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Workplace Safety Best Practices...OSHA's Increase Enforcement of Standards' Updated COVID-19 Guidelines; Preventing and Avoiding OSHA Citations and Expert Tips on How to Navigate Informal Conferences

Sustainability & Environmental Health & Safety Symposium

March 30, 2022



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Presenters

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Expert Tips on Navigating Informal Conferences



Informal Conferences

- ▶ Company meets with OSHA in person, phone, Teams, or Zoom
- ▶ Expedited Settlement Agreement
 - ▶ No accidents, fatality, catastrophes involved, more than two (2) high/greater serious, OSHA will send the Company an agreement that can be signed informally that offers 30% penalty reduction and requires abatement.

What Does OSHA Expect?

- ▶ Good faith efforts - for penalty reductions
- ▶ Before you get to the informal conference a conversation should have been had with the company during the closing conference to go over what to bring to an informal conference
 - ▶ Bring in some kind of abatement, be it interim until final abatement can be done - something that shows how the company is protecting the employees in the interim
 - ▶ Corrected During Inspection
 - ▶ Employers are sending their abatement information into OSHA before the informal

Types of Abatements for Violation Issues

- ▶ Lockout/Tagout
- ▶ Machine Guarding
- ▶ HazComm
- ▶ PPE
- ▶ PIV (powered industrial truck)
- ▶ Fall Protection



Informal Conferences

- ▶ Changes to citations can be made at the informal that could include vacating citations, changing standards, changing the Alleged Violation Descriptions, grouping citations, and reducing penalty
- ▶ Sometimes we run out of time due to the final order so don't be upset if you are asked to contest, this actually allows OSHA and the company to keep the conversation going

What now after the OSHA ETS for 100 or more employers? What's next in Heat, Healthcare and HazComm, Machine Guarding and LOTO?



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Presented by:

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Presenter

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- OSHA-Authorized 10- & 30-Hour General Industry Course Trainer
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- ABA OSHA Law Committee Active Member for 28 years
- ABA OSH Law Treatise Co-Editor-in-Chief
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- Completed OSHA 10 & 30 Hour General Industry Courses
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Presenters

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- Vice President Corporate Quality & Risk Control – Chief Quality Officer
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- ESH steering committee for the Association Rubber Producing Manufacturers (ARPM)
- Wyandot County Safety Council Steering committee

Moving Forward on COVID-19

- Employers need to have a written COVID-19 Prevention and Control Plan in place to make citations less likely
 - OSH Act requires all employers to provide “employment, and a place of employment, free from recognized hazards likely to cause death or serious injury or disease” (General Duty Clause).
 - OSHA and CDC strongly encourage vaccination of workers.
 - Take practical measures to reduce risk of COVID-19 spread in the workplace.



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Measures for Reducing COVID-19

in the Workplace – Recent Citations List as Feasible Means of Abatement

- Encourage vaccinations through training/posters
- Provide quality face coverings
- Continue physically distancing workstations
- Train employees on COVID-19 policy and enforce
- Remove COVID-19 positive or symptomatic employees from workplace
- Provide COVID-19 Testing



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Mandatory Vaccination or Testing Policies?

- Employers can still require testing or vaccination
 - Must provide for exemptions for disabilities and sincerely held religious beliefs.
 - Beware of state and local laws.
 - Ensure that COVID-19 vaccination records are kept confidential and stored properly under ADA.
 - Time spent on employer-required testing or vaccination during the regular day or shift is compensable.



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Protecting Against Legal Liability

- COVID-19 is a recognized workplace hazard.
 - Written COVID-19 policies may limit potential OSHA citations under General Duty Clause.
 - Taking safety measures may limit exposure to tort claims from employees to pierce employer immunity.
 - Avoid Title VII and ADA claims by providing applicable reasonable accommodations to mandatory policies.
 - Use employee-completed documents for requests.

