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OSHA DEFENSE 101: AVOIDING THE OSHA LIABILITY PYRAMID

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I. Introduction

Under the Obama Administration, employers have already seen OSHA's enforcement budget increase. The Democratically-controlled Congress has publicly announced its intention to amend the OSHA law to increase civil and criminal penalties. OSHA representatives have also identified new aggressive inspection strategies directed toward certain hazards or groups of employers. Over the next four to eight years, at least, employer can expect increased enforcement activity from OSHA, including more workplace inspections, more citations issued, higher penalties, and higher severity classifications, even criminal exposure for individual managers. Thus, it is critical for employers to understand their potential exposure for violations of health and safety regulations and to develop enterprise-wide strategies for responding to OSHA inspections and citations. A recent decision from the OSHA Review Commission, the judicial body within OSHA, illustrates the pitfalls of navigating OSHA law and is a clear signal

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of the trends that will emerge from the agency over the next several years. *Sec. of Labor v. E. Smalis Painting Co., slip op.*, O.S.H.R.C. Docket No. 94-1979 (Apr. 10, 2009) (“*Smalis*”). The cumulative impact of a history of citations resulted in an OSHA liability “pyramid” of multiple citations and millions in penalties. From large-scale construction sites to office buildings and factories, all employers can glean important lessons from *Smalis*.

II. Background

The underlying citations in the *Smalis* case involved employee exposure to lead while performing abrasive blasting to remove lead-based paint from a bridge. While the citations themselves are noteworthy, they are far less critical to employers than *Smalis*’ prior history of OSHA enforcement:

- In **July 1992**, *Smalis* was hired by the Pennsylvania Department of Transportation to repair a bridge. Under the contract, *Smalis* was required to remove lead-based paint using an abrasive blasting method.
- In **September 1992**, OSHA inspected the Pennsylvania worksite. During that inspection, OSHA found that employee exposure to lead was greater than the limit prescribed under its regulations. Consequently, OSHA issued three citations. The company contested the citations, but ultimately settled with OSHA, accepting all of the citations and paying a penalty of \$50,000.
- In **March 1993**, OSHA inspected another *Smalis* bridge project, this time in Jacksonville, Florida. OSHA again found violations of its lead-related regulations and issued citations. This time, however, OSHA classified the citations as “Repeat,” relying on their substantial similarity to the 1992 citations out of Pennsylvania.

- In **December 1993**, OSHA once again inspected the Pennsylvania bridge worksite. These type of “follow up” inspections by the agency are routine when there are ongoing operations. OSHA found that, despite Smalis’ prior settlement commitment to provide training, medical surveillance, respiratory protection, and air quality monitoring to protect its employees against exposure to lead, the Company had not done so in many respects.

As a result, the company’s liability took a dramatic turn, with OSHA issuing citations alleging **four Serious and 202 Willful violations** of the Act, resulting in a total proposed penalty of **\$5,008,500**.

III. Lesson #1: Escalation of Enforcement

Regardless of the particular regulations or compliance requirements that formed the bases for the citations issued to Smalis between 1992 and 1993, the facts illustrate the dangers of accepting OSHA citations. Many employers are totally unaware that if the employer accepts a citation, OSHA may issue a “Repeat” citation to the employer at any worksite in its jurisdiction for three years after the date of the original citation if it can establish that the violations are “substantially similar.” “Repeat” citations carry a maximum civil penalty of \$70,000 per citation, an amount that the Democratically-controlled Congress may well increase in the near future under the proposed Protecting America’s Workers Act.

Frequently, employers are tempted to accept an OSHA citation as written, particularly because the proposed penalties tend to be small compared to the costs and disruption of litigating the citation. In addition, employers who receive citations classified as “Other than Serious,” or “Non-Serious,” in some jurisdictions, with no penalty, may believe that contesting the citation is a waste of resources. However, neither the amount of the penalty nor the citation’s classification

will protect an employer from receiving a Repeat citation for a similar violation. Many employers erroneously believe that an “Other than Serious” or “Non Serious” citation cannot be used as the basis for a Repeat citation. In addition, a Repeat citation need not relate to the same worksite as the previous citation. As employers increase the number of worksites around the country, so too increases the risk of Repeat citations for OSHA violations.

