CHAPTER 4

Impact of Federal Regulation

The field of industrial safety and health took a giant leap in the early 1970s. Some would question, however, whether the leap was forward or backward. On December 29, 1970, Congress passed the Williams–Steiger Occupational Safety and Health Act of 1970, creating OSHA, the Occupational Safety and Health Administration of the U.S. Department of Labor. OSHA got off to a bad start and immediately became the target of sharp public criticism. However, at the same time, the agency created an immediate focus on the field of industrial safety and health. Changes in federal administrations have changed OSHA's methods, and these methods need to be examined here, along with the basic approaches on which OSHA was founded. Regardless of how OSHA may change, its impact on the field is a permanent one, and this book would not be complete without examining this impact.

Most people think of OSHA when the subject of federal safety and health regulations is mentioned. However, there are also MSHA, the Mine Safety and Health Administration; TOSCA, the Toxic Substances Control Act; and CPSC, the Consumer Product Safety Commission. Most of these other agencies and legislation governing safety and health are patterned after the OSHA agency and legislation. Accordingly, this chapter examines the basic approach of OSHA and the impact it has had on the field of industrial safety and health.

STANDARDS

The most significant change that OSHA brought to industry was a book of federal standards. Never before had virtually all general industries been subjected to a book of federally prescribed, mandatory rules for worker safety and health. This set of rules formed the basis for inspection, citations, penalties, and virtually every activity in which OSHA was engaged. One rule, however, was not in the book; it is the most important rule of all and will be discussed first.

General Duty Clause

Congress decided to set up one general rule for all to follow, and this rule was included in its entirety in the text of the law that created OSHA. This rule, called the *General Duty Clause*, might be called the *First Commandment of OSHA*. It is quoted as follows:

Public Law 91–596

> Section 5(a) Each employer . . .
>
> (1) 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 his employees . . .

The General Duty Clause is cited by OSHA whenever a serious safety or health violation is alleged, for which no specific rule seems to apply. This has drawn some criticism from industry because after a serious accident has happened, it is easy to conclude that a situation was unsafe. However, before the accident occurred, it might not be clear what should have been done, especially in the absence of any specific rule to provide guidance. Sometimes a specific rule will also apply somewhat, and OSHA has cited both the General Duty Clause and the specific standard. When a situation is clearly in violation of a specific standard, OSHA usually does not bother to cite the General Duty Clause.

If the General Duty Clause is the First Commandment of OSHA, the second is like unto it:

Public Law 91–596

> Section 5(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Note that Section 5(a)(1) describes a responsibility for employers, whereas Section 5(b) pertains to employees. Penalties are prescribed for employer violations, but no penalty is prescribed for employee violations. Section 5(a)(1) has been cited quite frequently, but as far as the authors of this book know, there has never been an OSHA citation of Section 5(b).

Standards Development

In addition to the General Duty Clause, the OSHA law also set up the machinery for OSHA to issue new standards, too technical and detailed to be included one by one in the text of the law. OSHA develops standards, using a process known as *promulgation*, as outlined in the Occupational Safety and Health Act of 1970. The Secretary of Labor may decide to introduce a new standard or remove existing ones as a result of recommendations from the Secretary of Health and Human Services (HHS), national standards-producing organizations, state or local government, or affected individuals. The proposed standard is published in the Federal Register and interested parties or persons have 30 days to respond with written comments on the proposed standard. If there are objections to the proposed standard, interested parties may request a public

hearing on the proposed standard. Following a hearing, the Secretary of Labor will issue the Final Rule or new standard within 60 days. OSHA has the authority to issue the Final Rule based upon its analysis of public comments, but the "Final" Rule can be, and often is, challenged in the courts, either by labor interests who believe that the rule does not go far enough, or by business interests who believe that the rule goes too far. The entire process, including court challenges, can encompass years of negotiation. Even Congress gets involved over very controversial issues. An example will be seen in Chapter 8 over the issue of an Ergonomics Standard.

The OSHA Act also recognizes that in some instances immediate action must be taken to protect employees as new hazards or dangers are found and these hazards expose employees to "grave danger." The OSHA Law authorizes the Secretary of Labor to issue Emergency Temporary Standards (ETS) addressing such issues. However, the proposed standard must then be reviewed and promulgated according to the above-mentioned process.

Similar to the process of citation appeal which will be discussed later in this chapter, a judicial appeal can be made on any final or emergency standard. This appeal does not stop enforcement of the new standard during the judicial review unless specifically ordered by the court. In addition to promulgation of standards through efforts by OSHA, Congress can and has mandated new standards through legislation. Such was the case in the standard on bloodborne pathogens, 1910.1030, which was covered in Chapter 2.

National Consensus

The OSHA law recognized the existence of national consensus standards already in use prior to the enactment of the OSHA law. This is a very important part of the law because it gave OSHA the authority to bypass the procedural safeguards just mentioned and issue standards without consulting the public. The principle was that the standards by their prior existence had already been accepted by the public. OSHA's authority to issue national consensus standards expired in early 1973, 2 years after the effective date of the Act. Thus, after 2 years, OSHA was no longer permitted to "grandfather in" safety and health standards. The largest number of national consensus standards were developed by the two leading national standards-producing organizations, the American National Standards Institute (ANSI) and the National Fire Protection Association (NFPA).

Besides the national consensus standards, any established federal standard was also permitted to be adopted as a general standard by OSHA. The established federal standards had formerly applied only to limited groups such as construction industries or government contracts. With the OSHA law, Congress permitted OSHA to extend these standards to virtually all industries.

The biggest issue with the national consensus standards was whether they ever really represented the national consensus. Virtually none of these standards had ever been enforced, and the language used made it obvious that the original drafters of many of the standards had never intended for them to be mandatory rules to be enforced with monetary penalties for offending employers. This issue will be examined further in the section entitled "Public Uproar."

Structure

When discussing standards, this book will sometimes use the terms *horizontal standard* or *vertical standard*. The safety and health manager needs to understand these terms. Prior to OSHA, states enforced codes for safety and health by industry, issuing separate handbooks of rules for each industry to follow. These standards have come to be called *vertical standards*. OSHA's basic approach, by contrast, is to generalize and organize standards by hazard sources, regardless of industry. These are called *horizontal standards*. There are certain standards that OSHA limits in scope to a particular industry, but these are the exceptions; the basic structure of the standards is horizontal.

OSHA almost had to use the horizontal approach. The nature of the OSHA law itself was to authorize the new agency to generalize on specific standards. Imagine for a moment the morass of books that would have been generated if OSHA had attempted to write a separate standards book for each industry, sifting through the national consensus standards to determine which standards should be included in each. Unusual industry categories would inevitably "fall through the cracks" under a vertical scheme, characterizing themselves as being under the scope of neither this nor that standard.

By using the horizontal approach, OSHA left the job of sifting through the standards to the public. Thus, a general book of standards entitled *General Industry, Part 1910*, was published to cover virtually all industries. A manufacturer of teacups must read out of the same book as does an airline, and both must determine whether they need to be concerned with a provision entitled "horse scaffolds."

The construction industry is one for which OSHA published a vertical standard entitled *Construction Standards, Part 1926*, but even these special categories of industries are also covered by the more general Part 1910 with respect to any hazard for which no standard exists in the narrower vertical standard. OSHA did make the job of compliance a little easier by subsequently publishing a larger construction standard that included those parts of the general industry standard that OSHA might cite at construction sites. However, it did not abdicate the right to turn to general industry standards, which were not included in even the larger version of the construction standard.