Actions of the Current Administration

- **OSHA ETS for 100 or more employees – stayed then withdrawn by OSHA**
- **Federal Contractors employees’** vaccinations – stayed by U.S. District Courts; pending in U.S. Courts of Appeals: Contractor employees working onsite in Federal buildings and facilities must still follow Federal agency workplace safety protocols when working onsite.
- **CMS** – Recipients of Medicare/Medicaid: Hospitals, Nursing Homes, Dialysis Units, etc., need to require vaccinations – allowed by U.S. Supreme Court
- **Federal employees’** vaccinations – nationwide stay on mandatory vaccinations only: guidance on protocols related to masking, distancing, travel, testing, and quarantine—remains in effect.
- **3-22-2022 – OSHA re-opened the comment period for a permanent Healthcare Standard for COVID-19**



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OSHA Healthcare COVID-19 Proposed Standard

- Comment period re-opened until April 22, hearing set April 27th
- Former OSHA ETS for Healthcare is the Proposed Standard
 - Medical Removal Benefits part of ETS: likely to remain
 - No weekly testing requirements included currently
 - CMS healthcare entities required to have vaccinations and will likely be covered as they were by the ETS
 - Other requirements could be added: roster, vaccination, etc.
- Comments are considered by the agency; *make them if you can*



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OSHA - Testing

- Testing:
 - OSHA is still citing testing as a feasible means of abatement in Citations
 - No current time requirements on testing
 - Recommend hiring a medical director to determine how often and under what circumstances testing should occur
 - Develop simple policy on testing after symptoms, diagnosis and CDC separation period



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OSHA – Testing (Financial)

No requirement by OSHA that employers pay for the cost of testing or for time to test, **but**:

- E.g., OH and NY require employer pay for exams under state law; TN does not; WV requires payment for required testing
- WHD requires employers to pay time for testing required during regular working hours; WHD to issue further guidance
- May be required by other laws or a CBA



OSHA General Duty – Face Coverings

- OSHA is listing face coverings as a feasible means of abatement in General Duty Citations being issued post-ETS
- An employer would still likely be subject to a retaliation charge if the employer tried to prevent an employee from voluntarily wearing a face covering unless it creates a greater hazard
- If there is an outbreak, OSHA will potentially allege that the employer should have required face coverings



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OSHA General Duty - Training

- No training requirement now, as such, but OSHA may seek to cite a lack of training as a cause for an outbreak, so at least inform employees on:
 - The CDC document “Key things to know about COVID-19 vaccines”
 - Information about protections against retaliation and discrimination
 - Information about criminal penalties for knowingly supplying false statements or documents (i.e. vaccination proof) ; and
 - Hang a poster containing the CDC “key things”

OSHA Non-HC - Reporting Still Required

- Report all work-related COVID-19 fatalities to OSHA within 8 hours of learning of the fatality if exposure occurred within 30 days of death
- Report all work-related COVID-19 in-patient hospitalizations within 24 hours of learning of the hospitalization and the relatedness if the exposure occurred within 24 hours of the hospitalization
- Work-relatedness: see the OSHA May 2020 questions



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COVID-19 Vaccinations In The Workplace

- EEOC FAQ:
 - Requesting proof of a COVID-19 vaccination is not a disability-related inquiry. But subsequent questions may elicit information about a disability.
 - If vaccinations are mandatory and employee cannot be vaccinated due to “disability” – only severe allergic reaction will qualify per CDC
 - Perform direct threat to health and safety analysis
 - If vaccinations are mandatory and employee cannot be vaccinated due to religious reasons – must provide reasonable accommodation for the belief, unless it would pose an undue hardship.

What the
COVID-19
vaccine
means
for your
workforce





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COVID-19 Vaccinations In The Workplace

- EEOC FAQ: issued by the Chair L2 and L3 Religious Exemption
 - EEOC has its own form for its employees to request a religious exemption
 - Updated Q&A shows that employers should typically consider employees sincere in the assertion of a religious ground for exemption from vaccination, unless the employer has objective evidence contrary to the information provided
 - Long lists of questions will likely be held as retaliatory according to at least one Commissioner on the EEOC
 - The traditional idea that only a de minimis burden on the employer for religious exemptions to be an undue hardship may be misleading
 - Carefully evaluate a religious exemption before refusing to accommodate
 - Non-religious objections or scientific objections do not qualify as religious



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Frequently Cited Standards Related to COVID-19 Inspections

