When Does an OSHA Violation Become a Crime?



A briefing paper explaining to your CEO the risk of criminal liability for safety violations.

Two ironworkers were killed when they got hit by a falling beam on a Chicago construction project. OSHA investigated and blamed the accident on the failure of an L-shaped connector that was secured with just a single bolt and no nut. The government brought criminal charges against the company. A jury found the company guilty of a "willful" OSHA violation. The company was fined $1 million and put on five years' probation [*United States v. Pitt-Des Moines, Inc.,* 168 F.3d 976 (7th Cir.), 1999].

THE PROBLEM

As the P*itt-Des Moines* case shows, a company can be criminally liable for OSHA violations. Under Section 666(e) of the OSHA statute, if a company commits a "willful violation" of a health or safety regulation and a worker dies as a result, the company faces a fine of $500,000 per fatality. And that's not all. You and your fellow officers and directors face can be *individually* liable for willful violations. That can lead to fines of $250,000 per fatality and up to six months in jail.

WILLFUL VIOLATIONS

To prove a violation, OSHA must show:

- A standard applied to a hazard (either under the law or industry practice);
- The standard was violated;
- The violation endangered a worker; and
- The company knew, or with the exercise of diligence, could have known of the violation.

Once the government proves a violation, it must decide how to classify it. All violations aren't the same. Willful violations are the worst kind. Serious violations are second worst. But only willful violations carry potential criminal penalties.

THE ANSWER

This means that avoiding willful violations is the key to protecting the company—and yourself—against criminal liability under OSHA. How do you avoid willful violations? Answer: Exercise diligence to comply with all OSHA standards and eliminate hazards.

THE EXPLANATION

Diligence isn't just a one-time or sporadic activity; it's something you have to do on a regular, ongoing basis. You need to ensure that the company has a system for:

- Conducting hazard assessments to identify hazards;
- Preparing written safety programs to address the hazards;
- Training and instructing workers;
- Performing walk-around inspections to identify hazards and document corrective action; and
- Disciplining workers who violate safety rules and procedures.

Officers and directors don't necessarily have to perform these functions personally. You can leave the day-to-day details to your safety directors and supervisors. But you're responsible for what they do. In other words, you don't have to don a helmet, go to the worksite and make sure all L-connectors are nailed down; but you do have to make sure somebody does.

You also have to be proactive. You're expected to monitor company safety efforts, legal developments and industry practice and seek improvement. A "call-me-when-an-accident-happens" approach isn't good enough.

7 QUESTIONS TO ASK YOURSELF

How can you tell if you're being duly diligent? There's no specific formula for an officer or director to follow to guarantee due diligence. But there are questions you can ask to figure out if you're doing enough:

1. Do you know the OSHA laws and industry standards?
2. Are you familiar with and involved in the implementation of company safety policies?
3. Do you get regular reports about injuries, complaints, and the overall effectiveness of the company's safety program?
4. Do you know what your safety director and supervisors are doing?
5. Do you know what training is being provided and whether it's working?
6. Do you know if your contractors are following adequate safety policies?
7. Last but not least, are you documenting all of the efforts you're making regarding safety? As the lawyers say, if it isn't documented, it never happened.