



American Road
& Transportation
Builders Association

Presented by:
Phillip B. Russell (Tampa)

Top Employment Law Disruptors for Contractors: OSHA, Overtime, and More

ARTBA TransOvation and Southern Regional Meeting
The Confidante Hotel / Miami Beach, Florida
October 28-29, 2019

Ogletree
Deakins

Phillip B. Russell



- Board Certified Labor and Employment Law
- 25 years representing businesses only
- 300+ OSHA inspections; 80-100 fatalities
- High-profile fatality cases
- FTBA Member ~ 18 years
- FTBA Safety Committee Co-Chair
- Speaker and Author

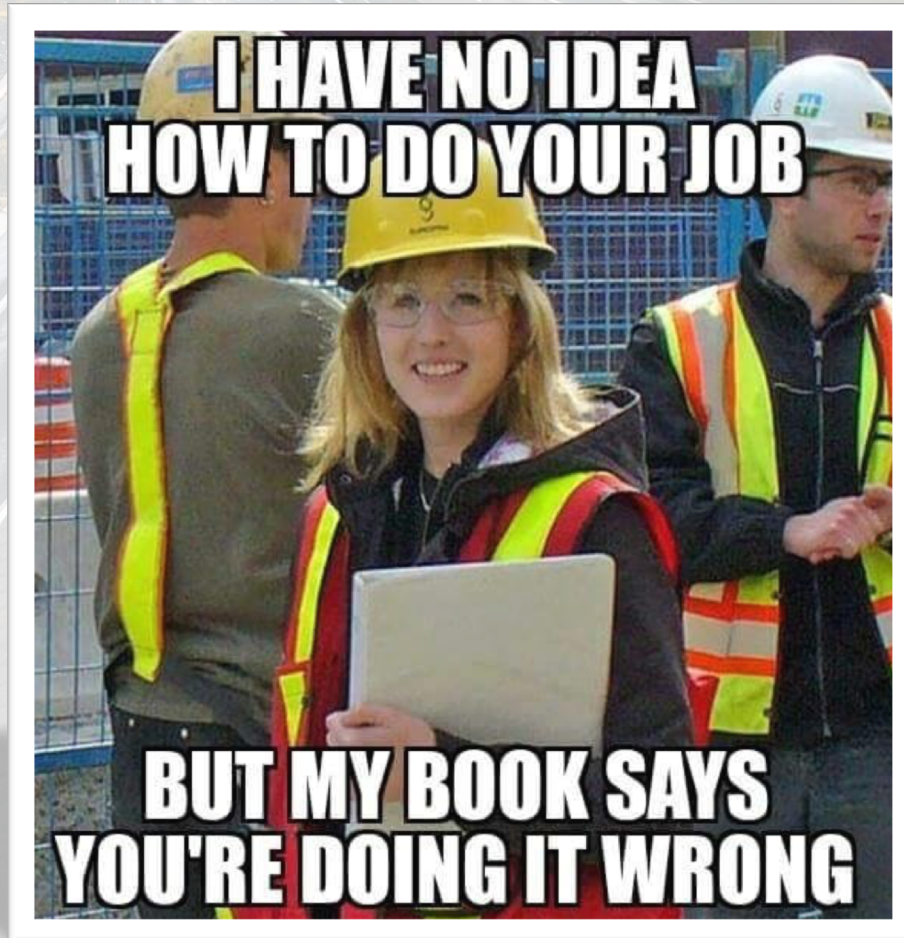


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Agenda: Workplace Disruptors

- Workplace Safety and Health (OSHA)
- Workplace Violence
- Overtime and Other Pay Issues
- Marijuana on the Jobsite
- Harassment
- Bonus: Top 10 Mistakes

OSHA and Workplace Safety Inspections



It Only Takes A Second...

- Backhoe operator's hand slips; kills a laborer
 - Was his grandson
- Safety director's son falls to his death
 - Was not wearing safety harness
- Operator flips roller
 - Was not wearing his seat belt
- Laborer slides into unseen sinkhole
 - Only warning sign was wet ground
- Worker cut in half by descending elevator
 - It was not locked out

