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The OSH Act: A Legal Overview

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Summary

Through the Occupational Safety and Health Act of 1970 ("OSH Act" or "act"), Congress sought a nationwide approach to regulating workplace accidents and injuries. The act authorizes the Secretary of Labor to create and enforce workplace safety standards. Additionally, the act contains a "General Duty Clause," also enforced by the Secretary of Labor, which generally requires employers to provide workplaces that are free of potentially harmful hazards. The act created the Occupational Safety and Health Administration ("OSHA") and an Assistant Secretary of Labor for Occupational Safety and Health, to whom the Secretary of Labor has delegated his enforcement rights and obligations under the act. The act also established the Occupational Safety and Health Review Commission ("OSHRC"), an adjudicatory agency independent of the Department of Labor, and therefore OSHA, that is tasked with reviewing enforcement actions. OSHA enforces its standards and the General Duty Clause through inspections, citations, and penalties. Employers can seek review of OSHA enforcement actions first with OSHRC and then with U.S. Courts of Appeals.

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Congress passed the Occupational Safety and Health Act of 1970[1] ("OSH Act" or "act") to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources …"[2] In the years leading up to the OSH Act, approximately 14,500 workers died annually from work-related injuries, and the number of Americans dying from work-related injuries between 1966 and 1970 exceeded the number of Americans killed in the Vietnam War during that period.[3] Additionally, work-related injuries disabled approximately 2.2 million Americans each year.[4] Congress therefore found existing health and safety standards inadequate at protecting workers and passed the OSH Act, whereby it sought a "comprehensive, nationwide approach" to occupational health and safety.[5]

Background

The OSH Act obligated the Secretary of Labor to protect occupational safety and health as required by the act. However, the act also created the Assistant Secretary of Labor for Occupational Safety and Health,[6] and thus the Occupational Safety and Health Administration ("OSHA"), to whom the Secretary of Labor has delegated responsibility for his obligations under the act.[7] The OSH Act also created the Occupational Safety and Health Review Commission ("OSHRC")[8]—an adjudicatory agency that is independent of the Department of Labor and therefore OSHA—that is tasked with reviewing OSHA enforcement actions (i.e., citations and penalties).[9]

The OSH Act contains express limitations on its applicability. For example, Section 4(b)(1) of the act provides that the act does not apply "to working conditions of employees with respect to which other federal agencies … exercise statutory authority" over occupational safety and health regulations and standards.[10] Congress apparently intended this language to prevent regulatory inefficiency by precluding OSHA from duplicating worker safety efforts in areas already regulated by other agencies.[11] To that end, health and safety regulations of other agencies that

[1] P.L. 91-596, 84 Stat. 1590 (1970).

[2] 29 U.S.C. §651(b).

[3] S.Rept. 91-1282, at 1 (1970). For comparison, in the most recent year for which data is available, 2012, the U.S. Bureau of Labor Statistics reported 4,628 occupational fatalities. U.S. BUREAU OF LABOR STATISTICS, REVISION TO THE 2012 CENSUS OF FATAL OCCUPATIONAL INJURIES (CFOI) COUNTS 1 (2014), *available at* http://www.bls.gov/iif/oshwc/cfoi/cfoi_revised12.pdf.

[4] *Id*.

[5] *Id*.

[6] *See* Occupational Safety and Health Act of 1970, P.L. 91-596, §29-30, 84 Stat. 1590, 1618-19 (codified as amended at 29 U.S.C. §553, 5 U.S.C. §5315, and 5 U.S.C. §5108).

[7] Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 77 Fed. Reg. 3,912, 3912 (Jan. 25, 2012).

[8] *See* 29 U.S.C. §661.

[9] 29 U.S.C. §659(c).

[10] 29 U.S.C. §653(b)(1). The act is also inapplicable to workplace conditions that are subject to the safety regulations of state agencies responsible for nuclear materials under §274 of the Atomic Energy Act of 1954. *Id*.

[11] *Organized Migrants in Cmty. Action v. Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975) (finding the "clearly enunciated legislative intent which is manifest in section 4(b)(1)" is "giving the Secretary omnibus authority to regulate occupational safety and health, … [while] avoid[ing] the wasteful duplication that would result where another federal agency was also providing for the occupational safety of a class of workers"); *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378, 1383 (No. 15462, 1980).

apply to a workplace hazard preempt OSHA's regulations regarding that hazard.[12] The OSH Act further expressly limits its applicability by allowing states to control occupational safety and health regulation through state plans.[13] If OSHA approves of a state plan, which requires, among other things, that the plan provide health and safety protection that is at least as adequate as the protections provided by OSHA,[14] then the state plan requirements, and not OSHA's standards and regulations, will apply.[15] Finally, the OSH Act applies only to employment performed in U.S. states and territories,[16] generally does not apply to federal, state, or local government employment,[17] and only applies to employers with employees (i.e., it does not apply to self-employed people).[18]

Standards

The OSH Act contains two primary enforcement provisions, each of which furnishes a unique obligation upon employers. First, Section 5(a)(1) of the act, the so-called "General Duty Clause," requires all employers, regardless of industry, to provide workplaces that are free of potentially harmful hazards.[19] Second, the act mandates employer compliance with OSHA's workplace safety standards, some of which are industry specific.[20] The General Duty Clause and OSHA's workplace safety standards are treated the same for purposes of complaints, inspections, and citations. That is, employers are equally bound to comply with the General Duty Clause and applicable OSHA standards and both are similarly enforced through complaints, inspections, and citations. OSHA bears the burden of showing that an employer has violated the General Duty Clause or an OSHA standard by a preponderance of the evidence.[21] Additionally, employers cannot be held liable for violations of the General Duty Clause or an OSHA standard unless they had actual or constructive knowledge of the violation's existence.[22] Thus, after establishing that an employer has violated the General Duty Clause or an OSHA standard by a preponderance of the evidence, OSHA bears the added burden of proving that the employer did so with actual or constructive knowledge.[23]

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[12] *AMR Servs. Co., Inc.*, No. 89-1764 at *1 (OSHRC Aug. 9, 1990).

[13] *See* 29 U.S.C. §667.

[14] 29 U.S.C. §667(c)(2).

[15] 29 U.S.C. §667(e). At the time of writing, OSHA has approved the plans of 21 states and Puerto Rico. 29 C.F.R. part. 1952.

[16] 29 U.S.C. §653(a).

[17] 29 U.S.C. §652(5) (defining "employer" in the context of the OSH Act as "a person engaged in a business affecting commerce who has employees, but … not the United States (not including the United States Postal Service) or any State or Political subdivision of state."). The act requires federal agencies to establish and maintain their own workplace safety programs. 29 U.S.C. §668. Additionally, the act requires that state plans apply to state and local employment in states that have chosen to adapt state plans. 29 U.S.C. §667(c)(6).

[18] *See* 29 U.S.C. §652(5).

[19] *See* 29 U.S.C. §654(a)(1).

[20] *See* 29 U.S.C. §654(a)(2).

[21] *See JPC Grp., Inc.*, 22 BNA OSHC 1859, 1860 (No. 05-1907, 2009); *see also Otis Elevator Co.*, 21 BNA OSHC 2204, 2205 (No. 03-1344, 2007).

[22] *See Henry J. Kaiser Co.*, 12 BNA OSHC 1008, 1009 (No. 83-1277, 1984).

[23] *See id* (applying the actual or constructive knowledge requirement in the context of a violation of an OSHA-created standard)*; see also Z & S Constr. Co., Inc.* 77 BNA OSHC 1728, 1731 (No. 78-1908, 1979) (applying the actual or constructive knowledge requirement in the context of a General Duty Clause violation).

General Duty Clause

Under the General Duty Clause, employers must provide employees with "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."[24] Apparently recognizing the impracticality of having OSHA issue safety standards for every type of employer and employment, Congress intended the General Duty Clause to be a catchall provision establishing a broad employer duty to protect worker health and safety in the absence of applicable OSHA-created standards.[25] To that end, when an OSHA-created standard applies to a hazard, an employer's compliance with the standard can be deemed to satisfy, and thereby preempt, the General Duty Clause.[26] However, this preemption occurs only when the employer successfully proves, as an affirmative defense, that the OSHA standard adequately addresses the hazard or, if the standard inadequately addresses the hazard, that the employer did not know of the inadequacy of the standard.[27] Thus, if an employer knows that a safety standard inadequately protects employees against a hazard, the employer must still comply with the General Duty Clause regarding that hazard.[28]

To successfully prove a violation of the General Duty Clause, OSHA must show that (1) a workplace condition poses a hazard to an employee; (2) the employer constructively or actually recognizes that the workplace condition is a hazard; (3) the hazard is causing, or is likely to cause, serious physical harm or death; and (4) feasible means exist to materially reduce or eliminate the hazard.[29] If OSHA successfully proves a violation of the General Duty Clause, it must then show that the employer violated the clause with actual or constructive knowledge for the employer to have violated the OSH Act.[30]

Hazard to an Employee

A General Duty Clause violation requires that a workplace condition pose a hazard to an employee. This does not require actual harm to an employee; the ability of a workplace condition

[24] 29 U.S.C. §651(a)(1).

[25] S.Rept. 91-1282, at 9-10 (1970) ("The committee recognizes that precise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which could result in such a misfortune. Therefore, to cover such circumstances, the committee has included a requirement to the effect that employers are to furnish employment and places of employment which are free from recognized hazards to the health and safety of their employees.").