In late 2008, the authors of this book performed an analysis of fiscal year 2008 enforcement statistics for federal OSHA inspections limited to construction operations only. The results are shown in Figure 4.1. Despite the fact that OSHA has a special vertical standard devoted to construction (OSHA standard 1926), a substantial percentage of

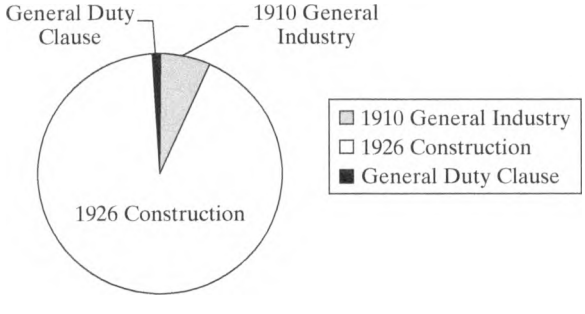
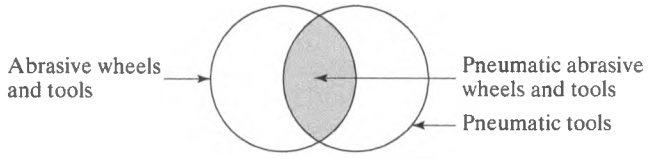


FIGURE 4.1

Comparison of OSHA construction industry citations of General Industry Standards (Part 1910.) versus Construction Standards (Part 1926) versus the General Duty Clause (Section 5.a.1) for fiscal year 2008.

FIGURE 4.2

Venn diagram to represent the relationship of two different overlapping types of equipment.



the construction citations nationwide is for the General Duty Clause and the horizontal General Industry standard (OSHA standard 1910).

The concept of vertical versus horizontal standards extends down within the subdivisions and individual paragraphs of the OSHA standard. For instance, OSHA standard 1910.106 pertains to flammable and combustible liquids and is basically a horizontal standard to be applied to general industry. However, within the standard there is paragraph 1910.106(i), which is entitled "Refineries, chemical plants, and distilleries." Therefore, that portion of 1910.106 should be considered a vertical standard applying only to those industries named.

One problem in determining the scope of all standards and of vertical standards, in particular, is the infeasibility of an exclusive classification of industries and equipment. Consider the diagram in Figure 4.2 (called a *Venn diagram*), which relates two different classes of equipment. The circles represent the two classes, and the shaded area is the overlap between the two groups. The circles could also be considered safety standards, and thus equipment represented by the shaded area would be subject to both standards.

Another classification for standards divides them into *specification standards* and *performance standards*. The specification type is easier to enforce because it spells out in detail exactly what the employer must do and how to do it. The performance type has its advantages, however, in that it permits the employer latitude in devising innovative ways to eliminate or reduce hazards. In short, the specification standard emphasizes methods, whereas the performance standard emphasizes results. The comparison is best shown by an example.

Example 4.1

Example of a *specification* standard:
OSHA standard 1910.110: Storage and handling of liquefied petroleum gases
(c) Cylinder systems
(5) Containers and equipment used inside buildings or structures
(vi) Containers are permitted to be used in industrial occupancies for processing, research, or experimental purposes as follows:
(a) . . .
(b) Containers connected to a manifold shall have a total water capacity not greater than 735 pounds (nominal 300 pounds LP-gas capacity) and not more than one such manifold may be located in the same room unless separated at least 20 feet from a similar unit.

Example of a *performance* standard:
OSHA standard 1910.36 General requirements (under Subpart E—Means of Egress)
(b) Fundamental requirements

> **(2)** Every building or structure shall be so constructed, arranged, equipped, maintained, and operated as to avoid danger to the lives and safety of its occupants from fire, smoke, fumes, or resulting panic during the period of time reasonably necessary for escape from the building or structure in case of fire or other emergency.

The standard in part (a) leaves no doubt in the reader's mind as to what must be done and specifies exactly the limitations of containers and manifolds within the room. There is no leeway for the employer to devise a better way—perhaps safer and cheaper—to minimize hazards. However, once the exact standards have been met, the employer can feel safe from citation.

In the performance standard stated in part (b), it can be seen that employers have all kinds of latitude to set up their buildings in ways to avoid undue "danger." If a new type of effective smoke alarm is developed and placed on the market, the employer has the choice of installing the new alarm or adopting a different strategy to enhance safety in the event of "fire or other emergency." However, with the performance standard, a disagreement may develop between an enforcement inspector and the employer over the effectiveness of the methods selected by the employer to protect against undue hazards.

Most standards do not exactly fit either type, but do rather roughly fit one or the other category. Employers tend to prefer performance standards, whereas enforcement officials generally prefer specification standards. However, this issue does not clearly divide the two groups. Sometimes employers prefer specification standards because it is easier to determine whether a given facility or equipment meets a specification standard. In addition, a few enforcement officials prefer the performance standard because if an accident does occur, it tends to strengthen the case for a citation regardless of the specific steps the employer may have taken to prevent the hazard.

NIOSH

The National Institute for Occupational Safety and Health (NIOSH) was established by the OSHA law to carry on research and training. NIOSH is mentioned here because of its important role in recommending new standards to OSHA. OSHA has the sole authority to promulgate new standards, but NIOSH develops the criteria for new standards and conducts the research necessary to justify the need for new standards. NIOSH is often thought of as being concerned primarily with health and toxic materials, but it is important to remember that NIOSH also has responsibility for safety-standards research and development.

Although the OSHA law infused new significance into the agency, NIOSH actually predated OSHA in existence. As early as 1914, NIOSH was part of the Department of Industrial Hygiene and Sanitation in Pennsylvania. In 1937, it became the Division of Industrial Hygiene as a part of the National Institutes of Health. Note the exclusion of the word safety in its title during this period. This orientation persisted for decades as the agency was made a part of the Bureau of State Services in 1944 and of the Bureau of Occupational Health in 1968. Two years later, the OSHA law elevated the agency to include safety and made it a part of the Department of Health, Education, and Welfare

(HEW), which was subsequently changed to the Department of Health and Human Services (HHS).

ENFORCEMENT

Occupational safety and health ought to be topics of vital interest and importance regardless of OSHA, but most of us would not have realized this if OSHA had not been given the authority in the 1970s to inspect industries and issue citations with monetary penalties.

Inspections

The original OSHA law gave the OSHA official the right to enter a factory or other workplace without delay (at reasonable times) upon presenting credentials. Such credentials consisted of basic identification of the officer, but no court-issued search warrant. The right of a government official to do this was later challenged by an Idaho businessman, and the U.S. Supreme Court ruled in his favor in the famous Barlow decision in 1978. Employers may now invoke the Fourth Amendment to the U.S. Constitution and require OSHA to obtain a search warrant to conduct an inspection.

Some company managers take the position that no time is a "reasonable time" to be visited by an OSHA inspector. They argue that their plant has such proprietary processes that a visit by an inspector would jeopardize their trade secrets. Congress anticipated this excuse and provided that any information gathered that might reveal a trade secret be kept confidential. Actually, this provision was essential to prevent OSHA from conflicting with existing laws to protect trade secrets.

OSHA inspections are generated according to the following priorities:

1. Imminent danger
2. Fatalities and major accidents
3. Employee complaints
4. High-hazard industries

Imminent danger would be a situation in which death or serious physical harm could be expected to occur immediately. Time is of the essence in these situations, and ordinary enforcement procedures may be too late to protect workers. OSHA may go to a U.S. district court and get a temporary injunction to remove employees from the work area in an imminent-danger situation. Such an action would be rare and must be reasonable in allowing some employees to remain to correct the condition and to permit a safe and orderly shutdown. If the process is continuous, a sudden shutdown might cripple the equipment and might even be unsafe. OSHA realizes this, and in the case of continuous process operations, the process does not have to be completely closed down; a pilot crew is permitted to remain and maintain the capacity of the process to resume normal operations.

OSHA requires a telephone call or other notification within 8 hours of occurrence of fatal accidents or accidents in which three or more persons are hospitalized.

This notification will invariably trigger an OSHA inspection because this category of inspections is second in priority only to imminent-danger inspections. In fact, at first, fatalities were considered top priority; later, it was decided that it would be better for OSHA to assign top priority to serious, perhaps fatal, hazards before the accident occurs rather than after the fact. OSHA has a policy of investigating both categories, however, within 24 hours of notification.

Another type of injury that requires immediate OSHA reporting is found in the standard for Mechanical Power Presses. Owing to the high potential for serious injury, OSHA requires reporting of all point of operation injuries due to mechanical power presses within 30 days of the injury per 1910.217(g). Protection of employees from these hazards will be discussed in greater detail in Chapter 15.

