



# 2025 Construction Law Seminar

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### Navigating The Maelstrom

*Creating A Culture of Safety and EHS Compliance*

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### What does it mean to create a culture of safety?

When safety becomes part of the culture, it transforms not just how people work, but how they care for each other. Today, we're not just talking about compliance or checklists. We're exploring what it takes to build a workplace where safety is second nature—woven into daily decisions, reinforced by leadership, and shaped by the people who live it every day. Wherever you fall in the construction industry, the principles we'll discuss today will help you energize your EHS operations team and focus your organization's health and safety mindset from reactive to proactive. When safety becomes a shared belief, not just a box to check, you can grow a culture of safety that will endure.

### OSHA INTRODUCTION AND BACKGROUND

***Purpose and Methods of OSH Act.*** The OSH Act was enacted in 1970 “to assure, so far as possible, every working man and woman in the nation safe and healthful working conditions.” It was designed to require employers to provide safe and healthy work places and to eliminate dangerous conditions in those workplaces. It was intended to balance the maintenance of safe and healthy work environments for workers with the necessity for industry to function without undue interference from the government. The OSH Act places the responsibility for workplace safety and health on employers, not on the governmental agency enforcing it—OSHA, a United States Department of Labor agency. OSHA attempts to accomplish its objectives through many means, including:

1. Stimulating employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;<sup>i</sup>
2. Providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;<sup>ii</sup>
3. Authorizing the Secretary of Labor to set mandatory occupational standards;<sup>iii</sup>
4. Providing occupational health and safety research;<sup>iv</sup>
5. Providing training programs;<sup>v</sup>
6. Providing an effective enforcement program;<sup>vi</sup> and
7. Encouraging the states to assume responsibility for occupational safety and health to the greatest extent possible.<sup>vii</sup>

***Extent of Statutory Authority.*** OSHA's statutory authority extends to most non-governmental workplaces. State and local government workers are excluded from OSH Act coverage, but some state programs extend coverage to state and local government employees.<sup>viii</sup> The Postal Employees Safety Enhancement Act<sup>ix</sup> made the U.S. Post Service the only quasi-governmental entity within OSHA's jurisdiction.<sup>x</sup>

### OVERVIEW OF OSHA REGULATIONS AND PROGRAM

#### ***Federal Occupational Safety and Health Act.***

***Applicability.*** The federal Occupational Safety and Health Act covers all employers in any state or territory of the United States.<sup>xi</sup> “Employer” includes any “person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.”<sup>xii</sup> The OSH Act does not apply to employers who are regulated by another federal agency if that agency actually exercises its statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.<sup>xiii</sup> ***Delegated State Programs.*** Any state or United States territory covered by the OSH Act may submit a proposal for approval of a state plan.<sup>xiv</sup> To attain OSHA approval for a state plan, the state must establish a program that covers all private employees and state and local government workers and is at least as effective as the OSH Act.<sup>xv</sup> Federal OSHA, as a general rule, does not enforce the OSH Act in “state plan” states or territories without the request or

agreement of the state agency.

There are approximately 22 approved state plans.<sup>xvi</sup> The states with approved state plans include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.<sup>xvii</sup> Six states and one territory have approved State Plans that cover state and local government workers only; Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and the U.S. Virgin Islands.<sup>xviii</sup>

## Employer's Duties Under OSHA

**Provide a Safe and Healthy Work Environment.** All employers have a duty to provide employees with a safe and healthy work environment. This duty includes a general duty, as well as a duty to abide by the specific OSHA requirements.<sup>xix</sup> **The General Duty Clause.** *"Each employer... 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. . . ."*<sup>xx</sup> The following elements are necessary to prove a violation of the general duty clause:

1. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
2. The hazard was recognized;
3. That hazard was causing or was likely to cause death or serious physical harm; and
4. There was a feasible and useful method to correct the hazard.<sup>xxi</sup>