[26] *See* 29 C.F.R. §1910.5(f) ("An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act ...."). OSHA is not required to make a preliminary showing that a specific standard does not apply when bringing action for violation of the General Duty Clause. *See Safeway v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004). Rather, courts generally treat applicable specific standards as affirmative defenses to a General Duty Clause citation. *See id.* Thus, the burden is on employers to show that the General Duty Clause does not apply because the cited hazard is governed by a specific standard. *See id.*

[27] *UAW v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir. 1987).

[28] *Id; Safeway, Inc. v. OSHA*, 382 F.3d 1189, 1194 (10th Cir. 2004).

[29] *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014); *Nelson Tree Servs., Inc. v. OSHRC*, 60 F.3d 1207, 1209 (6th Cir. 1995); *Roberts Sand Co., v. Sec'y of Labor*, No. 13-11478, 2014 WL 2566932, at *1, *1 (11th Cir. June 9, 2014). *Erickson Air-Crane, Inc.*, No. 07-0645 at *2 (OSHRC Mar. 2, 2012).

[30] *See Z & S Constr. Co., Inc.* 77 BNA OSHC 1728, 1731 (No. 78-1908, 1979); *see also Otis Elevator Co.*, 21 BNA OSHC 2204, 2208 (No. 03-1344, 2007).

to harm an employee can render it a hazard.[31] Additionally, OSHRC has recognized that a workplace condition can be a hazard absent a significant chance that the condition will injure an employee.[32] On the other hand, for a condition to be a hazard, it must occur in "other than a freakish or utterly implausible concurrence of circumstances."[33] Accordingly, for a workplace condition to be a hazard, it must be more than "utterly implausible" that the condition will injure or kill an employee, but there need not be a significant chance that it will injure or kill an employee.

"Recognized" Hazard

If a workplace condition is a hazard, OSHA must establish that it is a "recognized" hazard to prove a violation of the General Duty Clause. A recognized hazard is a workplace condition that is either recognized as hazardous by the employer's industry, or that the employer actually knows to be hazardous.[34] In determining that an industry recognizes a hazard, OSHRC has found persuasive evidence showing that, for example, accepted industry standards[35] or industry publications[36] acknowledge the hazard. Similarly, OSHA can establish an employer's actual knowledge of a hazardous condition by putting forth various types of evidence, including evidence showing that there were numerous previous accidents or injuries[37] or employee complaints.[38] An employer's actual knowledge of a hazardous condition can sustain a General Duty Clause violation even if the employer's industry has not recognized the condition as hazardous.[39]

Serious Harm or Death

If OSHA successfully establishes that a workplace condition is a recognized hazard, it must prove that the hazard is causing, or is likely to cause, serious physical injury or death to an employee. OSHRC has held that the probability that physical harm or death will occur, which it considers

[31] *See Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 542 (9th Cir. 1978) (noting that "it is beyond dispute that an accident need not occur for a violation of [the General Duty Clause] to properly be found ..."); *see also Nat'l Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257, 1267 (D.C. Cir. 1973) ("To establish a violation of the general duty clause, hazardous conduct need not actually have occurred…").

[32] *Valley Interior Sys., Inc.*, 21 BNA OSHC 2224, 2227-8 (No. 06-1395, 2007).

[33] *Id* (citing *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1063 (No. 89-2804, 1993)).

[34] *Dura Division*, 7 BNA OSHC 1938, 1939 (No. 78-3748, 1979); *Fabi Const. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007).

[35] *See Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1967 (No. 84-546, 1991) (observing that OSHA's reliance on an industry standard to show industry recognition of hazards is permitted).

[36] *See Culberson Well Serv., Inc.*, 11 BNA OSHC 1677, 1680 (No. 82-1162, 1983) (finding that industry safety manuals were "evidence of industry recognition of the hazard" at issue).

[37] *Carlyle Compressor Co. v. OSHRC*, 683 F.2d 673, 676 (2nd Cir. 1982) (observing that an employer had actual knowledge of a hazardous condition in part because the employer knew of prior incidents wherein the condition injured an employee); *Wal-Mart Stores, Inc.*, No. 09-1013 at *30 (OSHRC Apr. 5, 2011) (observing, in the context of hazard recognition, that "actual knowledge of a hazard may be gained by means of prior accidents, prior injuries, employee complaints, and warnings communicated to the employer by an employee.").

[38] *Wal-Mart Stores, Inc.*, No. 09-1013 at *30 (OSHRC Apr. 5, 2011) (observing, in the context of hazard recognition, that "actual knowledge of a hazard may be gained by means of prior accidents, prior injuries, employee complaints, and warnings communicated to the employer by an employee."); *see St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 (8th Cir. 1981) (finding that a hazard was recognized through an employer's actual knowledge in part because an employee had brought the hazard to the employer's attention).

[39] *See Brennan v. OSHRC*, 494 F.2d 460, 464 (8th Cir. 1974).

when determining whether a hazard exists as discussed above, is irrelevant in determining whether a recognized hazard is causing, or is likely to cause, serious physical harm or death to employees.[40] Rather, OSHRC considers the level of physical harm that an employee would face *if* an accident were to happen, no matter how slight the chance an accident would happen in the first place.[41] For example, in *Waldon Health Care Center*, a hazardous workplace condition presented only a small chance that employees would catch Hepatitis B, a virus from which, OSHRC noted, most people fully recover.[42] Even so, OSHRC found serious physical harm or death likely because a small percentage of people that catch Hepatitis B die or do not fully recover from it, and the hazardous condition therefore had the chance, though apparently slight, of seriously injuring or killing employees.[43] Previous incidents wherein the recognized hazard caused serious physical harm or death are not *necessary* to establish that the hazard is causing, or is likely to cause, injury or death.[44] However, it appears that previous injuries or deaths are *sufficient*, unless rebutted, to establish that the hazard is causing, or is likely to cause, serious physical injury or death.[45] Reviewing courts generally defer to OSHRC determinations that a recognized hazard is likely to cause serious injury or death.[46]

Feasible Means Exist to Reduce or Eliminate Hazard

Courts and the OSHRC generally agree that Congress did not intend the General Duty Clause to protect employees against all conceivable workplace hazards.[47] Rather, Congress intended the clause to protect employees against only hazards that are *preventable*.[48] Accordingly, if OSHA successfully establishes that a workplace condition poses a recognized hazard that is likely to cause serious physical harm or death to an employee, OSHA must then prove that the hazard is

[40] *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1062 (No. 89-2804, 1993) (noting that OSHRC "… has made clear, the criteria for determining whether a hazard is 'causing or likely to cause death or serious physical harm' is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm."); *Brian Hanley Logging*, 20 BNA OSHC 1228, 1233 (No. 02-1152, 2003).

[41] *See Walden Health Care Ctr.*, 16 BNA OSHC at 1062.

[42] *Id*.

[43] *Id*.

[44] *See Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 542 (9th Cir. 1978); *see also Am. Phoenix, Inc.*, No. 11-2969 at *14 (OSHRC Mar. 13, 2014) (finding serious injury or death by fire likely though no employees were previously injured by fire and the employer's citation stemmed from an inspection).

[45] *See, e.g.*, *Valley Interior Sys., Inc.*, 21 BNA OSHC 2224, 2230 (No. 06-1395, 2007) (noting that where an employee died after a malfunctioning aerial lift collapsed, the likelihood of death or serious injury was undisputed); *Hudspeth-McDowell Enterprises, Inc.*, 6 BNA OSHC 1900, 1907 (No. 77-3133, 1978) (holding that prior serious employee injuries are sufficient evidence that a recognized hazard is causing serious physical injury or death to employees).

[46] *See, e.g., Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 at n.33 (D.C. Cir. 1973) ("… the Commission's determination of likelihood [of serious physical harm] should be accorded considerable deference by the courts."); *Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 323 (5th Cir. 1984) ("The likelihood of the accident itself has received only low level scrutiny, leaving the Commission's expertise predominant in the area."); *Illinois Power Co. v. OSHRC*, 632 F.2d 25, 29 (7th Cir. 1980).

[47] *See Nat'l Realty & Constr. Co., Inc., v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) (observing that through the General Duty Clause, "Congress intended to require elimination only of preventable hazards"); *see also Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) (noting that "[t]he general duty obligation … is not designed to impose absolute liability or respondeat superior liability for employees' negligence. Rather, it requires the employer to eliminate only 'feasibly preventable' hazards"); *Metric Constructors, Inc.*, 16 BNA OSHC 1698, 1700 (No. 92-3322, 1994).