An employee can request that OSHA investigate a hazard by filing with OSHA a complaint describing the hazard believed to exist in the workplace. To be valid, the complaint must be signed by the employee. Many workers fear recrimination or other reprisal if they are subsequently identified by their signatures. However, OSHA is bound by law to keep the origins of an employee complaint confidential if the employee so requests. However, the employee has additional safeguards against discrimination, as will be seen later in this chapter.

Next in priority to complaints come the inspections of industries that are shown by statistical records to be particularly hazardous. Early in the implementation of OSHA's enforcement program, a collection of industries were named target industries. Subsequently, a target health standards group was named. Focus on the Target Industries Program (TIP) shifted later to a special-emphasis program, which named trenching and excavation cave-ins as the principal concern. Next came the National Emphasis Program (NEP) which is currently in-effect. As of the publishing of this text, below are the current National Emphasis Programs:

- Combustible Dust
- Federal Agencies
- Hazardous Machinery
- Hexavalent Chromium
- Isocyanates
- Lead
- Primary Metal Industries
- Process Safety Management
- Shipbreaking
- Silica
- Trenching & Excavation

An enduring emphasis since the inception of OSHA has been the construction industry, generally recognized as hazardous, especially from a safety standpoint. Other industries are identified as hazardous on the basis of statistical evidence that the incidence rates, such as TRC, DART, or DAFWII, as defined in Chapter 2, are higher than national averages for the corresponding industry classification (SIC or NAICS number)

as reported annually by the Bureau of Labor Statistics (BLS). The national incidence rates are a moving target, adjusting slightly every year, usually downward.

Citations

After the inspection, OSHA may issue a citation for alleged violations of specific standards or of the General Duty Clause. The statutory limit is 6 months, so if no citation has been received within 6 months, the employer can be assured that a citation will not be forthcoming. A growing percentage of firms do not receive a citation upon inspection. OSHA has on occasion pointed to this percentage and designated these firms as "in compliance." The designation may be a misnomer, however, because the depth of inspections varies considerably. A really thorough wall-to-wall inspection of a comprehensive manufacturing plant of any size except the very smallest is almost certain to reveal some OSHA violations. The OSHA compliance officer may be reluctant to issue a citation and may overlook some minor items if it is felt that the employer has shown a good-faith effort to comply with the standards.

OSHA recognizes that some conditions, even though they represent a violation of the letter of the law, have no direct or immediate relationship to safety or health. In these instances, OSHA may issue a de minimis notice in lieu of a citation. De minimis notices do not carry a monetary penalty.

If a citation is issued, it is not a very private matter. To the chagrin of the safety and health manager, the citation must be prominently posted near where the violation occurred. Employees and management alike have the opportunity to read the citation and note the alleged violation. This increases the overall awareness of OSHA's enforcement powers and may spawn complaints by employees for other potential violations. As far as management is concerned, the safety and health manager can prepare top management by explaining that many companies do receive a citation when inspected by OSHA; there is no disgrace to being found out of compliance with a few detailed provisions of the standards.

Table 4.1 arrays the statutory maximum penalty structure for OSHA violations. There is some history behind this somewhat peculiar penalty structure. Congress originally set penalty maximums in round numbers such as $1000 (for a nonserious violation) and $10,000 (for willful or repeat violations). However, the Omnibus Budget Reconciliation Act of 1990 authorized a sevenfold increase in the amount of OSHA penalties (Foulke, 1992). The provision that sets penalties for "willful violation resulting in death" was omitted from the revision which increased penalty levels sevenfold. On August 1, 2016, fines were increased by Congress to account for inflation from 1990 to 2016. The inflation adjustment factor used to calculate the increases was 1.78156. That resulted in an almost doubling of the fines. The omission of "willful violation resulting in death" from the 1990 updates resulted in the odd situation that statutory maximum penalties for willful violations resulting in death are actually lower ($10,000 and $20,000 for first and second offenses, respectively) than are the statutory maximum penalties for willful violations *not* resulting in death ($124,709).

OSHA penalties can be quite severe, as Table 4.1 indicates, but actual fines are usually quite inconsequential. Penalties for nonserious violations are often less than $100. OSHA has a formula for computing a reduced penalty, taking into consideration

Table 4.1 OSHA Penalties (Statutory Maximums)

Offense	Maximum Penalty	Offender
Nonserious violations	$12,471	Employer
Serious violations	$12,471	Employer
Willful violations (minimum $5000)	$124,709	Employer
Repeat violations	$124,709	Employer
Failure to abate a violation	$12,471 *per day*	Employer
Willful violation resulting in death to employee (minimum $5000)	$10,000 and/or 6 months in prison	Employer
Second offense: willful violation resulting in death	$20,000 and/or 1 year in prison	Employer
Failure to post notices, citations, etc.	$12,471	Employer
Giving advance notice of an inspection	$1000 and/or 6 months in prison	Anyone
Falsifying records or reports	$10,000 and/or 6 months in prison	Anyone
Killing an OSHA inspector	Life imprisonment	Anyone

the size of the company (small businesses tend to be assessed smaller fines), the history of previous violations, and "good faith" shown by the employer. Examples of these penalty adjustment factors can be seen in Table 4.2. By the time a given citation is issued, the formula for computing a possible reduction in penalty will have already been applied.

Although most OSHA penalties are small, it is possible for fines to become quite severe. Note that the failure-to-abate penalty is assessed for every day a violation remains uncorrected. For an actual example, in 2008 a metal fabricator in Buffalo, New York, was fined an additional $75,000 for failure to correct a violation for which the original proposed penalty was $6000. The company paid the fine, but allegedly failed to correct the violation within the prescribed abatement period. Some willful and repeat violations have resulted in fines of hundreds of thousands of dollars assessed on a single firm, although these cases are rare. With regard to rare cases, in a history-making case, OSHA posted a record $87.4 million fine against British Petroleum (BP) in 2009, after they allegedly failed to correct serious violations after their Texas refinery explosion

Table 4.2 Penalty Adjustment Factors

Penalty adjustment reason	Penalty reduction (%)
1–25 employees	60
26–100 employees	40
101–250 employees	20
250 or more employees	0
Good-faith effort	25
History Increase or Reduction (past 3 years)	10
Quick Fix	15

Source: Data from *Everything You Wanted to Know about OSHA*, 2009.

three years earlier killed 15 people and injured more than 170 people. If that wasn't enough, six years later in 2015, BP settled the Deep Water Horizon explosion fines for $18.7 billion dollars setting a new settlement record for government fines and claims (not all OSHA-related).

A question to consider is how many times a standard is violated within a plant or worksite. OSHA may issue a single citation when the inspector sees several employees exposed to a particular hazard. However, it is conceivable that OSHA might issue several citations of the same standard in the same inspection, accounting for each employee instance of violation of the rule. For instance, personal protective equipment applies to one employee at a time, and OSHA has taken seriously the exposure to each and every employee who is not protected in accordance with the standard. In 2008, OSHA articulated its intent to enforce personal protective equipment violations on an instance-by-instance basis by formally issuing a notice of proposed rulemaking in the Federal Register (Federal Register, Docket Number OSHA-2008-0031, 2008).

Some interesting comparisons can be made between the Table 4.1 penalty levels for OSHA violations and other unrelated federal fines. For instance, compare the maximum penalty for a serious OSHA violation at $12,471 with the penalty for violating the South Pacific Tuna Act at $350,000. In another comparison, a willful OSHA violation that happens to result in a fatality can result in a six-month prison sentence for a misdemeanor. On the other hand, harassing a wild burro on federal land can be classified as a felony and carry a prison term of a full year, not six months.

In addition to the statutory penalty categories listed in Table 4.1, an additional category, egregious violation, was established administratively by OSHA in the 1980s. Worse than a willful violation, an egregious violation is a glaring or flagrant violation, which may invoke even higher penalties. Citation of egregious violations requires clearance from OSHA's national headquarters in Washington, DC.

The following questions are frequently asked in seminars about OSHA:

1. Who in the organization goes to prison when the "employer" is found to be guilty of a willful violation resulting in death?
2. Where does the money collected in OSHA fines go—to OSHA's budget to pay inspectors?

