

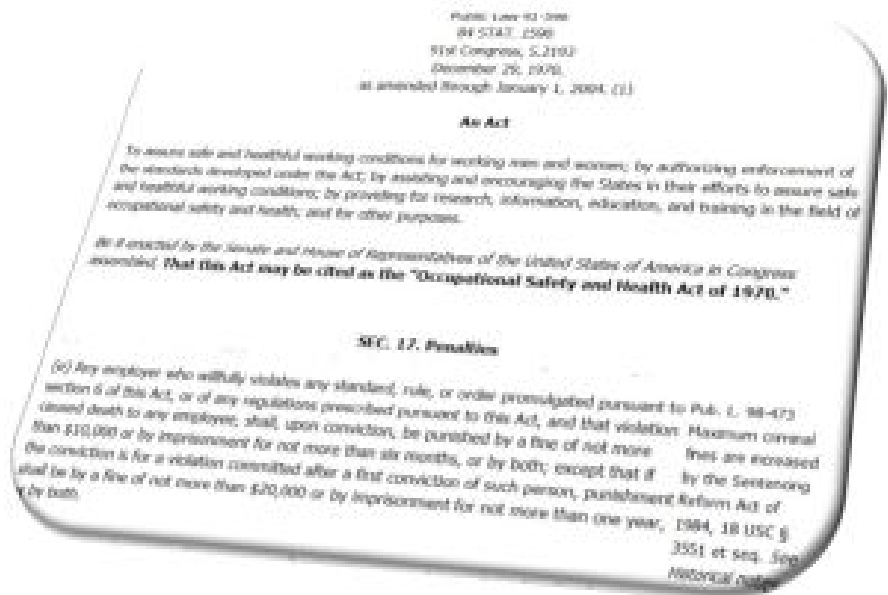
JANUARY 22, 2016 | KEY OSHA CASES EXPLAINED

OSHA Criminal Cases on the Rise

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In the forty plus years since Congress enacted the OSH Act, there have been more than 400,000 workplace fatalities, yet fewer than eighty total OSH Act criminal cases have been prosecuted – fewer than two per year – and only approximately a dozen have resulted in criminal convictions. Historically, the prosecutions typically have targeted cases in which the employers were alleged to have falsified documents and lied to OSHA in conjunction with underlying regulatory violations relating to an employee fatality. In other words, the “cover-up,” so to speak, was worse than the crime. Chronic violators and employers who demonstrated a systematic rejection of worker safety laws also were more likely to face charges.

One primary reason that historically so few criminal cases have been pursued under the Occupational Safety and Health Act (“OSH Act”) is that it is challenging to prove a criminal violation under the Act. Combine that with the fact that, even with a conviction, the consequences are less significant than the consequences for many other white collar crimes and you end up with a situation where the criminal provision of the OSH Act is rarely employed.



Here is how it works. Section 17(e) states:

“Any employer who willfully violates any standard, rule, or order promulgated pursuant to Section 6 of this Act, or of any regulations proscribed pursuant to this Act, and that violation

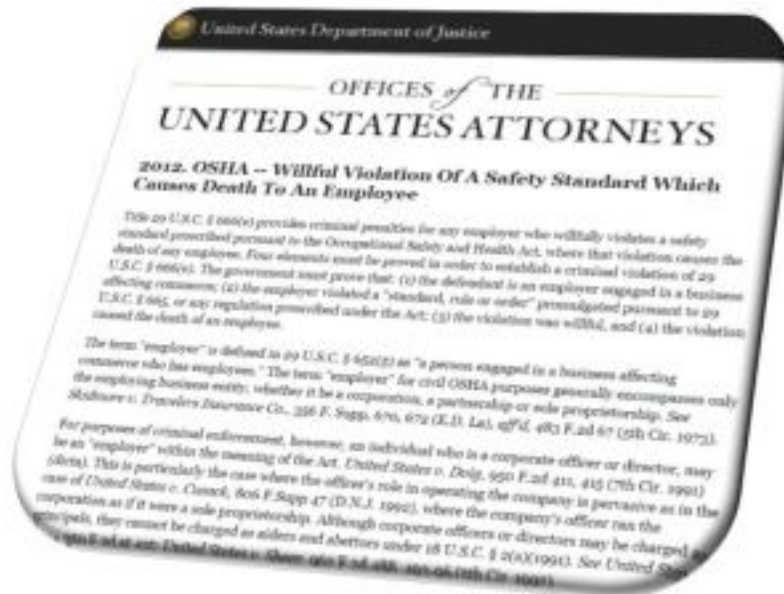
caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both."

