



of \$10,000 (in addition to the maximum civil penalty of \$70,000 for willful violations) where such actions result in one or more workers' deaths. These maximum statutory criminal fines are increased by the Sentencing Reform Act of 1984, 18 USC § 3551 et seq., to up to \$250,000 (individual) and \$500,000 (corporation). Only citations issued under specific standards codified in 29 CFR can be prosecuted criminally; general duty clause violations (issued under Section 5(a)(1) of the OSH Act), even if willful or intentional, are not criminal. Criminal prosecution also may lie against someone who provides advance notice of an OSHA inspection or falsely reports information to OSHA. However, under the federal statute, only corporations/employers are subject to such prosecution. See *United States v. Doig*, 950 F.2d 411, 412 (7th Cir. 1991) (holding that Congress did not intend to subject employees to charges of aiding and abetting employers in criminal violations under § 666(e) of the OSH Act).

Several pieces of legislation were introduced in the 109th Congress and will carry over for further consideration during 2006, but none have been given serious consideration because all were introduced by Democratic members. In the Republican-controlled Congress, such measures rarely receive even a committee hearing much less the opportunity for floor consideration. Sen. Michael Enzi (R-Wyo.), chairman of the Senate Health, Education, Labor and Pensions Committee that has legislative jurisdiction over OSHA, was expected to introduce a criminal penalties bill, but this did not occur after industry groups raised vociferous objections.

The Workplace Wrongful Death Accountability Act (S 947) was introduced by Sen. Jon Corzine (D-N.J.), but he subsequently left Congress after being elected governor of New Jersey. That legislation would have formally incorporated the higher penalties under the Sentencing Guidelines into the OSH Act and also would have increased incarceration to 10 years, making such violations a felony. Legislation introduced by Sen. Edward Kennedy (D-Mass.) has similar

GO DIRECTLY TO JAIL

EMPLOYERS HAVE MORE TO FEAR THAN OSHA CITATIONS

BY ADELE L. ABRAMS, ESQ., CMSP

STATE PROSECUTORS ARE TAKING A lead role in bringing criminal prosecutions against employers these days in the aftermath of workplace deaths or catastrophic accidents. This may be a response to OSHA's light-handed use of its criminal penalty provisions and Congress' slow pace in heightening federal penalties. This issue was highlighted in several media series targeting specific employers who got a hand-slap after flagrant violations were brought to light—and the unions have been calling for more stringent prosecution. Regardless of the cause, employers who skate along the edges of safety and health compliance have more to fear than just OSHA citations.

PENALTIES UNDER SCRUTINY

Currently, the Occupational Safety and Health Act of 1970 (OSH Act) has fairly minimal criminal penalties—a maximum of six months incarceration and maximum monetary penalty

provisions but also addresses civil penalties and expanded coverage for public sector workers (S 944). On the House side, companion measures (HR 2004 and HR 2005) were introduced by Rep. Major Owens (D-N.Y.), but they have similarly dismal prospects for passage.

As already noted, current OSHA criminal provisions are misdemeanors. Therefore, the U.S. Attorney's Office in the Department of Justice (DOJ), which prosecutes criminal cases rather than having them handled by the Department of Labor (DOL), may be reluctant to expend the agency's limited resources on prosecuting these cases. In fact, well under 100 such prosecutions have been brought in the more than 35 years since OSHA was established. Part of the problem is OSHA inspectors often do not conduct the type of thorough investiga-

investigation and potential prosecution. Less than 10 percent of willful citation cases where the violations resulted in employee deaths undergo this level of review and, in 2003-04, only 18 such cases were referred to DOJ for consideration. Far fewer of these actually were prosecuted.

STATES

What many employers do not realize, however, is that nearly half the states and U.S. territories run their own OSHA programs and are immune from the bureaucratic labyrinth that encumbers criminal prosecution at the federal level. These include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina,

slaughter or wrongful death.

There also are indications that state prosecutions may occur even in states where federal OSHA handles the civil investigations, and so far DOJ does not seem inclined to raise a federal preemption argument to bar such actions. See *Illinois v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 963 (Ill. 1989) (applying the state's reckless-conduct criminal statute to corporate officials). In a more recent case against Houston-based Motiva Enterprises, Delaware prosecutors brought criminal action against a refinery after a worker was killed in a sulfuric acid tank collapse. There, OSHA had reduced the civil citations to "unclassified" (making federal prosecution a nullity), so the state attorney general stepped in. Motiva Enterprises pleaded no contest to criminally negligent homicide and assault, only the second such prosecution in state history. The company was ordered to pay \$46,000 in fines, then the maximum under state law, and \$250,000 more to a victims' fund. The state subsequently increased its criminal fines for such matters.

