

Agribusiness, OSHA & Beyond: An  
Examination of Workplace Safety Regulations  
and Labor Law

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**“Accidents will occur in the  
best-regulated families.”**

## Occupational Safety and Health Act of 1970

“To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.”

## Agricultural and AgriBusiness Regulation

- ▶ Certain agricultural and/or agribusiness operations are covered by several Occupational Safety and Health standards including:
  - ▶ Recordkeeping (29 CFR 1904)
  - ▶ General Industry (29 CFR 1910)
  - ▶ Construction (29 CFR 1926)
  - ▶ Agriculture (29 CFR 1928)

## Agricultural and AgriBusiness Regulation, cont.

- ▶ General Duty Clause (Sec. 5 of OSH Act 29 USC §654):
- ▶ (a) “Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act.”
- ▶ (b) “Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.”

## Federal OSHA and State Plans

- ▶ Twenty-six states, Puerto Rico, and the Virgin Islands have OSHA-approved State Plans.
- ▶ State-run safety and health programs must be at least as effective as the Federal OSHA program.

## Statistics from OSHA and Bureau of Labor Statistics

- ▶ According to OSHA, Agriculture is among the most dangerous industries in terms of occupational hazards. OSHA notes that in 2011, the fatality rate for workers in the agricultural field was 7 times higher than the death rate for all workers in private industry.
- ▶ In 2011, the injury rate for agricultural workers was over 40 percent higher than the rate for all workers. Crop production agricultural workers' injury rates were 5.5 per 100 workers. Animal production agricultural workers' injury rates were 6.7 per 100 workers. The rate for all workers was 3.8.

## Statistics (cont.)

- ▶ The Bureau of Labor Statistics ("BLS") provides information about occupational injuries across industries.
- ▶ BLS reports -- from the 2016 Census of Fatal Occupational Injuries ("CFOI"):
  - ▶ With a fatality rate of 23.2 per 100,000 full-time equivalent workers, agriculture recorded the highest fatality rate for any industry sector, as categorized by the BLS.
  - ▶ The next highest industry, in terms of fatality work injury rate per 100,000 full-time workers was Transportation and Warehousing at 14.3, followed by Construction at 10.1 and Mining, Quarrying, and Oil/Gas Extraction at 10.1.
  - ▶ The 2016 rate for Manufacturing is 2.0.

## Statistics (cont.)

- ▶ In addition to other types of injuries, OSHA indicates that agricultural industry workers are at high risk for work-related lung diseases, noise-related hearing loss, skin diseases, and certain cancers related to chemical and sun exposures.
- ▶ Note: BLS includes cattle, chicken, pork farming/ranching, aquaculture, forestry/logging, and fishing among the sub-industries that comprise the Agriculture Industry for purposes of the CFOI data.
- ▶ Manufacturing includes (among the sub-industries comprising this industry segment) grain and oilseed milling, food manufacturing in the dairy, fruit/vegetable, animal, beverage, bakery and seafood subindustries.

## What Does OSHA Consider To Be “Agriculture”?

- ▶ OSHA has said “agricultural operations” include:
  - ▶ Activities involved in growing and harvesting (including field sorting) of crops, plants, vines, fruit and nut trees, ornamental plants, egg production, and raising livestock, poultry, fish and livestock products (e.g., feed for livestock on the farm); and
  - ▶ Preparation of the ground, sowing, watering and feeding of plants, weeding, spraying, harvesting, raising livestock, and all activity necessary for these activities.
- ▶ Also, “activities integrally related to these core agricultural activities (e.g., delivery of feed to chickens) also are considered agricultural operations.”

## What Does OSHA Consider To Be “Agriculture”?

- ▶ OSHA indicates that: “Determining whether an activity is a core agricultural operation is made on a case-by-case basis based on the nature and character of the specific activity.”

