

Federal Criminal Enforcement of Worker Safety

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March 3, 2017



OSHA Crimes

- Employer willfully violates OSH Act regulation causing employee death
- Person gives advance notice of OSHA inspection
- Person makes intentionally false statement in required record

OSH Act Crimes Not Often Prosecuted

- Average over 5 decades
 - 10,000 workplace fatalities/year
 - 2 federal criminal cases/year
- Reasons
 - Prosecutors' disinterest in misdemeanor cases (minor crimes)
 - In fatality cases, defendant most often is a business entity
 - OSHA willingness to compromise

New Emphasis on Prosecution

December 2015

- U.S. Dept. of Labor and U.S. Dept. of Justice agreement on criminal enforcement of worker safety laws

Memorandum of Understanding



**MEMORANDUM OF UNDERSTANDING BETWEEN
THE U.S. DEPARTMENTS OF LABOR AND JUSTICE
ON CRIMINAL PROSECUTIONS OF
WORKER SAFETY LAWS**

I. PURPOSE

The U.S. Department of Labor (DOL) and the U.S. Department of Justice (DOJ), recognizing the importance of ensuring the health and safety of America's workforce, enter into this memorandum of understanding (MOU) to provide for coordination of matters pertaining to worker safety that could lead to criminal prosecution by DOJ. This MOU establishes a process and framework for notification, consultation and coordination between DOL and DOJ to aid both agencies in more effectively implementing our national workplace statutes.

II. BACKGROUND AND RESPONSIBILITIES

The DOL/DOJ Undertaking

- DOJ's Environment and Natural Resources Division now responsible for prosecutions under:
 - OSH Act
 - Mine Safety and Health Act
 - Migrant and Seasonal Workers Protection Act

The DOL/DOJ Undertaking (cont.)

- DOJ examines workplace fatalities to determine if other crimes also can be charged
 - Clean Water Act
 - Clean Air Act
 - Resource Conservation and Recovery Act
 - False Statement Laws
 - Obstruction of Justice Laws
 - Conspiracy Law

The DOL/DOJ Undertaking (cont.)

- DOL/DOJ joint training
- DOL/DOJ information exchange

Recent Local Investigation

Bartlett Grain Co.

- 2011-grain elevator explosion
- 6 deaths
- OSHA alleged willful violations of regulations regarding grain dust accumulation and disposal

Recent Local Investigation (cont.)

- 2012 – Criminal referral to US Attorney-Kansas
 - Bartlett demonstrates explosion unrelated to dust accumulation
 - 2016 US Attorney closes investigation

2016 Prosecution in Kansas City

- U.S. v. DRNB, Inc.
 - Worker exited scissors lift to land roof decking
 - Worker wore harness and lanyards and had a choker which he did not attach
 - Worker was a journeyman iron worker
 - Supervisor did not see worker exit the scissor lift to land the decking

2016 Prosecution in Kansas City (cont.)

- Employer had outstanding safety record (e.g., 15 years and 1 million work hours without severe injury) and had substantial experience with similar jobs
- Employer's foreman had not been responsive to requests by iron workers for safety equipment

2016 Prosecution in Kansas City (cont.)

- Court said foreman was “not credible” in testimony that he was unaware worker was not tied off
- Impression: OSHA felt the foremen were not sufficiently insistent about fall protection

First Steps After Accident

- Interviews conducted by counsel of all employees with any possible knowledge of accident and job site
 - Interview information may be attorney-client privileged but company may want to make public

First Steps After Accident (cont.)

- Counsel to be present at employee interviews by OSHA investigator
 - Agreement of union leaders may be required
- Counsel should work with OSHA investigator to achieve best reasonable outcome

Basic Analysis of Serious and Willful Violations

- Safety violation was the cause of the injury
 - “but for” cause
 - employee conduct foreseeable
- Serious violation requires at least “constructive knowledge” of the safety violation
 - “reasonable diligence” would have revealed safety violation

Basic Analysis of Serious and Willful Violations (cont.)

- Willful violation requires actual knowledge of the safety violation
 - employer saw the condition, was told of the condition or intentionally avoided learning of the condition