In answer to the first question, "employer in a complex organization" can be construed to represent the entire chain of supervision, from the supervisor of the employee victim to the chief executive officer of the firm. However, what few cases have been prosecuted indicate that OSHA will usually attempt to zero in on only one guilty person to go to prison. The rationale is that OSHA attempts to prosecute the manager with the highest authority who knew about the violation and had the authority to correct it, but failed to do so, resulting in the employee's death. A notable exception will be examined in Chapter 7 in a case in which three members of top management in a single company, including the owner, were indicted for criminal violations.

The second question, "Where does the money go?" apparently has its origins in some state and local enforcement schemes. It would hardly seem reasonable to deposit fine money into the coffers of those agency officials who assess the fines. However, the misconception that OSHA is permitted to keep the money from fines collected seems

to persist in the minds of the public. The origins of this idea appear to be the tradition of state boiler inspection agency regulations, which provide for money collected to be deposited into the boiler inspection division accounts. OSHA does not use this strategy, however, and all fines are deposited directly into the U.S. Treasury and not earmarked for OSHA's use. OSHA fines would be insufficient to operate OSHA anyway, since the total amount collected annually is generally very low compared to OSHA's annual budget. It must be admitted that the 1990 budgetary move by Congress to increase OSHA's penalty structure sevenfold most certainly had the effect of adding credence to the opinion that OSHA fines were expected to fund OSHA's budget.

A big mistake made by some managers is to pay OSHA fines and then consider the matter closed. Such a strategy ignores the far more important aspect of the citation—the prescribed abatement period. The OSHA fine itself may be inconsequential; the big impact of the OSHA citation, if it is accepted, is that each item listed in the citation must be corrected, regardless of cost. The cost of correcting violations is usually much greater than the amount of the OSHA penalty.

Indeed, a 2014 estimate of OSHA's cost to business exceeds $140 billion per year (Injury Facts, 2016). It should be acknowledged that such an estimate does not take into consideration the benefit to the company from decreased direct and indirect costs of injuries and illnesses prevented.

Before accepting a citation, the safety and health manager should stop and think about whether it is really feasible to correct the violation. There is only a 15-day period (working days) after receipt of the citation for a decision to be made on whether to contest the citation. Appeals can even be taken through the judicial processes all the way to the Supreme Court.

Appeals of citations are not to be confused with variances. Appeals are for employers who have already been cited. Variances are for employers who need time to comply or have an alternative to compliance that is more practical and still protects employees.

Prescribed abatement periods can be seen to be very important. It is easy to overlook abatement periods and concentrate on the nature of the violations and the proposed penalties. The abatement period can seem to pass quickly, and then the firm is subject to a possible reinspection and potentially more severe penalties. OSHA is known to be very reasonable in extending abatement periods if the employer contacts OSHA and gives reasons for a request to extend. However, if the employer takes no action and the OSHA compliance officer returns, a severe penalty is likely. It is easy for OSHA to be too optimistic about timetables for changes in facilities, allowing insufficient time for administrative approvals, delayed equipment deliveries, installation schedules, and, of course, Murphy's law. It is up to the safety and health manager to bring up the subject of abatement and to ensure that OSHA sets reasonable periods.

Employee Discrimination

One penalty that is sometimes costly does not appear in Table 4.1. This is the penalty paid by the employer who is found to have discriminated against an employee for filing an OSHA complaint, answering the OSHA compliance officer's questions during an inspection, or exercising any other right afforded to employees under the OSHA law. Company management should be very careful to document reasons for discharging

any employee, especially if that employee has a history of complaining about safety and health hazards. This type of complaining is no basis for dismissal, and the company that dismisses such an employee may find itself later reinstating the employee with back pay. No fine must be paid to the government for such an infraction, but if the case has lain idle for many months, the cost of reinstatement with back pay can be substantial.

Besides dismissal of the employee, OSHA recognizes other, more subtle means of discrimination. Any of the following employer actions is considered by OSHA to be illegal discrimination if it is used as punishment for the employee's exercise of rights under OSHA:

- Termination
- Demotion
- Assignment to an undesirable job or shift
- Denial of promotion
- Threats or harassment
- Ostracize the employee with other employers

OSHA has even told employees that the employer may be in violation of the law for suddenly punishing an employee for doing something else wrong after the employee has protested a hazardous condition. It would be especially incriminating to single out a complaining employee for punishment for some unrelated action that goes unpunished for other employees. As can be seen, the whole matter can be extremely delicate, and the safety and health manager should ensure that all persons in management, from first-line supervisors on up, are aware and careful not to discriminate either directly or indirectly against any employee for complaining about safety and health violations, either during the worker's employment with the company or in the future if the worker seeks employment elsewhere.

One questionable worker "right" is whether an employee can walk off the job because of unsafe or unhealthy conditions and still expect to be paid. The courts have ruled against employees who sue to be paid by their employer for not working when they have walked off the job owing to unsafe or unhealthful conditions.

PUBLIC UPROAR

OSHA survived a very stormy first decade. Despite the validity of its purposes, OSHA quickly grew to be one of the most hated agencies the federal government had ever created. At times, its demise seemed imminent, but it continued to survive.

At the root of public criticism of OSHA lie the OSHA standards. Much has been said about "nitpicking inspectors," "unjustified fines," and "gestapo techniques," but these criticisms would probably never have arisen if the standards themselves had been set up differently.

The original standards had a few obsolete provisions that have subsequently been deleted. Another problem with the standards was that advisory provisions containing language such as "should" were incorporated as mandatory rules with language such as "shall." The courts frowned on this, and so did the public. The government has since

worked hard to eliminate advisory provisions from the standards. Federal standards have also been criticized for their level of detail, vagueness, redundancy, and irrelevance.

Some federal standards have seemed to do more for industries manufacturing safety equipment than they have done to protect the worker. A good example is the original standards for fire extinguishers. OSHA now permits alternatives to fire extinguishers for many applications.

A favorite weapon of OSHA's critics is the old question "Has it done any good?" They usually feel comfortable with the question without any examination of the record because they believe that OSHA could not have any measurable beneficial effect. It is difficult to assess the impact of federal regulation on worker safety and health because even the statistical recordkeeping has changed somewhat since OSHA was created. It is not even agreed on whether the changes in recordkeeping have made injury and illness rates look better or worse. Some believe that the presence of OSHA enforcement with OSHA compliance officers examining injury and illness records has tempted management to hide injuries and illnesses, making the overall record of injuries and illnesses under OSHA look better than it really is. Others believe that because injuries and illnesses requiring medical treatment are now required by law to be recorded, statistical summaries will show more injuries and illnesses and thus make OSHA look worse. There is no question, however, that, in some areas, OSHA has had a positive impact on worker safety and health. Dramatic results have been claimed in the reduction of fatalities from trench and excavation cave-ins. The overall picture regarding OSHA's effect on fatalities is not impressive, as Figure 4.3 reveals. Although the overall trend in fatalities in the workplace has shown an impressive downward trend throughout the 1900s, no improvement can be seen in this downward trend as a result of OSHA. Griffin

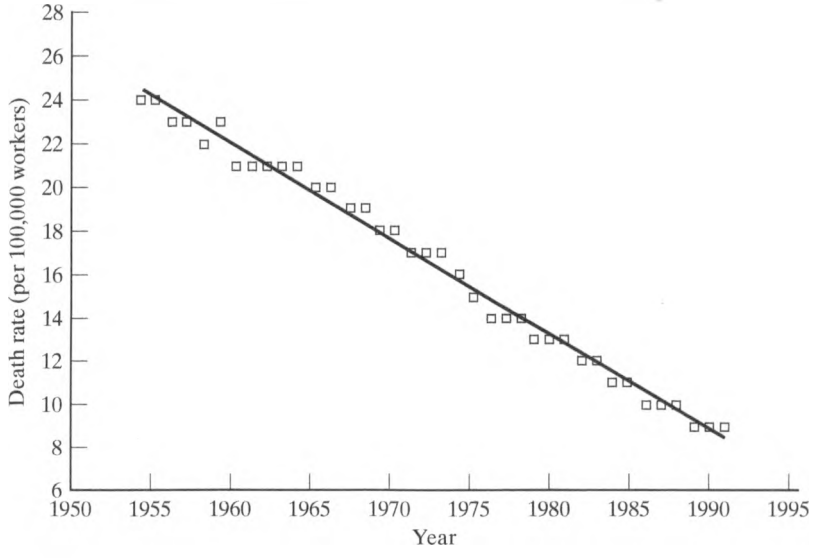


FIGURE 4.3

The workplace fatality rate follows a very linear downward trend, with no apparent change in this trend associated with the arrival of the OSHA era (Data from Griffin, Mark F., "A Review of the Effectiveness of OSHA's Safety Enforcement Policy," Master's thesis, University of Arkansas, Fayetteville, AR, 1993).

