

DOSH—What's It Up To, And Where's It Going?

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Presented by:

Joseph P. Hoag, Esq.

Today's Presentation

Developments in OSHA and WISHA

Top DOSH Violations (and how to avoid them)

What's Next – “Hot” Issues

OSHA and WISHA



VS



The Occupational Safety and Health Act (OSH Act...sometimes OSHA)

- Enacted in 1970
- Covers all non-government employees
- Enforced by U.S. Department of Labor
- Allows states to develop own safety and health standards

The Washington Industrial Safety and Health Act (WISHA)

- Washington is an approved “State Plan” state
- WISHA covers all employers – including public employers
- Enforced by Washington L&I’s Division of Occupational Safety and Health (DOSH)

OSHA vs. WISHA

- Vast majority of Washington employers are covered by WISHA, not OSHA
- State standards must be at least as protective as OSHA
- WISHA requirements often exceed those under OSHA

OSHA – Penalties

Federal Inflation Adjustment Act (Nov. 2, 2015)

- OSHA increased its penalties by nearly 80% in 2016
- Federal OSHA penalties are pegged to the US Consumer Price Index
- Adjustments made to federal OSHA penalties no later than January 15 of each calendar year

WISHA – Penalties

For all inspections that opened on or after January 23, 2019:

- Serious -- \$13,260 per violation
- Willful -- \$132,598 per violation
- Repeat -- \$132,598 per violation
- Failure to Abate -- \$13,260 per day

These levels remain until new penalty maximums announced in January 2020.

OSHA – Electronic Submissions

Obama Administration v. Trump Administration

Original federal OSHA version – 2016:

- employers annually e-file 300 logs, 300A summaries, and 301 incident reports annually
- OSHA promised to keep personal information protected
- “public shaming” approach

New federal OSHA version

- 300A summaries only
- First rule was suspended (May 2018), then rulemaking (Jan. 2019)
- Lawsuits pending

WISHA Does Not Immediately Follow...

“The requirement [to e-file OSHA forms] does not apply to Washington employers. That is because Washington State has not yet adopted the new electronic reporting requirement. If you are an employer in the state of Washington, you do not have to provide this information to OSHA until Washington adopts the same requirement in our state.”

—Washington DOSH, February 2019

...But Eventually Comes Around

August 2019, WISHA Regulation Revision (WAC 296-27-03103)

- Establishments must submit 300A Summaries annually if they employed:
 - 250 or more different employees; **or**
 - Between 20 and 249 different employees and “are in designated industries” (see NAICS codes listed in WAC 296-27-071, Appendix B)
- Electronic submissions through OSHA’s website
- Include Employer Identification Number (EIN) or federal tax identification number
- Deadline: March 2 for prior year (e.g. 300A Summaries for 2019 due March 2, 2020)

E-Filing Rule: Key Concepts

- Establishment
 - A single physical location where business is conducted or where services or industrial operations are performed.
- Different employees
 - Employers must count all full-time, part-time, seasonal, and temporary workers towards their running count of individual employees for the year. Each individual employed in the establishment during any part of the previous calendar year counts as one employee.

Employee Involvement & Anti-Discrimination

- Conformance with federal OSHA
- Establish and inform employees of procedures for reporting work-related injuries and illnesses
- Procedure cannot “deter or discourage a reasonable employee” from accurately reporting
- Inform employees that
 - They have a right to report work-related injuries and illnesses
 - Employer is prohibited from discriminating against employee for reporting
 - So...what about drug testing?
- WAC 296-24-02111, -02113; Effective Jan. 2020

DOSH Enforcement





Quiz – How Much is the Penalty?

Employer A is not a janitorial or maintenance company but owns some products related to cleaning and minor repairs – bleach, Simple Green (“nontoxic”) and caulking.

Products are in their store-bought containers and the employer has Safety Data Sheets. But the employer does not have a written hazard communication program and does not train employees on how to use the products.

Penalty is:

A: \$0

B: \$1,000

C: \$9,000

DOSH: Top Rule Violations 2019

- Hazard Communication
- Fall Protection
- Accident Prevention Plan (APP)
- Safety Committees/Safety Meetings
- Personal Protective Equipment
- Ladder Use
- Electrical Rules
- First-Aid Training/Certification
- Portable Fire Extinguishers
- Respirators

Be Prepared (i.e. do stuff and keep records)

- Safety Plans
 - APP
 - HazComm
 - Exposure Control Plan
 - Respiratory
- Safety Committee/Meetings
 - Form committee and hold meetings
 - Keep records
- Assessments
 - PPE assessments, noise, bloodborne pathogens, respirators
 - Keep records
- Training
 - Develop and conduct
 - Keep records
- Safety Records
 - 300/300A/301
 - Hep B
- Discipline
 - Do it
 - Keep records

“Hot” Topics

Quiz – Which City Had the Worst Air Quality in the World in 2018?

A. Beijing

B. New Delhi

C. Seattle



“Seattle’s dirty air among the world’s worst, but relief is in sight.” Seattle Times, Aug. 15, 2018

“Monday’s air quality is the worst this century – and Tuesday’s not much better.” SeattlePI.com, Aug. 21, 2018

“Why Seattle had the worst air quality in the world at some points this summer.” NPR, Aug. 31, 2018

Wildfire Smoke – DOSH Guidance

No Regulations; Guidance – “Wildfire smoke and Washington workers”

- Warning that smoke relates to range of health risks
- Suggestions:
 - relocate workers
 - change work schedules
 - change workloads
 - provide/improve filtration
 - provide respirators (remember respirator regulations!)
- “The Washington State Department of Labor and Industries does not enforce the EPA Air Quality Index as a regulatory standard.”
 - But, guidance includes a link to a webpage to file complaints, including safety complaints
 - General Duty clause

California Issues Emergency Rule

From Guidelines to Regulation

- Emergency (temporary) regulation effective July 29, 2019, lasts 180 days
- Proposed permanent regulation – more stringent than emergency rule
- Applies in the context of wildfire smoke (i.e. not normal pollution)

Employer Requirements – triggered when Air Quality Index indicates air is “unhealthy for sensitive groups”

- Employee notice/education, training
- Engineering controls to improve air quality “to the extent feasible”
- Administrative controls (e.g. moving work to other locations, changing schedules)
- Respiratory protective equipment (on request or mandatory, depending on AQI)

California previously assumed ability to enforce wildfire smoke health concerns through other regulations

Might Washington follow?

Whose Employee is it Anyway?

WISHA regulations permit an “employer” to be cited for a violation

- So – who is an “employer”?

Theories:

- Multi-Employer: creating/controlling/correcting/exposing
- Joint-Employer:
 - Leased employees
 - economic realities – who controls the worker and the worksite?
 - Knowledge **not** a factor
- Dual-Employer: control plus
 - “Primary” and “Secondary” employers
 - DOSH Directive 1.15

DOSH: Eliminate Joint Employer!

2 Cases: *Tradesmen International* and *Laborworks Industrial Staffing Specialists*

- Board of Industrial Insurance Appeals
 - Joint employer test controls, neither are employers
- King County Superior Court
 - Joint employer test controls, affirms one and reverses the other
- Court of Appeals – Pending



Thank You!



Joseph P. Hoag

Counsel, Davis Wright Tremaine

josephhoag@dwt.com

206.757.8299