[48] *Nat'l Realty & Constr. Co., Inc.*, 489 F.2d at 1266; *Champlin Petroleum Co.*, 593 F.2d at 640.

preventable; that is, feasible means of materially reducing the hazard exist.[49] In practice, litigation of whether feasible means of reducing a recognized hazard exist appears to unfold in two steps. First, because OSHA bears the burden of establishing that a feasible means of abatement exists, OSHA must initially show that an employer could feasibly take specific actions that would materially reduce a risk to employees.[50] Next, the employer often responds by arguing that OSHA's suggested actions are infeasible.[51]

OSHA bears the burden of showing that a feasible means of materially reducing a hazard exists, which requires it to show that specific abatement actions by an employer would feasibly and materially reduce the hazard.[52] These abatement actions generally appear to fall into two categories: physical means of abatement[53] and abatement by implementing new or additional procedures.[54] When proposing an abatement action, OSHA can show its feasibility through evidence showing, for example, that similar employers in the industry have successfully implemented the means of abatement[55] or industry standards recommend the means of abatement.[56] If an employer does not rebut OSHA's evidence by putting forth his own evidence showing that the suggested means of abatement would be infeasible or ineffective at reducing the hazard, OSHA has successfully met its burden of establishing that a feasible means exists to reduce or eliminate a hazard.[57]

Employers often attempt to rebut OSHA's evidence by showing that OSHA's suggested means of abatement is infeasible or ineffective. They may do so by, among other things, proving that the suggested means of abatement is cost prohibitive[58] or, though possible to implement and its

[49] *Nat'l Realty & Constr. Co., Inc.*, 489 F.2d at 1267*; Roberts Sand Co., v. Sec'y of Labor*, No. 13-11478, 2014 WL 2566932, at *1, *1 (11th Cir. June 9, 2014).

[50] *See Nat'l Realty & Constr. Co., Inc.*, 489 F.2d at 1267. If OSHA fails to provide evidence describing what actions an employer could feasibly have taken to abate a hazard and the effectiveness of those actions, it has failed to meet its burden of proof, and a General Duty Clause violation will not stand. *See id.* at 1268.

[51] *See, e.g., Performance Site Mgmt.*, 19 BNA OSHC 2054, 2057-59 (No. 01-0956, 2002) (wherein an employer argued that OSHA's recommended means of abatement, implementing new safety procedures, would not have materially reduced a recognized hazard because the suggested procedures were no different from the employer's existing procedures in practice).

[52] *Pelron Corp.*, 12 BNA OSHC 1833, 1836 (No. 82-388, 1986) ("[OSHA] must show specific additional measures [employer] should have taken … that would have materially reduced the risk of harm …").

[53] *See, e.g., Cargill, Inc.*, 10 BNA OSHC 1398, 1401 (No. 78-5707, 1982) (wherein OSHA's suggested means of abatement of a risk of explosions and fires was to physically move equipment to increase ventilation and decrease air pressure).

[54] For example, OSHA has argued that employers improperly used generalized warnings urging employees to avoid hazards or act in a safe manner when more specific safety precautions would feasibly, significantly, and materially reduce a hazard. *See Alabama Power Co.*, 13 BNA OSHC 1240, 1243 (No. 84-357, 1987). OSHRC rejected OSHA's argument in *Alabama Power Co.* after concluding that the employer's caution to employees was "not a mere generalized caution to employees to work safely." *Id.* at 1244.

[55] *Cont'l Oil Co. v. OSHRC*, 630 F.2d 446, 449 (6th Cir. 1980).

[56] *General Dynamics Land Sys. Div.*, 15 BNA OSHC 1275, 1288 (No. 83-1293, 1991).

[57] *United States Steel Corp.*, 12 BNA OSHC 1692, 1703 (No. 79-1998, 1986) (holding that though OSHA's suggested means of abatement appeared as though it may "substantially interfere" with an employer's operations, because the employer "made no attempt" to rebut OSHA's suggested feasible means of abatement, OSHA successfully met its burden of showing that a feasible means of abatement exists).

[58] *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1066 (No. 89-3097, 1993) (observing that proposed methods of abatement that are cost prohibitive are not feasible because "under the general duty clause, an employer is not required to adopt measures that would threaten its economic viability"); *Inland Steel Co.*, No. 79-3286 at *10-11 (OSHRC Apr. 7, 1982).

implementation would significantly and materially reduce the cited hazard, the suggested means of abatement causes some greater harm.[59] For example, in *Cargill, Inc.*, OSHA suggested that a grain elevator and feed mill operator upwardly extend sheet casings at the top of a vertical conveyor through the roof of a building so that, in the event of a grain dust explosion, air could escape and prevent secondary explosions and fires.[60] In response, the employer presented evidence that extending the casings would pierce structural beams which support the roof, thereby seriously weakening the roof, and OSHA did not challenge the employer's evidence on this point.[61] OSHRC, accepting the employer's evidence, found OSHA's suggested means of abatement infeasible because, while it may have reduced the risks of secondary grain dust explosions, it would have created a new risk by weakening the roof such that the roof could collapse.[62]

Actual or Constructive Knowledge

In addition to the four elements discussed above, to successfully hold an employer in violation of the General Duty Clause, OSHA must prove that an employer had actual or constructive knowledge of the condition that violated the OSH Act.[63] This requirement of actual or constructive knowledge on the part of the employer also applies to violations of OSHA-created standards, discussed below.[64] OSHRC has held that OSHA does not have to prove that an employer knew the requirements of the act or knew that a condition violated the act to establish an employer's knowledge.[65] Rather, OSHA must show that the employer knew of the physical conditions giving rise to the violation.[66]

Proving actual knowledge is generally as straightforward as it sounds: OSHA can do so through evidence showing that the employer knew that the violating condition existed.[67] Conversely, demonstrating an employer's constructive knowledge of a violating condition is less straightforward. This requires OSHA to prove that, though the employer did not know the condition existed, the employer could have known about the condition through the exercise of reasonable diligence.[68] OSHA can prove constructive knowledge by showing, for example, that

[59] *Steel Constructors, Inc.*, 8 BNA OSHC 2146, 2151 (No. 78-3839, 1980) (vacating a General Duty Clause citation because OSHA's proposed means of abatement "amounted to a greater hazard than that method followed by [employer] …").

[60] *Cargill, Inc.*, 10 BNA OSHC 1398, 1401 (No. 78-5707, 1982).

[61] *Id.* at 1407.

[62] *Id.* at 1408.

[63] *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1308 (No. 06-1201, 2008); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537-38 (Nos. 86-360 & 86-469, 1992).

[64] *W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 607 (5th Cir. 2006) (observing that the OSH Act sought prevention of only preventable and foreseeable hazards, and thus employers can only be liable if they knew, or with the exercise of reasonable diligence should have known, of the presence of a violation); *Brennan v. OSHRC*, 511 F.2d 1139, 1144-45 (9th Cir. 1975) (holding that the requirement of employer knowledge applies to all degrees of violations of the OSH Act, whether a violation is "non-serious," "serious," or "willful.").

[65] *See Sofco Erectors, Inc.*, 12 BNA OSHC 1867, 1868 (No. 85-776, 1986) (holding that an employer's argument that he lacked knowledge of a condition failed in part because "[i]f [employer] lacked knowledge, it was directed to the requirements of the law but not to the physical conditions which constitute a violation.").

[66] *See id.*

[67] *See, e.g.*, *J-Lenco, Inc.*, 19 BNA OSHC 1992, 1994 (No. 01-0712, 2002) (holding that OSHA met its burden of showing actual employer knowledge through employer admissions).

[68] *Tampa Shipyards*, 15 BNA OSHC at 1548.

the employer did not have an adequate safety program for promoting compliance with safety standards[69] or that the condition was in plain view.[70] The amount of time that a violating condition existed is relevant to determining whether it could have been discovered through the exercise of reasonable diligence; the longer a condition existed, the more likely courts and OSHRC are to find that the condition could have been discovered through reasonable diligence.[71] For example, in *R.P. Carbone Construction Co.*, a construction company allegedly failed to exercise reasonable diligence to protect its employees from potential falls while building a steel structure.[72] OSHRC found, and the U.S. Court of Appeals for the Sixth Circuit upheld, that because employees' lack of fall protection was plainly observable throughout the construction site and existed for approximately two weeks, the exercise of reasonable diligence could have informed the employer that the employees lacked fall protection.[73]

A supervisory employee's actual or constructive knowledge of a condition can generally be imputed to the supervisor's employer.[74] A supervisory employee is one to whom an employer has delegated authority over other employees, even if only temporarily.[75] In the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit"), however, if a supervisor's own conduct caused a condition that violates the act, the supervisor's knowledge of the condition cannot be imputed to his employer unless his conduct was foreseeable.[76] The Fifth Circuit has held that a supervisor's violative conduct is not foreseeable, and therefore a supervisor's knowledge of his own violative conduct cannot be imputed onto an employer, if an employer has sufficient safety policies, training, and disciplinary procedures in place.[77]

OSHA-Created Standards

In addition to the obligations under the General Duty Clause, employers must "comply with occupational safety and health standards" that OSHA promulgates pursuant to Section 5(a)(2) of the OSH Act.[78] The OSH Act defines occupational safety and health standards as standards requiring "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[79] OSHA-created standards generally take two forms: specific standards and general standards. Specific standards narrowly apply to specified industries or activities (e.g., a standard applicable to logging).[80] General standards apply to classes of

[69] *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1308 (No. 06-1201, 2008).

[70] *R.P. Carbone Constr. Co.*, 18 BNA OSHC 1056, 1064 (No. 96-1302, 1998).

[71] *See id.*

[72] *Id.* at 1058.

[73] *Id.* at 1064.

[74] *Tampa Shipyards*, 15 BNA OSHC at 1548; *ComTran Grp., Inc. v. DOL*, 722 F.3d 1304, 1317 (11th Cir. 2013); *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2nd Cir. 1996).

[75] *Tampa Shipyards*, 15 BNA OSHC at 1548

[76] *W.G. Yakes & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 608-09 (5th Cir. 2006).

[77] *Id.*

[78] 29 U.S.C. §654(a)(2).

[79] 29 U.S.C. §652(8).

