

# Minimizing Your OSHA Liability

*presented by*

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# Self-Evaluation

- Do you work for a company that has safety policies and procedures?
- Do those safety policies and procedures address the typical hazards your employees encounter on a daily basis?
- Does your company provide weekly safety training regarding various aspects of the safety policies and procedures?

# Self-Evaluation *cont'd*

- Does someone from the company frequently inspect or audit company job site to ensure employees are complying and management is enforcing the written safety policies and procedures?
- If violations are discovered, are the offenders disciplined and is documentation of that discipline retained?

# **I. Defenses to Citations**

# Three ways to attack a citation

- Procedural defects
- Defects in the prima facie case
- Affirmative defenses

# Procedural Defects

- CO must present his/her card and identify himself/herself
- Hold opening conference
- Must be allowed to accompany CO during inspection
- Hold closing conference

# Attack Prima Facie Case

OSHA must prove by a preponderance of the evidence four elements

- Cited standard applies
- Failure to comply with the cited standard
- Employees an access to the violative condition
- The employer knew or should have known of the condition with the exercise of reasonable diligence
  - Knowledge - either, actual or constructive, will be imputed to the employer from any supervisor, foreman

# Affirmative Defenses

- Numerous affirmative defenses available
- Most very difficult to prove
  - Impossibility, greater hazard, economic infeasibility

## **II. Unpreventable Employee Misconduct**

# Unpreventable Employee Misconduct

- Single, best defense is Unpreventable Employee Misconduct Defense, also called Isolated Employee Misconduct Defense.
  - ➔ Basically shifting liability back to employee
  - ➔ Premise of this defense is that it would be unfair to cite the employer who has promoted safety and trained the employees for something that could not be prevented

# Unpreventable Employee Misconduct *cont'd*

- The beauty or strength of this defense is that you can implement all the necessary elements of the affirmative defense into your work environment before you even get cited.
- If you have these elements in place there is a strong chance you will not get cited or will be able to beat any citation you receive.

# Unpreventable Employee Misconduct *cont'd*

- What are the four elements of the unpreventable employee misconduct defense?
  - ➔ Employer has work rules designed to prevent the cited violation
  - ➔ Employer has adequately communicated these rules to its employees
  - ➔ Employer has taken steps to discover violations of its work rules and/or OSHA regulations by its employees
  - ➔ Employer has effectively enforced the rules when violations have been discovered

# Employer Has Work Rules Designed to Prevent the Cited Violation

- Work rules must address the hazards most frequently encountered by your employees.
- Work rules must be as strict or stricter than the OSHA standards (i.e., mirror the OSHA regulations language).
- Work rules need to be in writing.
- Work rules should be distributed to all employees.

# Employer Has Work Rules Designed to Prevent the Cited Violation *cont'd*

- Employees should sign and date an acknowledgement upon receipt of the work rules.

“I, \_\_\_\_\_, hereby agree that I have received, read, understood and had an opportunity to ask questions about XYZ Company Safety Policies and Procedures. Any additional questions I may have may be directed to \_\_\_\_\_.”

- Work rules should be in Spanish as well as English if you employ employees that are Spanish-speaking only.

# **Employer Must Adequately Communicate the Work Rules**

- There is no “grace period” granted by OSHA for new employees.
- Need to ensure new employees are properly trained prior to being sent to work
  - Examine your orientation program
  - Classroom, video, one-on-one review of work rules, interactive computer program
  - OTJ training will not provide a defense

# Employer Must Adequately Communicate the Work Rules *cont'd*

## ■ Continued training

- Done at a minimum on a weekly basis
- Educate employee regarding most frequently encountered hazards
- Review portions of work rules and OSHA standards
- Distribute hand-outs
- Maintain documentation!
  - date, names of individuals in attendance, trainer, translator, detail specific topics covered, job site or location of class

# **Employer Must Adequately Communicate the Work Rules** *cont'd*

- Hold class in Spanish as well as English
- Management person should run session
- Office person should maintain strict records of weekly meeting and track subject matters
- Discipline supervisor for failure to hold meeting or for failure to return documentation in timely manner
- Periodically use guest speaker or do demonstration to enforce safety (i.e., video vendor demo.)

# Take Steps to Discover Violations

- Most complicated element because, if done, employer can also allege it did not have constructive knowledge
- Element OSHA will attack
  - ➔ Question laborers
    - how long did condition exist?
    - how long were they performing in such a manner?
    - did their supervisor instruct them to work in such a manner?
    - did their supervisor or anyone else from the company know they were doing this?

# Take Steps to Discover Violations *cont'd*

- Management official in charge of job site, foreman, supervisor or superintendent, must not have had any knowledge of misconduct.
- On-site management representatives or agents should inspect job site at least daily.
  - ➔ Detect hazard
    - written up hazards condition and abatement taken
  - ➔ Detect work rule violation
    - write up employee(s)

# Take Steps to Discover Violations *cont'd*

- Use other resources to do periodic safety inspections
  - ➔ Company safety representative
  - ➔ Top company management officials
  - ➔ Worker compensation carrier
  - ➔ General liability carrier
  - ➔ Outside consultant/auditor
  - ➔ Sub-contractor

# **Discipline When Violations Are Discovered**

- Second element frequently attacked by OSHA
- Does your company have a disciplinary system?
  - ➔ Is it in writing?
  - ➔ Is it in or referenced in the work rules?
  - ➔ Do the employees know they can be disciplined for violation of work rules?
  - ➔ Do the supervisors know they can, and will be disciplined for failing to discipline an employee for violating the work rules?

# Discipline When Violations Are Discovered *cont'd*

- Do you document verbal warning?
- Do you track discipline?
- Have you suspended or terminated an employee for violating your safety rules?
- Are employees aware that other employees have been disciplined for violating work rules?
- Your safety program must have “teeth.” In order to have that, you must enforce the safety rules through discipline.

# **III. What if the Supervisor is Violating the Safety Rule?**

# If Supervisor Violates the Safety Rule

- Normally, the affirmative defense fails if it is shown that the supervisor was the bad actor or the supervisor had knowledge of the bad acts and did not stop them.
- Supervisor's knowledge is imputed to the company. The company had the knowledge of the violation and failed to correct it. Thus, it was not unpreventable.
- The success of this defense depends in large part on the enforcement of the work rules by the supervisor.

# If Supervisor Violates the Safety Rule *cont'd*

- Can allege unpreventable employee misconduct involving a supervisor, but the burden of proof is very high for employer.
  - ➔ Act does not impose strict liability on the employer
  - ➔ Must truly prove action was an isolated, unauthorized act of misconduct by the foreman.
  - ➔ The employer had done everything possible to ensure compliance

# If Supervisor Violates the Safety Rule *cont'd*

## ■ Elements needed

- ➔ Significant demonstration of employer's commitment to safety
  - effectively implemented work rules
  - training of supervisors
- ➔ Effective communication of work rules to supervisors and employees alike
  - significant evidence supervisor was well trained
- ➔ Supervision of supervisory employees to ensure compliance of work rules

# If Supervisor Violates the Safety Rule *cont'd*

- Discipline of previous supervisors
  - This supervisor should have no past problems
- No evidence of past safety issue with supervisor in question

# Conclusion

- Supervisors must comply with company work rules and ensure enforcement of them.
- Employees must know they can be disciplined for failing to comply with the work rules.
- Employer must document all compliance steps.
- Auditing the workplace and progressive discipline are the keys to a successful safety program and an enforceable affirmative defense.