## Notable OSHA Developments – Agricultural Sector

- ▶ February, 2014 – OSHA News Release re: partnering with Agricultural Retailers Association and The Fertilizer Institute notifying employers of safety issues regarding storage and handling of ammonium nitrate.
  - ▶ September, 2018 -- OSHA Launches Regional Emphasis Program for Anhydrous Ammonia and Ammonium Nitrate Fertilizer Storage & Handling Facilities. (Arkansas, Kansas, Louisiana, Missouri, Nebraska, Oklahoma, and Texas).
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## Notable OSHA Developments – Agricultural Sector

- ▶ Apr. 12, 2011 – OSHA adds grain handling hazards to the list of High Emphasis Hazards in the Severe Violator Enforcement Program.
- ▶ Aug. 4, 2010 & Feb. 1, 2011 – OSHA issues warning letters to the grain handling industry re: grain storage and handling hazards.



## Walking-Working Surface Standard (Jan. 2017 with phases)

- ▶ Surface conditions – The employer must ensure:
  - ▶ All places of employment, passageways, storerooms, service rooms, and walking-working surfaces are kept in a clean, orderly, and sanitary condition. 29 CFR 1910.22(a)(1)
  - ▶ The floor of each workroom is maintained in a clean and dry condition. When wet processes are used, drainage must be maintained, and dry standing places must be provided. 29 CFR 1910.22(a)(2)
  - ▶ Walking-working surfaces are maintained free of hazards such as sharp or protruding objects, loose boards, corrosion, leaks, spills, snow, and ice. 29 CFR 1910.22(a)(3)

## Walking-Working Surface Standard, cont.

- ▶ Loads – The employer must ensure that each walking-working surface can support the maximum intended load for that surface. 29 CFR 1910.22(b)
- ▶ Access and egress – The employer must provide, and ensure each employee uses, a safe means of access and egress to and from walking-working surfaces. 29 CFR 1910.22(c)
- ▶ Inspection, maintenance, and repair – The employer must ensure:
  - ▶ Walking-working surfaces are inspected, regularly and as necessary, and maintained in a safe condition; 29 CFR 1910.22(d)(1)

## Walking-Working Surface Standard, cont.

- ▶ Hazardous conditions on walking working surfaces are corrected or repaired before an employee uses the walking-working surface again; 29 CFR 1910.22(d)(2)
- ▶ If the correction or repair cannot be made immediately, the hazard must be guarded to prevent employees from using the walking-working surface until the hazard is corrected or repaired; 29 CFR 1910.22(d)(2) and
- ▶ When any correction or repair involves the structural integrity of the walking-working surface, a qualified person performs or supervises the correction or repair. 29 CFR 1910.22(d)(3)



## Walking-Working Surface Standard, cont.

- ▶ Ladders – The new standard provides “phase-in” of ladder safety systems or personal fall arrest systems on fixed ladders. The final rule phases in over a 20-year period a requirement to equip all fixed ladders (extending over 24 feet) with ladder safety or personal fall arrest systems, and prohibits the use of cages & wells as a means of fall protection after the phase-in deadline. 29 CFR 1910.28(b)(9)(i)(D)

## Walking-Working Surface Standard, cont.

- ▶ The standard notes that cages and wells do not prevent workers from falling from fixed ladders or protect them from injury if a fall occurs. The final rule grandfathers in cages and wells on existing ladders, but requires employers to equip new ladders & replacement ladders/sections installed on and after November 19, 2018 with ladder safety or personal fall arrest systems. 29 CFR 1910.28(b)(9)(i)(B). All fixed ladders must be equipped with ladder safety or personal fall arrest systems by November 18, 2036.

## Walking-Working Surface Standard, cont.

- ▶ Spiral Stairs – OSHA's guidance under the new standard indicates that winding stairs attached to tanks do not have vertical poles (which is part of the definition of "spiral stairs". Winding stairs are not spiral stairs and must meet the requirements of §1910.25(b) and (c) (covering general stair requirements relating to such things as handrails, rail systems, vertical clearance, landings/platforms, riser height, tread depth, and installation angles).

## Fall Protection

- ▶ Fall protection – The new standard follows the construction-side fall protection principles in that it allows employers to utilize a variety of accepted fall protection systems, including personal fall protection systems. 29 CFR 1910.140
- ▶ Notably, the prior reliance upon use of guardrails as a primary fall protection method has been removed from the standard.
- ▶ The new standard covers, among other things:
  - ▶ Material composition and finish of connectors
  - ▶ Design, composition, installation, inspection, safety factor, use, minimum breaking strength, and minimum tensile load of lifelines and lanyards.
  - ▶ Minimum tensile load, proof testing, gate strength, and connection of D-rings, snaphooks, and carabiners.

