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# Legal Liability and Risk Management for Safety Professionals

## Presenters

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# Legal Disclaimer

THE INFORMATION CONTAINED IN THIS PRESENTATION IS ONLY INTENDED TO PROVIDE YOU WITH A GENERAL UNDERSTANDING OF THE LAW AND SOME OF THE CURRENT LEGAL CHALLENGES FACING EMPLOYERS. THE INFORMATION CONTAINED IN THIS PRESENTATION IS NOT TO BE CONSTRUED AS LEGAL ADVICE AND IS NOT MEANT TO BE A SUBSTITUTE FOR LEGAL ADVICE. YOU SHOULD CONSULT WITH QUALIFIED LEGAL COUNSEL FOR ADVICE FOR ANY SPECIFIC SITUATION.

# Summary of Topics

- Risk Management Overview
- What is Liability?
- Overview of Liability for Workplace Injuries
- OSHA Citations
- Workers Compensation
- Serious and Willful Claims
- Civil Liability
  - Employee suit
  - Retaliation
- Criminal Liability
- Case Studies

# Risk Management Overview

- Risk management is the systematic process of identifying, assessing, and mitigating threats or uncertainties that can affect your organization. It involves analyzing risks' likelihood and impact, developing strategies to minimize harm, and monitoring measures' effectiveness. – Harvard Business School
- Risk Management is an incredibly broad discipline which includes Operations Risk, Financial Risk, Competitive Risk, and Security Risk among others.
- Today, we will focus on operations risk, such as regulatory risk for safety violations and the financial risk when employees or third parties are injured due to some aspect of company operations.

# Risk Management Overview Cont.

- Companies should have an enterprise risk management team, which includes safety officers.
- This team is responsible for identifying risk, analyzing risk probability, developing policies and procedures for minimizing risk, and preparing to mitigate adverse effects of a loss.
- Focusing on safety, the most common risks are those resulting from injuries or from government regulators citing firms for non-compliance under OSHA, the Government Code, Labor Code, and administrative agency rules.

# What is meant by the term “Legal Liability”

- “The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.” (Blacks Law Dictionary, 11<sup>th</sup> ed. 2019.)
- Being found by an administrative agency, or a court of law to be “Liable” triggers a host of legal “remedies” owed, including:
  - Monetary Penalties
  - Administrative Oversight
  - Criminal Charges
  - Punitive Measures

# What Gives Rise to Liability?

- When discussing liability within safety circles, liability typically accrues when a company:
  - Actual or Alleged failures to follow an administrative regulation (OSHA)
  - A workplace accident occurs
    - Loss of Life, Limb, or Eyesight to employees or third parties
    - Loss of physical or electronic infrastructure
  - Employer security (data breach)

# What Triggers an OSHA Investigation

- **Imminent danger situations** – hazards at your facility that could cause death or serious injury. If an inspector views potential issues driving past your location, or receives a tip of imminent danger, then expect a visit.
- **Severe injuries or illnesses** – employers now have to report not only fatalities within 8 hours, but serious injuries within 24 hours to OSHA. Injuries requiring reporting are inpatient hospitalizations, amputations, or eye loss. This reporting will trigger the submission of a rapid response report to OSHA or a site visit.
- **Employee complaints** – concerned or disgruntled employees can contact OSHA at any time. The results will be a site visit or formal written correspondence on the complaint.
- **Referrals** – a site visit referral can come from other federal, state, or local agencies. A referral visit can also be generated from unwanted media attention over a situation.
- **Targeted Inspections** – OSHA has national and regional emphasis programs that drive inspections. High injury rates can also result in targeted visits. Remember that organizations with 20 or more employees must now upload their OSHA 300 log summary info into the Injury Tracking Application each year.



# Investigation and Aftermath

- An OSHA investigator responding to a report of an injury or hazardous condition will hold an opening conference with the employer and conduct an inspection of the injury site. This does not mean that they have carte blanche to look around your business. The employer has a right to have a representative present, and having an attorney present is always recommended to run interference.
- At the conclusion of the investigation, the OSHA inspector will conduct a closing conference with the employer and notify the employer of any citations.
- If a citation is issued, the employer may then file an appeal. Appeals are extremely important because this gives the employer the opportunity to assert all appropriate affirmative defenses and demand evidence collected from OSHA. A successful appeal can result in a settlement which can include reduced fines and can include a non-admission of fault clause which can prove valuable in the event of third-party proceedings at WCAB or in court.
- If no settlement is reached, the Employer will have the opportunity to go to a formal hearing.

# OSHA Citations

- Cal/OSHA is managed by the Department of Industrial Relations
- Has the power to inspect workplaces
- Has the power to respond to complaints
- Fines and Penalties in 2023
  - Cal/OSHA’s maximum penalties for “general and Regulatory violations is **\$15,873** as of January 1, 2024.
  - For “Serious” violations, the penalty amount remains **\$25,000**.
  - For “willful or repeated violations” maximum penalties are **\$158,727** as of January 1, 2024.
  - These penalties may be reduced or enhanced based on a number of factors.
  - When an employer is cited for a violation of OSHA standards, the citation must be posted near the incident area for three days or until the violation is resolved, whichever comes first.

# Criminal Liability

- Chapter 15 of OSH Act, 29 U.S.C. § 666(e), creates a criminal penalty against “any employer who willfully violates” an OSHA standard and an employee dies as a result. This is proven by the following elements:
  - The defendant is an employer engaged in a business affecting commerce
  - The employer violated a “standard, rule or order”
  - The violation was willful
  - That violation caused the death of an employee
- The OSH Act also contains criminal penalties for
  - Providing advance notice of an OSHA inspection (sec 666(f); and
  - Providing false statements on a document required by the Act (sec 666(g).
  - They include a fine of not more than \$10,000 or imprisonment for not more than six months, or by both for the first offense.

