

# OSHA Death Cases – Special Issues

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# OSHA Death Cases

- Record number of deaths in O&G industry
  - FY2011
    - 112 work-related deaths
      - North Dakota had highest fatality rate
  - FY2012
    - 138 work-related deaths
      - O&G Rate = 7.6 times the all-industry rate
      - 16% involved contractors
        - » >50% involved construction and/or extraction
      - Texas had highest fatality rate

# Traditional Resolution of OSHA Death Cases

- Citation / Contest / Settlement
  - Occasionally a trial on the merits
- Settlement typically involved small monetary payments
- Most fighting about classification of the violation – willful vs. serious vs. other than

# Significance of Willful Violation

- If willful violation results in death, it is punishable by a fine and/or imprisonment
  - Up to six months prison
  - Fine up to \$250,000 for individual, \$500,000 for a corporation
- Repeated violation – fine up to \$70k each
  - Original citation must be final (not under contest)
- Use of willful finding in state court personal injury case

# Criminal Prosecution of OSHA Violations

- Since OSHA was passed in 1970:
  - More than 400,000 workplace deaths
  - Less than 100 criminal prosecutions
  - Less than a dozen criminal convictions
- OSHA cases normally litigated before an ALJ by DOL Solicitors
- OSHA is now referring death cases involving willful violations to the Department of Justice for prosecution

# Criminal Prosecution for OSHA Violations

- To obtain a criminal conviction, the Department of Justice must prove beyond a reasonable doubt:
  - Violation of a specific OSHA standard (not a “general duty” violation)
  - Committed by employer
  - Violation conduct was direct cause of employee’s death
  - A willful violation

# Prosecution of a Willful Violation Resulting in Death – A Case Study

- *Adams Thermal Systems* (2013)
  - Employee crushed in machinery
  - OSHA cited employer for three willful violations
  - OSHA referred the case to DOJ
  - Settlement in form of deferred prosecution agreement:
    - \$450,000 payable to widow
    - \$450,000 payable as criminal fine
    - \$435,000 payable as OSHA fine
    - Company denied liability and there was no finding it acted “in a manner characterized as willful or repeated”
  - Company was placed in SVEP

# Safety, Health & Environmental – Retaliation Claims

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# Whistleblower Protections in Federal Safety and Environmental Statutes

- Occupational Safety and Health Act
- Surface Transportation Assistance Act
- Asbestos Hazard Emergency Response Act
- International Safety Container Act
- Energy Reorganization Act
- Clean Air Act
- Safe Drinking Water Act
- Federal Water Pollution Control Act
- Toxic Substances Control Act
- Solid Waste Disposal Act
- Comprehensive Environmental Response, Compensation, and Liability Act
- Others

# Whistleblower Protections in Federal Safety and Environmental Statutes

- The statutes generally protect reporting of violations to outside agencies only
- Some statutes protect intra-company whistleblowing
- Retaliation claims generally must be filed with OSHA within 30-180 days
- Typical remedies available include reinstatement, money damages, attorneys' fees

# Whistleblower Provisions Under State Law


- Texas Labor Code Sec. 411.082:  
“An employer may not suspend or terminate the employment of or otherwise discriminate against an employee for using the telephone service to report in good faith an alleged violation of an occupational health or safety law.”
- Similar laws and public policy protections in other states

# Retaliation Protection Under State Law

- *Sabine Pilot* Exception to At-Will Employment:
  - An employer cannot discharge an employee for the sole reason that the employee refused to perform an illegal act
- Similar laws and public policy protections in other states

# Burden of “Proof” in Retaliation Cases

- Plaintiff bears ultimate burden of proof
- Employer should be prepared to demonstrate an adverse action was taken in a fair manner and because of legitimate, non-retaliatory business reasons
  - Sloppy communication, documentation and/or management practices can doom the employer’s defense



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