



OSHA INDIVIDUAL CRIMINAL LIABILITY MAYBE EXPANDING

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Recent workplace deaths at BP Deepwater Horizon, Massey Mine and Imperial Sugar have revived the late Senator Edward Kennedy’s request for increased criminal penalties of willful Occupational Safety and Health Act (OSHA) violations.* Three years ago Senator Kennedy, released a report through the U.S. Senate Committee on Health, Education, Labor and Pensions entitled “Discounting Death,” detailing what he believed to be shortcomings of the criminal OSHA provisions; the failure of OSHA and the Department of Justice (DOJ) to refer and then seek criminal prosecutions; and proposed changes to create a criminal deterrent to employers.¹ Senator Kennedy highlighted the lack of criminal liability except when death occurred, with no criminal liability for violations that caused serious injury short of death.² As it stands, the maximum sentence for a first willful violation that causes death is a sentence of 6

* 29 USC § 666 (e) Willful violation causing death to employee. Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act [29 USCS § 655], or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$ 10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$ 20,000 or by imprisonment for not more than one year, or by both.

months (plus up to a \$10,000 fine) and a subsequent violation of up to maximum of 1 year and a \$20,000 fine.³ The status of OSHA criminal violations as a Class B misdemeanor is little incentive for DOJ to prosecute OSHA violations.⁴

Criminal penalties, first proposed by Senator Kennedy in 2008⁵, are now likely to become law under the proposed Protecting America's Worker's Act (PAWA).⁶ The bill would raise the maximum punishment from 6 months to 10 years in prison and for repeat violators move the maximum prison sentence raises from 1 year to 20 years.⁷ This increase represents the Obama Administration's new focus for OSHA, turning away from compliance assistance and towards tougher enforcement.⁸ Liability is broadened so as to be effective against corporate employers and small business, which currently bear the most exposure to the criminal provisions, by reaching any responsible corporate officer or director.⁹ Responsible corporate offices are those with responsibility and control, thus low level managers could fall into liability under the PAWA. Additionally, the PAWA would expand liability to cases of serious injury, not just instances where the employee dies.¹⁰

If proposed changes to the House version of the PAWA—which are backed by OSHA—become law, the major change in the criminal provisions with the passing of the PAWA will be the dumbing down of the mens rea requirement from “willful” to “knowingly.”¹¹ While willful violations would still garner higher civil penalties, a knowing violation could lead to criminal charges.¹² Knowingly is much lower burden of proof, which only requires that the actor knowingly perform an act or fail to perform an act that causes them to violate an OSHA provision, but not that they know they are in violation of a specific OSHA provision.¹³ The

PAWA would remove the requirement that the government prove the employer intentionally disregarded or was plainly indifferent to OSHA requirements.¹⁴ Under the PAWA employers would no have the defense to willfulness that they were acting under a good faith reasonable belief that its conduct conformed to law.¹⁵ The PAWA would put criminal liability for OSHA violations on par with federal environmental crimes, exacting stiff criminal penalties for violations, with a minimal burden of proving the mental state of the actor, which can be directed anywhere in a corporate structure top to bottom.¹⁶

The PAWA changes to the criminal statutes will likely cause an increase in prosecutions for OSHA violations. In the years between 2003 through 2008 OSHA conducted almost 10,000 inspections.¹⁷ In those inspections they found 237 willful violations of OSHA rules or regulations.¹⁸ OSHA referred 50 cases to the DOJ for criminal prosecution.¹⁹ Ten cases were eventually prosecuted by the DOJ.²⁰ OSHA has maintained that criminal prosecution is but one tool of enforcement and that many cases simply do not merit criminal prosecution.²¹ The Department of Labor screens willful violations that would meet only the civil preponderance of the evidence burden of proof standard and refers to DOJ only those cases in which it believes the government could prove willfulness to a jury beyond a reasonable doubt.²²

In Senator Kennedy's report he proposed that to create a criminal deterrence mechanism there must be felony charges available for an employer's repeated and willful violations of OSHA rules or regulations that result in a worker's death or serious injury.²³ DOJ officials have stated that the real problem with the law is who the criminal liability is directed at and not necessarily the status of the offense or maximum sentence.²⁴ Employers are liable if they act or

fail to act willfully, but the larger the entity the more likely that the employer's act will not be seen as willful because of a lack of knowledge about the violation.²⁵ The result is the prosecution of small companies where the 'employer' is active in the day-to-day operations on the ground and often working onsite, with larger corporations receiving a pass on criminal liability.²⁶ The 'responsible corporate officer' addition in the PAWA would broaden liability to allow supervisors and other willful violators in management to face criminal charges, thus exposing larger corporations to greater exposure to OSHA criminal liability.²⁷