## Fall Protection, cont.

- ▶ The attachment, support capabilities, design, installation, supervision, and safety factor of anchorages
- ▶ The connections and protection of ropes, belts, lanyards and harnesses.
- ▶ Training – Employers must ensure that workers who use personal fall protection and work in other specified high hazard situations are trained, and retrained as necessary, regarding fall and equipment hazards and fall protection systems. Employers must provide information and training to each worker in a manner the worker understands.

## The Control of Hazardous Energy (Lockout/Tagout)

- ▶ “This standard covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy, could harm employees. This standard establishes minimum performance requirements for the control of such hazardous energy.” (Emphasis added). 29 CFR 1910.147(a)(1)(i)
- ▶ OSHA had proposed to delete the word, “unexpected.” This issue arose in cases such as Reich v. General Motors Corp, 89 F.3d 313 (6th Cir. 1996).
- ▶ “The lockout/tagout standard covers only those machines that do not provide servicing workers sufficient advance notice of start up to avoid injury.”
- ▶ Other cases are consistent with the General Motors case.

## The Control of Hazardous Energy, cont.

- ▶ Common issues:
  - ▶ Lack of proper lockout/tagout and/or improper removal of lockout/tagout;
  - ▶ Misunderstanding the “minor servicing exception” (when it applies, what it requires, etc.);
  - ▶ Misunderstanding the “positioning” requirements of the standard;
  - ▶ Multi-person maintenance/servicing activities; and
  - ▶ Proper training and regular supervision are key drivers here.

## Hazard Communication

- ▶ The Hazard Communication standard addresses the hazards of chemicals produced or imported and to which employees may be exposed. 29 CFR 1910.1200
- ▶ The standard sets forth information regarding the classification of such chemicals and requires that information concerning the chemicals/hazards is provided to employers and employees.
- ▶ The information is conveyed by means of an employer’s written hazard communication program, labels and other forms of warning, safety data sheets, and information and training.
- ▶ OSHA requires that employers conduct all required training of workers in a language and vocabulary workers can understand.

## Hazard Communication, cont.

- ▶ Common issues:
  - ▶ Providing training and information in a language understood by each worker;
  - ▶ Use of unlabeled containers;
  - ▶ Determining exposure level(s) on a regular basis;
  - ▶ Employing appropriate engineering/administrative controls;
  - ▶ Working with the proper personal protective equipment for the chemical at issue;
  - ▶ Proper communication of hazard communication issues with contractors/other employers;
  - ▶ Organization and updating of safety data sheet inventory.

## Grain Handling Operations (29 CFR 1910.272) and Equipment Roll-Over (29 CFR 1928.51)

- ▶ Tractors and other equipment are subject to occupant safety/seat belt, roll-over, protective frames, and other protections
- ▶ Machine guarding and lockout requirements
- ▶ Training
- ▶ Engulfment/suffocation hazards
  - ▶ Attendant and rescue notification;
  - ▶ Appropriate communications
- ▶ Auger-related injuries
- ▶ Atmospheric conditions inside bins
  - ▶ Oxygen deficiency;
  - ▶ Hazardous gas issues; and
  - ▶ Combustible dust

## Records and Recordkeeping (29 CFR 1904)

- ▶ Current OSHA Regulatory Language (under 29 C.F.R.):
- ▶ 1904.35(b)(1): “What must I do to make sure that employees report work-related injuries and illnesses to me?”
- ▶ 1904.35(b)(1)(i): “You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.”
- ▶ 1904.35(b)(1)(ii): “You must inform each employee of your procedure for reporting work-related injuries and illnesses.”