[80] For example, the standards found in Title 29, Part 1918 of the Code of Federal Regulations (CFR) apply only to the longshoring industry, and the standards found in Title 29, Part 1926 of the CFR apply only to the construction industry.

hazards that may be found throughout a number of industries (e.g., fire prevention standards).[81] In order to establish that an employer violated an OSHA-created standard, OSHA bears the burden of proving that (1) the standard applies to the cited workplace condition; (2) the employer did not comply with the terms of the standard; and (3) employees had access to the cited workplace condition.[82] Additionally, as is also necessary to establish a violation of the General Duty Clause as discussed above, for OSHA to prove a violation of OSHA-created standards it must prove that the employer had actual or constructive knowledge of the cited condition.[83] More specifically, OSHA must establish that the employer knew, or could have known through reasonable diligence, of the existence of the cited condition.[84]

In determining whether a standard applies to an employer's conduct, OSHRC generally considers the activity that the employer was engaged in when the citation arose. For example, in *Pico Industries*, OSHRC observed that when an employer was "engaged in steel erection activity," a standard applicable to steel erection applied.[85] Under OSHA regulations, if multiple standards apply to an activity or hazard, the most specific standard preempts more general standard(s).[86] The reverse is also true: general standards apply when there is no applicable specific industry standard.[87]

OSHA standards include, for example, those found in Code of Federal Regulations (CFR) Title 29 Parts 1910 (general standards), 1915 (shipyard standards), 1917 (marine terminal standards), 1918 (longshoring standards), 1926 (construction standards), and 1928 (agriculture standards). Employers are responsible for determining which standards apply to them and following the requirements of applicable standards even in the absence of any action by OSHA.[88] That is, even if OSHA has received no complaints about an employer, has not inspected an employer, and has not issued a citation to an employer, the employer must comply with standards applicable to them.[89] However, employers obtain exemptions from standards through variances.

Variances

The OSH Act permits employers to apply for exemptions from the requirements of OSHA-created standards or regulations under specified circumstances. Generally, OSHA must approve such exemptions, called variances, before an employer can permissibly fail to comply with an OSHA standard or the employee is in violation of the standard.[90] In other words, variances excuse only failure to comply with OSHA standards occurring after OSHA grants a variance; they do not

[81] General standards can be found in Title 29, Part 1910 of the CFR.

[82] *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1051 (No. 86-1087, 1991).

[83] *See id*.

[84] *Id*.

[85] *Pico Indus.*, 21 BNA OSH 1228, 1229 (No. 04-1419, 2005).

[86] 29 C.F.R. §1910.5(c)(1) ("if a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.").

[87] *See, e.g., see Anthony Crane Rental v. Reich*, 70 F.3d 1290, 1302 (D.C. Cir. 1995) (observing that "the general industry standards apply unless they are preempted by specific industry standards.").

[88] *See* 29 U.S.C. §654(a)(2).

[89] *See id*.

[90] *See Indus. Steel Erectors, Inc.*, 1 BNA OSHC 1497, 1498 (No. 703, 1974).

retroactively remedy violations of standards.[91] The OSH Act authorizes OSHA to grant four types of variance: (1) temporary variances; (2) permanent variances; (3) experimental variances; and (4) variances required for national defense.[92]

Temporary Variances

The OSH Act allows employers to apply for, and OSHA to grant, temporary variances from OSHA-created standards when an employer cannot comply with a standard by the time the standard goes into effect.[93] To obtain such a variance, an employer must show three things. First, the employer must show that he cannot comply with a standard by its effective date because professional or technical personnel, materials, or equipment needed to comply with the standard are unavailable, or because the employer cannot finish necessary facility alterations or construction by the effective date.[94] Second, the employer must show that he is protecting his employees against the hazard covered by the standard despite not following the standard.[95] Third, the employer must show that a program is in place for complying with the standard as quickly as practicably possible.[96] OSHA cannot grant a temporary variance unless the employer's employees are first given notice of, and the opportunity to participate in, a hearing on the variance.[97] Temporary variances expire at the earlier of (1) the date the employer comes into compliance with the standard or (2) one year.[98] However, OSHA can grant renewal of a temporary variance up to two times.[99]

Permanent Variances

In addition to temporary variances, the OSH Act permits employers to apply for, and OSHA to grant, permanent variances from OSHA-created standards.[100] However, OSHA can only grant such permanent variances under narrowly prescribed circumstances.[101] More specifically, a permanent variance requires an employer to show, by a preponderance of the evidence, that his "conditions, practices, means, methods, operations, or processes" will provide the same level of health and safety protection as compliance with the standard.[102] In granting a permanent variance, OSHA must determine, on the record after the opportunity for inspection and, where appropriate, hearing, that the employer has successfully met his burden.[103] Additionally, before OSHA can

[91] *See id; see also* 29 C.F.R. §1905.5.
[92] 29 U.S.C. §§655, 665.
[93] 29 U.S.C. §655(b)(6)(A).
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] 29 U.S.C. §655(d).
[101] *See id.*
[102] *Id.*
[103] *Id.*

grant a permanent variance, affected employees must receive notice of, and the opportunity to participate in, a hearing on the application for a permanent variance.[104]

Permanent variances are permanent in the sense that they generally do not contain an expiration date.[105] However, OSHA can modify or revoke a permanent variance at any time six months after its approval.[106] An employer, employees, or OSHA through its own motion can apply to modify or revoke a permanent variance.[107]

Experimental Variances

The OSH Act allows OSHA to grant variances when doing so is necessary for an employer to participate in an experiment that demonstrates the effectiveness of novel workplace health and safety techniques.[108] Either OSHA or the Secretary of Health and Human Services must approve these experiments.[109]

Variances Required for National Defense

Under the OSH Act, OSHA can grant variances from standards "as … necessary and proper to avoid serious impairment of the national defense."[110] OSHA must determine that a variance is necessary for national defense on the record after notice and opportunity for hearing.[111] National defense variances last no more than six months, but employers can apply to renew them.[112]

Employer Recordkeeping, Reporting, and Posting Requirements

The OSH Act and OSHA regulations require certain employers to maintain and distribute information. More specifically, some employers must keep records of workplace injuries and illnesses, some of which they are then required to report to OSHA. The OSH Act and OSHA regulations further require employers to disseminate certain information to employees via posting requirements.

Recordkeeping

The OSH Act gives OSHA fairly broad authority to require employers to keep records of workplace injuries and illnesses.[113] The act authorizes OSHA to promulgate regulations requiring

[104] *Id*.
[105] *See id.*
[106] *Id*.
[107] *Id*.
[108] 29 U.S.C. §655(b)(6)(C).
[109] *Id*.
[110] 29 U.S.C. §665.
[111] *Id*.
[112] *Id*.
[113] *See* 29 U.S.C. §657(c)(2).

employers to maintain records of, and report, non-minor injuries, deaths, and illnesses that are work-related.[114] Under this authority, OSHA has passed generally applicable regulations requiring certain employers to maintain workplace injury and illness records and submit such records to OSHA.[115] OSHA's recordkeeping requirements for workplace injuries and illnesses are perhaps best considered by reference to two questions. First, as a threshold matter, to what employers do OSHA's recordkeeping regulations for workplace injuries and illnesses apply? Second, if OSHA's recordkeeping regulations apply to an employer, what workplace injuries and illnesses must be recorded and reported?

OSHA's recordkeeping requirements for workplace injuries and illnesses generally apply to all employers within the OSH Act's scope, subject to two broad exceptions.[116] First, the recordkeeping requirements do not apply to employers that had a total of 10 or fewer employees *at all times* during the last calendar year.[117] Second, the recordkeeping requirements do not apply to employers falling within one of the "low hazard retail, service, finance, insurance, or real estate" employer groups listed in the relevant OSHA regulations.[118] This list of exempted employer groups is extensive and specific; it includes, for example, hardware stores, gasoline service stations, used car dealers, and apparel and accessory stores.[119]

The recordkeeping regulations require employers operating multiple establishments, or physical locations where business is conducted,[120] to distinguish between exempted and non-exempted establishments for recordkeeping purposes.[121] For example, if an employer owns a factory that produces clothes (i.e., an establishment that is not on the list of exempt employer groups) and an apparel store that sells the clothes (i.e., an establishment that is on the list of exempt employer groups), the employer would have to maintain workplace injury and illness records for the factory but not the apparel store, provided that the employer has a total of 11 or more employees. Even if an employer qualifies for an exception from recordkeeping requirements, he must still maintain records if selected to participate in OSHA's annual employer survey, discussed below in the context of reporting requirements, or asked to do so by the Bureau of Labor Statistics (BLS).[122]

If an employer is required to keep workplace injury and illness records, he does not need to keep records on all workplace injuries and illnesses.[123] Rather, the employer is only required to keep records on injuries and illnesses that are (1) "work-related," (2) "new case[s]," and (3) qualify as injuries and illnesses as defined in the relevant regulations.[124] An injury or illness is work-related if an event in the workplace caused, contributed to, or significantly aggravated the injury or illness.[125] If an injury or illness results from workplace events, it is generally presumed to be a

[114] *See* 29 U.S.C. §657(c)(2); *see also* 29 U.S.C. §673(a).

[115] *See* 29 C.F.R. pt. 1904.

[116] *See* 29 C.F.R. §1904.1-2.

[117] 29 C.F.R. §1904.1.

[118] 29 C.F.R. §1904.2(a)(1).

[119] 29 C.F.R. §1904 App'x A.