**Specific Standards.** *"Each employer . . . shall comply with occupational safety and health standards promulgated under this chapter.."*<sup>xxii</sup> **Posting Citations.** Every employer cited for a violation of any requirement of the OSHA Program must post a copy of the citation at the site of the noted violations, as prescribed in the rules and regulations of the Board. The Board's regulations specify that the citation, or a copy of it, must remain posted in a conspicuous place and in unobstructed view at or near each place of the alleged violation for 3 working days or until the violation has been abated, whichever is later.<sup>xxiii</sup> Other notices, such as citations, notices of contest, and petitions for variances or extensions of abatement periods, orders, and any other document that is required to be posted by the Board's regulations must be posted for 10 working days in a place where notices to employees are routinely posted.<sup>xxiv</sup> The posting requirement applies regardless of whether the citation is being contested by the employer.<sup>xxv</sup> Violations of notification or posting requirements are subject to citation and penalty. **Reporting of Incidents.** The OSHA regulations require that within eight hours after the death of an employee as a result of a work-related incident, and within 24 hours after the in-patient hospitalization of one or more employees or an employee's amputation or loss of an eye as a result of a work-related incident, the employer must report to OSHA the fatality, inpatient hospitalization, amputation, or loss of an eye.<sup>xxvi</sup>

**Employer Recordkeeping Requirements** One of an employer's obligations under OSHA is to keep certain records and self-report certain incidents. The federal requirements are set out in 29 CFR 1904.4, *et seq.* There are two general classes of employers who are specifically exempted from compliance with OSHA's record keeping rules. These exemptions are detailed in sections 1904.1 and 1904.2 of the federal OSHA regulations (CAUTION: These businesses are exempted from OSHA recordkeeping requirements, but they must still comply with OSHA standards, display the OSHA poster, and OSHA reporting requirements). Generally, if an employer had no more than ten (10) employees at any time during the calendar year immediately preceding the year for which the records will be kept, it does not have to comply with any of the record keeping requirements, but if at any time during the previous calendar year the business had more than 10 employees, it is subject to the OSHA recordkeeping and reporting requirements for the subsequent year. This is tested on a business-wide basis, not

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based on the numbers in any given establishment. Another exemption from OSHA record keeping requirements is the exemption provided in § 1904.2 for establishments which are classified in specific low hazard industries (such as retail, service, finance, insurance or real estate). Employers are required to compile certain forms (or their equivalents) and maintain them for five years. The forms are sent to the government only if requested in an inspection, or if the employer is asked to participate in a statistical survey.

**OSHA Form 300 Log:** The OSHA Form 300 is for use in logging occupational injuries and illnesses. The OSHA Form 300 log is used for recording and classifying recordable occupational injuries and illnesses, and for noting the extent and outcome of each case. The log shows when the occupational injury or illness occurred, to whom, what the injured or ill person's regular job was at the time of the injury or illness exposure, the department in which the person was employed, the kind of injury or illness, how much time was lost, and whether the case resulted in a fatality, etc.<sup>xxvii</sup>

**OSHA 301 (Incident Report):** Completion of this form or an equivalent is required each time there is a recordable injury or illness. This supplementary record describes how the injury or illness exposure occurred, list the objects or substances involved, and indicates the nature of the injury or illness and the part(s) of the body affected. A workers' compensation "first report of injury" form or an internal accident report form will suffice as a substitute for the OSHA 301 form, so long as the form used contains all of the information contained in the OSHA 301 form.<sup>xxviii</sup>

## Employees' Duties and Rights.

Every employee must comply with all occupational safety and health rules and regulations and any orders issued thereunder that are applicable to his or her own action and conduct.<sup>xxix</sup> The law does not provide for the issuance of citations or the proposal of penalties against employees.

**Industry Specific Standards. General Industry Standards.** The occupational safety or health standards adopted by the Board from 29 C.F.R. Part 1910 apply by their own terms to all employers and employees at places of employment covered by OSHA. **Construction Industry Standards.** The occupational safety or health standards adopted by the Board from 29 C.F.R. Part 1926 apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the VOSH Program.