## Records and Recordkeeping, cont.

- ▶ 29 CFR 1910.35(b)(1)(iii)(A) and (B): “You must inform each employee that: Employees have the right to report work-related injuries and illnesses” and that “[e]mployers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses.”
- ▶ 29 CFR 1910.35(b)(1)(iv): “You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.”
- ▶ Section 11(c) of the OSH Act also prohibits discrimination against an employee for reporting a work-related fatality, injury, or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises rights afforded by the OSH Act.

## Records and Recordkeeping, cont.

- ▶ While the fate of portions of the recordkeeping regulation remain uncertain, we have seen litigation filed by OSHA against at least one employer asserting that portions of its safety program were unlawful.
- ▶ On or about April 25, 2017, OSHA filed suit against an employer in the State of Wisconsin over the employer's immediate reporting policy that, in OSHA's view, violated Section 11(c) of the OSHAct (the anti-retaliation section) .
- ▶ The court held that an employer's failure to follow its own internal accident investigation procedures could be used to support an OSHA retaliation (section 11(c)) case brought by OSHA against the employer.

## Records and Recordkeeping, cont.

- ▶ The employer's safety and disciplinary policy did not specify the meaning of the term "unsafe act."
- ▶ Further, there was an allegation that the employer did not discipline employees who reported unsafe acts relating to near misses, but did discipline employees who reported injuries due to unsafe acts.
- ▶ During the past few weeks, that case was settled with a \$100,000 award for back wages and compensatory damages.
- ▶ This case demonstrates that OSHA has recently enforced the anti-retaliation provisions of the OSHAct, despite the uncertainty surrounding the ultimate fate of portions of the still new recordkeeping regulation.

## Substance Abuse Testing Update

- ▶ While there is uncertainty about the ultimate form of the recordkeeping regulation, employers are faced with decisions about post-accident and other workplace substance abuse testing.
- ▶ In 2016, OSHA took the following position:
  - ▶ OSHA has stated its view that it is a violation of section 11(c) of the OSHAct if an employer has “blanket” post-injury drug testing.
  - ▶ OSHA indicates that the new rule does not prohibit employers from drug testing employees; however, the drug testing should be limited to situations where employee drug use is likely to have contributed to the incident and for which the drug test can accurately identify impairment caused by drug use.

## Substance Abuse Testing Update, cont.

- ▶ OSHA further commented that: “[e]mployers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing.”



## Substance Abuse Testing Update, cont.

- ▶ New OSHA Guidance to clarify its position on post-incident drug testing (and workplace safety incentives) issued on October 11, 2018.
- ▶ The guidance notes that many employers conduct post-incident drug testing to promote workplace safety and health.
- ▶ Further, OSHA confirms that where there is evidence that an employer consistently enforces legitimate work rules (whether or not an injury is reported), that would show that the employer is serious about creating a culture of safety.
- ▶ OSHA further clarifies that action taken under a post-incident drug testing policy would only violate the standard if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for promoting workplace safety and health.

## OSHA's Anti-Retaliation Perspectives, cont.

- ▶ Suggestion – Review “blanket” post-injury drug testing policies now.
- ▶ Suggestion – Consider adding language to such policies to provide for “reasonable suspicion” in relation to the facts of the incident and nature of the injury(s), if any, and ensure that the testing is designed to accurately identify impairment caused by substance use.
- ▶ Suggestion -- Before authorizing substance abuse testing, consider the facts of each case to determine whether any of OSHA's concerns might apply to the case.

## OSHA's Anti-Retaliation Perspectives, cont.

- ▶ Suggestion -- Consider changing such policy provisions to require “prompt” reporting of workplace safety “incidents” and specifically include a requirement of prompt reporting, even of “near miss” and “property damage only” incidents.
- ▶ Suggestion -- Consistently follow the investigatory, disciplinary, and other procedures set forth in your safety programs/policies.
- ▶ Suggestion -- Treat “near miss” incidents in the same serious way as incidents in which injuries are sustained.
- ▶ Check to determine whether terms like “near miss” or “unsafe act” are properly/clearly defined in safety programs/policies.
- ▶ Random drug testing – approved by OSHA in its recent clarification.