[120] 29 C.F.R. §1904.46.

[121] 29 C.F.R. §1904.2(a)(2).

[122] 29 C.F.R. §1904.41, 1904.42.

[123] *See* 29 C.F.R. §1904.4(a).

[124] *Id*.

[125] 29 C.F.R. §1904.5(a).

work-related injury.[126] Additionally, covered employers are only required to keep records of "new cases," meaning the employee has not had a previous injury or illness recorded of the same type affecting the same body part or, if the employee has, he recovered completely in the interim between the previous injury or illness and the current one.[127] An employee has recovered completely if all signs or symptoms have disappeared.[128] Finally, a qualifying injury or illness is generally one resulting in "death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness ... [or] significant injury or illness diagnosed by a physician or other licensed healthcare professional."[129]

Reporting

Under the OSH Act and OSHA regulations, employers are generally required to report information on workplace injuries and illnesses to OSHA outside of an inspection[130] in two circumstances. First, employers falling within the OSH Act's coverage, whether required to keep records or not, must report serious work-related injuries to OSHA.[131] Such serious work-related injuries include those resulting in: (1) deaths of employees; (2) hospitalizations that lead to any employee receiving in-patient treatment; or (3) an employee's amputations or loss of an eye.[132] Employers must report work-related deaths to OSHA within eight hours of their occurrence,[133] but have 24 hours to report work-related in-patient hospitalizations, amputations, or eye losses.[134] Reports of serious injuries must be made to OSHA via telephone, or through electronic submission at OSHA.gov.[135]

The second instance wherein employers must report workplace injury and illness data to OSHA outside of the context of an inspection occurs when OSHA selects an employer to participate in its annual survey.[136] OSHA regulations require the randomly selected employers in certain industries that receive OSHA's annual survey form to complete the form and send it back to OSHA.[137] The form generally requires employers to submit information from their injury and illness records.[138] However, as discussed earlier in this report, not all employers are required to

[126] *Id*. However, the regulations do contain exceptions to this presumption. *See* 29 C.F.R. §1904.5(b)(2). These exceptions include, but are not limited to, injuries or illnesses resulting from personal grooming or the employee doing personal tasks at a workplace outside of assigned working hours. *Id*.

[127] 29 C.F.R. §1904.6(a)(1), (2).

[128] 29 C.F.R. §1904.6(a)(2).

[129] 29 C.F.R. §1904.7(a).

[130] The reporting requirements applicable to inspections are discussed in the "Inspections" section of this report.

[131] *See* 29 C.F.R. §1904.39. The reporting requirements for serious injuries were expanded via a regulation that became effective January 1, 2015. *See* Occupational Injury and Illness Recording and Reporting Requirements—NAICS Update and Reporting Revisions, 79 Fed. Reg. 56187 (Sept. 18, 2014).

[132] 29 C.F.R. §1904.39(a). This reporting requirement does not extend to deaths or injuries caused by motor vehicle accidents on public streets or highways that are not in construction zones. 29 C.F.R. §1904.39(b)(3). Additionally, this reporting requirement does not apply to deaths or injuries involving commercial plane, train, subway, or bus accidents. 29 C.F.R. §1904.39(b)(4).

[133] 29 C.F.R. §1904.39(a)(1).

[134] 29 C.F.R. §1904.39(a)(2).

[135] 29 C.F.R. §1904.39(a)(3).

[136] *See* 29 C.F.R. §1904.41.

[137] *See* 29 C.F.R. §1904.41(a), (b)(1).

[138] *Id*.

keep injury and illness records under OSHA regulations. If OSHA sends an annual survey form to an employer that is exempted from the injury and illness recordkeeping requirements, the employer is required to keep such records for the following year and subsequently return the survey form to OSHA.[139]

In November 2013, OSHA proposed a rule that would eliminate OSHA's annual survey of employers, but heighten employers' obligations to report injury and illness data to OSHA.[140] Under the rule, employers that are already required to keep injury and illness records would have to submit information from these records to OSHA electronically.[141] The rule thus does not appear to impose additional recordkeeping obligations on employers. The frequency of the compulsory submissions required by the rule would vary based on the size of the employer.[142] Employers that had 250 or more employees in the previous calendar year would be required to submit injury and illness information four times per year.[143] Employers that had 20 or more employees in the previous calendar year and are in certain designated industries would have to submit the required data every year.[144] Additionally, all employers, regardless of their size, would have to submit injury and illness information to OSHA if OSHA informs them that they must do so.[145] Once the information is submitted, OSHA would make it publicly available, minus any data whose public release is precluded by the Freedom of Information Act, the Privacy Act, or any specific provisions of OSHA regulations.[146]

Posting

The OSH Act and OSHA regulations contain requirements apparently aimed at ensuring employers communicate to their employees about employee rights and obligations under the act. These requirements mandate that employers post certain materials at worksites where employees can readily see them. Posting requirements under the OSH Act and OSHA regulations direct employers to (1) display the OSHA poster at each work site;[147] (2) post annual summaries of injury illness and data records if they are required to maintain such records;[148] (3) post any citations that they receive;[149] and (4) post petitions for modifications of abatement dates subsequent to facing OSHA citations.[150]

The OSH Act mandates that OSHA promulgate regulations requiring employers to "keep their employees informed of their protections and obligations under [the act], including the provisions

[139] 29 C.F.R. §1904.41(b)(3).

[140] *See* Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. 67254 (proposed Nov. 8, 2013). After multiple extensions, the comment period for this proposed rule closed in October 2014. Supplemental Notice of Proposed Rulemaking, 79 Fed. Reg. 47605 (Aug, 14, 2014).

[141] *Id*.

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] 29 C.F.R. §1903.2(a)(1).

[148] 29 C.F.R. §1904.32.

[149] 29 C.F.R. §1903.16(a).

[150] 29 C.F.R. §1903.14a(c)(1).

of applicable standards" through "posting of notices or other appropriate means."[151] Pursuant to this mandate, OSHA regulations require covered employers to post a notice, furnished by OSHA, at their worksites.[152] This notice, known colloquially as the "OSHA poster," informs employees that, for example, they have the right to notify employers about workplace hazards, they can request OSHA inspections if they believe there are hazardous conditions at their workplace, and they have the right to see OSHA citations issued to their employer.[153] Employers must display the OSHA poster in "conspicuous place[s] or places where notices to employees are customarily posted."[154] Employers must also make sure the OSHA poster remains unaltered and undefaced.[155]

Covered employers must also post annual summaries of injury and illness records if they are required to keep such records.[156] Like the OSHA poster, employers must post such annual summaries in "conspicuous place[s] or places where notices to employees are customarily placed."[157] Further, like the OSHA poster, employers must ensure that the annual summary posting is not altered or defaced.[158]

In addition to the OSHA poster and annual summaries of injury and illness records, OSHA regulations require employers to immediately post any citations, or unedited copies thereof, that they receive.[159] A citation must generally be posted where the alleged violation giving rise to the citation occurred.[160] However, if it is not practicable to post the citation where the alleged violation occurred, an employer can post the citation in a "prominent place" where all affected employees can readily observe it.[161] Citations must remain posted until the latter of the date on which the employer eliminates the cited violation or three working days.[162] Contesting a citation does not absolve an employer of his obligation to post the citation.[163] However, under such circumstances the employer can also post a notice indicating that he is contesting the citation, including his reasons for doing so.[164]

If an employer petitions for modification of the abatement date of a citation, OSHA regulations require the employer to post the petition. When OSHA issues a citation to an employer for violating a workplace safety standard, such citations contain an "abatement date," or a date by which the employer must come into compliance with the cited safety standard.[165] The employer can petition OSHA to modify the abatement date when, despite good faith efforts, he has been unable to come into compliance with requirements of a citation by the abatement date because of

[151] 29 U.S.C. §657(c)(1).

[152] 29 C.F.R. §1903.2(a)(1).

[153] OSHA, JOB SAFETY AND HEALTH: IT'S THE LAW (2012), *available at* https://www.osha.gov/Publications/poster.html.

[154] 29 C.F.R. §1903.2(a)(1).

[155] *Id*.

[156] 29 C.F.R. §1904.32.

[157] 29 C.F.R. §1904.32(b)(5).

[158] *Id*.

[159] 29 C.F.R. §1903.16(a). This posting requirement does not apply to notices of de minimis OSH Act violations. *Id*.

[160] *Id*.

[161] *Id*.

[162] 29 C.F.R. §1903.16(b).

[163] *Id*.

[164] 29 C.F.R. §1903.16(c). The notice can include any specific actions the employer has taken to abate the violation. *Id*.

