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Workplace Injuries

Scrutinizing Workplace Fatalities

Assist in the investigation and reduce liability risk

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Workplace fatalities are not an uncommon occurrence: Since 1992, private industries have averaged at least one fatality each year for every 25,000 employees. Nor are fatalities limited to so-called "dangerous" industries like construction or electrical utilities — one-fourth of all private industry fatalities occur in the professional, retail, hospitality and financial industries. And because the Occupational Safety and Health Administration (OSHA) investigates each workplace fatality, any large company may face an OSHA fatality investigation.

Such is the microscope under which any company can now find itself, long before the causes of a fatal accident are known with any certainty. During this time, OSHA will be on site, interviewing employees, inspecting the facility, requesting and reviewing documents and, eventually, issuing citations. Familiarity with these OSHA procedures, as detailed in this article, can help companies effectively assist such investigations while reducing any potential liability.

Notification: Employers must notify OSHA within eight hours of an employee's work-related death. OSHA does not take kindly to oversight of this requirement — and rightly so — because witnesses may become unavailable, memories may fade and physical evidence may be lost or destroyed. (One note — this article refers to the federal OSHA. Twenty-one states and Puerto Rico have their own occupational safety and health agencies with requirements that may differ from those detailed here. Employers should know their states' requirements.)

Interviews*:* In any investigation, the OSHA compliance officer assigned to the case will request interviews of hourly and management personnel. Companies should schedule all interviews on company time rather than give the investigators personal information such as employees' home telephone and Social Security numbers. And although company representatives cannot attend the interviews of an hourly employee unless requested by the employee, employees should be debriefed in a nonthreatening way about their interviews to determine OSHA's concerns.

Company representatives can — and should — attend management and supervisory interviews, taking notes and keeping the following in mind. First, before any OSHA management interview is scheduled, the company should conduct its own interviews to determine what happened. Second, managers (and hourly workers, if possible) should be advised not to speculate — it is difficult to argue that a guess was not an admission after the fact. Third, interviews should be scheduled in reverse seniority order, so that the operations manager can be prepared with the questions posed to the part-time supervisor. Fourth, interviews are not depositions, and the interviewee may therefore, after careful consultation, volunteer helpful information. Further, employees should not sign a "transcript" after the interview; the compliance officer is not a court reporter, and a hastily prepared summary may contain errors. Any written company representative statement must be reviewed by upper management and legal counsel before signature.

The Site of the Accident

Inspection. An inspector will want to see the accident location and may decide to inspect the entire facility. A management representative must accompany the compliance officer throughout the inspection, noting anything the compliance officer finds, and separately taking the same pictures and measurements as the compliance officer — as well as arranging for parallel industrial hygiene monitoring. The compliance officer will also informally interview, and obtain admissions from, supervisors and managers. Companies should make certain that the compliance officer deals with only one competent manager, familiar with the facts that have been ascertained. Overall labor relations may affect the inspection, because union or other employee representatives have a right to accompany the inspector.

Documents. An inspecting compliance officer may request various docu-

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ments, from safety and health programs to training and maintenance records. Any requests could be backed up by a subpoena, so companies should accommodate the requests if possible. Counsel can arrange for sufficient time to gather and review document requests for privilege, trade secret information and possible third-party liability — the documents will be in the compliance officer's inspection file and publicly available through Freedom of Information Act (FOIA) requests. Counsel should mark any documents subject to FOIA exemption and seek a confidentiality agreement with OSHA. Finally, companies are not required to create documents in response to OSHA document requests that are not otherwise retained in the ordinary course of business.

Relationships. Companies should immediately designate a liaison to the next of kin to offer support and assistance with any available benefits. And, of course, the media will soon call. A public spokesperson should prepare a public statement: "No comment" will not do. Rather, the spokesperson should explain the facts related to the accident if they are clearly known and have been thoroughly discussed and agreed upon by all relevant company personnel, subject to counsel review. Otherwise, it is entirely appropriate to state that the accident remains under investigation and that the company is working closely and cooperating with OSHA and other agencies investigating the accident.

Possible OSHA violations

Citations. Once the investigation (which can take up to six months) is complete, the compliance officer will conduct a closing conference with the company, discussing likely OSHA violations. The closing conference is an opportunity to ask about the basis of proposed violations and to put the company's best foot forward on abating hazards; it is not the time to make admissions. The company has 15 working days from the date it receives the citations to contest them. The company may also hold an informal conference with the OSHA area director during that 15-day period to try to settle the citations.