Pursuant to the [Sentencing Reform Act of 1984, 18 USC § 3551 et seq.](#), which standardized penalties and sentences for federal offenses, the criminal penalty for willful violations of the OSH Act causing loss of human life was amended to be punishable by fines up to \$250,000 for individuals (18 U.S.C. Sec. 3574(b)(4)), and \$500,000 for organizations (id. at Sec. 574(c)(4)).

Accordingly, if an employer's willful violation of an OSHA standard causes the death of an employee, [Section 17\(e\) of the](#) OSH Act is implicated. However, violation of this provision is not a felony, but rather a "Class B" misdemeanor. And although Section 17(e) carries with it the possibility of a prison term, in practice, prison occurs only in the rare circumstances where a senior management official operates *de facto* as the company. Otherwise, practically, only criminal monetary fines are available for Section 17(e) criminal violations.

To obtain a conviction under Section 17(e), a prosecutor must establish *beyond a reasonable doubt* (unlike the lower civil standard for ordinary OSHA enforcement actions) that:

1. An OSHA regulatory standard was violated;
 - A violation of OSHA's "General Duty Clause" (Sec. 5(a)(1)) may not serve as the basis for an OSH Act criminal charge.
2. The violation was committed by the employer;
 - Courts evaluating OSH Act criminal prosecutions distinguish between "employees" and "employers." Only in extremely rare circumstances are individuals considered to exert so much control over a corporate entity that the individual would be considered, for all intents and purposes, to be "the employer" for purposes of an OSH Act criminal charge. Although a corporate officer or director might in some circumstances be deemed to be the "employer," this is only in the case where "an officer's or director's role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer under §666(e)." *U.S. v. Cusack*, 806 F. Supp. 47, 50 (D.N.J. 1992).
3. The violation of the standard was the direct cause of an employee's death;
 - Prosecutors must prove beyond a reasonable doubt that the conduct which amounts to the violation of an OSHA standard was both the "cause in fact" (i.e., the employer's conduct was the "but-for cause" of the accident) and the "legal cause" (the harm was a foreseeable and natural result of the conduct) of the injury.



4. The violation was committed by the employer.

willfully by

- Courts are in substantial agreement that “willfully” under Section 17(e) refers to a deliberate action taken by the employer with knowledge of both the hazardous condition and the OSH Act’s requirements (i.e., the employer knew the conduct was dangerous and unlawful).

Here is some guidance from the [Justice Department’s website about OSH Act criminal cases.](#)

In addition to willful OSHA violations that caused an employee fatality, employers (and employees) can face criminal sanctions in the following circumstances:

1. **Falsifying OSHA documents.** Section 17(g) of the OSH Act provides for a criminal charge against anyone (not just employers) who ‘knowingly makes any false statement, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act’
2. **Advance notice of an OSHA inspection.** Section 17(f) of the OSH Act makes it a criminal act for “[a]ny person to give advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees” (This provision generally applies to OSHA officials.)
3. **Perjury during OSHA proceedings.** 18 U.S.C. § 1001 provides felony penalties for false statements made in connection with any matter within the jurisdiction of the U.S. government, including any person who knowingly: (a) falsifies or conceals material facts; (b) makes materially false statements; or (c) presents any false document.
4. **State Criminal laws.** The OSH Act does not preempt prosecution under state criminal laws, such as manslaughter or negligent homicide for work related deaths and injuries.
5. **Environmental Statutes.** In addition to the criminal sanctions provided for under Section 17 of the OSH Act, employers with catastrophic events that also impact the environment could be subject to prosecution under the criminal provisions of numerous environmental statutes, such as, for instance, the Clean Water Act; the Clean Air Act; the Resource Conservation and Recovery Act (RCRA); the Emergency Planning and Community

Right-to-Know Act (EPCRA) or the Hazardous Materials Transportation Act (HMTA). These statutes typically include broader criminal provisions than the OSH Act.

