

Writer's direct phone
(312) 460-5877

Writer's e-mail
mlies@seyfarth.com

Writer's direct fax
(312) 460-7877



131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

PRIDE GOES BEFORE THE FALL: OSHA'S EMPHASIS ON FALL PROTECTION

By Mark A. Lies II¹
& Kerry M. Mohan²

INTRODUCTION

GRAVITY

Ever since Sir Isaac Newton's book *Philosophiæ Naturalis Principia Mathematica*, published in 1687 quantifying the principles of gravity, there has been no question that falls due to the hidden force of gravity can result in personal injury. This hazard is greatly magnified in the workplace because of the nature of work at heights and employee exposure to falling from platforms, catwalks, equipment and structures onto other equipment or structures. Despite this well-known hazard, employees frequently and tragically expose themselves to this hazard because they either arrogantly or mistakenly believe that they can avoid a fall by their actions. It is the employer's responsibility to prevent such careless conduct.

OSHA

Over the past several months, OSHA has again targeted its cross-hairs on fall protection and is forcefully reminding employers of actions they should take to prevent injuries and deaths related to fall hazards. For instance, on February 14, 2014, OSHA issued a letter specifically addressed to the communication tower industry, "reminding" employers of their duties to ensure employees are trained and fully-protected from fall hazards. (**OSHA Letter to Communication Tower Industry Employer**)³ More recently, on March 19, 2014, OSHA issued a national

¹ Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment law and civil litigation.

² Kerry M. Mohan is an associate with Seyfarth Shaw, (312) 460-5659, kmohan@seyfarth.com. His practice focuses on occupational safety and health, traditional labor matters, and related employment law and civil litigation.

³ https://www.osha.gov/doc/topics/communicationtower/Letter_CT_Employers.html

“stand-down for fall prevention in construction” to raise awareness among employers and employees about fall hazards. (**OSHA Announces National Stand-down for Fall Prevention in Construction**)⁴ By taking these actions, OSHA has placed all employers on notice that OSHA will more closely scrutinize employers’ fall protection programs and will likely issue more severe citations and penalties for violations of OSHA’s regulations. Further, although OSHA’s recent announcements have focused largely on the construction-related industry, employers subject to OSHA’s General Industry standards should be prepared to face similar scrutiny. This article addresses OSHA’s fall protection requirements and the potential issues employers may face related to fall protection.

OSHA’S CONSTRUCTION INDUSTRY FALL PROTECTION STANDARDS

Section 1926.501 of OSHA’s Construction regulations provides that all employees walking or working on a surface with an “unprotected side or edge which is 6 feet (1.8 m) or more above the lower shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.” Further, Section 1926.105 provides that “[s]afety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.” Though these two standards require different forms of protection, the common denominator is that employers in the construction industry are required to provide employees fall protection if employees are exposed to a fall hazard of 6 feet or more. In addition, there are extensive fall protection regulations relating to steel erection and residential construction.

OSHA’S GENERAL INDUSTRY FALL PROTECTION STANDARDS

OSHA’s General Industry regulations also require employers to ensure employees are protected from fall hazards. In Section 1910.23, OSHA provides that “every wall opening from which there is a drop of more than 4 feet” or “every open-side floor or platform 4 feet or more above adjacent floor or ground level” shall be guarded by a standard railing or other means of fall protection.

In addition to citing employers under the four foot rule, OSHA has often utilized its personal-protective equipment (“PPE”) standard, Section 1910.132, which requires employers to conduct a hazard assessment and provide appropriate PPE, including fall protection, if fall hazards exist in the workplace. Thus, in the event OSHA finds a violation under Section 1910.23 for failing to provide fall protection, OSHA may also cite the employer under Section 1910.132 for failing to conduct an appropriate hazard assessment to determine that fall protection should have been provided and thereafter to provide the PPE.

