

ACWI ADVANCE

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Yes, Employers Can Fight OSHA

As we reported earlier, federal OSHA is pursuing a nationwide National Emphasis Program (NEP) for Covid 19, targeting what it deems to be higher hazard industries for flood-the-zone enforcement action by hundreds of inspectors (AA, 4-1-21, P. 5).

Since March, the agency has surged through the hospital and healthcare industry before recently announcing a new focus on restaurants.

Keep in mind that among other targeted industries sure to see future visits from OSHA inspectors are general warehousing and storage, and temporary staffing agencies, as well as big retailers and meat processors.

If your business is on OSHA's hit list, you need to review and update your Covid 19 safety documents, programs and procedures. Be especially careful to mind state and local mandates that contradict the newest national mask guidelines issued by the Centers for Disease Control & Prevention (CDC).

Also take the time to review OSHA's most recent guidance for employers, [Mitigating and Preventing the Spread of Covid 19 in the Workplace](#), until – and if – the agency finally issues Emergency Temporary Standards. (AA, 4-15-21, P. 1).

OSHA reports 408 workplaces have received about 1,150 citations for Covid 19-related violations between July 1, 2020, and April 12, 2021.

Although this involved a wide range of citations, most of those issued since the NEP began have been for respiratory protection violations (with N95 respirator use topping the list) along with recordkeeping violations.



But employers are fighting back. “Typically, only 8% of cited employers contest citations. Not so for Covid 19,” report attorneys for the Jackson Lewis law firm. Employers cited by OSHA for alleged Covid 19 violations have contested the citations at more than quintuple the ordinary contest rate, to a whopping total of 42%.

One reason for this is that during the pandemic OSHA has seen an unusually large number of employee complaints, the attorneys note.

“Because these cases arose from a novel situation, OSHA applied pre-pandemic standards in novel ways, leading to disputes between the agency and employers over appropriate use and interpretations of standards relating to respiratory protection, sanitation, PPE and recordkeeping,” they point out.

Some employers chose to contest charges of failure to report “work-related” instances of Covid 19 exposure because it is impossible for OSHA to prove whether exposures to the disease took place in the workplace or in the community.

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“When OSHA receives employee complaints of Covid 19 exposures and cites an employer, it effectively places the onus on the employer to prove the employee caught the virus from a family member, in a grocery store, or from dining with friends in a restaurant – an impossible task,” the Jackson Lewis attorneys state.

Another issue is the shifting guidance from the Centers for Disease Control and Prevention (CDC), OSHA, and state and local health departments.

The attorneys also note that the traditional approach taken by an employer seeking to resolve a citation is to enter into an informal conference with OSHA employees and then agree to accept the citation in exchange for a penalty reduction.

After the employer has made the reduced payment and provided the required documentation of hazard abatement to OSHA, it hopes to quickly close the matter and move on.

“This short-term solution may provide false hope, especially if the employer waives potential defenses such as employee misconduct, technological infeasibility or greater hazard,” say the Jackson Lewis attorneys.

They argue that acquiescing to a citation ignores the hidden costs created when an employer accepts a quick settlement offer made during an informal conference, even if it immediately results in monetary or classification reductions (e.g., being changed from “Serious” to “Other Than Serious”).

These hidden costs can include exposure to later repeated violations that incur increased monetary penalties, lost business opportunities and creation of a public record of the violation on display for competitors, news sources and labor organizations to see that can irreparably damage reputations.

“During the Covid 19 pandemic, employers have made greater use of the ability to contest citations, for good reasons,” the attorneys stress.

When the Pen Is the Sword

If they don’t choose to fight the citation, employers should consider negotiating with OSHA over the language used in its press release announcing your violation to the world at large. Biden’s appointees announced their intention to follow the Obama-era agency practice of using these releases as a tactic

for “public shaming” employers charged with violations of safety and other federal regulations.

These releases then can be used by unions in organizing campaigns, as well as result in poisoning the jury pool if further litigation ensues.

“OSHA press releases are often picked up and mentioned in local or national news outlets, magnifying the negative publicity in the region,” say attorneys Mark A. Lies, II and Adam R. Young of the Seyfarth Shaw law firm.

Employers can face adverse professional rankings from third-party safety tracking services and even receive bans from certain customers for bidding on contracts or projects. Even worse, based merely on allegations, OSHA can place the employer into its Severe Violators Enforcement Program.

