

OSHA Publishes Game Plan for Workplace Violence-Related Inspections

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This post was contributed by Eric N. Athey, Esq., Co-Chair of the McNees Wallace & Nurick LLC Labor and Employment Group.

Homicide has consistently been one of the top four causes of work-related fatalities over the past decade, with an average of 590 incidents per year. Shockingly, in 2009, homicide was the leading cause of work-related death for women. The Occupational Safety and Health Administration has addressed the hazard of workplace violence from time to time over the past fifteen years in various ways, including publication of specific guidelines for high-risk industries such as late-night retail, health care and social services. However, to date, there is no OSHA general industry standard addressing this serious hazard.

Although there is presently no OSHA general industry standard for preventing workplace violence, OSHA has cited some employers for failing to address serious known risks under Section 5(a)(1) of the Occupational Safety and Health Act - also known as the "general duty clause." Basically, the general duty clause requires employers to provide a workplace free from recognized hazards. Citations under the general duty clause may arise where an OSHA inspector discovers evidence that an employer knew (or should have known) of individual or industry-specific risks of violence and failed to take feasible steps to prevent or minimize them. Given the persistence of the problem, OSHA recently took another step toward developing a standard approach to the issue.

On September 8, 2011, OSHA issued an "Instruction" to its Regional Offices titled "Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents." The Instruction is intended to facilitate a uniform approach to workplace violence inspections that are triggered due to: (1) a complaint, referral, or a fatality or catastrophic event in the workplace; or (2) as part of a programmed inspection where there is recognition of the potential for violence in the industry or where the hazard is identified and existing. The OSHA Instruction makes clear that inspections generally won't be considered in response to a single co-worker threat of violence and that such individualized issues should be referred to the appropriate government agency.

The OSHA Instruction lists three basic criteria that Regional Offices must consider when determining whether a workplace violence inspection is appropriate: (1) whether there are known risk factors in the particular workplace; (2) evidence of employer and/or industry recognition of the potential for workplace violence in OSHA-identified high risk

industries, such as late night retail, healthcare and social services; and (3) whether there are feasible abatement methods available to address the risks.

The "known risk factors" listed in the OSHA instruction are:

- Working with unstable or volatile persons in certain healthcare, social service or criminal justice settings.
- Working alone or in small numbers.
- Working late at night or during early morning hours.
- Working in high-crime areas.
- Guarding valuable property or possessions.
- Working in community-based settings, such as community mental health clinics, drug abuse treatment clinics, pharmacies, community-care facilities and long-term care facilities.
- Exchanging money in certain financial institutions.
- Delivering passengers, goods or services.
- Having a mobile workplace such as a taxicab.

The OSHA Instruction includes a number of examples to demonstrate how an OSHA Area Director must apply the above factors when determining whether a workplace violence inspection is warranted.

Perhaps of most relevance to employers, the Instruction details the types of information that OSHA inspectors should look for when conducting a workplace violence inspection, including (a) the existence of security personnel; (b) whether there is a workplace violence prevention program that is updated and enforced; (c) whether the employer has conducted hazard assessments; and (d) whether appropriate training has been provided to employees and supervisors. Inspectors may also interview employees and review documentation relating to the employer's handling of aggressive or abusive employees, employee medical records, workers' compensation records and OSHA injury/illness records.

The Instruction reaffirms that the general duty clause is the primary legal basis for citing employers who fail to address serious workplace violence hazards of which they are (or should be) aware. However, the OSHA Instruction makes it clear that there must be a feasible means of abatement in order to support a citation under the general duty clause. Addendum B to the Instruction lists a variety of potential abatement measures, including hazard analyses, structural changes to minimize risks, employee training, engineering controls (e.g. alarms and metal detectors), administrative controls (e.g. closer communication with police) and workplace violence prevention programs. An employer who fails to explore these steps in the face of a known hazard will have a hard

time defending a citation on the basis that the hazard cannot be abated. Such abatement efforts should be well documented and available for inspection upon request by an OSHA inspector.

In sum, the new OSHA Instruction regarding workplace violence does not change the law pertaining to workplace violence; however, it provides OSHA inspectors with a framework for analyzing this hazard in the workplace and for issuing citations under the general duty clause. Employers in industries with an inherent risk of violence, particularly those who employ workers that are exposed to the "known risk factors" listed above, are well advised to study the OSHA Instruction and implement appropriate abatement measures.

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