Another significant difference is that, unlike federal OSHA actions, states can criminally prosecute nonfatal cases under "reckless endangerment," assault or battery criminal statutes. As in the Delaware case, state proceedings need not be linked to willful violations and can proceed on their own track much more quickly than cases at the federal level. Some examples follow:

- In 2004, an Iowa district court criminally convicted a communication tower fatality when a 29-year-old employee died on his first day on the job. The court ruled the defendant was guilty on one count of Willful Violation Causing Death and one count of Willful Injury Causing Death. Sentencing included fines of \$1,500 for each count and the defendant was

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tions, including preservation of evidence, witness interviews, etc., that would support a large-scale federal criminal prosecution.

The time lag of up to six months between the close of OSHA's investigation and issuance of any citations also contributes to a loss of momentum in bringing a criminal action because it will not be known until that time whether "willful" findings are being filed in the first instance. Willful violations mean the employer acted intentionally to violate one or more OSHA mandatory standards or acted with a "plain indifference" to the legal requirements. The employer has the opportunity to have an informal conference on any OSHA citations, and these often result in elimination of "willful" allegations and modification of citations to "serious" or "unclassified"—both of which virtually eliminate the potential for criminal prosecution.

Even if a willful allegation withstands challenge, there are layers of review within OSHA and DOL's Office of the Solicitor before a final decision is made to refer the case to DOJ for criminal

Tennessee, Utah, Vermont, Virginia and Washington. Four more—Connecticut, New Jersey, New York and the Virgin Islands—run their own OSHA programs but only to cover public-sector workers; federal OSHA enforces the law at private workplaces in those states.

The so-called "State Plan States" normally enforce federal OSHA rules though some have more stringent standards that apply to specific activities (many of these affect construction), but they use state personnel to conduct inspections and accident investigations. The civil monetary penalties in State Plan States normally are the same as federal OSHA, but the criminal proceedings are entirely different. Typically, such cases are handled by the state's attorney or attorney general's office and employers are prosecuted under state criminal laws for criminally negligent homicide, man-

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committed to the custody of the sheriff of the county for 365 days for each count.

- A Staten Island, N.Y., builder, Formica Construction, was charged with second-degree manslaughter in November 2005 after a Mexican laborer was killed when the unshored trench in which he was working collapsed. The worker, already dead, was decapitated during the rescue attempt. A seven count indictment is pending in New York, and the employer faces a maximum of 15 years in prison if convicted of the top felony charge. The other charges include criminally negligent homicide, first-degree reckless endangerment and third-degree assault. By comparison, the 15 proposed OSHA civil citations arising from the fatality had penalties totaling \$15,000 though one was deemed willful.
- The Arizona attorney general successfully prosecuted Far West Water and Sewer Co., Yuma, Ariz., on five felony charges, including negligent homicide, aggravated assault and two counts of endangerment, in a double-fatality case. Two workers were overcome by toxic sewage gases while working on an underground sewer tank in 2001. A subcontractor on the project, Santec Corp., Castle Rock, Colo., also pleaded guilty to a felony charge for violating a safety standard causing the death of an employee in the same incident.
- In late 2004, Bronx Auto Venture Corp., a New York employer, was indicted by the state after a worker nearly died after being assigned to work in an underground tank where he was exposed to toxic vapors. The charges included reckless endangerment, as well as environmental crimes. Both are Class D felonies under New York Criminal Statutes.

States also are considering adopting more stringent criminal penalties for workplace safety violations. For example,

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Indiana HB 144 would impose penalties including eight years in prison and monetary fines against employers whose disregard for safety laws results in a workplace fatality. The "Corporate Manslaughter Act" would impose penalties against employers and their agents in certain cases of negligence. Introducing the bill in 2005, State Rep. Dan Stevenson stated: "The corporate culture has developed a mindset that it is better to address potential safety violations by paying a small fine instead of actively working to correct the problems. Through this bill, I want to make employers understand there are consequences when they show they don't care about keeping their workers safe."

ODDS

What are the odds of your company facing a potential criminal prosecution? Although workplace fatalities have decreased substantially during the past decade, 15 workers are killed on the job each day. In construction, where the most deaths occurred, 3.2 men and women died every day during 2000, raising the total in that industry to 1,154 deaths for the year. If an employer has previously received OSHA citations in a particular area known for high hazards (trenching, electrical, confined spaces, etc.) and a worker is subsequently killed while engaging in one of these activities, it raises the likelihood that OSHA would issue a repeat or willful citation in the event that conditions similar to those previously cited

were implicated in the fatality. Under these circumstances, the odds of federal or state criminal prosecution are heightened.

Employers obviously can eliminate such

vulnerability by fully conforming their work practices to OSHA requirements or at least making a good-faith effort to do so. Documenting training, having written work procedures and job-safety analyses that address safety for each task also are useful in precluding willful allegations and the resulting criminal exposure. Finally, whenever a catastrophic event occurs, employers must consider it a potential criminal case from the outset and act accordingly. This includes using sound incident management techniques; avoiding any incriminating statements or admissions against interest (because OSHA never will give you a Miranda Warning during its investigation of a workplace death); and using counsel to maintain privilege for accident investigation reports, witness interview statements and related documents.

With more aggressive prosecution at the state and federal level, the stakes are too high to take these laws lightly or view OSHA penalties as a cost of doing business. ■■

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