

THE
NATIONAL LAW REVIEW

Lockout or Be Locked Up - Industrial Accidents in Agribusiness

Saturday, May 5, 2012

Industrial accidents, where a seemingly routine task turns into catastrophe for the unwitting employee happen every day. The Deep Water Horizon oil platform explosion, which killed 11 workers, followed by an environmental catastrophe; recent mine accidents in the U.S. and Chile; the death of a 19 and 14 year old in an Illinois grain facility are just a few recent examples.

In the aftermath of such accidents, there are always calls for stiffer criminal penalties against corporate officers and management. Many states already have a history of prosecuting corporate officers for homicide in extreme cases. In the past few years the federal Occupational Safety and Health Administration (OSHA) has adopted a policy that it will refer *all* fatalities that it concludes resulted from willful violations of an OSHA standard to the U.S. Department of Justice for consideration of *criminal* prosecution. While only employers (not corporate officers or managers) can be criminally prosecuted under current federal law, this may change.

Most corporate officers and directors do not think that horror stories about catastrophic accidents will ever involve them. After all, most U.S. companies have a safety program and at least one person charged with safety responsibility. Yet catastrophic accidents nevertheless happen at these companies.

In the vast majority of catastrophic accidents, industrial activity creates a circumstance in which stored or built up energy is unexpectedly released with employees in harms' way. Sometimes this is just a fall from a ladder. At other times, however, employees are trapped in machines, equipment or there is an explosion and/or fire.

Accidents involving a combination of human and equipment error are different from a slip and fall case, a fall from a ladder, or similar circumstances. Accidents involving injury by equipment or entrapment-related injuries are often gruesome and, therefore, of interest to the press. This can have devastating results for a company and its owners as the media, customers, employees, the community where the business is located, and law enforcement officials follow the developing story over a period of days, weeks or even months (and often participate in rescue and clean-up operations).

In response to these accidents, the inevitable "rear view mirror" analysis leads to the knee-jerk conclusion that there had to have been human errors - that is, employer failure. The media and law enforcement focus first on the company's past OSHA record (available on the internet). Then they ask more probing and difficult questions: Why were the employees exposed to such dangerous conditions? Who knew these conditions existed or should have expected them? What was done to attempt to prevent them? If the answers are not sufficient, a referral for criminal prosecution may follow.

Many of the mega-fines leveled against employers and the criminal prosecutions of companies in the past were not based on the fact that a company manager directed an employee to do something unsafe. Rather the fines are based on the employer's alleged failure to consider the process, to develop a plan to avoid an accident, and then to implement that plan. In fact, many times the employer had a rule in place to avoid the incident, but allegedly failed to enforce compliance, or failed to engineer to eliminate the hazard.



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Lockout/Tagout Standards in the Agribusiness

The agribusiness industry has to deal with some of the more common hazards that have been involved in the recent, high-profile cases mentioned above – fire and explosion hazards, confined spaces, grain or other storage facilities, and flammable material piping processes. But if agribusiness companies had to follow just one regulation, the likely choice among government regulators would be the lockout/tagout standard, 29 CFR 1910.147, often referenced by the shorthand, “LO/TO”.

LO/TO refers to specific practices and procedures employers must adopt and implement to safeguard employees from unexpected energizations or start-up of machinery and equipment, or the release of hazardous energy during service or maintenance activities. LO/TO procedures can be found in many standards besides 29 CFR 1910.147. Those applicable to agribusiness are addressed in electrical safety standards (29 CFR 1910.306 and 333), process safety management regulations (29 CFR 1910.), as well as in confined space standards (29 CFR 1910.146), and grain handling facility standards (29 CFR 1910.272), among others.

Generally, all of these standards require that a machine, process, space or equipment be rendered safe, before an employee enters it or puts a body part in the zone of danger. LO/TO-type standards also require that an employee who enters a danger zone have exclusive control over the danger, so that another person cannot reintroduce the hazard -- for example, by turning on a switch or otherwise activating a process -- unaware of the presence of the employee in harm's way. In other words, the employer must insure that it has provided a fail-safe mechanism that prevents human error and a potentially-tragic result.

Finally, LO/TO-type standards recognize that employees may take short cuts or forget or deliberately bypass safeguards in order to solve problems more quickly or to increase productivity. LO/TO requirements mandate training and audits of procedures to verify compliance.

Recent Letter from the Director of OSHA

Recently, the head of federal OSHA responded to a series of fatal accidents in grain storage facilities with the following letter to 3300 grain facility storage operators:

Dear Grain Storage Facility Operator:

*Last week, two teenagers (ages 14 and 19) were killed in a tragic incident involving a grain elevator in Illinois. Both young workers suffocated after being engulfed in a grain bin they had entered to help clear. A third young worker was pulled out of the storage bin alive, and was hospitalized after being trapped for 12 hours. * * **

I am writing to you today because it is your responsibility to prevent your workers from dying in grain storage facilities. All employers, and especially those in high hazard industries such as the grain industry, must recognize as well as prevent workplace hazards. As an employer, you must be vigilant and always follow the long established, common sense safety practices that will prevent these tragedies.

The letter continued by identifying specific steps that, in the OSHA chief's view, are required of employers by existing law. First on the list was to lock out all power equipment. The letter identified three separate companies in Colorado, Wisconsin and South Dakota that recently had been issued combined penalties of almost \$4 million. The letter concluded with this warning:

If any employee dies in a grain storage facility, in addition to any civil penalties proposed, OSHA will consider referring the incident to the Department of Justice for criminal prosecution pursuant to the criminal provisions of the Occupational Safety and Health Act of 1970.

The OSHA Administrator's letter demonstrates the current tone of his agency, including its bent toward referring all potentially-appropriate cases for possible criminal prosecution. The letter also highlights the focus OSHA is placing on deaths caused by entrapment hazards, especially in the agricultural industry and the relationship of those hazards with LOTO standards.

Recommendations

In light of OSHA's current approach and attitude toward such hazards, agribusiness employers should look proactively for entrapment and other LO/TO-types of dangers to employees involved in maintaining, repairing, cleaning and loading/unloading equipment, electrical components, machines, tanks, pipes, containers, and other storage spaces and take steps compliant with the LO/TO standard and the LO/TO requirements of other standards: Educate employees on LO/TO principles (look for stored energy, such as pressurized or stacked material, explosion or fire hazards, electricity, hydraulic, pneumatic, chemical reactions, stored heat, etc.) and solicit their assistance in identifying related hazards. Create a comprehensive written program that addresses

LO/TO principles as applied to each of the work practices identified. Create a step-by-step LO/TO procedure for each such practice to insure that the hazards are neutralized before any work is done. Document the training of current and new employees. At least annually, conduct audits in order to verify continued compliance - by the employer and by its employees. And document the fact of the audit and its results.

Many agribusiness employers may be eligible for free consultation programs from state and federal resources to assist in developing these programs.

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