

Legal Corner

Economic Stimulus Will Result in Heightened OSHA Scrutiny—Are You Ready?

By John F. Heuer, Jr., Esq.

Along with the American Recovery and Reinvestment Act (“ARRA”) and the funds that are being disbursed throughout the country to stimulate a faltering economy comes a less publicized yet potentially potent threat to industry participants and owners—the increased oversight and more aggressive enforcement by OSHA.

Indeed, Secretary of Labor Hilda Solis pulled no punches in warning last July that “the U.S. Department of Labor is back in the enforcement business.”

In the same manner as contractors, subcontractors and owners need to be aware of OSHA’s heightened attention, so too do Construction Managers. Because construction projects are typically inhabited by multiple parties, performing multiple activities in concert (hopefully!) toward the timely completion of a work of improvement, OSHA views these worksites as “multiple-employer” worksites and applies certain specific rules to them.

On such worksites, more than one employer may be citable for a hazardous condition that violates an OSHA standard. In this regard, OSHA generally follows a two-step process to determine whether more than one employer may be cited. The first step is to determine whether the employer falls into one or more of the following categories: A creating, exposing, correcting, or controlling employer. If so, the next step is to determine whether the employer’s actions were sufficient to satisfy its duty to exercise reasonable care in the detection and prevention of violations. A failure in this second step could lead to citation and possibly penalties.

Except perhaps in the case of CM-At-Risk contracts, Construction Managers are generally not engaged in the actual performance of work, so the categories of “creating employer” (employers that cause a hazardous condition to exist) or “correcting employer” (employers who are responsible for correcting an existing hazard), will typically not apply. However, the “exposing employer” (an employer whose own employees are exposed to the hazard) or “controlling employer” (employer who has general supervisory authority over the worksite) designations are more likely to apply to Construction Managers. Indeed, the Multi-Employer Citation Policy published by OSHA states that a Construction Manager would be a “controlling employer” for its purposes if the Construction Manager is responsible for such things as schedules, sequencing, compliance with contract specifications and resolving disputes, even though the Construction Manager may not be responsible for compliance with safety and health requirements.

“The U.S. Department of Labor is back in the enforcement business.”

OSHA inspections are generally conducted without prior advance notice and may be either programmed (scheduled by OSHA according to some selection criteria) or unprogrammed (scheduled in response to a report of an alleged hazardous condition.) The inspection can either be comprehensive or a partial, focused inspection. At the outset of any inspection the CSHO is required to locate an owner representative and present his or her credentials and, thereafter, to present those credentials to any management representatives during the inspection.

Typically, an Opening Conference will take place during which the CSHO will inform all of the affected employers of the purpose of the inspection. Unless certain exigencies are present permitting immediate entry, an employer has a right to require that the CSHO seek an inspection warrant prior to entry and the employer may refuse the CSHO’s entry without such a warrant. However, on multi-employer sites, a CSHO can get around one employer’s refusal by obtaining consent from the owner or another employer with employees at the worksite.

The CSHO will want to review the employer’s injury and illness records and evaluate any recordkeeping deficiencies. Next, the inspector will likely conduct a walk-around inspection to identify actual or potential safety and/or health hazards at the worksite. The CSHO may be (and should be) accompanied by designated representatives of the affected employers and/or employee unions. Lawyers consistently advise clients and representatives prior to depositions to answer the question posed and refrain from volunteering information not directly responsive to a question. This same advice should be followed by designated representatives during an inspection.

A CSHO may (and has the right to) conduct private interviews with employees to obtain information that is “necessary or useful” for carrying out the inspection effectively. If an inspection proceeds and an employer interferes with the inspection, the CSHO may treat the interference as a refusal. Examples of interference include the refusal or limitation on: (1) a walk around inspection of the site; (2) the review of records essential to the inspection; (3) the taking of photographs and or videos; or (4) private employee interviews.

Following the inspection, a closing conference with the affected employers and union representatives (if applicable) will provide for discussion about any apparent violations, the employers’ rights and responsibilities, as well as the handling of any citations that may be issued or penalties imposed. Any noted violations should be abated promptly and, upon the CSHO’s departure, a safety meeting should be convened to address whatever violations, issues or concerns were identified during the inspection.

Although citations and proposed penalties may be forthcoming, (both of which can be addressed through established legal processes), knowing what to expect and appropriately managing an OSHA inspection may minimize hefty penalties and project-delaying sanctions. Construction Managers need to be proactive and prepared to be visited by OSHA because all indications are that they’ll be coming! **CM**

John Heuer is an equity partner in the Los Angeles-based firm of Gibbs, Giden, Locher, Turner & Senet LLP and is the current National Chair of CMAA’s Legal Committee. He can be reached at jheuer@gglts.com.

Waiting for the shoe to drop

By Raoul M. Ilaw

It’s not what you wanted to hear: the OSHA compliance officer at the closing conference tells you that you have a number of apparent violations. Now what?

Days pass and you either wait patiently for some communication from OSHA, or you may mentally cast aside the experience of being inspected. Then one day, an envelope arrives from OSHA.

You’ve just been handed your list of citations and penalties. Welcome to OSHA’s enforcement system.

OSHA has six months from the end of the inspection to serve you the citation. Your rights begin with a 15-day period in which you may meet with the OSHA area director at his office to discuss the citation and penalties.

You’d be smart to request this conference. You’ll be given an opportunity to get the details and explanation of why and what caused OSHA to come down on you. You’ll also have a clearer understanding of what standards mean. You’ll have an opportunity to attempt a settlement. And you can request an extension in order to abate (correct) violations, and correct them in the proper way to maintain a safe and healthful workplace.

The penalties you receive are based on your history with OSHA, the size of your business, how severe the violations were, and the way you acted during the inspection (your good faith).

In trying to come to terms with OSHA, try to reduce the classification of the violation, which is either egregious, willful, serious or other-than-serious. Penalties for willful violations start at \$70,000, and a serious violation starts at \$7,000. These violations can be re-classified to a lesser classification if the OSHA official agrees with you.

“In trying to come to terms with OSHA, try to reduce the classification of the violation.”

If you can’t reach an agreement, you may within that 15-day period contest the citation, or penalties, or both. Your case is then sent to the Occupational Safety and Health Review Commission, a separate group composed of several hearing judges, and the case is set for a trial.

You might have several possible defenses: Noncompliance was due to employee misconduct, and you trained every employee and communicated the specific information to that employee. Or, you investigated and attempted to correct any potential hazard and you enforced your company policy.

However, you must have clear, concise documentation to prove your case. **CM**

Raoul M. Ilaw is a former OSHA Administrator and OSHA/FEMA, Safety & Health Manager. This advice is excerpted from an article he wrote in 2005.