- 1910.134 – Respiratory Protection
 - Medical Evaluations, Fit Testing, Respiratory Protection Program, Training and Information
- 1904 – Recording and Reporting Occupational Injuries and Illnesses
 - Failure to Report Fatalities, Failing to Record Work-related Injuries
- 1910.132 – Personal Protective Equipment
 - Failure to Assess Hazards and certify appropriate PPE, Failure to Provide, Maintain in a Sanitary, Reliable Condition
- OSH Act 5(a)(1) – General Duty Clause
 - Employers Must Protect Employees From COVID-19 Hazards at the Workplace by, for example, Providing Respirators after Assessment, Installing Plastic Barriers and Ensuring 6 Foot Distancing

Potential Employer Defenses

- Employee Misconduct
 - Employees ignored training regarding PPE, Face Coverings or 6 foot distancing:
 - 1) Employer had a rule;
 - 2) Adequately communicated work rule;
 - 3) Employer disciplined employees on [similar, if possible] safety & health issues;
 - 4) Employer took reasonable steps to discover noncompliance.
- Impossibility/Technical Infeasibility of Compliance
 - Document unavailability of respirators or certain sizes of respirators, Fit Testing Kits, etc.
- Greater Hazard of Strict Compliance over interim protective measures
- Lack of Coverage - Standard doesn't apply to a specific industry
- Scientific basis developing/not known



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Respiratory Protection Program

- **Employer-Required** use (First think about PPE under 1910.132) of N95 or other Respirator: OSHA will require a Written Respiratory Protection Program 29 CFR § 1910.134
 - An RPP requires a medical questionnaire, review of the questionnaire by a medical professional, further medical examination if there are issues in the questionnaire and;
 - Fit-testing of the model of respirator to be used by the employee according to prescribed testing methods in the mandatory appendix to the Standard



Respiratory Protection Program



- *Additional OSHA requirements under 29 CFR § 1910.134*
 - Employer must train the employees in the written program
 - Fit-testing must occur annually or when there is a change in the respirator model, unless a reduced directive is in effect
 - Sanitary storage and handling of respirators must be part of the program

Voluntary use of N95s by employees for the purpose of protecting the employee from exposure to COVID-19 requires the employer to give **Appendix D** to the employee

Also consider HazCom and Bloodborne Pathogen Standards and PPE Standards for Eye and Face Protection (1910.133) & Hand Protection (1910.138)



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Heat Stress/Strain Notice of Rule Making

- High OSHA priority for a Heat Standard
- Comments closed in January, but comments are still being posted – almost 800
- No draft standard is available at this time
- Heat is a variable hazard based on humidity, geography, conditioning, environmental measures, amount of sunshine, wind speed in addition to temperature





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Heat Stress/Strain OSHA Standard

- National Safety Council (NSC) Comments:
- Heat Stroke, Heat Exhaustion, Rhabdomyolysis, Heat Syncope (fainting), Heat Cramps, Heat Rash are all illnesses that occur as a result of heat and once the process starts, then the heat illness effects can overwhelm in minutes
- Hot temperatures are more common; Southern U.S. has seen a doubling of 90+ temps since '80

NSC Identifies Industries

- General Duty Clause Citations: Pulp and Paper Mills, Foundries, Bakeries and Kitchens, Construction, Landscaping, Forestry, Agriculture are among those cited
- Ceramics, Plastics Molding and Injection, Steel mills, Sawmills and planer mills, HAZWOPER, Firefighters, warehouses, maritime and remote and isolated work are also high hazard for heat



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NSC – Multi-Employer Worksites

- Both indoor and outdoor work settings can become hot
- NSC notes multi-employer worksites at greater risk due to need for the host employer to ensure that all of the other employers are looking after employees under heat stress/strain conditions

NSC – PPE, Wages, and Heat

- Employees using respirators, chemical protection and other PPE have a greater heat risk
- Any PPE that interferes with the body's ability to sweat or ventilate need special attention
- Lower income workers tend to be in the occupations more exposed to high heat



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NSC – Elements of a Heat Program

- Written heat illness prevention program
- Assign trained person; train employees/mgmt
- Chilled potable water, shade, cool rooms, air movement under 95 degrees, ventilation
- Acclimatization and mandatory rest periods
- Reporting and immediate response to symptoms
- Medical monitoring/surveillance program
- Use recognized alert and exposure limits