(Griffin, 1993) studied the statistical significance of OSHA's effect on fatalities and found no statistically significant effect. In fact, he found the trend to follow a straight line very closely with a statistical correlation coefficient (r^2) of 0.99 when 38 years of data were analyzed (from 1954 to 1991). Figure 4.3 shows this very strong linear relationship, with no apparent changes in the trend anywhere near the beginning of OSHA enforcement in 1971 or in any year thereafter.

The concept of cost effectiveness continues to gain in importance. Thus, the old question "Does a federal regulation do any good?" is changing to "Does the regulation do enough good to warrant the cost of compliance?" The cost of compliance is a much greater consideration than is the cost of monetary penalties assessed by regulatory agencies.

ROLE OF THE STATES

Prior to OSHA, occupational safety and health were generally considered to be concerns of the states, not of the federal government. The general feeling among supporters of OSHA was that the states historically had not been doing a sufficient job in establishing and enforcing adequate standards for occupational safety and health. Recognizing, however, that some states might develop effective occupational safety and health standards and enforcement programs, the OSHA law provides for state plans to be submitted to OSHA for approval.

Enforcement

It must first be said about state enforcement that OSHA itself has been given no authority to regulate state agencies, counties, or municipalities. Even federal agencies are exempt from regular OSHA enforcement—a sore point with some private employers—but the OSHA law does provide for federal agency coverage as a part of the responsibilities of the heads of the various federal agencies. Obviously, it would be impractical for the federal government to cite and penalize itself, so OSHA does make inspections but does not issue citations to its sister agencies. As far as states are concerned, if the federal government were to issue citations to, and assess penalties on, state and local governments, there would be sovereignty problems; so, that is prohibited.

However, if a state submits a plan for occupational safety and health standards and enforcement, to be approved by OSHA the plan must contain a program applicable to employees of state agencies and political subdivisions of the state. In addition, the state standards and enforcement must be at least as effective as the corresponding federal standards and enforcement. About half of the states have achieved "as effective as" status and have had their state plans approved (see Appendix G). Three such states (Connecticut, New Jersey, and New York) formerly had comprehensive state plans, but withdrew from enforcement of the private sector while retaining their authority to enforce standards for state agencies. These states now have federal enforcement of the private sector within their borders. Safety and health managers operating in any of the state-plan states should consult with appropriate state officials for copies of standards and enforcement procedures. In most state-plan states, the standards are virtually identical to the federal OSHA standards.

The status of state programs was immediately brought into question with the occurrence of one of the worst fire disasters in the nation's history in Hamlet, North Carolina, the morning of September 3, 1991 (LaBar, 1992). The causes and details of this tragedy are discussed more fully in Chapter 7; in summary, 25 people were killed and another 56 were injured. Ironically, the catastrophe occurred in North Carolina, the state that was selected by OSHA as the nation's first to be approved to replace federal OSHA inspectors with state inspectors for enforcement of standards that were supposed to be "as effective as" the federal OSHA standards. Not surprisingly, the tragedy precipitated a thorough review of the North Carolina state plan for standards and enforcement. The final result was that North Carolina was permitted to continue to operate its state plan, but several changes were mandated to assure its effectiveness. The evaluation of the North Carolina plan became the first step in an extended program to evaluate all state plans. Approximately 1 year after the accident, OSHA announced that all state plans had been evaluated, that significant progress had been made, and that all approved state plans would be permitted to continue (OSHA, 1992).

Consultation

Besides standards and enforcement programs, OSHA also delegates to states authority and responsibility for consultative assistance in occupational safety and health to employers on request of the employers seeking such assistance. OSHA has authority to make federal grants to states to support enforcement, consultation, and other purposes of the OSHA law. Recent political tides have been in the direction of transferring federal agency authority and activity to the jurisdiction of the states. OSHA is pursuing this path with the state consultation programs. Cooperation with a state agency can even result in temporary immunity from OSHA citation in some cases. The possibility is worth checking into and safety and health managers should consider state consultation as a part of their overall strategies. There is no charge for state consultation, and as of this writing, it was available in some form in every state.

Employer Reluctance

The biggest problem with the OSHA consultation program is a reluctance on the part of the employer to call a government official, either federal or state, to "ask for an inspection." Many company managers, realizing that the standards are so complex that some fault can be found if one digs deep enough, simply do not want to involve the government inspectors if they can avoid it. This thinking is reminiscent of the joke known as "The Three Biggest Lies" about OSHA inspections:

1. The company management welcomes the OSHA inspector with the greeting, "We're glad to see you!" (lie 1)
2. The OSHA inspector says, "Well, we're just here to help you." (lie 2)
3. The union steward says, "Well, I sure didn't call him." (lie 3)

Despite the joke, it is true that OSHA has made genuine efforts to help employers voluntarily comply with standards. The agency must walk a tightrope, however, to avoid alienating labor interests by granting immunity to cooperating employers.

Inspection Immunity

It was stated earlier that cooperation with a state agency can result in "temporary immunity from OSHA citation in some cases." It should come as no surprise that this is a sensitive issue, and as such, OSHA policy has evolved somewhat over the years. At first, temporary immunity from enforcement inspections was granted to employers who requested consultations, with one important exception: If serious violations were found, the consultation inspector was obliged to notify OSHA. This exception chilled employers to the whole idea of requesting an inspection of any kind. Picture the awkward position of the safety and health manager who convinces management that a consultation inspection should be requested and then later finds the company embroiled in an enforcement inspection with stiff penalties to be paid. The policy was later modified slightly to state that the cooperating employer was temporarily immune from inspection provided that serious violations were corrected within an agreed-upon time period. Thus, if the employer cooperates, enforcement inspections will not be triggered by the consultation visit, even if serious violations are found. OSHA agency officials, of course, understand employer reluctance to request an inspection, and at the same time understand labor pressures to not exempt any employer who fails to comply with standards. This dilemma and others are addressed in the next section.

POLITICAL TRENDS

From this chapter, it can be easily seen that OSHA is a politically charged subject, so much so that it has been often thought that the agency was on the brink of repeal. However, despite its problems, OSHA appears to be quite durable and has survived repeated attempts to repeal or modify it.

The Barlow decision was an important one, but it really did not affect OSHA's enforcement operations as much as the public first thought it would. Those firms insisting on inspection warrants are usually inspected later; the procedure merely delays the process somewhat.

An attempt to exempt small businesses and family firms merely shifted enforcement emphasis. The same can be said of a strategy to inspect only those firms that have a lost-workday rate greater than the national average. An exemption of one category means emphasis on another, provided that the staffing and organization of the agency remain intact.

One indicator of OSHA's future is the congressional acts that have been patterned after the OSHA law and have been passed despite criticism directed at OSHA. The laws governing product safety and liability and mine safety were approved in the 1970s and were constructed and worded in a manner similar to the OSHA law. This illustrates that Congress has continued to endorse the concept of OSHA.

The evolution of OSHA standards is very slow. Once a standard has been adopted as the national consensus, it becomes very difficult to revoke the standard at a later date by saying that the standard did not represent the "national consensus" after all. Such a step repudiates or at least reflects adversely on the thousands of citations enforcing the given standard in inspections prior to the revocation. Any revision of the standards that can be considered subjective or controversial can be challenged in

the courts. All of this tends to preserve the status quo despite widespread controversy. OSHA has been able to overcome the inertia of existing standards by making some rather broad changes to some of the standards, the fire protection standard being the most notable example.