The informed employer will not accept any OSHA citation, regardless of the penalty amount or the classification, without a careful evaluation of the potential risk of receiving a Repeat citation. The employer has the right to contest any OSHA citation and should consider the following:

- **Is the citation factually correct?** The employer must thoroughly investigate the facts underlying the citation with legal counsel. This includes interviewing witnesses to any incident or alleged violation and reviewing any relevant documentation, such as training and disciplinary records, and incident and injury logs.
- **Is the citation based on sound law?** The employer must evaluate any legal and/or factual defenses to the citation and the relative strengths of any such defenses.
- **What is the employer’s risk of citation for the underlying hazard in future inspections?** The employer must determine which citation or citations present the greatest risk for future liability, either because of the pervasive nature of the activity or the expansive nature of the citation.
- **What is the negotiation strategy?** The employer must formulate a negotiation strategy based on the evaluation of defenses and liability risks, including which citations must be vacated or reclassified and what abatement will be required.
- **What is the strategy for the informal conference?** The employer should ask for an informal settlement conference with OSHA and present its arguments, including producing documents and witnesses that may be critical to establishing one or more of the employer’s factual defenses.

Lesson #2: Violations Alleged on a Per-Employee Basis

In addition to illustrating the importance of developing a comprehensive, enterprise-wide strategy for evaluating any OSHA citations issued to an employer, the *Smalis* decision is significant because it upholds OSHA's ability to issue citations on a per-employee basis. In doing so, the Review Commission departed from its own precedent, foreshadowing a shift away from legal positions that favor employers.

In this case, OSHA issued a total of **seventy-one Willful citations** to Smalis for failure to train seventy-one employees as required in OSHA's lead in construction standard, 29 C.F.R. § 1926.62(1)(1)(ii). The Review Commission upheld **twenty-seven** of those Willful citations, **one for each of the twenty-seven employees** who had been exposed to lead at or above the action level and who had not received the training.

Significantly, in affirming these twenty-seven Willful citations, the Review Commission reversed its prior decision in *Sec. of Labor v. Erik K. Ho, Ho Ho Ho Express, Inc.*, 20 O.S.H. Cas. (BNA) 1361 (O.S.H.R.C. Sept. 29, 2003) ("*Ho*"). In that case, OSHA issued eleven citations to the employer for failing to provide eleven employees with the training required under OSHA's asbestos removal standard, 29 C.F.R. § 1926.1101(k)(9)(i). The Review Commission vacated all but one of those citations, holding that OSHA did not have the authority to cite the employer on a per-employee basis for violations of a training requirement. The Review Commission recognized that some standards could apply on a per-employee basis, but only where the cited standard was sufficiently "individualized" to give the regulated community notice that per-employee citations were possible. The Review Commission found that training standards did not fall into the category of individualized requirements, such as recording a particular injury in an injury log, but instead was a "work practice" that applied to all employees.

The Review Commission held that training standards did not provide sufficient notice to employers that they could be penalized for violations on a per-employee basis.

As in *Ho*, *Smalis* involved per-employee citations under an **employee training** standard. Despite this similarity, the Review Commission in *Smalis* applied none of the same reasoning related to the validity of the per-employee citations. Instead, the Review Commission re-evaluated *Ho* and held that, when read in its entirety, the asbestos training standard “imposes a duty that runs to each employee.” Applying a similar analysis to the lead training standard, the Review Commission upheld **twenty-seven training citations based on the employer’s failure to train twenty-seven employees**. Ultimately, the Review Commission imposed a total penalty of just over \$1,000,000.

It is apparent that *Smalis* is a departure from somewhat employer-friendly legal precedent. Perhaps more importantly, the decision illustrates how an employer’s failure to implement a single program, such as required training, can lead to hundreds if not thousands of citations, one for each and every employee who did not receive the training.

VI. Recommendations

To protect against numerous citations, we recommend that employers do the following:

- Develop written policies for ensuring that required training is conducted for every employee subject to the requirement. This should include a method for ensuring, for example, that employees who are absent from work on the date of their scheduled training are not overlooked or forgotten.
- Maintain documentation demonstrating the receipt of training for every employee required to receive the training.
- Hold individual managers and supervisors accountable, through appropriate disciplinary measures where an employee does not receive required training. Maintain documentation of any such disciplinary action.

- Develop an electronic method for tracking and reminding management of the need for any regularly required refresher training.

VII. Conclusion

Under the new Administration, employers are experiencing more aggressive OSHA enforcement of workplace safety and health laws and regulations. This increased enforcement exposure, coupled with the Review Commission's validation of OSHA's ability to issue citations on a per-employee basis in *Smalis*, reinforces the need for employers to develop systematic and thorough strategies for addressing OSHA citations and correcting health and safety violations promptly to avoid a similar fate.