Informal conference. Lawyers usually do not attend informal conferences, but counsel should break this rule for fatalities. Attending this conference with essential and high-level personnel lets OSHA know that the company is taking the accident seriously, and it is counsel's only chance to talk to the area director freely and informally. Although the facts in each case are different, companies should emphasize the following points at informal conferences:

First, there should be a demonstration of the company's commitment to safety. Informal conferences are opportunities for positive contacts. A company should provide information about safety programs that will help demonstrate that it is already committed to safety and does not need a high-penalty prod to get moving. Especially if the programs were in place before the accident, they may support an argument for modification or withdrawal of a citation.

Not a Strict Liability Statute

Second, negligence does not automatically equal OSHA liability. The company may have concluded that it bears some responsibility for the accident; counsel may even acknowledge responsibility at the informal conference. But this does not prevent the company from challenging the citation. The Occupational Safety and Health Act is not a strict liability statute, and the occurrence of a workplace accident does not mean the company necessarily violated OSHA regulations. A company violates a regulation as written and not as OSHA thinks it should have been written.

Other defenses include employee misconduct — violation of work rules designed to prevent such an accident. Or the company can argue that it took required reasonable actions, but the unforeseeable occurred. For any violation, OSHA must prove that the employer knew or, with reasonable diligence, should have known of the hazardous condition. Even if the company recognizes in hindsight that it could have done more to prevent the accident, that does not necessarily amount to OSHA liability.

The company should also seek to eliminate citation items. When OSHA inspects a facility, it may allege numerous violations unrelated to the fatality, from expired fire extinguishers to missing exit signs. Such citations should not be accepted just to "get along," even if they are "minor." The company could face a "repeated" citation if a similar condition or admitted violation is found at any of the company's facilities in the next three years — or regardless of the elapsed time if the next violation is "willful" — with a possible $70,000 penalty.

Further, the company should seek to reduce its citation classification. There are four citation classifications: repeated, willful, serious and other-than-serious. Companies should seek to reduce the classifications as much as possible for two reasons. First, third-party liability: Civil plaintiffs may introduce OSHA citations as evidence that the employer intentionally disregarded or was indifferent to safety requirements (the willful classification) or knew or should have known about the hazard (the serious classification). Further, if the accident victim is not the company's employee, the workers' compensation defense will not be available, and a lower classification mitigates the possibility of third-party liability.

Second, a serious citation associated with the fatality could subject the employer to OSHA's Enhanced Enforcement Program (EEP). And unless the company is confident that OSHA could inspect all of its facilities and find no violations, it should seek to avoid entry into this burdensome program at all costs.

Finally, willful violations of a standard that are causally related to a fatality can lead to criminal prosecution. The Protecting America's Workers Act, if passed, would increase the maximum sentence from six months to 10 years in prison.

Reducing Penalties

In addition, the company should seek to reduce penalties. This goal is obvious, but listed last for a reason. While the company may be tempted to reap the short-term goal of a 50 percent penalty reduction (and a reduction that high is unlikely when a fatality occurs), it might be better to accept a higher penalty with fewer citations, considering the ramifications of repeated or willful citations or entry into the EEP.

That said, citation penalties associated with fatalities often run to more than $100,000, and penalty reduction may indeed be the company's highest priority.

Finally, there is the notice-of-contest option. If a settlement is not reached at the informal conference, the company must file a notice of contest. Counsel then begins settlement discussions with the trial attorney (with, of course, the possibility of a hearing on the horizon). Prospects for a favorable settlement may improve in negotiations with the regional solicitor's office once counsel has access to OSHA's investigation file. Much will depend on the government attorney's willingness to take a fresh look at the violations and exercise judgment independent from his OSHA client. Successful negotiations ultimately depend on the credibility the company and counsel have developed during the investigation and in previous dealings with the agency, both locally and in Washington.

Workplace fatalities, unfortunately, are not an uncommon occurrence. They are tragic, and often lead to understandable human reactions: Where did I go wrong and how could I have prevented it? The first reactions can lead to "confessions" to the first OSHA compliance officer on the scene, admissions that can be mistaken in context, and that can carry disastrous citation, third-party liability and public-relations consequences. Managing such workplace fatalities, or workplace disasters with multiple injuries, requires expertise, experience and sensitivity. ■