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Heat Program Best Practices

- Heat Break – Identify a Trigger Temperature
 - Add additional 5 minutes to each normally scheduled break
- Annual Training
 - Heat Acclimation
 - Heat Stress/Illness Signs and Symptoms (can also be done at NET)
 - Encourage Hydration before coming to work
- Heat Relief Items
 - Sqwincher Freeze Pops (contain electrolytes)
 - Headbands/bandannas, Gatorade, Medilyte tablets



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OSHA Heat App



- NSC: static heat scales or indexes lack flexibility
- The ASTM Foundry Heat Standard E3279-21 is an example for manufacturing
- The OSHA NIOSH Heat App takes into account temperature and humidity for geographic areas
 - Use to train employees on symptoms, first aid measures, and the “feels like” heat indicator can trigger employer program requirements

Unpreventable Employee Misconduct

- ***Wayne Farms, LLC, No. 17-1174, (OSHRC 2020).***
- Machine guarding citation vacated. Employee was warned before the injury.
- Employee's act of reaching into the moving parts of the hopper located 24 inches below the grate was the intentional, idiosyncratic behavior of only one employee.

- ***Angel Brothers Enterprises, LTD., No. 16-0940, (OSHRC 2020).***
- Rejected where no effective enforcement of its rules.
- Employer failed to discipline employees previously.
- Willful classification upheld -- foreman knowingly disobeyed instructions to install a trench box the day before the incident and the foreman's state of mind was imputed to the employer.

- ***TNT Crane & Rigging Inc. v. OSHRC, 821 F. App'x 348 (5th Cir. 2020)***
- Where injury resulted when a crane tipped over, employer failed to establish implied defense of unpreventable employee misconduct because employer's "work rules were inadequate to prevent the violation."



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OSHR – Unpreventable Employee Misconduct

- *Cooper/T. Smith Corporation, No. 16-1533, (OSHR 2020).*
 - Unpreventable Employee Misconduct defense rejected by the Commission where employer could not produce historic disciplinary records showing employees disciplined for the cited misconduct and employee in question was not disciplined following the incident.

OSHR – Multi-Employer Workplace

- *Stormforce of Jacksonville, LLC, No. 19-0593, (OSHR 2021).*
 - In a multi-employer situation, the Commission deemed Stormforce a “controlling employer” where its role on the project was supervisory, including scheduling, logistics, and quality of work such that it could have directed the subcontractors to correct safety violations.

Cited Standards



1910.147 -- Control of Hazardous Energy (LOTO)

1910.212, 215, 219, etc. -- Machine Guarding

1910.1200 -- Hazard Communication; 1030 – Bloodborne Path.

1910.303, 332, 333 -- Electrical

1910.132, etc. -- Selection and *Certification* of PPE by Employer

1910.178 – Powered Industrial Veh. [43 in OH from 2-1 to 3-17-22]

1910.179 – Overhead and Gantry Cranes; 1910.184 -- Slings

1910.28 – Fall Protection; .23 Ladders; .25 Stairways

1910.95 – Noise; .29, .39, Recordkeeping/Reporting



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Cited Standards (Ctd.)



1910.134 – Respirators and Respiratory Protection

1910.1053 – Respirable Silica – also large initial reason for insp.

1910.22 -- Housekeeping

1910.36 & .37 -- Exit Routes; .151 Provide Medical & First Aid

1910.1026 – Chromium; 1048, Formaldehyde; 1025, Lead

1910.101, 106 & 110 – Gases/Flammable Liquids/Petroleum

1910.12 – Applying 1926 to plant construction work

1910.156 – Fire Brigade; Don't forget Combustible Dust!

1910.253 – Oxy Fuel Welding and Cutting

1910.95 -- Noise



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Results

Control of Hazardous Energy LO/TO and Machine Guarding



- Hazardous Energy – why cover this again?
- Machine Guarding – We all know what this is, why?
 - From February 1, 2022 to March 17, 2022, in Ohio, 46 Manufacturing and Warehousing inspections were initiated due to an AMPUTATION – which must be reported to OSHA by phone or internet w/n 24 hours
 - Cincy: 15; Cleveland: 16; Columbus 6; Toledo 9
 - Typically, then the employer will be cited with either a 147 LOTO or 212 etc. Machine Guarding citation, then a detailed inspection of the whole plant



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Control of Hazardous Energy LO/TO and Machine Guarding – Why?