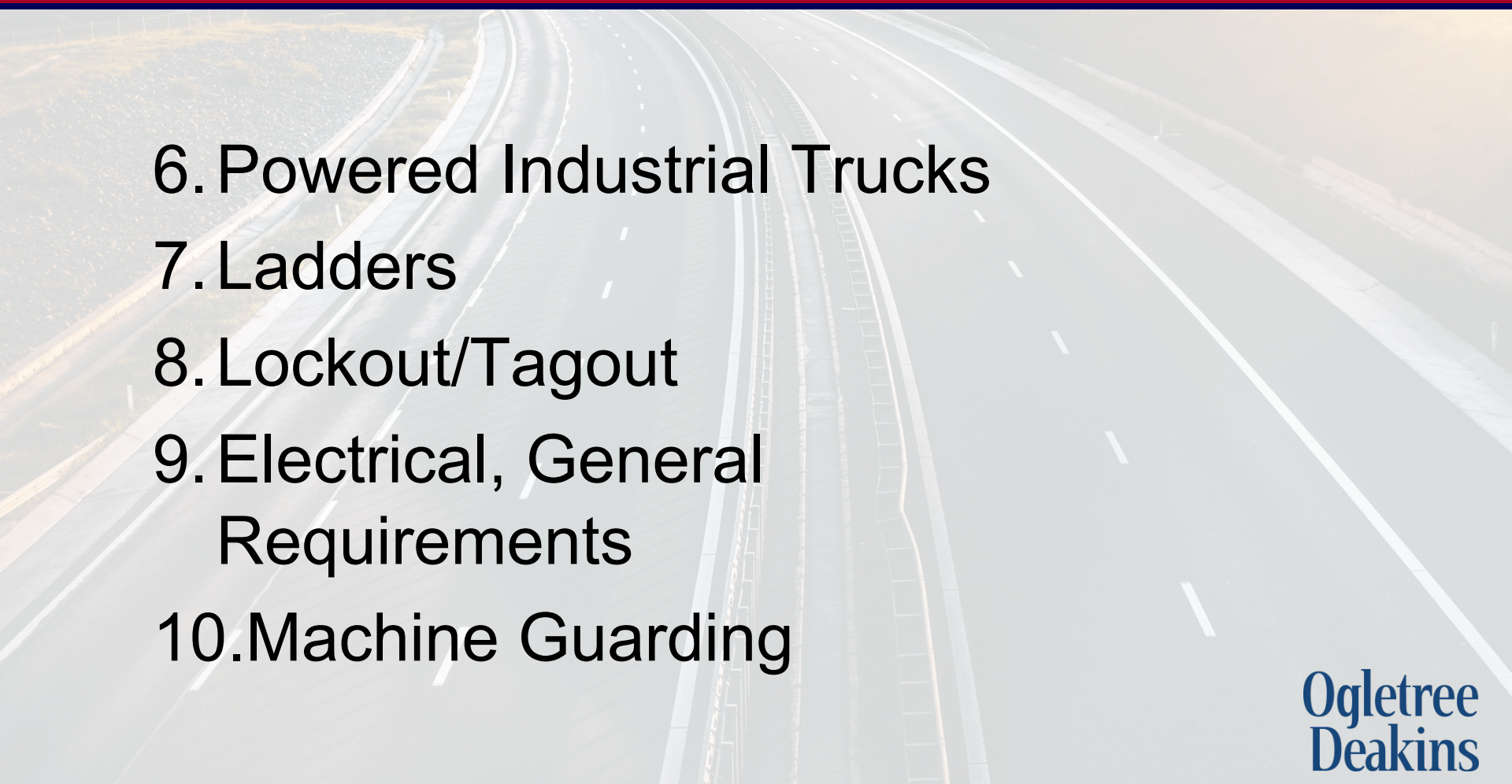
What is OSHA's mission?

