

The Occupational Safety and Health Act of 1970

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THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

The Occupational Safety and Health Act of 1970¹ is a major federal attempt to provide a safe and healthy work environment on a national scale.² The federal government's entry into the field of worker safety was prompted by the absence of effective state legislation.³ The Act applies to nearly all employment performed in businesses affecting interstate commerce.⁴

Workers in agriculture, the professions, retail and service businesses and industry are covered, without regard to the number of employees in the business enterprise.⁵ The major areas of noncoverage are the self-employed, domestic employees and immediate family members who work on family farms.⁶ Those workers whose employment is covered by other federal legislation⁷ and local and state government employees⁸ are also excluded from the Act's coverage.

Duties and Obligations of Employers

Employers are required to fulfill a variety of duties and obligations under the Act, including compliance with specific standards

1. Occupational Safety and Health Act §§ 1-34, 29 U.S.C. §§ 651-78 (1970).

2. Congressional intent was to "[a]ssure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651 (1970).

3. 14,500 deaths, 390,000 new cases of occupational disease and 2.2 million disabilities occurred annually due to working conditions. HOUSE COMMITTEE ON EDUCATION AND LABOR, OCCUPATIONAL SAFETY AND HEALTH ACT, H. REP. NO. 1291, 91st Cong., 1st Sess. 14, 15, 35 (1970).

4. "Employer" and "employee" are defined as private persons engaged in business affecting interstate commerce. 29 U.S.C. §§ 652(5), 652(6) (1970). Congress has the power to regulate a single activity if the aggregate of such activities has a substantial economic impact on commerce. *Wickard v. Fillburn*, 317 U.S. 111 (1942). For a discussion of the constitutionality of the Act itself, see Comment, 10 HOUSTON L. REV. 426 (Jan. 1973).

5. A recent congressional attempt to limit OSHA's coverage to workplaces with more than 15 employees failed. See H.R. Doc. No. 343, 92d Cong., 2d Sess. 8 (1972).

6. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH 2 (1972). The Act does cover other workers in agriculture, however.

7. Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, 811 (1970); Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, 2021 (1970).

8. The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a state. 29 U.S.C. § 652(5) (1970). Federal agencies must establish and maintain "effective and comprehensive" occupational safety and health programs under section 668 of the Act, while a state can assert jurisdiction over the safety and health of its employees, as well as those of the local governments, under section 667(a).

and a general duty clause.⁹ Specific safety and health standards are promulgated by the Secretary of Labor¹⁰ and are intended to be the primary method of attaining the goals of the Act.¹¹ Safety and health standards exist for all occupations covered by the Act.¹² The impact of these standards on industry can be shown by considering one standard which requires that "all portable power-driven saws shall be equipped with guards above and below the base plate or shoe."¹³ This standard requires all employers covered by the Act who utilize portable power-driven saws to equip them as specified above, regardless of general industry practice, cost or past experiences. An employer who fails to comply with a standard has committed a violation, whether an injury occurs or not, as the language of the Act states that "Each employer . . . shall comply with occupational safety and health standards."¹⁴

A situation may arise in which an employee violates a standard although the employer has attempted to comply with the Act, posing the question of whether this is also a violation by the employer. The employer who has instructed his employees on proper procedures and is unaware of their violation of a standard will probably be found to have committed no violation.¹⁵ However, an employer has a duty to

9. 29 U.S.C. § 654 (1970).

10. *Id.* § 655.

11. See 116 CONG. REC. 38371 (1970).

12. Employers can obtain standards and their interpretations from a subscription service begun by the Occupational Safety and Health Administration in February of 1973. 35 OCCUPATIONAL HAZARDS, Jan. 1973, at 38. Another useful publication is U.S. DEPARTMENT OF LABOR, GENERAL INDUSTRY GUIDE FOR APPLYING SAFETY AND HEALTH STANDARDS (1972).

13. Guarding of Portable Power Tools § 1910.243(A)(1), 37 Fed. Reg. 22295 (1972). An employer can attempt to obtain a variance from a standard, as discussed in the text, *infra*, but such a procedure would probably prove too expensive and time consuming to be utilized save for exceptional cases.

14. 29 U.S.C. § 654(A)(2) (1970). (Emphasis added.)