## Elements of Proof.

Case law has applied the following elements that must be shown to prove an alleged violation of a standard:<sup>xxx</sup>

1. must prove that a standard applies by its terms;<sup>xxxi</sup>
2. must show the existence of a condition that violates a standard;
3. must show that employees of an employer (not necessarily the cited employer) have been, or it is reasonably predictable that they will be, exposed to or have access to the violating condition;<sup>xxxii</sup> and
4. must prove that the employer knew or with the exercise of reasonable diligence could have known of the violative condition.<sup>xxxiii</sup>

OSHA must also show an employment relationship. This can be accomplished by showing that the employer's employees were exposed or under the multi-employer doctrine, and that the cited employer controlled or created a violative condition.<sup>xxxiv</sup>

For a General Duty Clause violation, OSHA must also prove:

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1. Existence of a hazard—A condition or activity in the workplace presents a hazard to an employee. It may exist even though no accident occurred.<sup>xxxv</sup>
2. Recognized Hazard” element—the condition or activity is recognized as a hazard.
  - a. Industry knowledge—parties often use expert witnesses to show industry knowledge.
  - b. Actual knowledge—there is no need for fair notice if the employer has actual knowledge.<sup>xxxvi</sup>
  - c. Obvious hazards: (i) Causing or likely to cause element—the hazard is causing or is likely to cause death or serious physical harm;<sup>xxxvii</sup> or (ii) A feasible means exists to eliminate or materially reduce the hazard (that is, a feasible abatement).<sup>xxxviii</sup>

Building a strong safety culture requires a holistic approach, encompassing leadership commitment, employee involvement, ongoing training, and a continuous focus on improvement.

**Leadership Commitment.** Culture starts at the top. To set the example for all leadership must visibly and consistently prioritize safety, making it a core company value rather than just a priority. Managers and supervisors should consistently follow safety procedures and wear appropriate PPE. Allocate sufficient resources (time, budget, personnel) for safety initiatives, including training, equipment, and audits.

**Employee Involvement and Empowerment.** Leadership must engage with employees on issues that impact safety, and encourage employees to participate in safety committees and provide feedback on safety practices. By fostering open communications with employees, you can create a safe space for reporting hazards and concerns without fear of reprisal or concerns falling on deaf ears. Empower employees by giving workers the authority and resources to make safety-related decisions, such as stopping work if they identify unsafe conditions. Leadership and management should recognize and reward safe behavior. Celebrate safety achievements and incentivize proactive safety measures to encourage positive habits. Actively seek and incorporate feedback from employees and use it to refine safety procedures.

**Training and Education.** You cannot provide too much training. Remember, training is not a one-time thing. It is imperative that an employer adequately train new hires prior to exposing them to workplace hazards. It is equally as important that the employer provide regular, comprehensive training sessions that cover hazard identification, risk assessment, safe work practices, and emergency response procedures. The Employer must also offer targeted training for specific tasks and equipment, especially for high-risk activities like working at heights, hazardous chemicals or materials, confined spaces, or with heavy machinery. Classroom training is often necessary, but the Employer should incorporate hands-on training, simulations, and interactive sessions to enhance learning and engagement on health and safety matters.

**Strive for Continuous Improvement.** An employer must perform regular inspections and audits, at least as frequently as required by OSHA standards, but more frequently if practical. The employer must also conduct frequent and regular inspections to identify potential hazards, to reevaluate known hazards, and to ensure employees are adhering to safety protocols. Consider compiling a health and safety aspect list, then identifying the three most critical risks from that list, and focusing on the mitigation of those three critical risks at regular intervals. Don't forget to dust off old hazard assessments to determine if any risks or hazards are not properly addressed with existing protocols.

**Incident investigation and analysis.** If an incident occurs, whether it is a near miss or it results in an injury, the Employer must thoroughly investigate the facts and circumstances to identify root causes, potential corrective actions, and then implement corrective actions.

**Stay Up to Date:** The employer cannot sit back and assume that yesterday's risks and hazards will continue in

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perpetuity, or that yesterday's solutions and protocols remain adequate and compliant today. The employer must adapt to evolving safety standards, regulations, and technological advancements to maintain a state of the art safety culture.