Notwithstanding the historic trend to not pursue criminal sanctions in OSHA cases, recently, OSHA has begun to increase the frequency with which it refers cases to the Justice Department for investigation by a U.S. Attorney for possible criminal prosecution. In fact, we understand from several representatives within OSHA and the Department of Labor Solicitor's office (OSHA's lawyers) that, as a matter of informal policy, OSHA now makes a criminal referral to the Department of Justice in every case involving an employee fatality and a willful violation. Regardless of whether there is truly a 100 percent referral rate, the past few years certainly have seen a rise in the instances of criminal investigations of workplace accidents being initiated by the Department of Justice, and criminal charges being brought and/or significant plea deals being negotiated. Indeed, FY 2014 saw a record number of criminal referrals and prosecutions under the OSH Act.

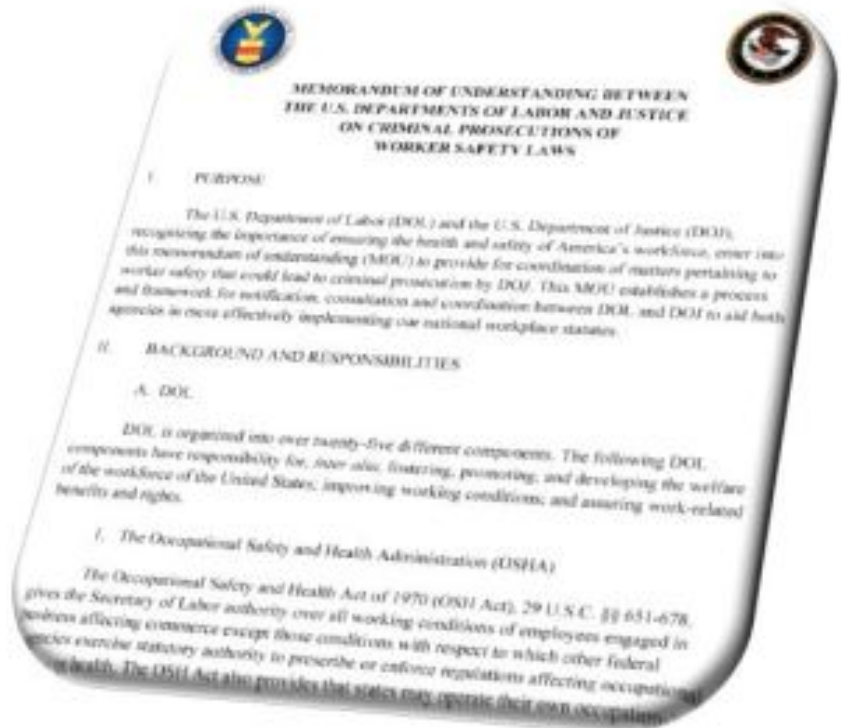
As mentioned above, in part because environmental statutes have stronger criminal teeth, if you will, criminal action by the government often occurs in cases involving alleged violations of both employee safety as well as environmental regulations. For example, in late July 2012, a federal grand jury in Texas indicted an environmental services company and its former president on conspiracy charges for illegally transporting hazardous materials that resulted in the death of two employees. The 13-count indictment alleged that Port Arthur Chemical and Environmental Services LLC and its former president willfully failed to implement administrative and engineering controls and to provide protective measures to keep employees' exposure to hydrogen sulfide within prescribed limits, resulting in fatal hydrogen sulfide exposures to two truck drivers at the facility. The indictment also alleged that the company illegally transported hazardous materials under the HMTA by knowingly using false documents and improper placards.