Lies and Young suggest employers adhere to the following communications strategy in creating talking points and your own press releases:

- Acknowledge that a serious incident or a major inspection occurred.
- Offer respectful condolences and concern for the health of any injured employees or other individuals harmed.
- State that the company’s investigation into the accident is ongoing.
- State that the company has and will continue to work cooperatively with OSHA and any other applicable government agency during their inspections of the worksite.
- Do not criticize OSHA or its personnel.
- Respectfully state the company disagrees with OSHA’s issuance of citations, and that the company will continue to discuss a resolution of the citations. If necessary, also indicate that the company is contesting the citation.
- Do not speculate as to the cause of the accident, admit fault, offer an apology or suggest that the company violated OSHA rules or its own policies.
- Do not blame any employee for the occurrence of the accident.
- Do not suggest that any employee involved in the incident is suspected to have been asleep or impaired by drugs or alcohol.
- Maintain employee privacy; do not disclose the names of any individuals involved in the incident.
- Note the company’s longstanding commitment to keeping all employees safe and healthy in the workplace.

Pallet Shortage Warning Issued

The growing wood pallet shortage threatens the availability of produce to consumers, reports the United Fresh Produce Association.

The lack of pallets is adding stress to a supply chain already facing significant challenges, it says. These include a lack of available trucks and shipping containers, ongoing labor challenges, fluctuating fuel costs, pandemic-related challenges and a pending shortage of resin used to make reusable containers and pallets.

“At this time, expectations are that the pallet shortage will continue for months, perhaps for the balance of 2021 – all at a time when many North American produce items are just beginning seasonal harvests and shipments,” UFPA predicts.

Pallet issues cited include a shortage of lumber and wood products that has increased the cost of raw lumber by 200% to 350%, and the cost of pallets in some cases by more than 400% -- “if the pallets are even available, and often they are not,” UFPA says.

One farmer was told by a pallet supplier that it was not accepting any new customers because it simply couldn't fill existing customer demand.

Also impacting the shortage are efforts by wholesalers, distributors and retailers to ensure sufficient inventory of non-perishables given previous pandemic-related impacts. Making matters worse is a lack of trucks for relocating pallets.

“If there is not a concerted effort across the supply chain to ensure pallet availability for shipment of produce, there is little doubt that it will be very difficult, if not impossible, for the grower/shipper community to meet buyer, and ultimately consumer, demand for produce,” the association said.

“We welcome the opportunity to work collaboratively with all parties within the supply chain to mitigate the impacts of the current shortages and will reach out to stakeholders to identify a path forward that provides solutions to this increasingly disruptive threat and enables the continued flow of goods.”

CN Tops CP's Offer for KCS

Canadian National has apparently outbid Canadian Pacific in their competing attempts to acquire Kansas City Southern, stirring shipper concerns.

The drama began when the management of KCS chose to accept a \$29 billion offer from CP. After that, CN countered with an unsolicited offer totaling \$33 billion.



Last April, the Surface Transportation Board permitted the CP-KCS transaction approval process to proceed under merger rules that were in place prior to 2001, the year the STB adopted what are now called “the new rules”. (AA, 5-15-21, P. 5).

The Freight Rail Customer Alliance told the board the CN-KCS bid should be reviewed under the new rules because of serious competitive issues it raises.

The CP-KCS combination would merge the two smallest Class I railroads, in the end creating what would still be the smallest Class I railroad. By contrast, the merger of CN and KCS would create the fifth largest Class I railroad in North America.

FCRA asserted that CN's overriding commitment to Precision Scheduled Railroading is likely to translate into service deterioration for shippers, particularly those who are considered captive.

The shipper coalition, joined by the National Coal Transportation Association and Private Railcar Food and Beverage Association, added, “CN's PSR-related dedication to reducing its already low operating ratio means that CN will act to minimize the extent to which shippers will share in the efficiencies that CN achieves through its merger.”

American Chemistry Council President Chris Jahn also urged the STB to adopt safeguards to shore up rail competition, or “any merger could have a negative impact on manufacturing in the U.S., and the broader economy.”

Fed Minimum Wage Is Raised

On April 27, President Biden ordered a raise in the minimum wage that federal contractors are expected to pay their workers.



This will increase the minimum wage paid to employees working on or in connection with federal government contracts to \$15.00 per hour, supposedly scheduled to become effective Jan. 30, 2022.

This is a substantial increase from the current minimum wage of \$10.95 applicable to most federal contracts. It also applies to federal subcontractors.

In each subsequent year after the new minimum wage officially goes into effect, it will be subject to Consumer Price Index-based increases that will be published by the Secretary of Labor at least 90 days before they are to take place.

Under the order, the Secretary of Labor is expected to issue implementing regulations by Nov. 24. The the Federal Acquisition Regulatory Council is directed to amend contract rules to provide the new minimum wage provisions in federal procurement solicitations, contracts, and contract-like instruments within 60 days after issuance of the Labor Department's implementing regulations.

