Reports
Forging Machines	1910.218	Safety Checks and Certification
Welding, Cutting and Brazing	1910.255	Certification
Telecommunications	1910.268	Training Certification Inspection Records
Grain-handling Facilities	1910.272	Emergency Action Plan Permit for Hot Work Confined Space Permit
Electrical Wiring Design and Protection	1910.304	Assured Equipment Grounding Conductor Program Tests
Electrical Work	1910.333	Lockout/Tagout Procedure
Commercial Diving, Post-Dive Procedures	1910.423	Various Records of Dives

Topic	*Standard*	*Recordkeeping Required*
Maritime		
Shipyards	1915.7(a)(2)	Competent Person Designation
	1915.7(c)(1)-(2)	Record of Tests and Inspections
	1917.7(c)(3)	Hot Work and Fumigation Certificates
Explosive and Dangerous Atmospheres	1915.12(c)(4)	Tests, Inspections, Instructions
Shackles and Hooks	1915.113(b)(1)	Certificates and Tests
Portable Air Receivers and Other Unfired Pressure Vessels	1915.172(d)	Certification of Examinations and Tests
Hazardous Atmospheres and Substances	1917.23(b)	Tests
Vessel Cargo Gear Certification	1919.11(b)	Certification of Vessels
Operators or Offices of Vessels	1919.12	Register and Certificate of Inspection, Testing, Heat Treatment of Derricks, Cranes, Etc.
Construction		
Medical and First Aid	1926.50(c)	Certification and First Aid Testing
	1926.50(f)	Contact Information for Medical Response
Rigging Equipment and Material Handling	1926.251	Tests on Hooks
Ground Fault Protection	1926.404	Grounding Conductor Program, Tests
Cranes and Derricks	1926.550(a)	Inspections
Crawler, Locomotive and Truck Cranes	1926.550(b)	Certification
Personnel Hoists	1926.552	Certification
Excavations	1926.652(b)	Written Design
	1926.652(c)	Supporting Data for Deviations from Manufacturer Specifications for Support System

Topic	*Standard*	*Recordkeeping Required*
Lift-Slab Construction Operations	1926.705	Instructions

4.2 The Health Standards

As discussed, OSHA has promulgated standards designed to limit exposure to a variety of hazardous substances. These standards include requirements for performing monitoring to determine exposure levels as well as mandatory medical examinations. Many of the retention and other requirements for maintaining records required by health standards are set out in the Access to Employee Exposure and Medical Records standard.[128]

4.2.1 The Typical Health Standard

Section 6(b)(5) of the OSH Act contains the requirements OSHA must follow in "promulgating standards dealing with toxic materials or harmful physical agents," including setting "the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."[129]

As stated, OSHA has promulgated health standards addressing a variety of toxic substances.[130] While each standard is necessarily different because unique substances are addressed, each health standard generally follows a common pattern in that three distinct types of records are required. First, health standards generally require the employer to perform initial monitoring to determine whether the "action level"—the level at which the employer is obligated to take action—is met. Assuming the regulated substance is present at levels at or above the action level, the employer must then perform periodic monitoring to determine whether the control measures, such as work and engineering controls, are effectively reducing exposure to levels at or below the permissible exposure limit (PEL).

Second, health standards typically require the employer to provide a medical surveillance program. Under the program, employees undergo periodic medical

[128] 29 C.F.R. Section 1910.1020.

[129] 29 U.S.C. Section 655(b)(5).

[130] Health standards are contained in Subpart Z of OSHA's general industry standards. Some health standards have also been promulgated for the construction industry (Subpart Z of the Part 1926 standards) and shipbuilding.

examinations performed by a physician or other licensed health care professional. The PLHCP prepares a written opinion, and the employer must provide a copy to the employee and retain a copy. In addition, some health standards contain medical removal provisions that require an employer to remove an employee from a particular job when his or her medical examination or other biological monitoring, such as blood tests, show a certain level of the substance in the employee's body. If medical removal is required, then additional medical examinations are required, and the employer must maintain these records.

