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New DOJ and DOL Reliance on Environmental Laws Lowers Bar for Workplace-Safety Criminal Prosecutions

by Eric J. Conn

In the more than 40 years since Congress enacted the Occupational Safety and Health Act (OSH Act), the federal government has prosecuted fewer than 80 criminal cases under that statute. Those prosecutions the government did pursue under the law generally involved exceptional circumstances, such as multiple fatalities at the worksite and falsification of documents or other obstructive acts.

Such infrequent criminal enforcement seems to be coming to an end. Over the last several years, the Occupational Safety and Health Administration (OSHA) has increasingly referred cases to the U.S. Department of Justice (DOJ) for criminal investigation, especially in instances where an allegedly willful violation led to an employee fatality. Indeed, 2014 saw a record number of criminal referrals and prosecutions in OSH Act cases.

A DOJ initiative announced in December 2015 will further increase criminal prosecutions for workplace-safety and health violations. DOJ's new "worker-endangerment initiative" recommends reliance on the criminal provisions of statutes other than the OSH Act. This initiative formalizes the growing trend to rely on environmental statutes, as well as the general federal criminal statute, Title 18, as preferred prosecutorial tools for workplace violations.

OSH Act § 17 very narrowly defines criminal conduct, limiting it to a small band of activity that includes intentional behavior that results in a worker's death. To obtain a conviction under § 17, a prosecutor must establish *beyond a reasonable doubt* that:

1. **The violation was committed willfully by the employer**. Courts are in substantial agreement that "willfully" under § 17(e) refers to a deliberate action taken by the employer with knowledge of both the hazardous condition and the OSH Act's requirements (*i.e.*, the employer knew the conduct was dangerous and unlawful).

2. **The violation of the standard was the direct cause of an employee's death**. Prosecutors must prove that the conduct that violated an OSHA standard was both the "cause in fact" (*i.e.*, the employer's conduct was the "but-for cause" of the accident) and the "legal cause" (the harm was a foreseeable and natural result of the conduct) of the injury.

3. **The violation was committed by the employer**. Courts evaluating OSH Act criminal prosecutions distinguish between "employees" and "employers." Only in extremely rare circumstances are individuals considered to exert so much control over a corporate

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entity that the individual would be considered "the employer" for purposes of an OSH Act criminal charge. Although a corporate officer or director might in some circumstances be deemed the "employer," this only occurs in cases where "an officer's or director's role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer under § 666(e)."[1]

4. **A specific OSHA regulatory standard must be violated**. A violation of the catch-all "General Duty Clause," which requires all employers to provide a place of employment free from recognized hazards likely to cause serious physical harm or death, will not result in criminal sanctions.

Criminal punishments are available under the OSH Act in only two other circumstances:

1. **Falsifying OSHA documents**. Section 17(g) of the OSH Act provides for a criminal charge against anyone (not just employers) who "knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act ... ."

2. **Advance notice of an OSHA inspection**. Section 17(f) of the OSH Act makes it a criminal act for "[a]ny person to give advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees ... ."

This latter provision generally applies to OSHA officials, and thus offers an extremely limited basis for employer prosecutions. Hence, falsifying documents or intentionally causing an employee's death are critical elements in an OSH Act criminal case.

OSH Act penalties for criminal violations are also relatively lower than those available in other federal criminal laws. Section 17(e) states:

> Any employer who willfully violates any standard, rule, or order promulgated pursuant to Section 6 of this Act, or of any regulations proscribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both.

While the monetary penalty cap for OSH Act violations has been somewhat adjusted over the years, it remains low in comparison to criminal and even civil penalties that can be imposed under the major federal environmental statutes. Currently, as a result of the Sentencing Reform Act of 1984,[2] the cap on the criminal penalty for willful violations of the OSH Act causing loss of human life is $250,000 for individuals,[3] and $500,000 for organizations.[4] However, the six-month cap on jail time remains in place. In addition, an OSH Act criminal conviction is a "Class B" misdemeanor rather than a felony.

The Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act, the Toxic Substances Control Act, and a number of other environmental statutes all contain stiff criminal provisions that carry with them higher sanctions than § 17 of the OSH Act. The provisions also cover a

[1] *U.S. v. Cusack*, 806 F. Supp. 47, 50 (D.N.J. 1992).
[2] 18 U.S.C. § 3551 et seq.
[3] 18 U.S.C. § 3574(b)(4).
[4] *Id*. at § 3574(c)(4).

wider swath of behavior than the OSH Act. Because cases involving alleged violations of occupational safety and health frequently include allegations of a violation of environmental regulations (chemical exposures to workers can also result in land, air, and water emissions), DOJ has recently been utilizing the environmental statutes to support criminal charges against employers for actions that historically had been pursued only under the OSH Act.