Does this mean that the new hourly minimum wage for federal contracts will not be imposed until early next year? Not necessarily, says Scott Arnold, an attorney with the law firm of Blank Rome.

With respect to contracts that are already existing, or that are entered into between April 27, 2021, and Jan. 30, 2022, agencies are strongly encouraged, to the extent permitted by law, to ensure that the hourly wages paid under such contracts "are consistent with" the minimum wage that does not actually go into effect until Jan. 30, 2022.

To the extent that federal agencies heed this encouragement, these contractors will need to pay the new wage prior to 2022, in Arnold's view.

CA Contractors Under Threat

A three-judge federal appeals court panel has ruled that federal law does not protect interstate trucking employers by preempting California's draconian independent contractor law.

The Ninth Circuit Court of Appeals judges voted 2-1 that a federal law called the Federal Aviation Administration Authorization Act (FAAAA), does not preclude application of the state's AB 5 contractor law to trucking companies operating in interstate commerce.

Trucking employer groups immediately asked the full court to review and reverse the panel's decision, which could soon result in removal of a stay blocking AB 5's application to trucking.

Under the state law, those who work in the same line of business as the firms who contract them must be considered employees, and not contractors.

Early last year, before the new law went into effect, a federal district court judge granted an injunction barring the state from enforcing it against interstate truckers while the court heard their argument that federal law pre-empted the state statute.

However, the same law could be coming soon to where you operate if Congress succeeds in passing the Protecting the Right to Organize Act (PRO Act), a bill favored by unions and strongly supported by Democrat legislators and President Biden

If enacted, the PRO Act would outlaw right to work laws in states, authorize secondary boycotts, institute card check and subject management to personal civil liability for labor law violations.

It also would apply California's AB 5 law for contractors nationwide. The bill already has been approved by the U.S. House of Representatives and now is under consideration by the Senate.

Legislative efforts seeking to replicate California's law also have been mounted in other states, and federal agencies like the Department of Labor have grappled with the issue over the years. One thing is certain – it's not going away anytime soon.

Ransomware a Top SC Concern

The disaster that followed the Colonial Pipeline ransomware attack brought home to everyone just how vulnerable our national supply chain is, but many don't realize that these assaults on logistics providers have been going on for years.

On June 2, the Massachusetts Steamship Authority Martha's Vineyard ferry service fell victim to a ransomware attack. Last year, logistics companies struck by these attacks included Forward Air, the French container shipping company CMA CGM, Pennsylvania-based Greatwide Truckload Management, Canadian motor carrier Boutin Express and Germany's Seifert Logistics Group, according to a recent article in *FreightWaves*.

These attacks typically begin when an employee accidentally clicks on a malicious link that then allows the attackers into your system.

The U.S. government's National Institute of Standards and Technology Computer Security Resource Center offers useful advice about how the management of logistics service providers can act to prevent such attacks from disrupting your business and costing you money.

→ Use antivirus software at all times – and make sure it's set up to automatically scan your emails and removable media (e.g., flash drives) for ransomware and other malware.

→ Keep all computers fully patched.

→ Use security products or services that block access to known ransomware sites on the Internet.

→ Configure operating systems or use third-party software to allow only authorized applications to run on computers, thus preventing ransomware from working.

→ Restrict or ban use of personally-owned devices on company networks and for remote access or telework without adding to security.

The Computer Security Resource Center also advises following these tips for work computers:

→ Use standard user accounts instead of accounts with administrative privileges whenever possible.



→ Avoid using personal applications and Websites, such as email, chat, and social media, from work computers.

→ Avoid opening files, clicking on links, etc., from unknown sources without first checking them for suspicious content.

For example, the center says you can run an antivirus scan on a file, or look at a link to see if it goes to the site it claims to be going to.

“Organizations without dedicated cybersecurity professionals should consider establishing relationships with third-party cybersecurity service providers and using their expertise to assist in improving their protection against ransomware,” the center recommends.

Unfortunately, even with protective measures, a ransomware attack may succeed. Prepare by taking steps to ensure that information will not be corrupted or lost, and normal operations can resume quickly. You can take the following steps:

→ Implement an incident recovery plan with defined roles and strategies for decision making, and regularly exercise that plan.

→ Carefully plan, implement, and regularly test a data backup and restoration strategy. It's important not only to have secure backups of all your important data, but also to make sure that these backups are kept isolated so ransomware can't readily spread to them.

→ Maintain an up-to-date list of internal and external contacts for ransomware attacks, including law enforcement, and understand the role of each contact in recovery efforts.