Third, some health standards require the employer to maintain "objective data" supporting any exemption from complying with the standard. For example, the Asbestos standard allows employers to rely upon "objective data that demonstrates that asbestos is not capable of being released in airborne concentrations at or above" the permissible exposure limit rather than performing initial monitoring.[131] Similarly, the Chromium (VI) standard allows the employer to rely upon "historical monitoring data" obtained before the effective date of the standard rather than performing initial monitoring.[132] These standards as well as other health standards require the employer to maintain records regarding this type of historical or objective data.

4.2.2 Health Standards Applicable to General Industry

The recordkeeping requirements for some typical health standards applicable to general industry are listed below:

Topic	*Standard*	*Recordkeeping Required*
Asbestos	1910.1001	Exposure monitoring, Medical surveillance, Objective data
13 Carcinogens	1910.1003	Medical surveillance
Vinyl chloride	1910.1017	Exposure monitoring, medical surveillance
Inorganic arsenic	1910.1018	Exposure monitoring, medical surveillance
Lead	1910.1025	Exposure monitoring, medical surveillance, medical removal
Cadmium	1910.1027	Exposure monitoring, medical surveillance, medical removal, objective data
Benzene	1910.1028	Exposure monitoring, medical surveillance, medical removal
Coke oven emissions	1910.1029	Exposure monitoring, medical surveillance

[131] 29 C.F.R. 1910.1001(d)(2)(iv).

[132] 29 C.F.R. 1910.1026(b) and (d)(3).

Topic	*Standard*	*Recordkeeping Required*
Cotton dust	1910.1043	Exposure monitoring, medical surveillance
1, 2-dibromo-	1910.1044	Exposure monitoring, medical surveillance
Acrylonitrile	1910.1045	Exposure monitoring, medical surveillance
Ethylene oxide	1910.1047	Exposure monitoring, medical surveillance
Formaldehyde	1910.1048	Exposure monitoring, medical surveillance, objective data[133]
Methylenedianiline	1910.1050	Exposure monitoring, medical surveillance, medical removal, objective data
1,3 Butadiene	1910.1051	Exposure monitoring, medical surveillance, objective data
Methylene chloride	1910.1052	Exposure monitoring, medical surveillance, medical removal, objective data
Ionizing radiation	1910.1096	Exposure monitoring[134]

4.3 Hazard Communication and Bloodborne Pathogens

Two health standards—Hazard Communication and Bloodborne Pathogens—merit special mention because they apply to many workplaces.

4.3.1 Hazard Communication

Section 1910.1200 applies to general industry worksites as well as construction, marine terminal, shipyard and longshoring worksites and requires employers to maintain Material Safety Data Sheets (MSDS).[135] MSDS must contain certain information about the physical and health hazards of substances and are generally prepared by chemical manufacturers and distributors and sent to purchasers with shipments.[136] Employers are required to maintain MSDSs for hazardous substances that are present in the workplace and ensure that MSDSs are "readily accessible" to employees.[137]

133 Section 1910.1048(o)(2) requires the employer to "maintain a record of the objective data relied upon to support the determination that no employee is exposed to formaldehyde at or above the action level."

134 Section 1910.1096(d) requires covered employers to "make such surveys as may be necessary to comply" with the standard, and to provide personal monitoring equipment to employees who enter "restricted areas."

135 *See* 29 C.F.R. Section 1926.59 (applying Section 1910.1200 to construction); 29 C.F.R. Section 1918.90 (applying Section 1910.1200 to longshoring); 29 C.F.R. Section 1915.1200 (applying Section 1910.1200 to shipyard employment); 29 C.F.R. Section 1917.28 (applying Section 1910.1200 to marine terminal operations).

136 29 C.F.R. Section 1910.1200(b)(1).

137 29 C.F.R. Section 1910.1200(g)(8).