- Citations and Proposed Penalties of \$200K, \$400K, \$600k etc. result because a variety of violations are found
- If there is a history, then a **Repeat**, which does not require OSHA to show intention, up to **\$145,027**
- If there is evidence that the employer knew of the hazard and did nothing and was indifferent to the hazard, then a **Willful** up to **\$145,027** is possible
- Designation as a Severe Violator under the **SVEP** program can then occur, with years before the company is off the list



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Control of Hazardous Energy

LO/TO 1910.147



- Hazardous Energy – what is it?
 - Energy sources can be electrical, mechanical, hydraulic, pneumatic, chemical, thermal, or other sources
 - During servicing and maintenance of machines and equipment, the unexpected startup or release of stored energy can result in serious injury or death
- Employers in General Industry [and Construction] should be aware of this standard and what are the requirements under this standard



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LO/TO General Industry

29 CFR 1910.147



Important Requirements from 1910.147:

- Develop, implement and enforce an energy control program
- Use lockout devices for equipment that can be locked out. Tagout devices may be used in lieu of lockout devices only if the tagout program provides employee protection equivalent to that provided through a lockout program.
- Ensure that new or overhauled equipment is capable of being locked out.
- Develop, implement, and enforce an effective tagout program if machines or equipment are not capable of being locked out.
- Develop, document, implement and enforce energy control procedures
- Use only lockout/tagout devices authorized for the particular equipment or machinery and ensure that they are durable, standardized and substantial.



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LO/TO General Industry

29 CFR 1910.147



- Important Requirements, ctd.:
 - Ensure that lockout/tagout devices identify the individual users
 - Policy that permits only the employee who applied a LO/TO device to remove it
 - Inspect *procedures annually*
 - Provide *training* for all employees covered by the standard – do not use “boilerplate” training



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Application of LO/TO Standard

- 1910.147(a)(2)(i): only applies to control of energy during servicing and/or maintenance of machines and equipment.
- 1910.147(a)(2)(ii): normal production operations are not covered. Servicing and/or maintenance which takes place during **normal production is covered if:**
 - An employee is required to **remove or bypass a guard** or other safety device
 - An employee is required to **place any part of the body** into an area on a machine where work is actually being performed upon the material being processed or where the **danger zone** exists



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Application of LOTO Standard - 2

- **Exception:** minor tool changes and adjustments, and other minor servicing activities
- If they are ***routine, repetitive and integral to the use of the equipment*** for production,
- Provided that the work is performed ***using alternative measures*** which provide ***effective*** protection.
- **Exception often disallowed by OSHA**



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Other Requirements Under the LO/TO Standard

Contractors:

When outside servicing personnel are to be engaged in activities covered by the scope and application of this standard, the on-site employer and the outside employer **shall inform each other** of their respective LO/TO procedures

On-site employer shall ensure that its employees understand and comply with the restrictions and prohibitions of the outside employer's energy control program





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Sec. of Labor v. Angelica Textiles

- Filed 2008, decided 6-24-2018 by the OSHRC – Procedures on each machine present
- “clearly and *specifically* outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy and the means to enforce compliance”
- Found specificity of lockout procedures lacking
- Found insufficient specificity of procedures to **verify each source of energy** has been locked out

Machine Guarding



- Machine Guarding – General Industry – 1910 Subpart O
 - 1910.211: Definitions
 - **1910.212: General Requirements for all machines (hydraulic presses and press brakes have no specific standard)**
 - 1910.213: Woodworking machinery requirements
 - 1910.214: Cooperage machinery
 - 1910.215: Abrasive wheel machinery
 - **1910.216: Mills and calendars in the rubber and plastics industries**
 - **1910.217: Mechanical power presses**
 - 1910.218: Forging machines
 - **1910.219: Mechanical power-transmission apparatus**



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Machine Guarding



- **1910.212(a)(1)**: One or more methods of machine guarding shall be provided to protect **the operator and other employees** in the machine area from hazards such as those created by **point of operation**, *ingoing nip points, rotating parts, flying chips and sparks*. Examples of guarding methods are- barrier guards, two-hand tripping devices, electronic safety devices, etc.
- **1910.212(a)(2)**: Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself.