In addition to changes to OSHA criminal enforcement, civil enforcement of OSHA violations is also being toughened. Recently the Obama administration has revamped OSHA's Enhanced Enforcement Program (EEP), replacing it with the new Severe Violator Enforcement Program (SVEP), which will focus on recalcitrant employers who endanger workers by demonstrating indifference to OSHA rules and regulations.²⁸ While EEP had serious problems, its process made OSHA more aware of criminal violations and more awareness led to more referrals.²⁹ OSHA referrals to DOJ increased from 6 per year (1993-2003) to 12 cases being referred in 2008.³⁰ OSHA under the Obama administration has committed itself to ensuring that the proper cases are being referred to the DOJ for prosecution, as well as seeing how OSHA and DOJ can work better together to prosecute the cases that are referred.³¹

In October of 2009 British Petroleum (BP) settled with OSHA for the largest civil penalty ever given for failing to correct safety issues related to their Texas City, Texas refinery, where an explosion killed 15 employees in 2005.³² OSHA fined BP \$56.7 million for 271 instances of failing to correct a hazard, and \$30.7 million for 439 "willful and egregious" violations.³³ These fines came after BP had spent more than \$1 billion to upgrade the refinery in the wake of the

deadly blast, yet OSHA found BP failed to comply with the settlement agreement and fix safety violations.³⁴ BP had previously paid fines to OSHA in excess of \$20 million relating to the explosion, paid \$50 million in criminal fines under the Clean Air Act, and had set aside \$2.1 billion to settle the more than 4,000 civil claims levied against BP after the explosion.³⁵ No criminal charges under OSHA were brought.

Another high profile disaster occurred when an Imperial Sugar plant in Port Wentworth, Georgia exploded killing 14 workers in February of 2008.³⁶ OSHA has yet to fully resolve the issue, though it is seeking \$5.1 million for safety violations at Port Wentworth and another \$3.1 million for violations at another Imperial Sugar refinery in Gramercy, Louisiana.³⁷ To date, a final settlement has not been reached because Imperial is resisting admissions of willfulness that would be helpful to a criminal prosecution for OSHA violations, something OSHA says it has not ruled out.³⁸ OSHA has alleged 69 willful violations occurred at the Port Wentworth, Georgia refinery and another 49 willful violations occurred at the Gramercy, Louisiana refinery.³⁹ A criminal prosecution is possible in the Imperial case because the U.S. Chemical Safety Board concluded that company officials knew about the dangerous conditions for years and never attempted to correct them.⁴⁰ The Board blamed the explosion on faulty maintenance, housekeeping and equipment design.⁴¹

Employee deaths from high profile incidents may cause Congress to enhance the OSHA criminal statutes. The Massey Mine in West Virginia, where 29 miners lost their lives in a collapse on April 5th, 2010, has already been issued 23 citations for significant and substantial violations by the Department of Labor.⁴² These violations are based solely on the surface

investigation.⁴³ The Upper Big Branch Massey Energy Co. mine received more than 500 citations in 2009, which Massey claims were all resolved prior to the collapse.⁴⁴

Whether through OSHA's new focus on enforcement over cooperative compliance or through the dramatic changes the PAWA would make to the criminal statutes, employers will face a tougher OSHA than they have seen in the past.

¹ EDWARD M. KENNEDY, DISCOUNTING DEATH: OSHA'S FAILURE TO PUNISH SAFETY VIOLATIONS THAT KILL WORKERS, COMM. ON HEALTH, EDUCATION, LABOR AND PENSIONS, 110TH CONG., (2007), <http://www.philaposh.org/pdf/2008KennedyReport.pdf>.

² *Id.*

³ 29 U.S.C. § 666 (2010).

⁴ *Is OSHA Working for Working People?: Hearing Before the Subcomm. On Employment and Workplace Safety of the Comm. on Health, Education, Labor and Pensions*, 110th Cong. (2007) (statement of Edward Kennedy, Chairman) , http://www.allamericanpatriots.com/48722048_congress_senator_ted_kennedy_health_and_safety_workers.

