

2024 OSHA Q&A



Are you seeing, OSHA or federal prosecutors more willing to use OSHA citations as the basis for criminal cases – either for willful violations with fatalities or lying to the federal government?

The simple answer is yes. Over the past few years, the Department of Labor has been transparent about increasing its partnerships with state and federal law enforcement. Based on its messaging and conduct, the Department of Labor believes criminal prosecutions and personal liability serve as effective tools in encouraging compliance and holding employers accountable.

Recently, the Solicitor of Labor's FY 2023 Enforcement Report highlighted examples of the Department of Labor's enhanced criminal coordination efforts, including:

- (1) The criminal referral of a roofing contractor and its owner after two fatalities. The contractor had a history of repeatedly and willfully violating OSHA's fall protection standard and was subsequently charged by the U.S. Attorney for the Southern District of New York for the same.
- (2) The filing of a motion to hold a contractor in contempt after the contractor failed to abate his safety violations. A Special Master appointed by the Eight Circuit Court of Appeals, found the contractor in contempt and took him into custody. The contractor was released from custody only after agreeing to cease and desist all operations until a compliance plan was entered; and
- (3) Assisting the Eastern District of Kentucky in its criminal prosecution of a coal company and its dust examiner. The company and examiner were found to have submitted false samples and were held criminally liable.

While the OSH Act provides for criminal sanctions itself, the associated penalties are limited. By referring cases, however, to state district attorneys and the Department of Justice—and supporting the prosecution thereof, the Department of Labor can effectively enforce the OSH Act with wider and harsher penalties than contemplated in the OSH Act itself. E.g. manslaughter, negligent homicide, and/or homicide.

In recent years, several construction fatalities have provided us with examples of a willful OSHA citation being used as the basis for criminal prosecution. See A4S LLC; Botticello Inc.; ContractOne Inc.; Favored Design Construction; Northridge Construction Corporation; R.J. Valente Gravel; WSC Group; etc. Examples of this approach can also be seen in other industries as well. See Didion Milling.

Again, the Department of Labor has been clear that it will work with state and federal prosecutors to hold individuals accountable when their actions or inactions kill workers. See generally, July 14, 2022, DOL Trenching Notice. Based on the increasing number of referrals and subsequent charges, it appears the Department is sticking to its word. We expect this trend to continue..

Does a plant's director of operations need to confirm on their own that internal compliance records required by OSHA are accurate?

Everyone involved in the process of responding to OSHA should be certain that the records being provided are accurate. We recommend that the company designate a point person for handling OSHA responses. As an example, the Director of EH&S or another, similar, role is the right person. Then that individual can be both record keeper and record provider. That way they know the records are accurate. With that said, the OSH act requires employers to maintain accurate and updated records for the purposes of compliance with the Act. The Act has a Record Keeping Rule for the purposes of documenting and reporting workplace injuries. However, that rule does not require a "responsible official" or for the employer to designate specific person as the "keeper of records." That being said, while there is no technical requirement for independent verification, if you are the individual providing records, we recommend that you engage in due diligence to ensure they are accurate.

If there are problems with reports' accuracy, should reports be corrected while an inspection is open? Or is it too late?

The report should absolutely be corrected, but not overwritten. You do not want to destroy a previous record. Spoliation and hiding evidence are a surefire way to trigger problems. See the answer to the second question to make sure that you do not end up in this situation.

HAHN LOESER OSHA ATTORNEY CONTRIBUTORS



MICHAEL B. PASCOE, PARTNER
mpascoe@hahnlaw.com
216.274.2397



ANDRÉS J. GALLEGOS II, ASSOCIATE
agallegos@hahnlaw.com
312.637.3057



COLTEN J. SIEDLARCZYK, ASSOCIATE
csiedlarczyk@hahnlaw.com
216.297.4178