Returning to the subject of consultation, OSHA can be seen vacillating between trying to satisfy labor and keeping peace with management. In December 2000, OSHA revised its rules on the consultation program to stiffen the program somewhat. Always aware of its labor constituency, OSHA authorized employees to take a larger role in the consultation inspection, with union or other employee representation during the consultation inspection. In addition, OSHA required that the employer post a list of serious violations found, so that employees can see the results of the consultation. Employers were required to leave the posting up for 3 days or until the hazards were corrected, whichever was *later*. Then, less than a year later, in 2001, OSHA finally began to recognize that it just was not reaching some employers who were shy about calling either OSHA or a state agency supported by OSHA to perform a consultation inspection. Therefore, OSHA initiated a new program in which specialists provide training and compliance assistance without the threat of inspection. The compliance assistance specialists were kept separate and distinct from OSHA's enforcement program. One can see that, politically, OSHA has a great deal of difficulty in balancing industry and labor interests when it comes to defining its position on consultation.

A final question to be addressed in this section is "Which political party, Democrat or Republican, defends or condemns OSHA?" Most would call this question a "no-brainer," because Democrats are thought to be more liberal and pro labor and, therefore, pro OSHA. Republicans are thought to be the protectors of business interests and personal and entrepreneurial liberty and, therefore, anti OSHA. However, it is politically naïve to buy into this oversimplification of the political dynamics. The real differences are more subtle. If we examine the political history of OSHA and the controversial issues related to the agency, the distinctions between the two major political parties begins to blur. Consider, for instance, that it was under a Republican presidential administration (but a Democratic Congress) that OSHA was first conceived. Richard Nixon signed the OSHA law into existence. Despite this fact, the Republican sweep of both the White House *and* Congress in 1980 was thought to spell doom for OSHA. It did not turn out that way. Indeed, toward the end of the decade, OSHA enforcement appeared to intensify, with the assessment of some exceptionally large penalties. This period also saw the inception of the policy for egregious violations. The Democrats were back with the election of Bill Clinton in 1992, but OSHA was kept low-key, apparently with the intent of not arousing the ire of business interests. By the year 2000, with the return of the Republicans to power in both Congress and the White House, OSHA detractors had already given up hope that they would bring about outright repeal of the law. In 2008 in the waning days of the Bush administration, Assistant Secretary of Labor for OSHA, Edwin G. Foulke, Jr., emphasized OSHA's "balanced approach to workplace safety encompassing education, training, information sharing, inspection, regulation and aggressive enforcement." Analogous to the Democrats' fear of alienating businesses, the Republicans did not want to alienate labor, so the distinction between the two remains blurred. One can see a difference between the parties, however, in specific issues, such as ergonomics dealt with in detail in Chapter 8.

During President Barack Obama's presidency, OSHA celebrated its fourth decade. OSHA's focus was to bring together all their constituents and working to listen to their opinions. Additionally, OSHA shared access to data which had previously been unavailable such as exposure measurements sampled from thousands of OSHA inspections. OSHA also required the electronic reporting of injury/incident data to increase public availability of this data. The concern at the beginning of the Obama administration was for an increase in OSHA power and scope. Conversely, there could be concern of the opposite effect with the Trump administration. Suffice it to say, OSHA has been around for almost half a century and will likely be here for another 50 years to come.

Positive Developments

Gilbert J. Saulter (Saulter, 1988) summarized his assessment of public sentiment in 1988 by saying that OSHA was reaching "maturity." He cited successes in achieving public awareness by observing that the number of university academic programs in safety and health had tripled since 1970. Saulter emphasized the success of the program of exemption through consultation, whereby employers seek free consultation, usually provided by the states, and thus achieve limited immunity from citation.

In 2017, nearly 30 years after Saulter's words were spoken, "maturity" does indeed seem to describe OSHA's status. Despite the controversy surrounding its existence, OSHA has proven its durability and has taken its place among other permanent agency establishments of the federal government. Both the agency and the nation have survived the horrendous terrorist attacks of 2001 and the economic crisis of 2008. The twenty-first century rise in the recognition of the reality of the energy crisis and of global warming have caused society to adapt and adjust to new paradigms of behavior. OSHA has shown a willingness to adapt to these new needs as the next section will demonstrate.

National Crisis Management

OSHA has emerged as a central office of responsibility for coordinating many agency actions in a national crisis. OSHA's response to the 2001 terrorist attacks will be discussed in detail in Chapter 6. In the environment of a national crisis OSHA has shown a willingness to shift its emphasis to one of advice, assistance, and support as contrasted with its traditional role of enforcement. The devastation of the city of New Orleans by Hurricane Katrina provided a stage for OSHA's presentation of its new image as a crisis manager. The presidential administration of George W. Bush was already under fire for the war in Iraq. Hurricane Katrina became another focus for criticism of the Bush Administration, this time for failure to respond quickly enough to a national crisis at home in the United States. When the government did respond to the crisis in New Orleans, OSHA played a key role in providing advice and assistance in safety and health matters, sharply contrasting its more traditional role as the enforcer of standards.

SHARP Program

OSHA's "Safety and Health Achievement Recognition Program" (SHARP) is designed to provide recognition to small companies (250 employees or less) that

cooperate and participate in OSHA's consultation program. To obtain this recognition, the employer must be proactive and go beyond simply requesting a consultation visit. Specifically, the employer must (1) have at least one year of operating history at the worksite seeking SHARP participation, (2) receive a comprehensive safety and health consultation visit, (3) receive acceptable scores on all basic and specified "stretch" attributes of a foundational safety and health management system, such as employee participation in hazard prevention and control activities, (4) lower the company's DART (Days Away/Restricted or Job Transfer) and TRC (Total Recordable Cases) rates below the published BLS industry average, and (5) agree to notify the Consultation Project Manager (CPM) and request a subsequent visit when changes occur in the work conditions or processes that may introduce new hazards. After the employer satisfies these requirements, the CPM may recommend that the worksite be recognized with a certificate of approval as a certified SHARP site. The reward to employers for agreeing to cooperate in these ways is a temporary exemption from OSHA programmed inspections for a period of up to two years. Note carefully the use of the word "programmed." This means that OSHA will exempt the employer from the random selection of the facility for general inspections. However, if there is a serious accident or an employee complaint during the temporary "exemption," OSHA will be there.

Recent history has confirmed that OSHA wants the SHARP program to work. After initial approval, SHARP participants may be eligible for renewal periods of up to three years. Even for firms that do not meet the guidelines for SHARP status approval, they may qualify for "Pre-SHARP" status if they exhibit a reasonable promise of achieving agreed-upon milestones for SHARP participation. In addition, firms that lose SHARP status, say, due to a finding of a "willful" violation, may still re-apply after 12 months. Such positive OSHA support has been a surprising encouragement to employers.

VPP Program

Another positive program is the Voluntary Protection Program (VPP). This program is a comprehensive one that involves a serious commitment on the part of the employer to maintain an exemplary safety and health program for its employees. Such a program can be compared to the corresponding Malcolm Baldridge award for manufacturing quality. The first step is called "*Demonstration*," which identifies the company as seeking recognition from the VPP program. The Demonstration phase recognizes the possibility that an employer may be using an approach different from the current OSHA requirements for VPP. Thus it can be seen that OSHA is open to testing of the efficacy of different approaches to the goal of safety and health in the workplace. After a lengthy series of steps, the firm qualifies for the next rating, entitled "Merit." The highest designation, reserved for outstanding safety and health programs, carries the designation "Star."

The VPP concept had its origins in the State of California in 1979 and quickly was picked up on the national level. An outgrowth was the national professional organization entitled "Voluntary Protection Program Participants' Association" (VPPPA). The New Orleans Conference in the year 2017 marked the 33rd annual conference of this professional society.

Recent OSHA emphasis is on the management of safety and health, an approach that is heralded in this book. OSHA has become increasingly interested in both training and the effectiveness of employee committees for safety and health. The stress is on hazards analysis and feedback to correct safety and health problems so that the same injuries and illnesses do not recur.