For example, in 2012, a federal grand jury in Texas indicted an environmental-services company and its former president on conspiracy charges for illegally transporting hazardous materials that resulted in the deaths of two employees. The 13-count indictment alleged that Port Arthur Chemical and Environmental Services LLC and its former president willfully failed to implement administrative and engineering controls and provide protective measures to keep employees' exposure to hydrogen sulfide within prescribed limits. The indictment also alleged that the company transported hazardous materials illegally under the Hazardous Materials Transportation Act by knowingly using false documents and improper placards.

The September 2012 Atlantic States' Cast Iron Pipe Company case provides another example of the government's combined use of safety and environmental-crimes provisions. Four former managers ultimately lost appeals of prison sentences and serious financial penalties in connection with multiple safety and environmental compliance charges brought under the CWA, the CAA, and the Comprehensive Environmental Response, Compensation, and Liability Act. The defendants were also charged with conspiracy and obstruction of justice for allegedly covering up those violations. The convictions stemmed from a number of safety and environmental incidents at a division of McWane Corporation's Atlantic States' Phillipsburg, NJ plant in the late 1990s and early 2000s. The company was placed on four years' probation and required to pay an $8 million fine.

On December 17, 2015, DOJ and the Department of Labor (DOL) expanded and formalized a "worker-endangerment initiative" to specifically address worker-safety and health violations. In a Memorandum of Understanding on Criminal Prosecutions and Worker Safety Laws ("MOU"), Deputy Attorney General Sally Quillian Yates announced the Justice Department's intention to seek criminal charges in cases involving worker endangerment. Deputy Attorney General Yates issued the worker safety MOU just two months after her Memorandum to the Federal Bureau of Investigation, Executive Offices of the U.S. Trustee, and all U.S. Attorneys calling for greater individual accountability for corporate wrongdoing:

> One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.[5]

A key change in DOJ's strategy for "upping the ante" in workplace-safety criminal enforcement is the decision to transfer responsibility for prosecuting worker-safety violations from the Justice Department Criminal Division's Fraud Section to the Environmental Crimes Section (ECS) of the Environment and Natural Resources Division. The MOU offered three reasons for moving worker safety cases to DOJ's Environmental Crimes Section:

[5] Memorandum by Sally Quillian Yates to Assistant Attorney Generals, et al., Regarding Individual Accountability for Corporate Wrongdoing, Sept. 9, 2015 at 1.

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1. Worker-safety violations often occur in conjunction with environmental offenses;

2. Federal air, waste, and toxic exposure laws can often be charged as felonies, and carry much more severe criminal fines and penalties than the limited criminal penalties available through the OSH Act; and

3. Proving environmental crimes is often much easier for prosecutors than OSH Act criminal cases.

In discussing the MOU, Deputy Attorney General Yates remarked that "the announcement demonstrates a renewed commitment by both DOJ and DOL to utilize criminal prosecutions as an enforcement tool to protect the health and safety of workers."[6]

While the Justice Department's ECS will ultimately be responsible for prosecuting these worker-safety cases, DOL will continue to play a role. The MOU encourages federal prosecutors to work with ECS to pursue worker-safety violations under the OSH Act, the Mine Safety and Health Act, and the Migrant and Seasonal Agricultural Worker Protection Act as environmental crimes. Indeed, the ECS attorneys have now trained hundreds of OSHA inspectors how to recognize and document violations of the U.S. Criminal Code. As a result, these three agencies will jointly investigate cases, share information, and make criminal-case referrals.

Thus, while environmental statutes have occupied an increasingly important place in OSHA criminal enforcement over the last few years, the new Department of Justice worker-endangerment initiative will result in a renewed and more concerted effort to pursue criminal charges under environmental statutes where workers' health and safety is allegedly being threatened. Based on this rekindled commitment by DOL and DOJ, employers should expect government officials investigating workplace-safety violations to probe for possible criminal violations—not only under the OSH Act where there has been a fatality, but under the myriad of environmental statutes and Title 18's federal criminal code. With this expanded emphasis and effort, regulated entities should not be surprised to find OSHA anxious to try out these new tools during traditional workplace inspections.

[6] DOJ Press Release: "The Departments of Justice and Labor Announce Expansion of Worker Endangerment Initiative to Address Environmental and Worker Safety Violations," Dec. 17, 2015.

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