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OSHA is at the Door: Recent Initiatives to Amplify Enforcement of Worker Safety Violations

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Please Note

This roundtable is designed to provide accurate information about the subject matter. However, it only provides general information and does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, let us know directly.

Preliminary Considerations

- This platform should not be used for activities prohibited by antitrust law.
- Avoid discussions leading to a restriction, or coordination, of competition between or among attendees.
- Attendees should not share information, have discussions and/or make arrangements on, among other things, pricing, market conduct, terms of sale, individual manufacturing costs and costs of sale, output, or supplier or customer relations/allocation.

OSHA Criminal Liability

- Criminal liability for OSHA violations – must be ***willful*** and must ***cause the death*** of an employee
- Maximum penalties:
 - 6 months imprisonment
 - Fines:
 - Up to \$250,000 fine for individuals
 - Up to \$500,000 fine for corporations
- Criminal liability for making false statement or representation
 - Maximum penalties:
 - 6 months imprisonment
 - Up to \$10,000 fine

OSHA Criminal Liability in Practice

- Since OSHA was enacted, there have been:
 - Over 400,000 workplace fatalities
 - Fewer than 80 criminal prosecutions
 - Only a fraction of these resulted in convictions

Why?

- Relatively low penalties and misdemeanor offense make OSHA criminal prosecutions less of a priority
- Burden of proof is difficult:
 - Defendant is an employer engaged in a business affecting commerce;
 - Employer violated a “standard, rule or order” promulgated pursuant 29 U.S.C. § 665 or any regulation;
 - The violation was willful; and
 - The violation caused the death of an employee

DOJ and DOL Join Forces

- Memorandum of Understanding, December 2015
 - DOJ Environment and Natural Resources Division, Environmental Crimes section will prosecute criminal cases under OSHA
 - DOJ and DOL will work together to develop and carry out training, exchange data and information, and provide technical and professional assistance

Yates Memorandum to U.S. Attorneys

- Encourages U.S. Attorneys to make OSHA enforcement meaningful by charging other serious offenses that can occur in association with OSHA violations
- Designation of criminal coordinators from DOL to increase the frequency and effectiveness of criminal prosecutions for worker safety violations

Other Potential Offenses

- Title 18 of the United States Code
- Environmental violations:
 - Resource Conservation and Recovery Act
 - Clean Air Act
 - Clean Water Act
 - Comprehensive Environmental Response, Compensation, and Liability Act
 - Toxic Substances Control Act

Potential Increased Penalties

- **Knowingly and willfully making a false statement:**
 - Up to 5 years imprisonment
 - Up to \$500,000 fine for corporations
- **Knowing violations of environmental statutes that knowingly put another person in imminent danger of serious bodily injury or death:**
 - Up to 15 years imprisonment
 - Up to \$1,000,000 fine for corporations (doubles for subsequent violations)

Civil Enforcement on the Way

- Current Memorandum of Understanding covers criminal enforcement
- DOJ has indicated it is also increasing civil enforcement efforts, in coordination with OSHA and EPA
 - Incorporation of worker safety concerns into environmental administrative settlements
 - Cross-training between federal agencies
 - Information sharing to identify industries/activities that are jurisdictional, typically under-enforced
 - Each case referral will be reviewed for worker safety concerns

Hypothetical

You get a call from the manager of your facility in Idaho City, Idaho. An employee has just died in an explosion that occurred at the facility. Apparently, the employee purchased a used 55-gallon drum from the facility at an equipment surplus sale. The drum's label had been removed, but it previously contained a flammable solvent. The employee used a facility-owned torch to remove the lid from the drum, and the drum exploded, killing the employee. You immediately report the fatality to OSHA. The next day, an OSHA inspector shows up to inspect the facility. What do you do?