[165] *See* 29 C.F.R. §1903.19.

factors that are "beyond his reasonable control."[166] The employer must post a copy of such a petition in a conspicuous place that would provide notice to all affected employees, or near the location giving rise to the violation.[167] The petition must remain posted for 10 working days.[168]

OSHA Inspections

The OSH Act grants OSHA the authority to enter and inspect sites wherein employees perform work for an employer.[169] The OSH Act further permits OSHA to inspect all relevant structures, equipment, and conditions found within such worksites.[170] However, OSHA's authority to enter and inspect worksites is limited in two ways. First, any OSHA entrance into, and inspection of, a worksite must be "reasonable."[171] More specifically, OSHA can only enter and inspect workplaces at "reasonable times" such as during work hours, "within reasonable limits," and "in a reasonable manner."[172] Second, the Supreme Court has held that OSHA inspections are subject to the Fourth Amendment, and thus OSHA needs a warrant to inspect worksites without employer permission.[173]

Inspection unreasonableness is an affirmative defense to a citation resulting from that inspection that must be raised and proven by an employer.[174] To succeed, an employer must point toward unreasonable OSHA conduct in violation of the OSH Act.[175] The employer must also show that OSHA's unreasonable conduct prejudiced the employer.[176] The inquiry into whether an OSHA inspection was unreasonable is factual, varying from case-to-case. For example, OSHRC has found an OSHA inspection unreasonable when a city building inspector gave an employer 10 days to correct violations of building codes and forwarded the employer's building code violations to OSHA, which then conducted an inspection before the 10 day correction period expired.[177] After inspection, OSHA cited the employer for the same hazards as the city building inspector, which OSHRC deemed "inherently unfair and unreasonable."[178] If an employer succeeds in establishing that an inspection was unreasonable in violation of the OSH Act, any evidence obtained through that inspection cannot be used against the employer.[179]

In addition to being limited by the OSH Act reasonableness restrictions, the Supreme Court held in *Sec'y of Labor v. Barlow's* that OSHA inspections are limited by the Fourth Amendment, and OSHA therefore needs a warrant to inspect an employer's worksite over the employer's

[166] 29 C.F.R. §1903.14a(a).

[167] 29 C.F.R. §1903.14a(c)(1).

[168] *Id*.

[169] *See* 29 U.S.C. §657(a).

[170] *Id*.

[171] *See id*.

[172] *Id*.

[173] *Sec'y of Labor v. Barlow's, Inc.*, 436 U.S. 307 (1978).

[174] *See Cody Zeigler, Inc.*, Nos. 00-0040, 00-0222 at *3 (OSHRC Nov. 12, 2000).

[175] *See id*.

[176] *Trinity Indus., Inc.*, Nos. 88-1545, 188-1547 at *16 (OSHRC Aug. 10, 1990); *Gem Indus., Inc.* 17 BNA OSHC 1184, 1186 (No. 93-1122, 1995).

[177] *VSH Rest. Corp.*, 17 BNA OSHC 1336, 1337 (No. 93-1357, 1995).

[178] *Id*.

[179] *See Envtl. Utils. Corp.*, 5 BNA OSHC 1195,1196 (No. 5324, 1977).

objections.[180] In *Barlow's*, when an OSHA inspector went to the defendant's electrical and plumbing installation business to conduct an inspection, the defendant refused the inspector entry citing his Fourth Amendment rights.[181] The Court held that the Fourth Amendment prohibition against unreasonable governmental searches applies to both homes and workplaces.[182] The court observed that, generally, warrantless governmental searches are presumptively unreasonable under the Fourth Amendment.[183] Accordingly, despite noting that nothing in the language of the OSH Act appears to require a warrant or any other process before an OSHA inspection,[184] OSHA inspectors generally cannot conduct an inspection without first obtaining a warrant.[185] However, this warrant requirement does not apply to OSHA inspections that are conducted with an employer's consent.[186]

If proper authority for an inspection exists (i.e., the inspection is reasonable under the OSH Act and complies with the warrant requirement if the employer objects to inspection), OSHA can conduct both programmed and unprogrammed inspections.

Types of Inspections

OSHA generally conducts two types of inspections: unprogrammed inspections and programmed inspections. Unprogrammed inspections are initiated in response to a specific incident or event. In contrast, programmed inspections are those routine inspections that are scheduled under OSHA's objective administrative procedures.

Unprogrammed Inspections

Unprogrammed inspections, or inspections that OSHA initiates in response to a specific incident or event, often take one of two forms. First, unprogrammed inspections occur in response to employee complaints or third party referrals submitted to OSHA.[187] Second, unprogrammed inspections occur after OSHA receives a report of a serious accident.[188]

The OSH Act allows employees to request an OSHA inspection if they believe that an imminent danger or a violation of a health or safety standard poses a physical threat to employees.[189] The act requires that any such employee request for an inspection be in writing, detail the grounds for the inspection with "reasonable particularity," and be signed by the employee or employee's

[180] *Sec'y of Labor v. Barlow's, Inc.*, 436 U.S. 307 (1978).

[181] *Id*. at 309.

[182] *Id*. at 312.

[183] *Id*.

[184] *Id*. at 309.

[185] *Id*. at 325. The Court observed that, in the context of an OSHA inspection, the probable cause necessary to support a warrant can take one of two forms: (1) it can be based on "specific evidence of an existing violation" of the OSH Act; or (2) it can be based on OSHA showing that reasonable standards for inspecting the workplace are satisfied. *Id*. at 320.

[186] *See Shneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("it is … well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

[187] *See* OSHA, OSHA'S FIELD OPERATIONS MANUAL 2-8 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[188] *See id*.

[189] 29 U.S.C. §657(f)(1).

representative.[190] Once an employee requests an OSHA inspection, OSHA determines whether there are "reasonable grounds" to believe that the alleged imminent danger or violation exists.[191] If OSHA determines that such reasonable grounds are present, OSHA must conduct an inspection.[192] If OSHA determines, however, that reasonable grounds do not exist, it must inform the requesting employee of such and is not obligated to conduct an inspection.[193] Though not addressed in the OSH Act, OSHA regulations allow an employee to internally appeal OSHA's determination that no reasonable grounds for an inspection exist.[194] If, on review, OSHA again finds inspection unwarranted, such a finding is "final and not subject to further review."[195] OSHA similarly conducts inspections based on referrals, which are distinguished from employee complaints because they generally originate from third parties.[196] OSHA may conduct inspections based on referrals via, for example, information reports by media sources made directly to OSHA or disseminated through the news.[197] OSHA may also conduct inspections in response to reports by other federal, state, or local government agencies.[198]

Unprogrammed OSHA inspections can also result from the reports of serious injuries that employers are required to make to OSHA. As discussed earlier in this report, all employers subject to the OSH Act must report to OSHA any workplace accidents resulting in an employee's death, or resulting in the in-patient hospitalization of three or more employees.[199] OSHA policies require that all such deaths or injuries be "thoroughly investigated" via inspection to determine whether a violation of the OSH Act or OSHA standards contributed to the death or injury.[200]

Programmed Inspections

In addition to unprogrammed inspections, OSHA conducts programmed inspections, or routine inspections that are scheduled under the objective administrative procedures of an inspection program or plan.[201] OSHA conducts multiple types of programmed inspection. For example, OSHA conducts programmed inspections for specific industries, such as parts of the maritime and construction industries.[202] OSHA also maintains an inspection program, known as the Site-Specific Targeting Program, for worksites that have 40 or more employees and have high rates of worker injuries and illnesses.[203]

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[190] *Id*.

[191] *Id*.

[192] *Id*.

[193] *See id*.

[194] 29 C.F.R. §1903.12(a).

[195] *Id*.

[196] *See* OSHA, OSHA's FIELD OPERATIONS MANUAL 9-2, 9-3 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[197] *Id.* at 9-3.

[198] *Id*.

[199] 29 C.F.R. §1904.39(a).

[200] OSHA, OSHA's FIELD OPERATIONS MANUAL 11-7 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[201] *See* OSHA, OSHA's FIELD OPERATIONS MANUAL (2011) at Chapter 2 part VI, *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[202] *See, e.g.,* OSHA, INSPECTION SCHEDULING FOR CONSTRUCTION (2013).

[203] *See* OSHA, OSHA's FIELD OPERATIONS MANUAL 2-10 (2011), *available at* https://www.osha.gov/OshDoc/
(continued...)

Inspection Process

Under the OSH Act, any person who gives an employer unauthorized advance notice of an inspection can face up to a $1,000 fine and six months in prison.[204] OSHA regulations clarify when advance notice of an inspection is authorized, and thus can be given without violating the act. Under these regulations, advance notice is only permitted when (1) there is an imminent danger, so that the employer can attempt to remedy the danger immediately; (2) an inspection would be best conducted after normal business hours or other special preparations must be completed before an inspection; (3) it is necessary to ensure that parties who must be allowed to accompany an inspector can be present; and (4) OSHA determines advance notice would better effectuate inspection.[205]

OSHA is authorized to set the time for an inspection, subject to the reasonableness restrictions discussed earlier in this report.[206] Even so, OSHA generally conducts inspections during regular working hours unless "special circumstances indicate otherwise."[207] When an OSHA inspector arrives at a worksite for an inspection, he must present his credentials to the employer and "explain the nature and purpose of the inspection."[208] Further, if the employer must keep injury and illness records, the OSHA inspector can ask for copies of such records, which the employer must provide within four hours.[209] At the onset of the inspection, the OSHA inspector must inform the employer of what records he wants to review.[210]

The OSH Act allows both employers and employees to have a representative accompany an OSHA inspector during an inspection.[211] OSHA regulations further allow additional employer or employee representatives to accompany OSHA inspectors when inspectors find that additional representatives will assist inspection.[212] Employees' representatives must generally also be employees of the employer.[213] However, inspectors have the discretion to permit third parties to serve as employee representatives if an inspector determines that such representation is "reasonably necessary" to conducting an "effective and thorough" worksite inspection.[214] Additionally, inspectors can deny any representative from accompanying them during inspections when the representative's accompaniment would inhibit the inspection.[215]

(...continued)

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[204] 29 U.S.C. §666(f).