# Criminal Liability Cont.

- On October 6, 1999, then Governor Gray Davis signed into law AB 1127 which codified criminal penalties for willful violations of Cal/OSHA regulations. (See Labor code sections 6423, 6425, 6428, 6430, and 6432.)
- Individual managers and supervisors may now be fined up to \$250,000 and be imprisoned for up to four years.
- Criminal fines range up to a maximum of \$3.5 million in fines for corporations and limited liability companies.
- For purposes of criminal liability, California defines "willfully" to simply mean a willingness to commit or not commit an act. The term "willfully" for Cal/OSHA purposes does not require any intent to violate law or to injure someone. (See Labor Code section 6425(e).)

# Workers' Compensation

- Workers' compensation is the statutory exclusive remedy for workplace injuries when an employee is injured within the course and scope of their employment. (See Labor Code section 3600 et seq.)
- Exceptions include:
  - Fraudulent Concealment
  - Employer Assault or Ratification
  - Power Press
  - Uninsured Employer
- \*\*If one of these exceptions applies, an employee can civilly sue an employer
- Workers Compensation also does not apply to non-employees on company property

# Serious and Willful Claims (WC)

- Under California Labor Code § 4553, an employer that is found to have caused an employee's injury by its "serious and willful misconduct" will be ordered to pay an amount equal to **half the value of all benefits paid** as a result of the injury. This includes all temporary and permanent disability, medical and vocational rehabilitation benefits
- To recover under section 4553 the employee must demonstrate that the employer's conduct was "willful"; that is, that the employer actually knew of the dangerous condition, yet deliberately failed to take corrective action. This requirement has been interpreted by the courts to mean conduct which is something more than even gross negligence. It has been said to be conduct of a quasi-criminal nature.
- An employee may use an issued OSHA citation as proof of S&W liability, therefore, it is very important for an employer facing a "serious" or "serious & willful" citation after an injury to appeal the citation and/or settle with non-admission of fault language.

# Case Study

## ■ **Reyes Pacheco S&W - 2024**

- Employee fell through skylight on employer's commercial warehouse
- Treated for 9 years with workers compensation.
- Employer cited with a "Serious" violation and successfully appealed with non-admission language.
- WCAB judge allowed employee to attempt to prove S&W despite lack of finding by OSHA investigator.
- Dispute whether fall protection was available
- Major issue was whether or not employer was subject to construction safety orders or general safety orders
- Waiting on WCAB Judge's decision

# Civil Liability

- OSHA citations are normally only issued against corporate entities. However, there have been particularly egregious cases where OSHA Administrative Law Judges have “pierced the corporate veil” and found personal liability against corporate officers.
- If an employee injury claim falls within an exception to workers’ compensation, then the employee may sue the company for workplace negligence in a court of law. If the employee is successful, the employee may be able to recover civil damages:
  - Compensatory/ Economic Damages (Medial expenses, lost wages, loss of earning capacity)
  - Non-economic Damages (Pain and suffering, emotional distress, hardship, loss of consortium, loss of enjoyment of life, punitive damages.)
- The company will also be responsible for paying for its defense fees, unless those fees are covered by insurance.



# Civil Liability Cont.

- Whistleblower Protection, Retaliation, and Punitive Damages
  - OSHA Act section 11(c) and the California Labor Code section 6310 **prohibits an employer from retaliating** against an employee who complains about safety or health conditions or practices at the workplace, institutes or testifies in any proceedings relating to the employee's rights to safe and healthful working conditions, exercises any rights under the federal or California law relating to occupational health and safety, or participates in an occupational health and safety committee established under Section 6401.7.
  - **Can result in a complaint through the labor commissioner, or as part of a larger civil lawsuit in the superior court.**
  - Punitive damages available in egregious cases. When “oppression, fraud, or malice” is proven.
    - See *Steffens v. Regus Group, PLC*, SD Cal, Aug. 2013 (3.5 million in punitive damages for being terminated after reporting violations of the labor code.)

# Fallout

- Years of litigation
- Increased Regulation of industry
- Bad Industry Press
- Degraded company operations



# How to Avoid Liability

- Regularly review and revise operating procedures and safety manuals to ensure they are up-to-date with current operations and protocols.
- Promptly and fully address all known or obvious workplace hazards.
- Promptly and fully address all employee safety complaints and concerns.
- Train company management on how to handle OSHA inspections and investigations—before OSHA comes knocking.
- Be sure to involve senior management and / or appropriate legal counsel, if OSHA shows up for an inspection or investigation.

# Case Study

## ■ **Death of Maria Isabel Vasquez Jimenez (2008)**

- Merced Farm Labor Contractor worked employees for 9+ hours without water in the fields, shade, or meal and rest breaks.
- May 14, 2008, Maria Isabel Vasquez Jimenez, 17, collapses after laboring more than nine hours without accessible shade or water. She dies two days later. Management never calls 911 and tells Maria Isabel's fiancé to lie about the events. Death due to heat stroke.
- Governor Schwarzenegger attends funeral.
- Company license revoked
- Political march on Sacramento
- Criminal Charges brought against owners of the company
- OSHA Fines imposed
- Title 8, section 3395 imposed increasing heat illness regulations in California

# Case Study

## ■ **Death of Fernando Santisteban (2011)**

- Died after attempting to cut through iron auger in nut processing facility
- Lock-out – tag-out procedures may or may not have been followed (disputed)
- OSHA citations
- Criminal charges brought against the company
- Workers compensation claim + Serious and Willful claim
- Civil lawsuit



# Conclusion

- Implement a preventative safety program
- Document, Document, Document!
- When in doubt, call your attorney!

**Questions?**