

# CRIMINAL PROSECUTION FOR SAFETY VIOLATION IS NO ACCIDENT

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# WHEN DO SAFETY VIOLATIONS BECOME CRIMINAL VIOLATIONS?



## OSHA'S MANDATE

- OSHA established for protection of employees.
- Conducts safety inspections.
- Fines for violations based upon whether less than serious, serious, willful or repeat.

# SAFETY VIOLATION PROSECUTIONS

- Where it can be demonstrated that employer “**willfully**” violated an OSHA standard and that violations caused the death of a worker matter may be referred to DOJ for criminal prosecution.
- Criminal prosecution addition to civil citations and penalties.
- Willful finding does not necessarily mean criminal referral.
- Each element of a criminal violation, including willfulness, must be proven to a jury beyond a reasonable doubt.
- Lesser standards for civil violation – preponderance of the evidence.
- OSHA/Office of Solicitor will only refer cases they believe can meet the higher burden of proof.



- ✂ Willful violations causing death to an employee is a criminal misdemeanor.
- ✂ Employer who willfully violates any standard, rule, or order promulgated under this Act [29 U.S.C. 655] that caused death to any employee, shall, upon conviction, be punished by fine of not more than \$10,000.00 or imprisonment for not more than 6 months, or both, EXCEPT
  - If conviction is for violation committed after a first conviction, punishment shall be a fine of not more than \$20,000.00 or imprisonment for not more than 1 year, or both. 29 U.S.C. 666(e) of OSHA Statute.



# OSHA REGULATIONS CANNOT ADDRESS EVERY WORKPLACE CONDITION

☞ Section 5a of the OSHA Act spells out duties of the employer:

(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 chapter.





Did you  
do your  
safety



- ⌘ General duty covers work condition that employer knows is health or safety threat even if no specific OSHA regulation
- ⌘ Employer duty to protect employees from danger if employer aware of safety threat.
- ⌘ Used in many states on construction sites to deem site a homicide location for possible criminally negligent homicide. Freezes site for evidentiary purposes until designation lifted and event declared accident.



- ☞ **Example** – Illinois case. Workers complained of headaches as a result of work environment due to exposure to chemical.
- Worker collapsed and died from this chemical poisoning. OSHA investigated and issued citations, fines to company. Illinois Attorney General filed criminally negligent homicide suit against company principals citing 5a.
  - Case based that employer knew health problems but did not address.
  - Ultimately, four company principals found guilty of the death of the immigrant worker. Three were given sentences of 25 years. Sentences appealed and punishment reduced.

# Examples of Individual Prosecution

- ⌘ Owners of plumbing company pled guilty to criminal charges of willfully violating OSHA trenching safety standards after two employees killed in a trench collapse.
- ⌘ Employee fell to death while laying steel decking at construction site. Company had history of OSHA violations including warned about its failure to buy fall protection. Company owner pled guilty to willful violation and sentenced to 4 months in prison.
- ⌘ Employee killed when fell retrieving equipment from tower. Owners attempted to cover up that employee was not wearing proper safety equipment. Owners pled guilty and sentenced to 3 months in prison.
- ⌘ Plumbing company owner lied to investigators involving trench collapse killed employee. Owner created false documents in a cover up. Sentenced to 10 months, 5 of which in prison and 5 months home confinement.



# Types of Instances where Individual Prosecutions have Occurred

1. cave in
2. structure collapse
3. falls
4. explosions
5. crane accidents



☞ Cases prosecuted by U.S. Department of Justice or U.S. Attorney's Offices. Also, beware of:

1. Regulators,
2. Congress,
3. CSB,
4. Civil suits.



☞ Trend to prosecute more safety violations.

# BP REFINERY EXPLOSION IN TEXAS CITY, TEXAS

- ☞ March 2005 – Third fatal accident at the Refinery.
- ☞ OSHA found over 300 safety violations and “organizational and safety deficiencies at all levels of the BP Corporation”.
- ☞ October 2009 BP settled with OSHA for largest single penalty for failure to correct safety issues relating to Texas City, Texas refinery where 15 employees killed, 180 injured in 2005.
- ☞ OSHA fined BP \$56.7 Million for 271 instances for failing to correct a hazard and \$30.7 Million for 439 “willful and egregious” violations. BP paid \$50 Million in criminal fines under the Clean Air Act but no criminal charges under OSHA were brought.



# IMPERIAL SUGAR PLANT EXPLOSION PORT WENTWORTH, GEORGIA

- ✎ February 2008, 13 workers killed, 40 injured. OSHA alleged 69 willful violations and 51 serious violations.
- ✎ Refinery dates back to early 1900s, older equipment.
- ✎ No uniform cleaning procedure. Sugar dust would accumulate on overhead surfaces, piling up on equipment.
- ✎ Airborne sugar dust only needs slightest spark to explode.







