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OSHA EXPANDS MANDATORY REPORTING REQUIREMENTS TO ENCOMPASS INDIVIDUAL EMPLOYEE HOSPITALIZATIONS, AMPUTATIONS, AND EYE LOSS

Hodgson Russ Alert
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In 2001, the Occupational Safety and Health Administration (OSHA) adopted a regulation requiring employers to report to their local OSHA office any work-related incidents that resulted in an employee death or the in-patient hospitalization of three or more employees. (See 29 C.F.R. § 1904.39.) That regulation required the report to be made within eight hours following the death or hospitalization. In most cases, an OSHA compliance officer would then be dispatched to conduct an investigation of the incident. As one might expect, the mandatory reporting of these types of incidents tends to result in the employer being thoroughly investigated and often cited for one or more OSHA violations. Where the employer had a past history of being cited for violating the same standard, repeat or willful violations might follow, which can carry penalties of up to $70,000 each.

According to the Bureau of Labor Statistics' preliminary report for 2013, approximately 12 work-related deaths occurred every day in the United States, a total of 4,405 deaths. While these numbers have been trending downward through the years, the ten most frequently cited standards largely repeat themselves, with some limited variation from year to year. For 2013, the top ten were:

1. Fall protection, construction (29 CFR 1926.501)

2. Hazard communication standard, general industry (29 CFR 1910.1200)

3. Scaffolding, general requirements, construction (29 CFR 1926.451)

4. Respiratory protection, general industry (29 CFR 1910.134)

5. Electrical, wiring methods, components and equipment, general industry (29 CFR 1910.305)

6. Powered industrial trucks, general industry (29 CFR 1910.178)

7. Ladders, construction (29 CFR 1926.1053)

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8. Control of hazardous energy (lockout/tagout), general industry (29 CFR 1910.147)

9. Electrical systems design, general requirements, general industry (29 CFR 1910.303)

10. Machinery and machine guarding, general requirements (29 CFR 1910.212)

This group of standards is particularly significant in that all ten are associated with managing hazards that present high risks of death, hospitalizations, and/or amputations. For example, nearly 37 percent of all construction-related deaths resulted from a fall from heights, whether from a ladder, scaffold, or other equipment. An additional 10.3 percent of the construction deaths were caused by falling objects, while electrocutions comprised another 8.9 percent. Approximately 50 percent of all amputations occurred in the manufacturing sector, with the remainder distributed across construction, wholesale and resale trade, the service sector, and other industry groups. Regardless of industry, however, the overwhelming number of amputations stem from portable and stationary machinery, implicating deficiencies in the application of lockout/tagout and machine guarding standards.

Individual in-patient hospitalization data was not previously tracked by OSHA, except in a handful of states operating their own safety and health programs. But after evaluating historical data from these states and estimates developed from worker-compensation and hospitalization data supplied by other agencies and groups, OSHA estimates that there are some 210,000 work-related in-patient hospitalizations per year. While OSHA recognizes this estimate may be on the high end of the spectrum, there can be no doubt that the number of individual in-patient hospitalizations is sizable and that workplace incidents that cause in-patient hospitalizations and amputations are going to have greater import to employers and will influence OSHA enforcement practices beginning in 2015.

On September 11, 2014, OSHA adopted a final rule that significantly broadens the mandatory reporting requirements, resulting in an amended Section 1904.39 that becomes effective on January 1, 2015. The amended regulation will require employers not only to report deaths within eight hours as before; it also mandates that employers report to their local OSHA office, subject to limited exceptions, all in-patient hospitalizations of an employee, all amputations, and all eye loss incidents within 24 hours of the event. And, of course, these events must also be recorded on the employer's OSHA 300 log.

For purposes of applying these criteria, OSHA defines in-patient hospitalization as "a formal admission to the in-patient service of a hospital or clinic for care or treatment." In-patient hospitalization that involves "only observation or diagnostic testing" need not be reported. The new regulation defines an "amputation" as:

> the traumatic loss of a limb or other external body part. Amputations include a part, such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached. Amputations do not include avulsions, enucleations, deglovings, scalpings, severed ears, or broken or chipped teeth.

Because of the anticipated avalanche of mandatory reports OSHA expects to receive under the greatly expanded regulation, local Area Offices will necessarily need to exercise greater discretion in deciding which incidents and employers warrant an inspection. OSHA's own rule-making recognizes that it simply does not have the resources to pursue every one of them. This means the decision will likely depend on the facts and circumstances underlying the incident as reported to OSHA, as well as the employer's prior OSHA inspection history. Employers with OSHA histories that contain high-hazard violations or violations of a type that could have contributed to the reported incident should be especially wary of an ensuing inspection.

Construction employers in New York should be particularly concerned with these changes in reportable cases involving falls from elevated heights or where the adequacy of fall-related safety devices are concerned, especially where New York Labor Law §§ 240, 241, and 200 could serve as a basis for triggering a personal-injury suit and in multi-employer construction worksites. Similarly, manufacturing and construction employers need to be concerned about cases involving amputations, eye losses, and fall-related injuries that could qualify for the "grave injury" exception to New York Workers Compensation Law § 11, thereby allowing the employer to be sued for contribution or indemnification by a different prime defendant, such as another contractor, project owner, or equipment manufacturer.

An employer's compliance with OSHA's mandatory reporting requirements may result in an employer issuing rushed and ill-considered statements, creating incorrect or incomplete accident reports and other documents, or failing to conduct a proper and independent investigation, any of which could adversely affect the employer in both an OSHA inspection and in the hands of a skilled personal-injury plaintiffs' lawyer. Any OSHA inspection that stems from a reported incident will likely also result in the creation or collection of additional evidentiary-type material by the employer and/or third parties that may be adverse to the employer's interests should litigation arise, not to mention any resultant OSHA citations. While there may be questions of access to and admissibility of the actual information created by OSHA, injured employees often obtain access to some of the critical elements of OSHA's investigative file through routine Freedom of Information Act requests, around which their attorneys can build or enhance the liability suit through the litigation discovery process. For these and many other reasons, employers are well-advised to contact their OSHA attorney immediately for advice upon the occurance of a reportable incident under this revised OSHA regulation. Failure of an employer to engage in immediate efforts to manage the situation in the hours following the incident could broaden the employer's exposure on multiple fronts, leading to long-term, deleterious financial, regulatory, and liability consequences.