15. Decisions of the Occupational Safety and Health Review Commission [hereinafter cited as O.S.H.R.C.] are not published at the present time; however, abstracts of decisions are available in the following services: BUREAU OF NATIONAL AFFAIRS OCCUPATIONAL SAFETY & HEALTH REPORTER [hereinafter cited as BNA OSHR]; CCH EMPLOYMENT SAFETY & HEALTH GUIDE [hereinafter cited as CCH ESHG]; PRENTICE-HALL GUIDE [hereinafter cited as P-H LAB. REL.]. In *Garden State Farms, Inc.*, P-H LAB. REL. ¶ 90,142, O.S.H.R.C. No. 979 (1973) two employees had violated a standard by removing a guard from a circular saw without the employer's knowledge or permission; the judge held that a brief, isolated unwarranted action by the employees without the company's knowledge wasn't a violation. In *Chicago Bridge & Iron Co.*, P-H LAB. REL. ¶ 90,087, O.S.H.R.C. No. 609 (1973), a violation of a requirement for employees to use eye protection equipment in grinding operations was dismissed, as

insure that his employees comply with applicable standards, and a failure to institute procedures to insure such compliance can result in an employee's violation of a standard being found to be that of his employer as well.¹⁶ An interpretation of the Act which penalized a good faith employer for an employee's disregard of a known standard would be detrimental to its purpose by not differentiating those employers who were attempting to achieve compliance.

Standards are classified as either permanent¹⁷ or emergency,¹⁸ with emergency standards giving the Secretary a procedure by which he may respond quickly to new health and safety findings.¹⁹ Emergency standards are designed to take effect immediately upon publication in the Federal Register if the Secretary determines that such a standard is needed to protect employees.²⁰ An employer can seek a temporary or permanent variance from either a permanent or an emergency standard.²¹ A permanent variance requires the employer to show that he can provide a place of employment as safe as that provided by the standard,²² while a temporary variance requires a showing of inability to comply, the taking of available safety measures, and the establishment of a plan to achieve compliance.²³ The initial standards promulgated by the Secretary consisted mainly of existing national consensus²⁴ and federal standards.²⁵

the employer had given out protective gear and indicated that it should be used, but the employees had disobeyed specific instructions.

16. In *Irvin H. Whitehouse & Sons, Inc.*, P-H LAB. REL. ¶ 90,130, O.S.H.R.C. No. 1262 (1973), the company was held to be liable for letting employees work on a scaffold without approved safety lifebelts, even though they were available at the worksite. The company was obligated to insure that employees used the protective devices supplied.

17. 29 U.S.C. § 655(b) (1970).

18. *Id.* § 655(c).

19. S. REP. No. 1282, 91st Cong., 2d Sess. 7 (1970).

20. For example, an emergency standard for asbestos was petitioned for and granted soon after the act was enacted. Bloom, *Occupational Safety and Health—It's the Law*, 2 NEW ENGINEER, May, 1973, at 5.

21. The Occupational Safety and Health Administration had received 360 applications for variances from its standards by the first of March, 1973. JOB SAFETY AND HEALTH, June, 1973, at 27.

22. 29 U.S.C. § 655(D) (1970).

23. *Id.* § 655(B)(6).

24. These standards were developed by such organizations as the American National Standards Institute.

25. See Walsh-Healey Public Contracts Act, 41 U.S.C. § 35(e) (1970); Longshoremen's & Harbor Worker's Compensation Act, 33 U.S.C. § 941 (1970) (two examples of such legislation). Future standards may require medical examinations, labeling of hazards, monitoring employee exposure to hazards, and various types of protective clothing. Bloom, *Occupational Safety and Health—It's the Law*, 2 NEW ENGINEER, May, 1973, at 5.

In addition to specific standards, the general duty clause²⁶ requires workplaces which are free from "recognized hazards" which cause, or are likely to cause,²⁷ death or serious physical harm. A "recognized hazard" is defined as

a condition that is (a) of common knowledge or general recognition in the particular industry in which it occurs, and (b) detectable by means of the senses (sight, smell, touch and hearing), or (2) is of such wide, general recognition as a hazard in the industry that even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence which should make its presence known to the employer.²⁸

This general duty²⁹ is intended to cover those situations where a precise standard is lacking³⁰ and is applicable if there exists an employment relationship, a "recognized hazard," and the likelihood of death or serious physical harm.³¹ However the clause poses problems in three areas: where there exists a multi-employer relationship; where the employee causes the harm; and where a "recognized hazard" must be defined.³²

26. "Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees" 29 U.S.C. § 654(A)(1) (1970).