- ❧ Chemical Safety Board concluded company knew about the dangerous conditions for years but never did correct them.
- ❧ CSB also said explosion due to faulty maintenance, housekeeping, and equipment design.
- ❧ CSB found management at Imperial Sugar was aware that there were hazards caused by combustible dust and knew it had not been effectively managing the accumulation for years.
- ❧ Demonstrated indifference to the serious problem by not implementing corrective measures to remove accumulation of sugar dust from operating areas and not controlling potential ignition sources.

- ✎ OSHA found that fatalities/injuries could have been prevented had Imperial complied with existing OSHA standards on housekeeping and other requirements.
- ✎ OSHA official testified before U.S. Senate that the **“employer’s willful violation of OSHA requirements were committed in an especially egregious manner”**. Edwin G. Foulke, Jr., Assistant Secretary, OSHA, in testimony before Subcommittee on Employment and Workplace Safety Committee on Health, Education, Labor and Pensions. U.S. Senate, July 29, 2008.



- ❧ Graham Harris Graham, Vice President for Operations at Imperial Sugar. Hired by Imperial six weeks before explosion. Immediately recognized dangerous conditions, customs and practices at refinery. Fired plant manager, instructed operations manager to identify safety violations, initiate housekeeping blitz, and begin site-wide clean up.



# MASSEY MINE COLLAPSE, WEST VIRGINIA

- ☞ 29 miners killed from collapse of mine in April 2010.
- ☞ 23 violations for significant violations by DOL filed.
- ☞ Approximately 500 citations in 2009 received before collapse. Matter is currently under criminal investigation.
- ☞ FBI investigating whether safety devices and procedures were by-passed or tampered.
- ☞ 2009 Massey subsidiary pled guilty to willful violations of mandatory safety standards resulting in death of 2 miners in 2006. Fined \$2.5 Million in the criminal case.





# OTHER MINING PROSECUTIONS

⌘ Criminal charges filed after –

- 1989 explosion at a Kentucky mine where 10 miners killed.
- 1991 incident at West Virginia mine where 2 miners killed.



# DEEPWATER HORIZON EXPLOSION

- ✂ April 20, 2010, explosion of the Deepwater Horizon. 11 workers killed. Approximately 4 million barrels of oil deposited in Gulf of Mexico for 3 months creating the largest oil spill in American waters.
- ✂ Investigations include:
  - Congress
  - Marine Board of Inquiry (Joint Department of Interior and U.S. Coast Guard)
  - Presidential Commission
  - Chemical Safety Board
  - Civil suits
  - Criminal investigation



# BEYOND OSHA CRIMINAL INVESTIGATION

Using environmental laws to prosecute workplace safety violations.

- ✎ DOJ and OSHA, along with the Environmental Protection Agency, entered into a major enforcement initiative for inter-agency cooperation and prosecution of workplace safety violations utilizing environmental statutes.

- ✎ **Focus:** businesses using hazardous substances; scrutinizes companies to be mindful of safety **and** environmental regulations.
- ✎ Perceived that employers who ignored worker safety would ignore environmental safety and regulations that could result in death or injury to workers.
- ✎ **Goal:** Get OSHA to recognize potentially serious violations and bring them to the attention of EPA and DOJ.
- ✎ Memo of understanding between the agencies agreeing to:
  - Conduct joint investigations and inspections
  - Share data
  - Conduct inter-agency training
  - Issue reports on major chemical accidents.



- ✧ Utilizing statutes other than OSHA that carry greater penalties, criminal liability, and incarceration.
- ✧ Prosecutors looking to use criminal provisions of:
  - The Clean Air Act
  - The Clean Water Act

- ☞ **EXAMPLE:** In 2005, Motiva Enterprises, LLC, 5<sup>th</sup> largest oil refinery in U.S. pled guilty to Clean Air Act and Clean Water Act violations. Activity involved explosion that killed 1 employee and injured 9.
- Vapors from a corroded steel tank caused the tank to explode and spill nearly 100,000 gallons of acid into the Delaware River.
  - Motiva pleaded guilty to negligently releasing hazardous substance into the air by releasing the hazardous substance into the air by placing person in imminent danger of death (Clean Air Act violation).
  - The Clean Water violations were for discharging pollutants into the river.
  - Motiva paid \$10 million fine.



# SEAFARER MANSLAUGHTER

- ☞ Seafarer manslaughter 3 groups to liability.
  1. Ship's officers
  2. Individuals that have responsibility for condition of the ship where their acts or failure to act could cause loss of life.
  3. Corporate management
- ☞ If death results, imprisonment of up to 10 years
- ☞ Prosecutions holding seafarers, owners of vessels and corporate management that controls vessels only accountable for maritime events that result in the death of a person (Title 18 U.S.C. 1115).
- ☞ Law criminalizes the misconduct of negligence of a ship's officers that result in death and/or for corporate management that knowingly and willfully causes or allows the misconduct or negligence officers that result in the death of a person.