Like the emphasis on management is the attempt by OSHA to use a systems approach to dealing with hazards, this view of safety and health as a complex systems problem that impacts many other facets of the production system is a further sign that the agency is maturing. Sophisticated OSHA technical personnel now look beyond the citation and abatement of individual violations and seek solutions more basic to the problem(s) at hand.

Ergonomics

In no arena is the systems approach more evident than in that of ergonomics. Ergonomics is the study of human capability in relation to the work environment, and solutions to ergonomics problems usually require a sophisticated analysis involving perhaps a redesign of the workstation to fit the process. One of the hottest issues of the 1990s was a proposed OSHA standard for ergonomics. The subject of ergonomics is mentioned here because it is one of the most controversial political issues related to occupational safety and health. Owing to the importance of this subject, Chapter 8 is devoted entirely to it.

OSHA's emphasis on ergonomics has been highly visible to the public in the form of severe penalties, especially in the meat-packing industry. An example is OSHA's inspection and citation of a snack food manufacturer in which a total of $1,384,000 in penalties was proposed for alleged violations, including $875,000 for repetitive motion illnesses at $5000 each (OSHA Proposes Fines for Ergonomics-Related Injuries, 1989). The trend is expected to continue and will have an impact on production that goes beyond the issue of safety and health.

"Extra-Hazardous Employer" Status

This chapter has emphasized OSHA as the primary regulator and enforcer of safety and health standards, but there are other agencies and laws to consider. In Chapter 2, the workers' compensation system was examined, and it was stated there that the system is being expanded from its traditional role of compensation of the injured to a more general role that includes regulation and enforcement. One of the prominent aspects of this new development is the creation of the designation "Extra-Hazardous Employer" (Hazardous Employer Program, 1997). The management of a company unhappily discovers that it has received this designation when notified by the Workers' Compensation Commission of the state of the company's residence. The designation is determined by a calculation of the company's lost-time injuries incidence rate and comparison with the "expected rate" for that company's industry. When the company's rate exceeds the level that can "reasonably be expected" for that industry, the company is designated an Extra-Hazardous Employer.

Being dubbed "extra hazardous" carries with it certain responsibilities for management. The first of these is to have a safety consultation within a short time period, usually 30 days. Options for this consultation may include the state labor department,

the company's insurance carrier, or a professional consultant approved by the Workers' Compensation Commission of the state of residence.

The written report of the safety consultant is then used by the company as a basis for the development of a mandatory "accident-prevention plan." The plan must be more than a general document; it must address each of the hazards or unsafe practices identified in the safety consultation report. The plan must also include provision for the following:

1. Statement of company safety policy
2. Analysis of hazards
3. Recordkeeping
4. Education and training
5. In-house audits or inspections
6. Accident investigations
7. Periodic review of abatement effectiveness
8. Implementation schedule

The plan must be more than a "paper plan." Six months after submittal of the plan by the company, the Workers' Compensation Commission may return to the worksite and conduct a follow-up inspection to determine whether the plan was actually implemented. Penalties are an option if the company has failed to comply.

The foregoing description of the Extra-Hazardous Employer program was based on specific states' programs—in particular, Texas and Arkansas. Other states may use different approaches. As was stated in Chapter 2, the principal purpose of workers' compensation reform measures is to reduce the enormous increases in workers' compensation claims, with benefit to employers and employees alike. The Extra-Hazardous Employer program is seen as a preventive or proactive approach that attempts to reduce the number of injuries or illnesses that arise on the job before they become a claim in the workers' compensation system.

The Extra-Hazardous Employer program of state workers' compensation agencies can also be seen as a means of requiring employers to develop safety and health programs and plans, even though OSHA's own attempts to require such programs have not met with political approval. The more aggressive workers' compensation programs can also be seen as a threat to OSHA's authority to enforce safety and health standards. This is bound to create political controversy over who has authority to enforce safety and health in the workplace and ultimately may lead to a constitutional showdown on the issue of states' versus federal rights to enforce workplace safety and health.

Americans with Disabilities Act

On July 26, 1990, the Americans with Disabilities Act (ADA) of 1990 was signed into law and immediately became the focus of attention of employers and institutions that deal with the public. The law was in response to findings that an estimated 43,000,000 Americans have one or more physical or mental disabilities (Public Law 101–336, 1990). This number is expected to increase as the population as a whole is growing older.

The American public and businesses alike were already familiar with the term *discrimination* as it applied to civil rights legislation forbidding discrimination based on race, color, religion, sex, and national origin. The ADA extended this concept to the handicapped with regard to employment and access to public facilities and services. Specifically, the ADA prohibits discrimination against the disabled in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment.

The ADA has had a significant impact on the field of worker safety and health because it has been common practice to discriminate against job candidates whose safety or the safety of their coworkers may be at stake if these candidates have physical or mental impairments that might affect their performance of the particular job for which they are being hired. The ADA does not forbid medical examinations and screening tests for employment, but it has regulated such practices to assure that all candidates are tested fairly, not just the impaired, and that all characteristics being screened truly are significant to the health and safety of the worker or coworkers. In addition, the ADA requires that the results of medical preemployment exams be kept confidential.

A controversial issue with respect to medical tests and preemployment screening is the subject of drug testing and alcohol abuse. The relevant question is this: Is the use of drugs or alcohol considered to be a handicap and thus protected from discrimination by the ADA? Congress anticipated this question and did not forbid drug testing in its passage of the ADA law. Current users of illegal drugs or alcohol may be barred from the workplace by the employer, but former users who have completed a supervised drug rehabilitation program are again eligible to work. Indeed, former drug users are protected from general discrimination in the hiring process. Companies should avoid a blanket policy that excludes former drug users. Each former drug user should be evaluated to determine whether he or she poses a "direct threat" to himself or herself or to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation, as is demonstrated by Case Study 4.1.

CASE STUDY 4.1

EEOC SUES EXXON

The Exxon Corporation was sued in 1995 by the Equal Employment Opportunity Commission (EEOC) for issuing a blanket policy excluding all employees with a record of past substance abuse from certain jobs (Gonzales, 1995). The job description involved in the case was "aircraft flight engineer," a "designated" safety position. Although it was recognized that the job "aircraft flight engineer" had a direct relation to safety, the subject issue was whether a former drug user was still a risk in this particular job. Even though the job impacted safety, Exxon was sued because it was allegedly not clear that former drug use would contribute to the hazard in this job.

As can be seen from Case Study 4.1, employers must be careful to avoid blanket policies that bar the hiring of former drug users. The ADA law requires that employers determine on a case-by-case basis whether the former drug user poses a direct threat

through individualized assessment based on medical analysis or other objective factual evidence before excluding the former drug user from a given job.

A related controversy is over the definition of an impairment. If a mental or physical condition qualifies as an "impairment" under the ADA law, a person having the impairment is protected from discrimination in employment, that is, the employer must make reasonable accommodations to accept the individual for employment. The law excludes such behavioral characteristics as transvestitism and transsexualism from protection, but it does not exclude diseases such as AIDS or HIV positivity. The law also excludes compulsive gambling, kleptomania, and pyromania from protection under ADA as an impairment.

Another impact the ADA has had on the field of industrial safety and health is in the construction and remodeling of buildings and facilities. The law requires that the employer make reasonable accommodation to permit handicapped employees to perform jobs as much as possible like the jobs performed by nonhandicapped employees. Recognition is given to those situations that would result in undue hardship to the employer to provide such reasonable accommodation. Undue hardship is judged on an individual basis considering the level of difficulty or expense to comply. Factors to be considered are the nature and cost of the accommodation and the overall financial resources and size of the company.

IMMIGRANT WORKERS

The first decade of the twenty-first century has seen increased interest in the welfare and rights of immigrant workers. The issue becomes controversial when the immigrant worker is "illegal," that is, working in the United States without proper visa or naturalized citizen papers. Despite labor objections, the use of immigrant labor, legal or otherwise, has become a fact of the U.S. workplace. OSHA and the Secretary of Labor have strongly supported OSHA's mission of protecting the health and safety of all U.S. workers without regard to their immigration status. Indeed, the Secretary of Labor under the George W. Bush administration, Elaine Chao, was herself an immigrant.