Employers are also required to ensure that labels on incoming shipments are not defaced and must also label each container of hazardous chemicals in the workplace with information about the identity of the chemicals and hazard warnings.[138] In addition, the standard requires employers to develop a written program describing how the employer will comply with the standard.[139]

Pursuant to OSHA's Medical Records Access standard (Section 1910.1020), employers are required to keep MSDSs for hazardous substances that are no longer used, or to keep records of when and where hazardous substances were used. The requirements of Section 1910.1020 are discussed later in this chapter.[140]

4.3.2 Bloodborne Pathogens

The Bloodborne Pathogens standard (Section 1910.1030) applies to general industry and shipyard employment, but does not apply to construction, agriculture, marine terminal, or longshoring operations.[141] Within general industry and shipyard employment, the standard applies to any employee with "occupational exposure" to blood or other potentially infectious material such as human body fluids, organs, or tissue cultures.[142] "Occupational exposure" is defined as "reasonably anticipated" contact with blood or other potentially infectious materials that result from the employee's job duties.[143] Based on these definitions, employees in many health care industries, laboratories that handle blood or other specimens, and similar facilities are covered by the standard. In addition, employees at non-health care facilities are covered to the extent that they provide first aid or other medical services to other employees.[144]

Employers with covered employees must develop and maintain several types of documents. First, the employer must offer a Hepatitis B vaccination to any employee with occupational exposure to blood or other potentially infectious material. If the employee declines the vaccination, he or she must sign a declination form that must be maintained by the employer.[145]

138 29 C.F.R. Section 1910.1200(f)(5). The employer is also prohibited from removing or defacing existing labels on incoming shipments. 29 C.F.R. Section 1910.1200(f)(8).

139 29 C.F.R. Section 1910.1200(e).

140 Hazard communications requirements for laboratories are set out in the Occupational Exposure to Hazardous Chemicals in Laboratories standard, 29 C.F.R. Section 1910.1450.

141 *See* 29 C.F.R. Section 1915.1030 (applying general industry standard at 29 C.F.R. Section 1910.1030 to shipyard operations).

142 *See* definitions at 29 C.F.R. Section 1910.1030(b).

143 *Id.*

144 OSHA's Medical and First Aid standard requires employers at facilities without nearby hospitals or clinics to train employees to provide first aid treatment. 29 C.F.R. Section 1910.151.

145 29 C.F.R. Section 1910.1030(f).

Second, in the event an employee is exposed to blood or other potentially infectious material, the employer must provide a "confidential medical evaluation and follow-up," and must obtain and maintain the resulting report from the physician or other health care professional.[146]

Third, the employer must provide training to employees with occupational exposure. The training records must be kept for three years from the date of the training.[147]

Fourth, the employer must maintain a "sharps injury log" with information about any "percutaneous injuries from contaminated sharps," such as needlesticks.[148]

Fifth, the employer must develop a written "exposure control plan" that describes how the employer determined which employees have occupational exposure as well as methods the employer will use to comply with the standard.[149]

Finally, required employee medical records, such as post-exposure medical examinations, must be kept in accordance with the Medical Records Access standard (Section 1910.1020), which is discussed in the next section.

4.4 The Access to Employee Exposure and Medical Records Standard

The Access to Employee Exposure and Medical Records standard (the "Access standard") contains requirements for providing access to specific types of records to employees and their representatives, and also governs how long records must be retained. The standard applies to employers in the general, construction and maritime industries.[150]

The Access standard requires employers to retain the types of records required by the health standards discussed in the previous section. Specifically, employers are required to retain "employee medical records" and "employee exposure records." An employee medical record concerns the "health status of an employee" and is "made or maintained by a physician, nurse, or other health care personnel, or technician." Medical records include: "medical and employment questionnaires or histories"; "results of medical examinations," such as pre-employment or periodic physical examinations, work-related laboratory tests or X-rays; "medical opinions, diagnoses, progress notes and recommendation"; "first aid records," "descriptions of treatments and prescriptions," and; "employee medical complaints." Medical records do not include actual physical specimens, health insurance records that are maintained by the employer's health insurance company that are "not accessible to the employer by employee name or other direct personal identifier," records that are privileged under the attorney-client privilege or attorney work product doctrine, or records resulting from employee assistance programs, such as drug or alcohol counseling services.[151]

[146] 29 C.F.R. Section 1910.1030(f)(5).

[147] 29 C.F.R. Section 1910.1030(h)(2).

[148] 29 C.F.R. Section 1910.1030(h)(5).

[149] 29 C.F.R. Section 1910.1030(c).

[150] 29 C.F.R. Section 1910.1020.