# PROPOSED LEGISLATION



## **Misdemeanor violation is not sexy.**

- Senator Kennedy in 2008 first proposed Protecting America's Worker's Act (PAWA).
- Bill would raise maximum punishment from 6 months to 10 years.
- Repeat offenders, prison 1 year to 20 years.
- Legislation would also lower the *mens rea* requirement from “willful” to “knowingly”.
  - Lower standard of proof only requires the actor knowingly performed an act or failed to perform an act that causes them to violate OSHA provision.
  - Need not know they are in violation of specific OSHA provision.
- Obama Administration support of focus away from compliance assistance to tougher criminal enforcement. Legislation died in the last Congress.
- Between 2003 and 2008, OSHA conducted 10,000 inspections.
  - Of those, 237 willful violations.
  - Of those, 50 cases referred to DOJ for prosecution.

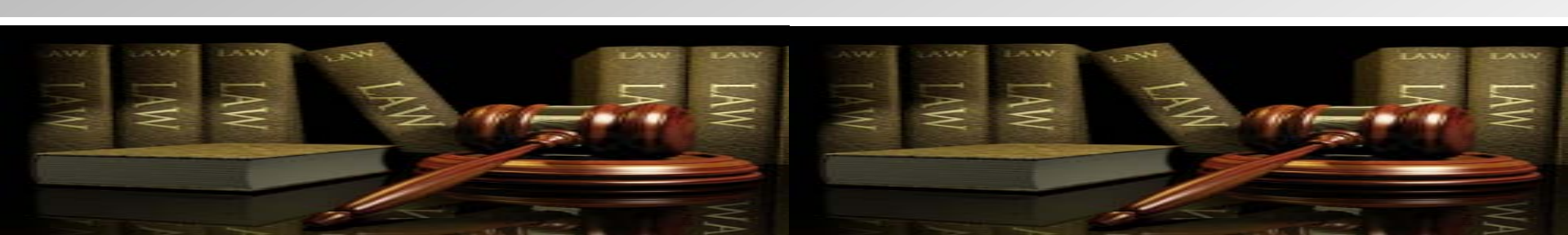


# FEW OSHA PROSECUTIONS – WHY?

- ✎ Criticism that OSHA has helped large corporations avoid the threat of prosecution by downgrading “willful”.
- ✎ Imperial Sugar: instead of willful violations and an \$8.9 Million penalty as proposed, “willful” dropped and \$4 Million fine.
- ✎ OSHA inspectors meet resistance from corporations; gusto to pursue criminal charges dissipates.
- ✎ OSHA inspectors want numbers and corporations to slow down that process. **“A simple lack of guts and political will,”** John T. Phillips, a former regional OSHA administrator.
- ✎ Solicitor is a political appointment who represents the Secretary of Labor. Makes the final decision whether to refer the case to the Justice Department.
- ✎ Companies work to eliminate the word “willful” and have designation “unclassified” in settlement. Reason for internal investigations.

# CONFLICT OF INTEREST

- ✧ Conflict of interest between corporation and employee.
- ✧ Determine if individual employees need independent counsel.
- ✧ Employee has potential for individual liability. Or, Potential or actual conflict of interest between corporation and individual.

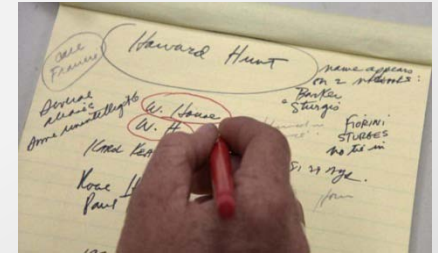
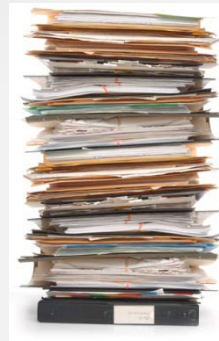


- ✧ Corporation may recommend particular attorney but employee has right to choose.
- ✧ Corporation may have responsibility to pay for counsel if matter is:
  - Within company policy;
  - Contractual agreement between corporation and employee;
  - Local law;
  - By-laws.
- ✧ Corporation will, in most cases, pay for employee's individual counsel if employee was functioning within the scope of employment and that activity is under investigation.
- ✧ Though corporation is paying for the legal fee, the employee's counsel is doing what is in the employee's best interest.

# INTERNAL INVESTIGATION CONDUCTED BY CORPORATION

∞ Internal investigation, retrieval of relevant **documents**, that will include:

- Emails;
- Notes;
- Documents / Manuals;
- Computer information;
- Hard drives;
- Plant entry records (badge swipes);
- Videotape records;



- **Interviews.** Credibility of witnesses will be determined by looking at witness's demeanor;
- Quality of witness's story;
- The ability of the witness to observe or recall event;
- Determination whether there is bias or other motive;
- Determination if inconsistent statements are given;



# INVESTIGATIONS GENERALLY

- Parallel investigation with Government investigation;
- Government may contact employee at home / work, independent of company;
- Employees have choice whether to speak to Government investigators. No requirement to do so.
- Anything said to a Government investigator is not “off the record” or “informal”;
- Employee may ask that the Government interview be conducted at another time or place including work;
- Employee may request that company counsel attend interview as a company representative but not as counsel for employee.
- Employee may have own counsel present.

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