***Proactive Measures and Risk Management.*** In the construction industry, preconstruction safety planning is vital. The employer must develop a detailed safety plan during the preconstruction phase, including hazard identification, risk assessment, and control measures. Proactively identify all potential hazards (falls, electrical, machinery, etc.) and implement appropriate controls, such as engineering controls, administrative controls, and PPE to adequately address each hazard.

***Emergency Preparedness.*** Develop and communicate a comprehensive emergency response plan, including first aid training, and emergency contacts. Be prepared to respond to an incident, injury, fatality, or unannounced OSHA inspection. Practice, practice, practice.

***Build the EHS Team.*** Before an incident, injury, fatality, or OSHA inspection, designate your response team. The team should include management representation, on-site representation, the internal or external EHS manager, counsel, and the EHS consultant (if applicable).

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<sup>i</sup> 29 U.S.C. § 651(b)(1).

<sup>ii</sup> 29 U.S.C. § 651(b)(2).

<sup>3</sup> 29 U.S.C. § 651(b)(3).

<sup>4</sup> 29 U.S.C. § 651(b)(5).

<sup>v</sup> 29 U.S.C. § 651(b)(8).

<sup>vi</sup> 29 U.S.C. § 651(b)(10).

<sup>vii</sup> 29 U.S.C. § 651(b)(11).

<sup>viii</sup> See Va. Code § 40.1-2.1; 16 VAC 25-60-30.

<sup>ix</sup> Pub. L. No. 105-241, 12 Stat. 1572 (codified as amended at 29 USC § 651 *et seq.* (1998)).

<sup>x</sup> 29 U.S.C. § 652(5).

<sup>xi</sup> 29 U.S.C. § 653(a).

<sup>xii</sup> 29 U.S.C. § 652(5).

<sup>xiii</sup> 29 U.S.C. § 653(b)(1).

<sup>xiv</sup> 29 U.S.C. § 667.

<sup>xv</sup> *Id.*

<sup>xvi</sup> [www.osha.gov/stateplans](http://www.osha.gov/stateplans)

<sup>xvii</sup> *Id.*

<sup>xviii</sup> *Id.*

<sup>xix</sup> 29 U.S. Code § 654(a)(1).

<sup>xx</sup> *Id.*

<sup>xxi</sup> Va. Code § 40.1-51.1(A); 16 VAC 25-60-160; VOSH Field Operations Manual, Ch. 10, p. 15.

<sup>xxii</sup> 29 U.S. Code § 654(a)(2).

<sup>xxiii</sup> See 29 CFR § 1903.16(b)

<sup>xxiv</sup> *Id.*

<sup>xxvi</sup> 29 C.F.R. § 1904.39(a).

<sup>xxvii</sup> 29 CFR § 1904.29; See Appendix I.

<sup>xxviii</sup> 29 CFR § 1904.29; See Appendix II.

<sup>xxix</sup> 29 U.S.C. 654 (b).

<sup>xxx</sup> *National Coll. of Bus. & Tech., Inc. v. Davenport*, 57 Va. App. 677, 685, 705 S.E.2d 519, 523 (2011) (citing *Secretary of Labor v. Dun-Par Engineered Form Co.*, OSHRC Docket No. 82-928, 1986 WL 53522 (1986)).

<sup>xxx</sup> *Secretary of Labor v. Gary Concrete Prods., Inc.*, 15 O.S.H. Cas. (BNA) 1051, 1052 (No. 86-1087, 1991).

<sup>xxxii</sup> *Secretary of Labor v. Fabricated Metal Prods., Inc.*, 18 O.S.H. Cas. (BNA) 1072, 1074 (No. 93-1853, 1997).

<sup>xxxiii</sup> *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir. 1996).

<sup>xxxiv</sup> 16 VAC 25-60-260(F).

<sup>xxxv</sup> *Secretary of Labor v. Walden Healthcare Ctr.*, 16 O.S.H. Cas. (BNA) 1052 (No. 89-2804, 1993).

<sup>xxxvi</sup> *International Union, UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir. 1987).

<sup>xxxvii</sup> Va. Code § 40.1-51.1(A).

<sup>xxxviii</sup> *National Realty & Constr. Co.*, 489 F.2d at 1265-66.