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General Requirements for Safeguards



- Prevent Contact - prevent worker's body or clothing from contacting hazardous moving parts
- Secure - firmly secured to machine and not easily removed
- Protect from Falling Objects - ensure that no objects can fall into moving parts
- Create no New Hazards - must not have shear points, jagged edges or unfinished surfaces
- Create No Interference - must not prevent worker from performing the job quickly and comfortably
- Allow Safe Lubrication - if possible, be able to lubricate the machine without removing the safeguards



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Five Methods of Machine Safeguarding

- Guards
 - fixed
 - interlocked
 - adjustable
 - self-adjusting
- Devices
 - presence sensing
 - pullback
 - restraint
 - safety controls (tripwire cable, two-hand control, etc.)
 - gates
- Location/Distance
- Feeding and Ejection methods
 - automatic and/or semi-automatic feed and ejection
 - robots
- Miscellaneous aids
 - awareness barriers
 - protective shields
 - hand-feeding tools – not as a substitute for proper guards





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What Makes a Guard Effective?

- Must prevent any contact to the machine hazard and installed to prevent contact around, over, through or under the guard!
 - “...so designed and constructed as to prevent the operator from having any part of his/her body in the danger zone during the operating cycle.” 29 CFR 1910.212(a)(3)(ii)
- Must not present a new/additional hazard
- Must be affixed to the machine where possible
- Must conform w/ other appropriate standards (ANSI B11/NFPA 79/RIA 15.06) – Concept of Control Reliability





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Inspection & Maintenance



- The user shall ensure that the safeguarding is maintained and inspected, and shall ensure the initial training and the continued competency of personnel responsible for the maintenance and inspection of the safeguarding
- When the safeguarding is removed or disabled for maintenance, alternate safeguarding shall be provided to protect maintenance or operating personnel, or other individuals. LOTO!
- **SETUP – Must be locked out or effectively guarded otherwise OSHA will Cite! Not a normal production exception per OSHA.**



Machine Safety Responsibilities

- **Strong Recommendation: Have a *detailed* written program**
- **Management**
 - Ensure all machinery is properly guarded
- **Supervisors**
 - Train employees on specific guard rules in their areas – *document the rules – safety SOP*
 - Ensure machine guards remain in place and are functional – *inspect daily*
 - Immediately correct machine guard deficiencies
- **Employees**
 - Do not remove guards unless machine is locked and tagged
 - Report machine guard problems to supervisors/ maintenance immediately
 - **Do not operate** equipment unless guards are in place
 - **Do not bypass guards** under any circumstances!



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Training on Machine Guarding

- The user should take into account the safeguarding supplier's instructions, specifications, recommendations, etc., when developing a training program
- Training should include, but not be limited to:
 - types of safeguarding;
 - capabilities/options of safeguarding;
 - description of safeguarding for a specific application and hazard;
 - function of the safeguarding;
 - proper installation and operation of the safeguarding;
 - functional testing of the safeguarding;
 - limitations of the safeguarding;
 - abnormal or unexpected operation of the safeguarding.
 - **NO REACHING UNDER, AROUND OR OVER GUARDS for Production Personnel – do not use defeat devices such as magnets!**
- The user shall verify their understanding and provide for continued competency



Relationships



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Budgeting
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Know-How



Results

OSHA and Industry Standards



- ANSI – American National Standards Institute
- API – American Petroleum Institute
- ASME – American Society of Mechanical Engineers
- ASTM – American Society for Testing and Materials
- NFPA – National Fire Protection Association
- SAE – Society of Automotive Engineers



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Results

Helpful HazComm Hints

- 1) Give extra focus on sections of SDS that show what to do in the event of an exposure -- 3-4-5-6
- 2) Prevention: 1-2-7-8-9-10 of SDS; read entire SDS
- 3) Training deficiencies and damaged labels on containers and lack of labels on secondary containers are frequently cited by OSHA
- 4) Update your SDS, but archive old versions!
- 5) Transporting to another plant may require labelling
- 6) Think about HazComm in HAZWOPER training



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The General Duty Clause

Section 5(a)(1) of the OSH Act: each employer “furnish to each of his employees **employment and a place of employment** which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”