[205] 29 C.F.R. §1903.6(a).

[206] 29 C.F.R. §1903.7(a).

[207] OSHA, OSHA'S FIELD OPERATIONS MANUAL 3-6 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[208] 29 C.F.R. §1903.7(a).

[209] 29 C.F.R. §1904.40(a).

[210] 29 C.F.R. §1903.7(a).

[211] 29 U.S.C. §657(e).

[212] 29 C.F.R. §1903.8(a).

[213] 29 C.F.R. §1903.8(c).

[214] *Id*.

[215] 29 C.F.R. §1903.8(d).

During a worksite inspection, OSHA inspectors can collect environmental samples, take pictures or videos, or use any other reasonable investigation methods.[216] OSHA inspectors may also consult with employees regarding potential health and safety concerns, and employees must be given the opportunity to inform the inspector of any OSH Act violations that they believe exist at the worksite.[217] If an inspector uncovers an imminent danger that could immediately cause death or serious injury, he must inform affected employees and employers.[218] The inspector will then encourage the employer to remedy the danger.[219] If the employer refuses to or cannot remedy the danger, the OSH Act grants federal district courts jurisdiction to restrain any workplace conditions or practices posing such imminent dangers.[220]

A regulatory requirement that inspections not unreasonably disrupt workplace operations constrains OSHA inspector conduct during an inspection.[221] Additionally, the OSH Act generally requires inspectors to keep confidential any information obtained during an inspection containing, or with the potential to reveal, trade secrets.[222] However, inspectors can disclose such information in two circumstances: (1) when needed to effectuate enforcement of the act, they can disclose such information to officers and employees and (2) they can disclose such information in proceedings under the act.[223] When an inspector discloses information containing trade secrets during a proceeding, the entity hearing the proceeding (i.e., OSHA, the OSHRC, or a court) issues any orders that are appropriate to protect the information from further disclosure.[224]

At the end of an inspection, the OSHA inspector conducts a closing conference with the employer and employee representatives.[225] This conference can occur jointly—with both representatives—or separately, on-site or via telephone.[226] At this closing conference, the inspector discusses anything found during the inspection that appears to violate the act or raise any other relevant issues.[227] The OSHA inspector also informs the employer and employee representatives of their rights and obligations moving forward and answers any of their questions.[228]

Citations and Penalties

If an inspection shows that an employer has violated the OSH Act or an OSHA standard, OSHA issues the employer citations and, potentially, penalties. The act prescribes the procedural and

[216] 29 C.F.R. §1903.7(b); OSHA, OSHA'S FIELD OPERATIONS MANUAL 3-22 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[217] 29 C.F.R. §1903.10.

[218] 29 C.F.R. §1903.13.

[219] OSHA, OSHA'S FIELD OPERATIONS MANUAL 11-3 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[220] 29 U.S.C. §662.

[221] 29 C.F.R. §1903.7.

[222] 29 U.S.C. §664.

[223] *Id*.

[224] *Id*.

[225] OSHA, OSHA'S FIELD OPERATIONS MANUAL 3-28 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[226] *Id*.

[227] *Id*.

[228] *Id*.

substantive requirements for citations and penalties. The act further provides that penalties vary depending on the type of violation.

After an inspection, OSHA reviews the report of its inspector to determine whether the inspection uncovered a violation of the OSH Act or an OSHA standard.[229] If, after reviewing the inspection report, OSHA believes that an employer has violated the OSH Act or an OSHA standard, the act requires OSHA to issue a citation to the employer.[230] OSHA must issue this citation "with reasonable promptness" no more than six months after the OSH Act or OSHA standard violation.[231] The OSH Act requires that citations be in writing, particularly describe the nature of the violation, provide notice of which provision of the OSH Act or OSHA standard the employer allegedly violated, and contain an abatement date, or date by which the employer must remedy the violation.[232]

OSHA may issue a notice of proposed penalty within a reasonable time of an inspection after, or concurrent with, a citation.[233] OSHA must send any notice of proposed penalty to an employer by personal service or certified mail.[234] Additionally, a notice of proposed penalty must inform the employer that the proposed penalties will become final unless the employer seeks their appeal within 15 working days of receiving the notification.[235] Under the act, penalties vary depending on the seriousness and type of violation that occurred. Violations fall into one of three levels of seriousness: (1) serious violations; (2) non-serious violations; and (3) de minimis violations. Additionally, violations at each level of seriousness can result in increased penalties if the violation is willful, results from a failure to abate harm, or is part of an employer's repeated violation of the act.

Penalties for Serious Violations

A violation of the OSH Act or OSHA standards is serious if there is a "substantial probability" that the violation could result in death or serious physical harm for an employee.[236] Courts and OSHRC have held that this requirement does not mean OSHA must establish that there is a substantial probability that an accident *will* occur.[237] Rather, to establish a serious violation of the act, OSHA must show that there is a substantial probability that if an accident were to occur, no matter its chances of happening, it could result in death or serious physical harm in "other than

[229] 29 C.F.R. §1903.14(a).

[230] 29 U.S.C. §658(a).

[231] 29 U.S.C. §658(a), (c). OSHRC has interpreted the requirement that any citation be issued within six months of the occurrence of a violation to mean that citations must be issued within six months from when the Secretary discovers, or reasonably should have discovered, that the violation exists. *See Turner Constr. Co*, 19 BNA OSHC 1926, 1929 (No. 01-0814, 2002); *see also Austin Indus. Specialty Servs.*, No. 11-2555 at *15 (OSHRC June 4, 2013).

[232] 29 U.S.C. §658(a).

[233] 29 C.F.R. §1903.15(a).

[234] *Id*.

[235] *Id*.

[236] 29 U.S.C. §666(k).

[237] *See Wal-Mart Stores v. Sec'y of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005); *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984) (holding erroneous the defendant's contention that serious violations require the potential to *cause* physical harm); *Alabama Salvage Auction Co.* at *6 (OSHRC Mar. 3, 2014) (observing that to establish a serious violation "the Secretary need not show that there was a substantial probability that an accident *would* actually occur; he need only show that if an accident occurred, serious physical harm *could* result.").

freakish or utterly implausible" circumstances.[238] Even if a violation could result in death or serious physical harm for an employee, the violation will not be considered serious if the employer did not, and could not through the exercise of reasonable diligence, know of the violation.[239] If an employer commits a serious violation, the OSH Act requires OSHA to issue the employer a penalty no greater than $7,000.[240]

Penalties for Non-Serious Violations

The OSH Act classifies "non-serious" violations distinctly from "serious" violations, and provides different penalties for the two.[241] However, unlike serious violations, the act does not define non-serious violations other than to provide that they are violations "determined not to be of a serious nature."[242] OSHRC has interpreted this language to include violations that have a "direct and immediate relationship" with occupational health and safety, but do not present a substantial probability that death or serious physical harm will result.[243] Unlike serious violations, for which OSHA *must* issue penalties up to $7,000, OSHA *may* issue penalties up to $7,000 for non-serious violations.[244]

Penalties for De Minimis Violations

De minimis violations are those that do not have a direct and immediate relationship with safety and health.[245] Such violations occur when, for example, an employer complies with a proposed standard rather than the standard in effect and the proposed standard provides equal or greater employee protection, or follows the intent of a standard but deviates slightly from its specific requirements in a way that poses no direct or immediate threat to employee safety or health.[246] De minimis violations do not result in citations; if an employer commits a de minimis violation, OSHA issues the employer a notice instead of a citation.[247] Notices of de minimis violations are not subject to the same requirements as citations (e.g., they need not contain an abatement date[248] and there is no requirement that they be issued within six months of the alleged violation).[249] De minimis violations cannot result in penalties.[250]

[238] *Wal-Mart Stores*, 406 F.3d at 735.

[239] 29 U.S.C. §666(k).

[240] 29 U.S.C. §666(b).

[241] 29 U.S.C. §666(b), (c).

[242] 29 U.S.C. §666(c).

[243] *See, e.g., S & F Concrete Contractors*, 20 BNA OSHC 1943, 1942 (No. 03-1816, 2004); *Lourdes Hosp.*, 20 BNA OSHC 1789, 1795 (No. 03-0641, 2004).

[244] 29 U.S.C. §666(c).

[245] 29 U.S.C. §658(a).

[246] OSHA, OSHA'S FIELD OPERATIONS MANUAL 4-36 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

[247] 29 U.S.C. §658(a); 29 C.F.R. §1903.14(a).

[248] *Gen. Carbon Co. v. OSHRC*, 860 F.2d 479, 487 (D.C. Cir. 1988).

[249] *See* 29 C.F.R. §1903.14(a).

[250] 29 C.F.R. §1903.15(c).