Another example of the government's combined use of safety and environmental crimes provisions is seen in the September 2012 Atlantic States Cast Iron Pipe Company case, when four former managers lost appeals of imposed prison sentences and financial penalties in connection with multiple safety and environmental compliance charges brought under the Clean Water Act, the Clean Air Act, and CERCLA, as well as conspiracy and obstruction charges alleging cover-up of those violations. The convictions stem from a number of safety and environmental incidents at a division of McWane Corporation's Atlantic State's Phillipsburg, NJ plant in the late 1990s and early 2000s. The Company will be placed on four years' probation and required to pay an \$8 million fine. Further, the following employee jail sentences were upheld:

- 70 months in prison for the former plant manager;
- 41 months in prison for the former human resources manager in charge of safety;
- 30 months in prison for the former maintenance supervisor; and
- 6 months in prison for a former supervisor.

Although environmental statutes have been used as a vehicle for OSHA criminal enforcement for years, a new Department of Justice initiative will result in a renewed and more concerted effort to pursue criminal charges

under environmental laws, workplace safety is being treated. The U.S. Department of Justice (“DOJ”) and the U.S. Department of Labor (“DOL”) recently expanding their worker endangerment initiative to specifically address worker safety violations. In a [December 17, 2015 Memorandum of Understanding on Criminal Prosecutions and Worker Safety Laws](#) (“MOU”), Deputy Attorney General Sally Quillian Yates announced a new initiative to pursue all manner of individual corporate wrongdoing, and specifically to seek criminal charges in cases involving worker endangerment. This December Memorandum came on the heels of a DOJ Memorandum issued this past Fall (September 9, 2015 Memo) by Deputy AG Yates to various assistant attorneys general, the FBI, the Director, Executive Offices of the U.S. Trustee and all U.S. Attorneys calling for greater accountability for corporate wrongdoing:



“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”

DOJ’s strategy for upping the criminal ante in workplace safety prosecutions included a vote by the Attorney General’s Advisory Committee to transfer responsibility for prosecuting worker safety violations from the Criminal Division’s Fraud Section to the Environmental Crimes Section (ECS) of the Environmental and Natural Resources Division. The rationale supporting this change for moving worker safety cases to DOJ’s Environmental Crimes division is:

1. Worker safety violations often occur in conjunction with environmental offenses;
2. Federal air, waste, and toxic exposure laws can often be charged as felonies, and carry much more severe criminal fines and penalties than the limited criminal penalties available through the OSH Act; and
3. Proving environmental crimes is often much easier for a prosecutor than OSH Act criminal cases.

In discussing the MOU, Ms. Yates remarked that:

“the announcement demonstrates a renewed commitment by both DOJ and DOL to utilize

criminal prosecutions as an enforcement tool to protect the health and safety of workers.”

While the DOJ’s Environmental Crimes Section will ultimately be responsible for prosecuting these worker safety cases, the Department of Labor will continue to play a role, as is clear under the December 2015 MOU, which encourages federal prosecutors to work with ECS to pursue worker safety violations under the OSH Act, the Mine Safety and Health Act, and the Migrant and Seasonal Agricultural Worker Protection Act as environmental crimes. Indeed, the ECS attorneys have now trained hundreds of OSHA inspectors how to recognize and document violations of the U.S. Criminal Code. As a result, these three agencies will jointly investigate cases and/or share information and make criminal case referrals.



Based on this renewed commitment by the DOL and the DOJ to utilize criminal prosecution as an enforcement tool to protect the health and safety of workers, employers should expect a ramped up effort by government officials investigating workplace safety violations to look for possible criminal violations, under not only the OSH Act, but the myriad of environmental statutes and the federal criminal code. With this renewed encouragement and support, don't be surprised if you find OSHA and its Solicitors itching to try out these new tools and increased authority.