⁴https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=25755

POTENTIAL FALL PROTECTION ISSUES FROM SEEMINGLY INNOCUOUS SITUATIONS

It is generally understood by all employers that employees working at significant heights must be provided some form of fall protection, whether it be by guardrails, a personal fall arrest system, safety nets, or something else that is equally effective. However, employers subject to OSHA's General Industry standards can sometimes overlook how OSHA's fall protection requirements apply to more than just employees working at such heights. For instance, because OSHA may consider almost any place an employee can stand on to be a "working/walking surface," OSHA has issued citations to employers because employees were not provided fall protection when they were on:

- Loading docks;
- Beds of a flatbed truck;
- Hoods and tops of a motor vehicle;
- Machinery housings;
- Scissor lifts;
- Storage racking systems; or
- Roofs and parapets.

In all of these situations, while the risk of falling may appear to be minimal, employees can often be exposed to falls of 4 feet or more. Thus, employers must conduct a fall hazard assessment to evaluate all potential surfaces employees may access and determine whether the employees are exposed to a fall of 4 feet or more and, if so, what type of fall protection must be provided.

FALL PROTECTION CONCERNS IN MULTI-EMPLOYER WORKSITES

Because we live in a world of specialization, many employers often have sub-contractors at their facilities to perform any number of jobs. In such a situation, OSHA will evaluate employee exposure to hazards and violations under the multi-employer worksite doctrine, where a host employer can be issued a citation even when their employees were never exposed to the hazard. The host employer's citation can be based on the claim that the host employer "controlled" the hazard, "created" the hazard, or failed to "correct" the hazard.

In a 2011 OSHA Review Commission decision, OSHA expanded the application of its fall protection requirements to a host employer, even when its employees were never exposed to the hazard. In *Secretary of Labor v. Ryder Transportation Services*, OSHRC Docket No. 10-0551 (ALJ, February 28, 2011), the employer, Ryder Transportation Services (Ryder), owned a facility that it used to rebuild automotive equipment for its vehicles. Since 2006, no Ryder employee had been on the roof and the roof was classified as a restricted area where employees were forbidden to access the roof. In 2009, Ryder requested an outside electrical contractor, M.C. Dean (Dean), to install exhaust fans in the facility. After the fans were installed and failed

to function, the Dean employees decided to access the roof to determine why the fans, which protruded through the roof, did not function. While on the roof, a Dean employee fell through an unguarded skylight to his death.

Though none of Ryder's employees had accessed the roof (and were never exposed to the hazard), OSHA cited Ryder under multi-employer worksite doctrine as the "controlling employer" for failing to protect the Dean employee from the hazard. The Administrative Law Judge found that the multi-employer workplace doctrine applied and that Ryder was the controlling employer. But, he vacated the citation on a narrow finding that Ryder had "neither actual nor constructive knowledge that an employee would be exposed to unguarded skylights that were *remote* from his work area" (emphasis added). OSHA has appealed the decision.

This decision graphically demonstrates how any employer who engages an outside contractor to perform work is potentially exposed to liability if it does not confirm that the outside contractor employees are protected from fall hazards. This will require the host employer to confirm that sub-contractors are aware of potential fall hazards, have provided their employees fall protection, and have properly trained their employees on how to use fall protection.

RECOMMENDATIONS

To avoid potential liability based on fall hazards, an employer should consider the following actions:

- conduct a job hazard analysis of its facility to determine whether fall hazards exist;
- once the job hazard analysis has been completed, consider what type of fall protection is required and feasible for employees (and outside contractors) who may be exposed to the fall hazard;
- after the feasible means of fall protection are identified, develop a written procedure that incorporates these measures and also sets out under what circumstances "authorized" employees can work in areas with fall hazards and what type of fall protection will be required;
- conduct documented training for the "authorized" employees who access work near the fall hazards, monitor their compliance, and discipline the employees who are non-compliant;
- when the employer is utilizing an outside contractor to perform work in areas that contain fall hazards, conduct and document a meeting with the outside contractor and provide the outside contractor with information on the presence and location of any fall hazards; and
- confirm and document that the outside contractor has been informed of these hazards and that the outside contractor has the means and methods to provide the necessary fall protection for its employees and that it will supervise, monitor and enforce compliance with its fall protection program.

If an employer undertakes these actions, it will minimize its potential liability for fall hazards for its own employees and those of the outside contractor.