## Recording Requirements (29 CFR 1904)

- ▶ Companies with more than ten employees, you must keep OSHA injury and illness records;
- ▶ Employers in partially exempt industry (low hazard industries such as florists, banks, etc.) do not have to keep such records, unless asked by the government;
- ▶ Each employer required to keep must record each fatality, injury and illness that is work-related, is a new case, and meets one or more of the general recording criteria.
- ▶ Forms 300 (log), 300A (annual summary), and 301 (incident report).

## OSHA's Electronic Reporting Rule – Tracking Workplace Injuries and Illnesses Update

- ▶ The new rule does not change an employers' existing obligation to collect, maintain and certify injury/illness records. But it does require some employers to electronically submit such records, as follows.
- ▶ OSHA's website provides a detailed description of covered employers, compliance dates and electronic portal instructions. But, here are a few general guidelines:
- ▶ Establishments with 250 or more employees in industries covered by OSHA's recordkeeping regulation are required to electronically submit information only from their 2017 form 300A by July 1, 2018. OSHA is not currently accepting Form 300 and 301 information. Beginning in 2019 and every year thereafter, the information required by OSHA must be electronically submitted by March 2 of each year.

## OSHA's Electronic Reporting Rule – Tracking Workplace Injuries and Illnesses Update

- ▶ Establishments with 20-249 employees in certain high-risk industries must also electronically submit information from their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information required by OSHA must be electronically submitted by March 2 of each year. The list of such "high-risk" industries, categorized by NAICS number can be found at OSHA's website.
- ▶ OSHA has issued a notice of proposed rulemaking (NPRM) to reconsider, revise, or remove provisions of the "Improve Tracking of Workplace Injuries and Illnesses" final rule, including the collection of the Forms 300/301 data.

## Reporting Requirement (29 CFR 1904.39)

- ▶ As of January 1, 2015, the revised FCR rule now requires employers report to OSHA as follows:
- ▶ Any work-related fatality within 8 hours of the employer's knowledge of the fatality;
- ▶ All work-related hospitalizations of one or more employees within 24 hours of the employer's knowledge of the hospitalization;
- ▶ All work-related amputations within 24 hours of the employer's knowledge of the amputation;
- ▶ All work-related losses of an eye within 24 hours of the employer's knowledge of the loss.

## Reporting Requirement, cont.

- ▶ Employers must report an inpatient hospitalization due to a heart attack, if the heart attack resulted from a work-related incident.
- ▶ When in doubt as to whether to report a heart attack occurring at work, it should be reported as OSHA will decide whether to investigate the event, depending on the circumstances of the heart attack.
- ▶ An inpatient hospitalization is defined as a formal admission to the inpatient service of a hospital or clinic for care or treatment.

## Reports Are Not Needed For The Following

- ▶ Employers do not have to report an event if it:
  - ❖ Resulted from a motor vehicle accident on a public street or highway. Employers must report the event if it happened in a construction work zone.
  - ❖ Occurred on a commercial or public transportation system (airplane, subway, bus, ferry, streetcar, light rail, train).
  - ❖ Occurred more than 30 days after the work-related incident in the case of a fatality or more than 24 hours after the work-related incident in the case of an inpatient hospitalization, amputation, or loss of an eye.

## Reports Are Not Needed For The Following, cont.

- ▶ Employers do not have to report an inpatient hospitalization if it was for diagnostic testing or observation only.

## Summary of Certain OSHA Case Timelines

- ▶ Investigation
- ▶ Closing Conference
- ▶ Issuance of Citations
- ▶ 15-Working Day Period (following receipt of citations) for:
  - ▶ Informal Conference; and
  - ▶ Written Notice of Contest (which must be filed and posted following receipt of Notice of Docketing). Contest of citations or penalty or both.
- ▶ Note: State Plan Jurisdictions may have different procedures and timelines!
- ▶ Following Notice of Contest, the agency should transmit to the Commission within 15 working days.

## Summary of Certain OSHA Case Timelines

- ▶ Complaint Filing
- ▶ Answer (due within 20 days after service of Complaint) -- must include all affirmative defenses
- ▶ Corporate Declaration – listing of all parents, subsidiaries, affiliates, etc.
- ▶ Discovery process
- ▶ Hearing
- ▶ Appeals

**Questions?**

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