27. "A hazard is causing or is likely to cause serious physical harm if it is causing or would more likely than not cause serious physical harm as defined in section B of this chapter." U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH, ADMIN., COMPLIANCE OPERATIONS MANUAL, Ch. VIII, A(b)(2), at VIII-2 (1972). "Serious physical harm is that type of harm that would cause permanent or prolonged impairment of the body" *Id.* Ch. VIII (B)(2), at VIII-3.

28. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH, ADMIN., COMPLIANCE OPERATIONS MANUAL Ch. VIII, A(2)(b)(1) (1972). The definition of a recognized hazard may be a source of continuing controversy, as shown by *Somerset Tire Serv., Inc.*, 1 BNA OSHC 1163, O.S.H.R.C. No. 44 (1972), in which an electrical plug with a defect which could only be discovered by a testing device was held to be a "recognized hazard." Commission Chairman Moran dissented on the ground that a defect which can only be detected with the use of special equipment was not a violation of the general duty clause.

29. In *National Realty & Construction Co.*, 1 BNA OSHC 1049, 1051 (1972), the common law defenses of contributory negligence, assumption of the risk, and the fellow-servant rule were held to have no application to the general duty clause and actions initiated under it.

30. The Occupational Safety and Health Review Commission upheld the general duty clause as valid in *R.E.A. Express, Inc.*, 1 BNA OSHC 1241, O.S.H.R.C. No. 28 (1972).

31. 29 U.S.C. § 654(A)(1) (1970).

32. A good discussion of the general duty clause and problems in its application

Current business practices in construction and manufacturing may result in several employers sharing a common job site or workplace; thus, the employees of one employer are exposed to conditions under the control of another.³³ It would seem that the employer would be liable under the general duty clause if the injury were caused by an employer over whom the first employer had control. However, a more complex issue arises when the employer has no such control. The Department of Labor's position is that an employer may be held liable if he knew or should have known of the existence of the hazard on the theory that a reasonable man in such a situation would have refused to permit his employees to work in such an environment.³⁴ Such a position does not appear to fully take into account the large number of employers who may be located on a single site or that economic reality may prevent an employer from having any control over such unsafe conditions. This matter may be further complicated when the other employer has violated a standard resulting in a citation; thus a general contractor could be cited for a violation of a standard committed by a subcontractor.³⁵ An approach to multi-employer situations which takes into account the knowledge of the employer and his control over the hazardous condition would result in liability being placed on the employer in the best position to remedy the condition while avoiding penalizing the employer who lacked control over the situation.³⁶

The employee whose injury was caused by his own unauthorized conduct should not subject his employer to liability for violation of the general duty clause unless the employer tolerates such actions. In *Richmond Block, Inc.*,³⁷ an employee died due to his disregard of company safety procedure; the judge noted that

despite the mutuality of responsibility which the Act imposes on

may be found in Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973) and in White and Carney, *OSHA Comes of Age, The Law of Work Place Environment*, THE BUSINESS LAWYER, July 1973, at 1309.

33. In *Thorlief Larsen and Son, Inc.*, P-H LAB. REL. ¶ 90,036, O.S.H.R.C. No. 370 (1971), the judge upheld the employer's liability in such a case.

34. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH, ADMIN., COMPLIANCE OPERATIONS MANUAL, Ch. X, at X-7 (1972).

35. A discussion of such a problem as it occurred in *Giles and Cotting, Inc.*, O.S.H.R.C. No. 394 (1972) may be found in White and Carney, *OSHA Comes of Age, The Law of Work Place Environment*, THE BUSINESS LAWYER July 1973, at 1309, 1317.

36. Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 999 (1973).