The safety record of immigrant workers is not a good one. Although the overall workplace fatality rate decreased toward the end of the twentieth century, the fatality rate for Hispanics and Latinos actually increased. One reason for the large number of fatalities among Hispanic and Latino workers is obvious: a disproportionate number of Hispanics and Latinos work in construction, one of the more dangerous industries. Even illegal immigrant workers have the right to file a complaint with OSHA for unsafe working conditions, but will they hesitate to do this for fear that their illegal immigration status will be uncovered? The status of the immigrant worker is a controversial issue likely to see significant change, especially considering the economic crisis of 2008 and 2009.

SUMMARY

This chapter has provided a glimpse of the effect of government regulation on the field of industrial safety and health and the controversy this regulation has spawned. The

primary agency that affects the field is OSHA, but other agencies and regulatory laws, such as the ADA, are also having an impact. Despite the controversy over government regulation, it is very difficult to repeal federal regulation once it is in place. It cannot be questioned that OSHA and associated government regulation have had a profound effect on the field of industrial safety and health management.

EXERCISES AND STUDY QUESTIONS

4.1 What is NIOSH? What is its role?
4.2 By what procedure can an employer request time to comply with an OSHA standard before an enforcement inspection?
4.3 Describe the procedure established for employers who believe that OSHA has issued an unfair citation.
4.4 Identify at least three legal rights extended to employees by OSHA.
4.5 What is the General Duty Clause?
4.6 What is a national-consensus standard as defined by the OSHA law? Have any such standards been adopted in the 1990s? Why or why not?
4.7 Compare performance versus specification standards.
4.8 Compare horizontal versus vertical standards.
4.9 Explain the significance of the Barlow decision.
4.10 Explain the difference between appeal and variance as far as OSHA is concerned.
4.11 Suppose that you are a writer of new standards. Pick a familiar hazard and write a two- or three-sentence paragraph for a possible standard to protect against this hazard. Write the standard first in the style of a specification standard and then in the language of a performance standard.
4.12 Compare advantages of specification standards versus performance standards from the viewpoint of the employer and then from the viewpoint of an enforcement agency.
4.13 List in order of priority four OSHA inspection categories.
4.14 What is the difference between a repeat violation and failure to correct a violation? How do the penalties differ?
4.15 Name some public criticisms of OSHA standards.
4.16 Describe some employee impairments for which the Americans with Disabilities Act explicitly prohibits discrimination.
4.17 Name several employee behavioral characteristics that do not qualify as impairments under the Americans with Disabilities Act.
4.18 Is it prohibited to discriminate against kleptomaniacs by refusing employment to them? Why or why not?
4.19 This chapter has stated that OSHA's highest inspection priority is the "imminent danger" category. However, very few imminent danger inspections are actually performed. Explain this anomaly.
4.20 When OSHA has been unable to stimulate development of safety and health programs, what steps can states take?
4.21 When was the origin of the original agency that eventually became NIOSH? When was safety added to NIOSH's mission?
4.22 Under what circumstances is it permissible for a company to leave a pilot crew on duty when OSHA obtains a court order to prohibit workers from entering an "imminent-danger" area?
4.23 When a fatality or major accident occurs, an employer is required to quickly report the incident to OSHA. Within what time limit must the employer report? According to OSHA policy, how soon after the report will OSHA respond with an inspection?

4.24 Which industry has received OSHA emphasis since the inception of the law?
4.25 How has state "sovereignty" become an issue with regard to OSHA enforcement?
4.26 Under what circumstances are state agencies and political subdivisions covered by safety and health standards and enforcement?
4.27 What tragic accident in 1991 precipitated a general review of the effectiveness of state plans for safety and health standards and enforcement?
4.28 Why is it especially difficult to revoke an existing standard once it has been put into effect?
4.29 The ADA law was passed in response to a finding that millions of Americans have one or more physical or mental disabilities. In this finding, how many millions of Americans were estimated to be in this category?
4.30 Does OSHA give employees the right to walk off the job because of safety and health issues and then receive pay from their employers while they are waiting for the safety and health issues to be resolved? Explain your position.
4.31 Does OSHA have a vertical standard for the construction industry? Under what circumstances does OSHA have authority to cite a construction company for violation of a general industry standard? Does it often do this? Explain.
4.32 Suppose more than one employee in a plant is violating a safety rule. Is OSHA permitted to cite a separate violation for each instance of the violation? Explain.
4.33 The maximum statutory penalties in Table 4.1 are not round numbers (as they once were). Explain why.
4.34 The maximum penalty for a serious violation is shown in Table 4.1 to be $12,471. Formerly this maximum was $7000. Explain the difference.
4.35 To qualify for recognition in OSHA's SHARP program, what specific marks in safety and health records must the employer achieve?
4.36 What national professional organization has arisen as a result of OSHA's Voluntary Protection Program (VPP)?
4.37 How much did OSHA increase citation amounts and why in their most recent rate increase?
4.38 Can employees be cited under the General Duty Clause?
4.39 What is the process of promulgation and how does it apply to OSHA?
4.40 Name some diseases that do not qualify for ADA protection?
4.41 What are Emergency Temporary Standards (ETS)?
4.42 Compare and contrast the General Duty Clause with ETS.
4.43 Is a person with AIDS protected under the ADA law?
4.44 Which five of the National Emphasis Programs focus on hazardous materials or chemicals?
4.45 What remedy does a former drug user have when a potential employer denies his or her employment?
4.46 During a remodel of existing buildings, what considerations are employers required to make per ADA?
4.47 When a company is cited by OSHA, quick fix and good faith are examples of what and how do they impact the employer?

RESEARCH EXERCISES

4.48 Do research to provide an estimate of the current number of Americans who have one or more mental or physical disabilities.
4.49 Use the OSHA website (www.osha.gov) to study the impact of OSHA's General Duty Clause by examining the number of citations of this clause in industries having more than

250 employees. Which industry group is cited most? What percentage of all citations for the General Duty Clause is for firms employing 250 employees or more?

4.50 Use the OSHA website (www.osha.gov) to check OSHA statistics to see whether the OSHA General Duty Clause for employees [Section 5(b)] has been cited at all for the current fiscal year.

4.51 Find the names of five consulting firms that could assist managers with compliance to the Americans with Disabilities Act (ADA).

4.52 Check government statistics to estimate the total number of disabled workers employed by the federal government. What percentage of the total federal workforce is disabled?

4.53 Check out "What's New at NIOSH" using the website http://www.cdc.gov/niosh/. What do you suppose the letters "cdc" stand for in this site address?

4.54 This chapter discussed the ADA and requirements for making reasonable accommodations to employ the handicapped. Search the Internet and other possible sources for actual case histories in which the employer was sued or fined for failure to make reasonable accommodation to employ the handicapped. What is the largest fine you can find on record for this type of violation?

4.55 Search out state workers' compensation programs for policies with regard to employers designated as "Extra Hazardous." What states have such programs?

4.56 In Exercise 4.55, your answer should have included the state of Texas. What is the monetary fine in Texas for failure to implement an "accident-prevention plan?"

4.57 Is it possible for OSHA to cite a firm for an "egregious" violation if the offense is only in recordkeeping? Search for an example of egregious recordkeeping violation in the news media.

4.58 Examine the account of the citation of Samsung Guam, Inc. (SGI), one of the largest OSHA fines on record. What dollar penalty did OSHA propose? In the final settlement, how much did SGI agree to pay?

STANDARDS RESEARCH QUESTIONS

4.59 Use the database search tool on the Companion Website to estimate the percentage of annual OSHA citations that are designated as "repeat" violations. Do the same for "willful" violations.

4.60 Use the database search tool on the Companion Website to estimate the average OSHA proposed penalty for a "General Duty Clause" violation.

4.61 Take a sampling of standards from general industry and determine the percentage of citations in your sample that have arisen from an employee complaint.

4.62 This chapter stated that OSHA had announced its intent to enforce personal protective equipment violations on an instance-by-instance basis by formally issuing a notice of proposed rulemaking in the Federal Register. Use the Internet to check on the status of this proposed rulemaking to determine whether OSHA was successful in finalizing this rule.