

OSH Law Primer, Part III: The Duty to Comply with Standards

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This series of articles is intended to provide the reader with a very high-level overview of the Occupational Safety and Health Act (OSH Act) and the Occupational Safety and Health Administration (OSHA) and how both influence workplaces in the United States.

By the time this series is complete, the reader should be conversant in the subjects covered and have developed a deeper understanding of how the OSH Act and OSHA work. The series is not—nor can it be, of course—a comprehensive study of the OSH Act or OSHA capable of equipping the reader to address every issue that might arise.

In this, the third article in the series, we examine the duty to comply with standards. Previous articles in the series addressed the [occupational safety and health framework](#) established by the OSH Act and the process of [OSHA rulemaking](#).

Quick Hits

- Section 5(a)(1) of the OSH Act sets forth the general duty clause, requiring employers to comply with the health and safety standards.
- When there is more than one standard that governs the action in question, the more specific standard prevails over the more general.
- Employers are required to comply with the more specific standards, even in industry-specific situations. However, certain general industry standards are specifically held to be inapplicable to construction work, shipyard employment, marine terminals, longshoring, and agriculture.

Section 5(a)(2) of the OSH Act sets forth the requirement that employers comply with the act's health and safety standards.

The Principle of Preemption

When there is more than one standard that governs the action in question, the more specific standard prevails over the more general. Known as the “principle of preemption,” employers are required to comply with the more specific standards, even in industry-specific situations. Nevertheless, there are certain standards set forth under Part 1910, the “General Industry Standards,” that are specifically

held to be inapplicable to construction and other types of work.

With respect to many standards, employer compliance depends on if there is, or with reasonable predictability will be, exposure of employees to a violative condition. Under this principle, OSHA bears the burden of proving that either employers were in the zone of danger created by a violative condition or that it was reasonably predictable by “operational necessity” that employees would be in the zone of danger due to the scope of their work. Even a finding of exposure of a single employee is sufficient to satisfy OSHA’s burden of proof.

Multi-Employer Worksites

In multi-employer worksites, liability is expanded to include a number of entities. In general, multi-employer liability is predicated on the basis that employers that create or control the cited hazard have a duty to protect their own employees, as well as other employees who might be exposed to the hazard. On construction worksites, this allows general contractors to be liable for hazards created or controlled by subcontractors. Outside the construction industry, multi-employer liability has been raised in situations with boat owners and factory owners that were alleged to have been responsible for violations committed by independent contractors.

Employers defending against an allegation of multi-employer liability must demonstrate that they did not create or control the allegedly violative condition and either took reasonable protective measures or did not know of the hazardousness of the condition with the exercise of reasonable diligence.

When a standard is so vague that it deprives employers of fair notice of the standard’s requirements in contravention of the Due Process Clause of the Fifth Amendment of the U.S. Constitution, OSHA may be required to prove that a reasonable person would have recognized a hazard requiring protective measures and the measures were feasible.

Employer Defenses to OSHA Citations

When an employer is cited for violating a health or safety standard under the OSH Act, the employer may raise affirmative defenses to defend against the allegations. The burden of proving these defenses is on the employer. Some affirmative defenses include, but are not limited to the following:

- *Infeasibility*. Formerly known as the “impossibility defense,” the infeasibility defense requires an employer to prove that the means of compliance prescribed by the standard would have been infeasible insofar as implementation would have been infeasible or necessary work operations would have been infeasible after implementation *and* either an alternative method of protection was used or no such alternative method existed.
- *Greater hazard*. Employers need not strictly comply with a standard to the extent that compliance would create greater hazards than noncompliance. Under this defense, it is not sufficient for an employer to allege that compliance would create new or different hazards. Rather, the employer must show that all alternative ways of protection are more dangerous—not simply the ones prescribed in the standard.
- *Unpreventable employee misconduct*. Pursuant to this defense, an employer must demonstrate that it has established work rules that would have prevented the violation, those rules were adequately communicated to employees, steps were taken to discover violations, and the employer effectively enforced rules when violations were discovered. Effective enforcement generally requires that it be progressive, growing increasingly severe with additional infractions.

- *Invalidity of the standard.* A standard is invalid if it was not adopted in accordance with a statutory procedural requirement. The standard may not be construed or applied in a way that deprives employers of fair notice of the standard's requirements. An employer may also argue that a violation is de minimis in nature, such that it has no direct or immediate relationship to safety or health. In such cases, an employer may request the issuance of a notice in lieu of a citation.

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