37. *Richmond Block, Inc.*, 2 BNA OSHR 119, O.S.H.R.C. No. 82 (1972).

employer and employee, it is clearly apparent that because the employer controls the work environment, the standard of care he owes to his employees under the general duty clause of the Act is high, but not so high . . . that the employer becomes virtual insurer of the conduct of his employees, and thus absolutely liable for all their acts of commission and omission.³⁸

The standard required of the employer is that of reasonable supervision of his employees, although some cases have penalized an employer despite apparent reasonable supervision.³⁹ The exercise of reasonable supervision should protect an employer from liability for employee misconduct as he "cannot, in all circumstances, be held to the strict standard of being an absolute guarantor."⁴⁰

A "recognized hazard" is necessary to show a violation of the general duty clause, yet this term is not defined in detail. The legislative history⁴¹ indicates that the test should be whether the hazard was "known" to the industry as a whole. A question exists as to whether a "recognized hazard" is one which is detectable by the human senses or one which is detectable only by the use of special equipment, and no definite answer has been adopted. The better view, removing the uncertainty in this area, appears to be that of *Puget Sound Power and Light Co.*,⁴² in which it was indicated that a "recognized hazard" would be one which was apparent or visible under inspection practices normal and accepted in the industry.

Furthermore, employers are required to maintain comprehensive records on all disabling, serious, or significant injuries and occupational illnesses, whether they result in loss of work time or not.⁴³ Even minor injuries must be recorded.⁴⁴ Finally, employers are required to record employee exposure to potentially toxic materials or other

38. *Id.* as quoted in White and Carney, *OSHA Comes of Age, The Law of Work Place Environment*, THE BUSINESS LAWYER July 1973, at 1309, 1321.

39. See Hansen Logging Co., 1 BNA OSHC 1061, O.S.H.R.C. No. 141, (1972) (where the administrative law judge found that reasonable supervision was lacking when an experienced employee with a good record entered a hazardous area despite frequent instructions forbidding such an act).

40. Standard Glass Co. Inc., 1 BNA OSHC 1045, 1046, O.S.H.R.C. No. 259 (1972).

41. See the discussion in 116 Cong. Rec. 38377 (Daily Ed. Nov. 23, 1970), in which Representative Daniels states that "a recognized hazard is a condition that is known to be hazardous . . . taking into account the standard of knowledge in the industry."

42. 2 BNA OSHR 364, O.S.H.R.C. No. 15 (1972).

43. 29 U.S.C. § 657(c)(2) (1970).

44. Minor injuries which must be recorded are those which involve loss of consciousness, medical treatment other than first aid, restriction of work or transfer to another job.

harmful physical agents in certain areas specified by standard.⁴⁵

Penalties and Liabilities

Penalties are provided in the Act in order to insure compliance,⁴⁶ with the degree of penalty varying with the nature of the violation.⁴⁷ These penalties are imposed only upon the employer; however, the employer can enforce safety among his employees by the exercise of normal disciplinary measures.⁴⁸ The Act classifies violations as either serious or nonserious, while an additional classification, *de minimis*, is defined in the guidelines established by the Department of Labor.⁴⁹ No need exists for an injury in order to have a violation, but violations are classified on the basis of the severity of the possible injury. An employer who has been cited for a serious violation (deemed to exist where there is a substantial probability that death or serious physical harm could result from a condition or practice unless the employer did not, and could not, with reasonable diligence, know of its existence)⁵⁰ shall be assessed a civil penalty of up to \$1,000 for each violation.⁵¹ A nonserious violation (where the incident or occupational illnesses resulting from a violation would probably not cause death or serious physical harm but which would have a direct or immediate

45. 29 U.S.C. § 657(C)(3) (1970). An employer whose workers were exposed to radiation, for example, would have to maintain records of their exposure. 29 C.F.R. 1910.96(m) (1972).

46. 29 U.S.C. § 666 (1970).

47. "Since its inception April 28, 1971, OSHA has made 67,026 inspections resulting in 43,108 citations alleging 214,916 violations with proposed penalties totaling \$5,542,858.00." *OSHA News Briefs*, JOB SAFETY AND HEALTH, Aug. 1973, at 27.

48. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH 27 (1972).

49. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH, ADMIN., COMPLIANCE OPERATIONS MANUAL Ch. XI (1972). The access of the private individual to materials used by the Labor Department was an issue in the case of *Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972). An attorney sought to compel the Labor Department to produce manuals and training aids used within the Department for his scrutiny prior to testifying before the Subcommittee on Environmental Problems Affecting Small Businesses of the U.S. House of Representatives. The Labor Department refused to produce this material. The court held that the training manuals and teaching aids used by the Department to instruct its compliance officers on proper emphasis to be placed on various types of violations of the Act had to be made available to the attorney. The court said this material did not relate solely to internal personnel rules and practices of an agency and thus was not excepted from disclosure under 5 U.S.C. § 552 (1970).

50. 29 U.S.C. § 666(j) (1970).

51. 29 U.S.C. § 666(b) (1970). The Act distinguishes between penalties which are permissive and "may" be applied and those which are mandatory and "shall" be applied.

relationship to the safety or health of the employee)⁵² may result in the imposition of a penalty of up to \$1,000 per violation.⁵³ A violation which is classified as *de minimis* (where a violation of a standard has no immediate or direct relationship to safety or health)⁵⁴ will not result in a penalty.

Violations may be further classified as wilful and repeated, for which a penalty as high as \$10,000 may be imposed,⁵⁵ or as imminent,⁵⁶ for which a penalty is proposed depending on whether it is serious, nonserious or *de minimis*.⁵⁷ Should an employer fail to correct a violation within the assigned period, he may be assessed a fine for each day in which the uncorrected condition continues.⁵⁸ The death of an employee due to a wilful violation will be punished by a fine and/or six months imprisonment, while the second death shall be punished by another fine and/or imprisonment up to a year.⁵⁹ Violation of a posting requirement or knowing falsification of required records shall also be penalized by a fine.⁶⁰ A *de minimis* or nonserious violation of the general duty clause does not result in a penalty.⁶¹

Regardless of the type of violation, a penalty may be adjusted downward depending on the employer's good faith, the size of the business and its history of previous violations.⁶² Moreover, the penalty may be further reduced by 50 percent if an employer corrects the

52. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH ADMIN., COMPLIANCE OPERATIONS MANUAL Ch. VIII, at VIII-6 (1972). The Occupational Safety and Health Review Commission has held that serious and non-serious violations are distinguishable on the basis of the seriousness of the injury which is possible, not on the basis of the probability of such an injury. *Standard Glass & Supply Co.*, 1 BNA OSHC 1223, O.S.H.R.C. No. 585 (1973).

53. 29 U.S.C. § 666(c) (1970).

54. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH ADMIN., COMPLIANCE OPERATIONS MANUAL Ch. VIII, at VIII-7 (1972).

55. 29 U.S.C. § 666(a) (1970).

56. *Id.* § 662(a).

57. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH ADMIN., COMPLIANCE OPERATIONS MANUAL, Ch. XI, at XI-4 (1972).

58. The fine may be as high as \$1,000 per day. 29 U.S.C. § 666(d) (1970).

59. 29 U.S.C. § 666(e) (1970). However, the imposition of a penalty in such a case is possible only if a conviction in a criminal proceeding has been obtained. For a discussion of the constitutional questions posed see Comment, 10 HOUSTON L. REV. 426 (Jan. 1973).

60. The fine may be as high as \$10,000 for knowingly making false statements on records, 29 U.S.C. § 666(g) (1970), and as high as \$1,000 for posting violations, 29 U.S.C. § 666(h) (1970).

61. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH ADMIN., COMPLIANCE OPERATIONS MANUAL Ch. XI, at XI-5 (1972).

62. Good faith may be evidenced by such actions as the employers' immediate abatement or correction of an alleged violation. *Id.* Ch. XI, at XI-2.

violation within the abatement period.⁶³ An additional consideration is that violations of a single standard⁶⁴ are considered as a single violation, thus only one penalty can be imposed.⁶⁵

The statute does not create a civil remedy. The Act declares that it shall not be construed to

diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees . . . with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.⁶⁶

However, the argument can be advanced that a private action is implied⁶⁷ by the congressional intent or federal common law.⁶⁸ The argument that a right exists to bring suit under federal common law because of the federal interest in insuring adequate compensation to workers for employment injuries⁶⁹ is contrary to the explicit language of the Act. In the only case treating this question, *Skidmore v. Travelers Insurance Co.*,⁷⁰ the court found no civil remedy, a result reached in the interpretation of the similar Walsh-Healey Act.⁷¹ The court found nothing

tending to create the slightest implication that Congress intended to create a duty to respond to the individual employee in damages . . . civil liability does not necessarily or inevitably result from

63. U.S. DEP'T OF LABOR, OCCUPATION SAFETY & HEALTH ADMIN., COMPLIANCE OPERATIONS MANUAL Ch. XI, at XI-2 (1972).

64. *Id.* Ch. VIII, at VIII-1: "[e]ach subsection of the regulations shall constitute a separate standard for purposes of citation."