"Employee exposure records" are defined as having the following types of information: results from "environmental (workplace) monitoring or measuring of a toxic substance or harmful physical agent," such as personal or area sampling results; "biological monitoring results," such as blood or urine tests; material safety data sheets; and records like chemical inventories that show where and when chemicals were used.[152]

Employers are required to maintain employee medical records for the duration of employment plus thirty years.[153] Employers are not required to meet this retention period for "health insurance claims records maintained separately from the employer's medical program and its records" or "first aid records" for minor scratches, cuts or similar injuries that do not result in an entry on the employer's OSHA 300 Log.[154] Employers are not required to maintain medical records for employees who work at the facility for less than one year as long as the records are provided to the employee upon termination of employment.[155]

Employers are generally required to maintain employee exposure records for a total of thirty years regardless of how long the employee is employed at the facility. "Background data" like laboratory reports and worksheets from workplace monitoring must only be kept for one year as long as a report with the results is maintained. MSDSs for substances that are no longer at the facility do not have to be maintained for any specified period as long as the employer maintains for 30 years a record of when and where particular substances were used.[156]

The purpose of maintaining employee medical and exposure records is to provide access to employees, their designated representatives, and OSHA. Employees and their designated representatives must generally be given access to all employee exposure records upon request.[157] Employees must be given access to their own medical records, and designated employee representatives and OSHA

[151] 29 C.F.R. Section 1910.1020(c)(6)(i).

[152] 29 C.F.R. Section 1910.1020(c)(5).

[153] 29 C.F.R. Section 1910.1020(d)(1)(i).

[154] *Id.*

[155] *Id.*

[156] 29 C.F.R. Section 1910.1020(d)(1)(ii).

[157] 29 C.F.R. Section 1910.1020(e)(2)(i).

are permitted to review personally identifiable medical records only if they have written consent from the employee.[158]

If an employer ceases to do business, all records covered by the standard must be transferred to the successor employer. If there is no successor employer, then current employees must be notified of their rights to access records at least three months before the business closes. In addition, records must be sent to the National Institute of Occupational Safety and Health if the employer ceases to do business and there is no successor or the employer plans to dispose of any records required to be maintained for at least 30 years.[159]

5.0 Using Records to Prove Compliance

Even if particular OSHA standards do not require a written record, employers may, as a practical matter, have to prepare written records to prove compliance in the event of an enforcement action. For example, the Respiratory Protection standard requires employers to provide training to employees who wear respirators, but does not have any explicit requirements to document the training.[160] Similarly, the Noise standard requires employers to provide annual training on the "effects of noise on hearing," "the purpose of hearing protectors," and "the purpose of audiometric testing."[161] Although the standard requires employers to provide "materials related to the employer's training" to OSHA, no explicit recordkeeping provisions are included in the standard.[162] Even though no records are required by these and other standards, written records will be the most effective way to prove that the employer complied with the standards in the event of an OSHA inspection.

Employers also often rely upon written records to prove that employees have been informed of safety requirements. For example, the employer may have specific safety rules that prohibit employees from operating equipment when machine guarding has been removed. No OSHA standard requires this type of written rule. If, however, OSHA inspects the facility and observes employees working on unguarded equipment, the employer will be able to show that it had written rules prohibiting this conduct and trained employees on the requirements of the rule. By presenting these documents to OSHA, the employer may be able to show that the OSHA violation resulted from unpreventable employee misconduct and the employer is therefore not liable.

158 29 C.F.R. Section 1910.1020(e)(2)(ii). *See also* 29 C.F.R. Part 1913.10 (rules governing OSHA access to medical records).

159 29 C.F.R. Section 1910.1030(h).

160 29 C.F.R. Section 1910.134(k).

161 29 C.F.R. Section 1910.95(k).

162 *Id.*

Finally, employers often develop documents such as audits or inspection checklists that may be used to prove that a particular hazard was addressed. For example, OSHA's general housekeeping standard requires floors to be clean and dry and requires aisles to be clear.[163] Written safety rules and checklists for periodic inspections of the worksite may be used to show OSHA that the employer made reasonable efforts to ensure that the housekeeping requirements were met. Through these types of documents, the employer may be able to show that it could not have had knowledge of housekeeping violations that did not exist for extended periods of time.

163 29 C.F.R. Section 1910.22.