

OSHA Steps Up Workplace Violence Enforcement, But Some See Unresolved Legal Issues

OSHA has made workplace violence a key new enforcement priority — a move strongly backed by unions — but some industry lawyers are voicing concern about the legal ramifications of the agency using the OSH Act's general duty clause to address the issue, particularly in cases where the violence is created by a third party outside the employer's control.

Agency chief David Michaels mentioned workplace violence in a recent speech as one of several “newer problems” that OSHA is trying to address, also citing ergonomics and infectious diseases. The agency has issued several citations on workplace violence recently and appears to be hiking enforcement in that area, sources pointed out.

Questions persist, however, about OSHA's legal stance in issuing such citations, and some representing industry say this type of use of the general duty clause has not been completely reviewed. Michael Billok, an attorney with Bond, Schoeneck and King, contended that the agency will have to demonstrate how employers cited in workplace violence cases have violated the OSH Act since the alleged hazards are often created by third parties.

Billok cited a case that went before an Occupational Safety and Health Review Commission (OSHRC) administrative law judge (ALJ) in 1995, *Megawest Fin., Inc.*, in which the judge vacated the citation against an apartment complex over an alleged violation of the general duty clause arising from workplace violence. Since then OSHA pulled back on enforcement of such cases, he said. “It dropped off the map and they definitely didn't do it with any regularity,” Billok said. “Dr. Michaels announcing that they're going to restart this ... is troubling because the commission hasn't decided the issue.” There is a final order of the commission, but it is an ALJ decision, not a commission ruling, he noted.

Enforcement of such cases is vague and also the agency is citing employers for something that is not under their control, he contends. “You're basing it on actions of third persons,” he said. “That's way beyond what the [OSH Act] requires for employers, and frankly it's untenable.”

Organized labor presses the issue, nonetheless, citing high rates of worker mortality as a result of workplace violence. The annual AFL-CIO report on job-related fatalities for 2011 states that in 2009, workplace violence was among leading causes of worker deaths.

“It's a significant and serious problem,” a union official told *Inside OSHA Online*. Further the source argues that the fact that the whole OSHRC has not resolved the issue should not stand in the way of enforcement, and says there are many issues that are subject to such citations. “That doesn't mean you don't enforce.”

On top of the ALJ decision, there is existing case law, from the 10th Circuit U.S. Court of Appeals, which cited the ALJ decision. And while the court decision is only binding within its circuit, sources say other courts would likely consult the 10th Circuit ruling for its persuasiveness.

“Because the absence of *any* specific OSHA standard on workplace violence is undisputed, the district court correctly recognized that the only possible area of OSH Act preemption was under the general duty clause and the OSH Act's overarching purpose,” the recent appeals court decision states in the case of Ramsey Winch Inc. and others against Oklahoma officials. “Thus, in finding preemption, the district court held that gun-related workplace violence was a ‘recognized hazard’ under the general duty clause, and, therefore, an employer that allows firearms in the company parking lot may violate the OSH Act. We disagree. OSHA has not indicated in *any* way that employers should prohibit firearms from company parking lots. OSHA's website, guidelines, and citation history do not speak at all to any such prohibition. In fact, OSHA *declined* a request to promulgate a standard banning firearms from the workplace,” the decision states.

The appeals court decision further cites the *Megawest* decision as the only opinion issued by an ALJ concerning a general duty clause violation due to workplace violence — and notes that the ALJ reversed the citation, ruling that potential violent behavior by residents did not constitute a “recognized hazard.”

Baruch Fellner, partner in Gibson, Dunn & Crutcher, suggested that the ALJ and appeals court rulings can make it difficult for OSHA in this area of enforcement. “It's a rare ALJ decision that gets so roundly endorsed by a court of appeals,” he told *Inside OSHA Online*. “There is a substantial question as to whether OSHA's jurisdiction extends to sociopathology. The notion that OSHA can intrude in the regulation of criminal activity is far-reaching.”

— Christopher Cole