65. *Id.* Ch. XI, at XI-1. A case has occurred in which a judge has held that the compliance operations formula for assessing a penalty would not govern, even with a serious violation, where other factors reduced the gravity of the offense, and reduced the penalty assessed in accordance with the formula. See *Agnew Plywood Co.*, 1 BNA OSHC 3060, O.S.H.R.C. No. 1125 (1973).

66. 29 U.S.C. § 653(4) (1970). (Emphasis added.)

67. Implied remedies are most commonly found in the securities market. See *SEC v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262 (S.D.N.Y. 1966) (where civil damages were implied under rule 10b-5 of the Securities Exchange Act of 1934). See also, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implied cause of action for violations of section 14(A) of the Securities Exchange Act).

68. See Comment, 47 WASH. L. REV. 629 (1972).

69. "[P]ersonal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce . . ." 29 U.S.C. § 651(A) (1970).

70. 356 F. Supp. 670 (E.D. La. 1973).

71. 41 U.S.C. § 35(e) (1970); see *United States v. W.H. Kisler Stat. Co.*, 200 F.2d 805 (10th Cir. 1952).

the violation of a statutory duty expressly made enforceable in some other manner.⁷²

Procedure

Enforcement of the Act is effectuated through inspections of places of employment,⁷³ which may result from an employee request⁷⁴ or an independent determination by the area director,⁷⁵ without advance notice to the employer.⁷⁶ After an inspection,⁷⁷ the area director has authority to issue a citation⁷⁸ for a violation of the Act. The citation will notify the employer of the nature and source of the alleged violation,⁷⁹ state a time for abatement and also notify the employees of their right to challenge this time period.⁸⁰ This citation

72. *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670, 671 (E.D. La. 1973). Consideration should also be given to the authority granted employees by the Act to sue the Secretary of Labor to enforce the imminent danger provision, but comments in the legislative history emphasize that such a suit can be brought only to seek a writ of mandamus. See SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong., 1st Sess. 35 (1971).

73. 29 U.S.C. §§ 553, 678 (1970). The Area Office for Louisiana is located in New Orleans. Enforcement personnel are members of the Department of Labor Occupational Safety and Health Administration.

74. Inspections must be conducted after an employee request unless the Area Director determines that there are no reasonable grounds to believe that a danger or violation exists. 29 U.S.C. §§ 553, 678 (1970).

75. Priority of inspections are investigations of catastrophes and disasters, complaints, special programs, and then a cross-section of industry. Special emphasis has been given to industries with a high injury rate, especially longshoring, lumber and wood products, mobile homes, roofing and sheet metal, and meat and meat products. Bloom, *Occupational Safety and Health—It's the Law*, 2 NEW ENGINEER, May, 1973, at 5-6.

76. Anyone who gives advance notice of an inspection may be fined or imprisoned if convicted. 29 U.S.C. § 666(F) (1970).

77. The employer may refuse entry to an inspector who fails to present appropriate credentials. 29 U.S.C. § 657(A) (1970). During the inspection, representatives of the employer and the employees have the right to accompany the inspector. 29 U.S.C. § 657(E) (1970).

78. 29 U.S.C. § 658(A) (1970). A citation issued 67 days after an alleged violation was dismissed as not meeting the criteria of "reasonable promptness." *Stokes Construction Co.*, P-H LAB. REL. ¶ 90,063, O.S.H.R.C. No. 1420 (1973).

79. 29 U.S.C. § 658(A) (1970).