Penalties for Willful Violations

The OSH Act permits OSHA to issue increased penalties to "any employer who willfully … violates the requirements of [the act]."[251] However, the act does not define a willful violation. Courts and the OSHRC have held that a willful violation is one that an employer commits with either intentional disregard of the requirements of the act, or plain indifference for employee safety.[252] An employer intentionally disregards the requirements of the act when he actually knows what the act requires yet fails to comply with the act.[253] Even if an employer does not actually know of the requirements of the act, he can be found to have willfully violated the act if his behavior shows plain indifference toward employee safety, which requires OSHA to show that the employer's state of mind was such that even if he were aware of the violation, he would not care.[254] Employers have not willfully violated the act if they reasonably, and in good faith, believed their conduct was not in violation of the act.[255] Additionally, it is generally harder for OSHA to prove a willful violation of the General Duty Clause than a willful violation of an OSHA standard because it is more difficult to prove that an employer intentionally disregarded, or was plainly indifferent to, "the broad duty to 'furnish a place of employment free from recognized hazards.'"[256]

An employer that willfully violates the OSH Act faces a mandatory penalty of between $5,000 and $70,000.[257] Further, if an employer's willful violation of an OSHA standard causes an employee's death, the employer shall, upon conviction, be punished by a fine of up to $10,000 or imprisonment for up to six months.[258] If the employer had previously been convicted of such a willful violation causing death, the employer can be punished by a fine of up to $20,000 or imprisonment for up to one year.[259]

Penalties for Failure-to-Abate Violations

OSHA can issue a Notification of Failure to Abate if an inspection reveals that an employer failed to bring a violating condition, for which OSHA has issued the employer a citation, into

[251] 29 U.S.C. §666(a).

[252] *See, e.g., Conie Constr., Inc. v. OSHRC*, 73 F.3d 382, 384 (D.C. Cir. 1995); *Daniel v. OSHRC*, 295 F.3d 1232, 1239 (11th Cir. 2002); *Trinity Indus., Inc. v. OSHRC*, 107 Fed. App'x 387, 393 (5th Cir. 2004); 23 BNA OSHC 1596, 1620 (No. 94-3393, 2011).

[253] *See, e.g.*, *Wynnewoood Ref. Co. v. Sec'y of Labor*, 340 Fed. App'x 462, 466 (10th Cir. 2009) (upholding OSHRC's determination that an employer willfully violated the act when it knowingly failed to comply with a standard because of economic infeasibility); *Donovan v. Williams Enters., Inc.*, 744 F.2d 170, 180 (D.C. Cir. 1984) (upholding OSHRC's determination that an employer willfully violated the act when OSHA repeatedly warned the employer about his failure to comply with safety standards and the employer ignored the warnings).

[254] *John Carlo, Inc.*, 21 BNA OSHC 1670, 1673 (No. 04-1405, 2006).

[255] *Chao v. Barbosa Grp., Inc.*, 296 Fed. App'x 211, 213 (2nd Cir. 2008); (*Gen. Motors Corp.*, 14 BNA OSHC 2064, 2068 (Nos. 82-630, 84-781, 84-816, 1991).

[256] *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 847-48 (8th Cir. 1981); *Mobil Oil Corp.*, 10 BNA OSHC 1606, 1615 (No. 80-6678, 1982) (observing that OSHA's burden of establishing willful conduct in the context of a General Duty Clause violation is "notably more difficult.").

[257] 29 U.S.C. §666(a).

[258] 29 U.S.C. §666(e).

[259] *Id*.

compliance with the OSH Act by the abatement date within the citation.[260] For a Notification of Failure to Abate to withstand review, OSHA must prove that the original citation became a final OSHA order,[261] and that the violative conditions for which OSHA originally cited the employer still existed upon re-inspection.[262] If OSHA successfully meets its burden, an employer can potentially raise a number of defenses. For example, the employer can argue that the original citation did not particularly describe the violation such that he lacked notice of what was needed to abate the hazard,[263] or that the original cited hazard, which became final due to operation of law rather than adjudication, did not violate the OSH Act.[264] Under the OSH Act, if OSHA issues a Notification of Failure to Abate to an employer, the employer can face a penalty of up to $7,000 for each day past the abatement date that the employer fails to correct the hazard.[265]

Penalties for Repeated Violations

Unlike a failure-to-abate violation, which results from an employer's failure to remedy an *existing* violation that they have already been cited for, a repeated violation results from a *new* violation.[266] This new violation must be "substantially similar" to a previously cited violation which resulted in a final order against the employer.[267] To meet its burden of establishing that the latter violation is substantially similar to the prior violation, OSHA can show that both citations result from the employer's failure to comply with the same standard.[268] The burden then shifts to the employer to show that the two violations are not substantially similar by, for example, showing that they involve different conditions or hazards.[269] Violations of the same specific standards, rather than general standards, make two violations more likely to be substantially similar because the violations are more likely to involve the same conditions and hazards.[270] When two violations result from different standards, OSHA can generally prove that they are substantially similar by showing that the violations resulted from substantially similar hazards.[271] OSHA can issue penalties of up to $70,000 for repeated violations.[272]

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[260] 29 C.F.R. §1903.18(a).

[261] A citation generally becomes a final order through settlement, litigation, or, if uncontested by the employer within 15 working days of receiving a notice of proposed penalty pursuant to a citation, through operation of law pursuant to 29 U.S.C. §659(a).

[262] *M & J Painting Co., Inc.,* 24 BNA OSHC 1450, 1468 (No. 11-2694, 2012); *Hercules, Inc.*, 20 BNA OSHC 2097, 2098 (No. 94-2790, 2005).

[263] *Hercules, Inc.*, 20 BNA OSHC 2097, 2099-2100 (No. 94-2790, 2005) (finding that because a citation for failure to properly record injuries and illnesses did not provide sufficient information to allow the employer to bring his records into compliance, the citation lacked sufficient "particularity" for a subsequent failure-to-abate violation).

[264] *Franklin Lumber Co., Inc*, 2 BNA OSHC 1077, 1077 (No. 900, 1974); *M & J Painting, Co.*, 24 BNA OSHC 1450, 1467 (No. 11-2694, 2012).

[265] *See* 29 U.S.C. §666(d).

[266] *See Midwest Masonry, Inc.*, 19 BNA OSHC 1540, 1541 (No. 00-322, 2001).

[267] *See id; see also Potlach Corp.*, No. 16183 at *3 (OSHRC Jan. 22, 1979).

[268] *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir. 1981); *Potlach Corp.*, No. 16183 at *3 (OSHRC Jan. 22, 1979).

[269] *See Bunge Corp.,* 638 F.2d at 837; *see also Potlach Corp.*, No. 16183 at *3 (OSHRC Jan. 22, 1979).

[270] *See Bunge Corp.,* 638 F.2d at 837; *see also J.L. Foti Constr. Co. v. OSHRC*, 687 F.2d 853, 857 (6th Cir. 1982); *Potlach Corp.*, No. 16183 at *3 (OSHRC Jan. 22, 1979).

[271] *See Potlach Corp.*, No. 16183 at *4 (OSHRC Jan. 22, 1979).

[272] 29 U.S.C. §666(a).

Process of Adjudicating Citations and Penalties

Employers have 15 working days upon receiving a citation or notice of proposed penalty to notify OSHA that they intend to contest the notice or citation, which can include protest of the abatement date contained within the citation.[273] If the employer does not notify OSHA of his intent to contest the citation or notice of proposed penalty within this 15-working-day window, the citation and notice of proposed penalty are deemed final orders of OSHRC and are not subject to agency or judicial review.[274] Employees also have a right to protest, though it is narrower than an employer's right to protest: they can protest only the abatement date of a citation on the basis that the allotted abatement time is unreasonable.[275] This limited employee right to protest is subject to the same 15-working-day time constraint as employers' right to review.[276] When an employer or employee notifies OSHA of its intent to protest a citation or notice of proposed penalty, OSHA "immediately advise[s]" OSHRC of such notification.[277] OSHRC then commences its independent review process.[278]

A protest before OSHRC first goes to an OSHRC Administrative Law Judge (ALJ), who hears it.[279] The ALJ then issues a written decision.[280] Any party adversely affected by the ALJ's decision can then petition to OSHRC for further review.[281] Additionally, an OSHRC Commissioner may direct review of an ALJ's decision on his own motion.[282] In either circumstance, no party has a right to OSHRC review of an ALJ's decision; review is discretionary with OSHRC.[283] If OSHRC does not order review of an ALJ's decision within 30 days of the docketing date of the decision, the decision becomes a final order of OSHRC.[284] If OSHRC does review an ALJ's decision, it then issues a final order on the matter.[285]

Any person adversely affected by a final OSHRC order can seek its appeal in (1) the U.S. Court of Appeals wherein the violation allegedly occurred; (2) the U.S. Court of Appeals wherein the employer has its principal office; or (3) the U.S. Court of Appeals for the D.C. Circuit.[286] Additionally, OSHA can seek appeal of an OSHRC order.[287] Petition for review of an OSHRC order, whether by an adversely affected party or OSHA, must be filed within 60 days of the OSHRC order.[288] Filing a petition for review of an OSHRC order does not stay the order; the

[273] 29 U.S.C. §659(a).
[274] *Id*.
[275] 29 U.S.C. §659(c).
[276] 29 U.S.C. §659(a).
[277] 29 U.S.C. §659(c).
[278] *Id*.
[279] *See* 29 U.S.C. §661(j).
[280] 29 C.F.R. §2200.90(a).
[281] 29 C.F.R. §2200.91(b).
[282] 29 C.F.R. §2200.91(a).
[283] *Id*.
[284] 29 C.F.R. §2200.90(d).
[285] *See* 29 C.F.R. §2200.94.
[286] 29 U.S.C. §660(a).
[287] 29 U.S.C. §660(b).
[288] 29 U.S.C. §660(a), (b).

order remains in effect until a court of appeals vacates it.[289] On review, the courts of appeal find OSHRC's findings of facts conclusive if the facts are supported by substantial evidence.[290]

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[289] *See* 29 U.S.C. §660(a).

[290] 29 U.S.C. §660(a).