- Jurisdiction: *Science Applications Int’l Corp., dba SAIC*, No. 14-1668 (2020)

CAUTION

IF YOU THINK
OSHA IS A
SMALL TOWN
IN WISCONSIN
YOU'RE IN
TROUBLE

000000-000000 000000-000000 000000-000000 000000-000000

The General Duty Clause



Elements: the Government must prove:

- A condition or activity in the workplace presents a *hazard* to an employee;
- The condition or activity is recognized as a hazard [actually by the employer or by the industry the employer is in (e.g., Robotics Industry Association), or generally by industry (e.g., NFPA)];
- The hazard is causing or is likely to cause death or serious physical harm; and
- A feasible means exists to eliminate or *materially reduce* the hazard



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The General Duty Clause



- Recognition of a Hazard
 - Actual knowledge of the employer or by a “general understanding in the employer’s industry.” *Otis Elevator*, 2007, *Kokosing*, 1996, quoted in SAIC, 2020.
- Industry Knowledge: see Wahoff, ABA Journal of Labor & Employment Law, Vol. 34, No. 1: *Industry Standards: How Does OSHA Use Them to Prove Its Case Under the General Duty Clause*
- If actual knowledge of the hazard is shown, no need for industry standards to prove knowledge.



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General Duty -- Feasible Means of Abatement



- Sec’y did not show a feasible and effective means of abatement in the alleged heat exhaustion death case, *A.H. Sturgill Roofing, Inc.* (2019) by using general diagrams of heat stress, or stating the employer should have emptied a grease drawer (*Mid-State Waffles*) .
- But in a workplace violence case in which the employee was killed by a client being served, the Workplace Violence Prevention Program described by the Sec’y would have materially reduced the hazard, *Integra* (2019), and did in the death of a swimmer training a sea lion to detect intruders on the coast when keeping in contact with the swimmer at all times would have materially reduced the hazard. *SAIC* (2020)

Secretary of Labor v. Missouri Basin Well Service

March 1, 2018

- Commission vacated General Duty Clause citation
 - Secretary failed to prove that materially effective means existed to abate the hazard
- Secretary alleged there was a hazardous condition of an unsafe distance between the mud pump and the discharge of oil and gas from the discharge tank.
- Secretary failed to prove his proposed abatement measure would materially reduce the risk of a fire.



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Missouri Basin, ctd.



- Secretary did not utilize *expert witness* testimony, but relied solely upon extensive testimony of Compliance Officer who was not qualified as an expert and the Commission gave no weight to his testimony. Employer needs an expert, too.
- Secretary also cited API safety recommendation w/o expert
 - this provision was located in a section titled “Special Services” not applicable to the circumstances in this case.
- Note: Commission has jurisdiction over not only legal conclusions in case, but facts as well - review from the beginning



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Multi-Employer Worksite Employer Categories

- **Exposing Employer** - An employer whose employees were exposed to a hazard that may or may not have been created by that employer.
- **Creating Employer** - An employer who is alleged to have created a hazard to which employees were exposed.
- **Controlling Employer** - The employer who was responsible by contract or actual practice for the site with authority to correct.
- **Correcting Employer** - The employer who allegedly had the responsibility to correct the hazard.



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Implications For Different Industries --

OSHA will evaluate whether each employer met its responsibilities according to category

- Healthcare – multiple employers with employees entering hospitals for multiple procedures/services
- **Manufacturing – use of temporary and contract labor; contractors working in the plant revising the line, etc.**
- Construction: often many coming and going with materials and different crafts and laborers participating – who is a supervisor of whom?
- Colleges and universities – contracted service providers on campus

Labor entities/Contractors on your Site

- 1) Regular general safety/indemnification provisions insufficient: specific contract language is needed to assign responsibilities and perhaps avoid joint employer claims
- 2) Assess whether the contractor's safety program is sufficient
- 3) Some standards, such as PSM and LOTO require the host to exchange information with contractors
- 4) Have your Team trained and ready as to roles in case of compliance inspection by OSHA and take contractors into account
- 5) Consult knowledgeable OSHA counsel to make sure you have taken into account all considerations regarding contractors' employees
- 6) Insurance does not cover OSHA Citations and Defense –
Suggestion: reserve funds by estimating what violations might cost



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