80. Employees have a right to a hearing on the reasonableness of an abatement period if they notify the Area Director of their objections within 15 working days of the violation. 29 U.S.C. § 659(c) (1970). If an employee challenges the abatement date, the Labor Department must show that the abatement period is reasonable. *Kawecki-Berylco Ind., Inc.*, 1 BNA OSHC 1210, O.S.H.R.C. No. 1942 (1973).

must be posted prominently at the place where the violation occurred.⁸¹ The employer will also be sent a notice of the proposed penalty. After receiving this, he has 15 working days to file a notice of contest with the area director.⁸² Failure to file a notice of contest with the area director will result in the penalty being deemed final and not subject to appeal.⁸³

If the employer files a timely notice of contest, the area director notifies the Occupational Safety and Health Review Commission⁸⁴ and they in turn will docket the case and refer it to an Administrative Law Judge.⁸⁵ The judge will hold a hearing at the site of the alleged violation and render a decision,⁸⁶ which automatically becomes the final decision of the Commission unless one of its members directs that it be reviewed by the Commission.⁸⁷ Appeal lies directly from the Commission's decision to a United States Court of Appeals.⁸⁸

Special provision is made to deal with a situation of imminent danger, defined as

any condition or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.⁸⁹

When a compliance officer concludes that such a situation exists, he must advise the employer and employees of its existence and seek an injunction from a federal district court.⁹⁰ This allows the employer time to file a petition to intervene in the proceedings.⁹¹

81. 29 U.S.C. § 658(b) (1970).

82. *Id.* § 659(A).

83. *Id.* §§ 659(A), 661.

84. 29 U.S.C. § 661 (1970). The Commission is a quasi-judicial agency consisting of three members, created to adjudicate contested actions initiated under the act.

85. Administrative Law Judge is the term currently used for what the Act referred to as a hearing examiner.

86. Hearings are held in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 (1970), 29 U.S.C. § 659(L) (1970).

87. 29 U.S.C. § 661(i) (1970). The Commission has exercised its discretionary power to review in only 6% of the decisions filed by its judges. Address by Robert D. Moran, A.B.A. Labor Law Section Meeting, August 13, 1972, *quoted in* Cohen, *OSHA—A Labor Lawyer's Overview*, 33 OHIO S.L.J. 788 (1972).

88. 29 U.S.C. § 660(A) (1970).

89. *Id.*

90. *Id.* § 662(B).

91. 29 C.F.R. 2200.6 (1972).

Effect Upon Louisiana

Louisiana does not possess a comprehensive law on occupational safety and health.⁹² The principal law in this area consists of the Industrial Health Regulations,⁹³ a requirement that every employer provide reasonably safe employment,⁹⁴ and various miscellaneous requirements.⁹⁵ Since Louisiana does not have a federally approved occupational safety and health plan, the OSHA provides that the federal act will preempt state law.⁹⁶ Thus, it might be possible for a Louisiana employer to be in compliance with R.S. 23:13, which requires the use of "methods reasonably adequate"⁹⁷ to insure safety, while at the same time be in violation of the general duty clause⁹⁸ or a standard⁹⁹ of OSHA. In a similar manner, the federal Act extends coverage to agricultural field occupations while state law exempts this area from coverage.¹⁰⁰

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92. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OCCUPATIONAL HEALTH AND SAFETY LEGISLATION 118 (2d Rev. Ed. 1970).

93. LOUISIANA STATE BOARD OF HEALTH, SANITARY CODE OF LOUISIANA, (Reprint 1953), *in accordance with* LA. R.S. 40:11 (1950).

94. LA. R.S. 23:13 (1950).

95. Divers, Tunnel and Caisson Workers, LA. R.S. 23:481-88 (1950); Type-Casting Machines, exhaust fans and flues LA. R.S. 23:511 (1950); and Minors under 18, Prohibited Employment, LA. R.S. 23:161 (1950). Regulation of the use of fluoroscopic or radiation shoe-fitting devices, LA. R.S. 40:1295 (Supp. 1958). Safety Glazing, LA. R.S. 40:1171 (Supp. 1973).

96. 29 U.S.C. § 667 (1970).

97. Employer's Duty as to Safety, LA. R.S. 23:13 (1950).

98. 29 U.S.C. § 654(A)(1) (1970).

99. *Id.* § 654(A)(2).

100. *Id.* § 653(A).