⁵ Jesse J. Holland, *Democratic Senators want tougher OSHA penalties*, USA TODAY, Apr. 29, 2008, http://www.usatoday.com/news/washington/2008-04-29-1318445642_x.htm.

⁶ *The safety debate - Bill would impose prison term for willful workplace violations*, FINANCE & COMMERCE, May 10, 2010, <http://www.finance-commerce.com/article.cfm/2010/05/11/The-safety-debate--Bill-would-impose-prison-term-for-willful-workplace-violations>.

⁷ *Id.*

⁸ *Id.*

⁹ James Nash, *Justice Dept. Drops Most Criminal OSHA Referrals*, EHS TODAY, http://ehstoday.com/news/ehs_imp_36865/.

¹⁰ *Hearing Before the Subcomm. On Employment and Workplace Safety of the Comm. on Health, Education, Labor and Pensions*, 111^h Cong. (2010) (statement of David Michaels, Assistant Sec. for Occupational Safety and Health, Dept. of Labor).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *See, American Wrecking Corp. v. Sec. of Labor*, 351 F.3d 1254, 1262—1263, (D.C. Cir 2003).

¹⁵ *See, Id.*

¹⁶ *Hearing Before the Subcomm. On Employment and Workplace Safety of the Comm. on Health, Education, Labor and Pensions*, 111^h Cong. (2010) (statement of David Michaels, Assistant Sec. for Occupational Safety and Health, Dept. of Labor).

¹⁷ EDWARD M. KENNEDY, DISCOUNTING DEATH: OSHA'S FAILURE TO PUNISH SAFETY VIOLATIONS THAT KILL WORKERS, COMM. ON HEALTH, EDUCATION, LABOR AND PENSIONS, 110TH CONG., (2007), <http://www.philaposh.org/pdf/2008KennedyReport.pdf>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ OSHA Fact Sheet, OSHA's Role When a Worker Dies On the Job, http://www.osha.gov/OshDoc/data_General_Facts/factsheet-death_on_the_job.pdf.

²² *Id.*

²³ EDWARD M. KENNEDY, DISCOUNTING DEATH: OSHA'S FAILURE TO PUNISH SAFETY VIOLATIONS THAT KILL WORKERS, COMM. ON HEALTH, EDUCATION, LABOR AND PENSIONS, 110TH CONG., (2007), <http://www.philaposh.org/pdf/2008KennedyReport.pdf>.

²⁴ James Nash, *Justice Dept. Drops Most Criminal OSHA Referrals*, EHS TODAY, http://ehstoday.com/news/ehs_imp_36865/.

²⁵ *Id.*

²⁶ See, *Id.*

²⁷ See, *Id.*

²⁸ News Release, U.S. Department of Labor, US Department of Labor's OSHA takes action to protect America's workers with sever violator program and increased penalties (Apr. 22, 2010) (Release Number: 10-538-NAT), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17544.

²⁹ Improving OSHA's Enhanced Enforcement Program, Hearing Before the SubComm. On Workforce Protections of the H. Comm. on Education and Labor, 111th Cong. 111-18 (2009) (Statement of Jordan Barab, Acting Assistant Sec. for Occupational Safety and Health U.S. Dept. of Labor).

³⁰ *Id.*

³¹ *Id.*

³² Steven Greenhous, *Bp Faces Record Fine for '05 Refinery Explosion*, N.Y. TIMES, Oct. 30, 2009, at B-1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Larry Peterson, *Imperial: Deal reached on fines*, SAVANNAH MORNING NEWS, May 25, 2010, <http://savannahnow.com/news/2010-05-25/imperial-deal-reached-fines>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Kris Maher, *Inspectors Cite More Violations at Massey Mine*, WALL ST. J., May 27, 2010, [http://online.wsj.com/article/SB10001424052748704032704575268890401992412.html?mod=WSJ_hpp_MIDDLE
NexttoWhatsNewsTop](http://online.wsj.com/article/SB10001424052748704032704575268890401992412.html?mod=WSJ_hpp_MIDDLE_NexttoWhatsNewsTop)

⁴³ *Id.*

⁴⁴ *Id.*