***We are not an educational institution.
We are here to punish!***

Top 10 OSHA Violations

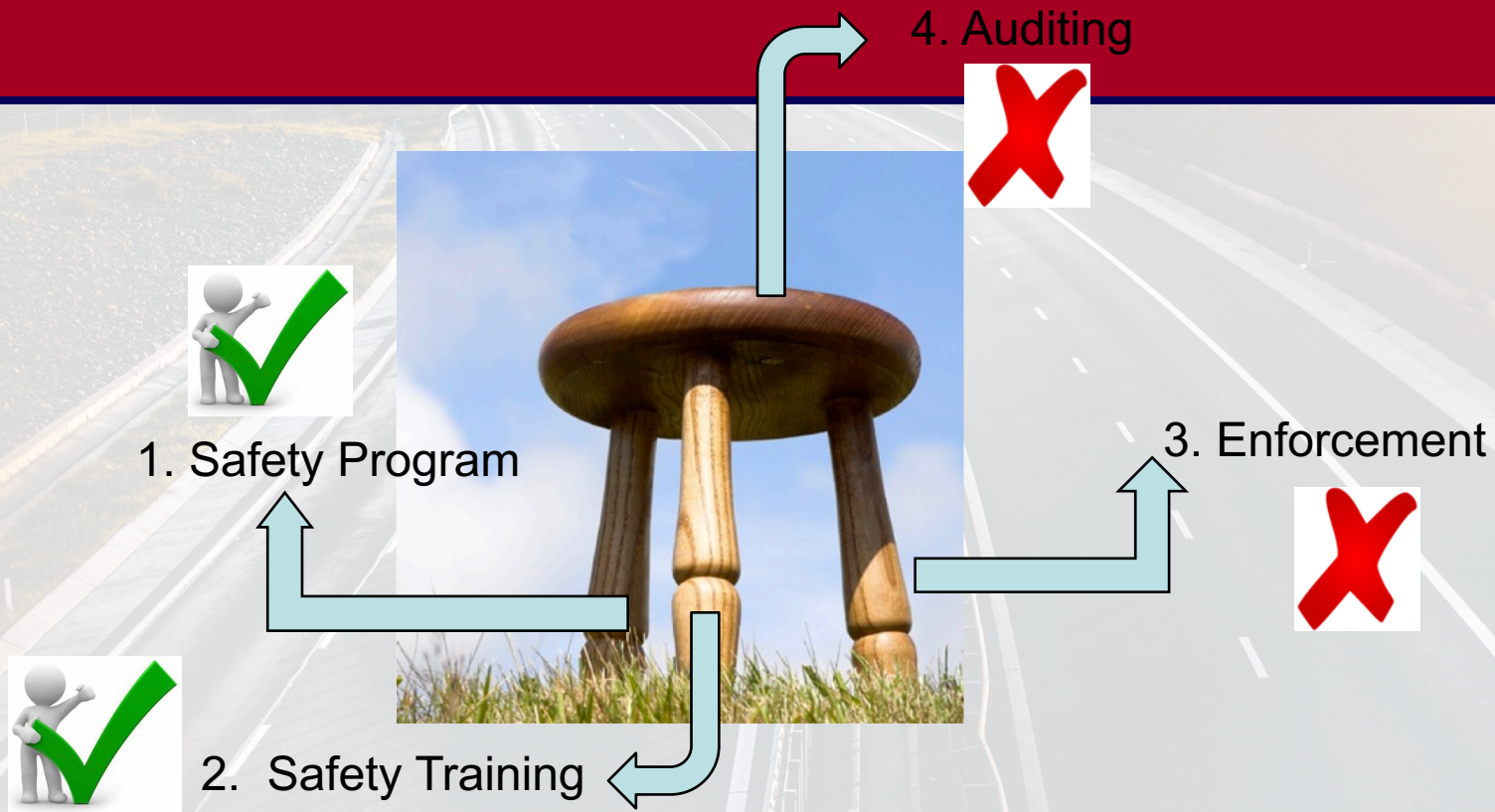
1. Fall Protection
2. Hazard Communication
3. Scaffolding
4. Respiratory Protection
5. Electrical, Wiring Methods

Top 10 OSHA Violations

- 
6. Powered Industrial Trucks
 7. Ladders
 8. Lockout/Tagout
 9. Electrical, General Requirements
 10. Machine Guarding

4 things you need NOW

*I bet I can prove you
don't have at least 2 of
them right now!*



Why Would OSHA Show Up?

1. Report
2. Complaint – hazardous condition
3. Referral from another agency
4. Programmed inspection
5. Follow-up inspection

Reports

1. Fatality
2. Hospitalization
3. Amputation
4. Loss of an Eye

8 hours for fatality; 24 hours for all others

Employer Duties

- Section 5(a)(1) General Duty Clause -- Employer must provide employees a place of employment free from **recognized** hazards that are causing or are likely to cause death or serious physical harm (and feasible means of abatement exist).
- Section 5(a)(2) -- Employer must comply with applicable occupational safety and health standards.

Citations

- Willful
- Repeat
- Serious
- Other than serious
- Failure to abate

Criminal Penalties

- Willfully violating a specific standard that causes the death of an employee.
- Falsifying records.
- General criminal liability.



Impact on Your Business?

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U.S. Department of Labor

Occupational Safety and Health Administration
8713 Airport Freeway
Suite 302
Fort Worth, TX 76180
Phone: 817-428-2470 Fax: 817-581-7723



Citation and Notification of Penalty

To:
Key Energy Services Rig# 66
and its successors
1301 McKinney St. Suite 1800
Houston, TX 77010

Inspection Number: 947355
Inspection Date(s): 11/06/2013 - 11/06/2013
Issuance Date: 01/23/2014

Inspection Site:
5750 E I-20
Kennedale, TX 76060

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

This Citation and Notification of Penalty (this Citation) describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed herein is (are) based on these violations. You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation and Notification of Penalty **you either call to schedule an informal conference (see paragraph below) or you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above.** Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form. Issuance of this Citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless this Citation is affirmed by the Review Commission or a court.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation(s) cited herein has (have) been abated, or for 3 working days (excluding weekends and Federal holidays), whichever is longer.

Contesting Citations

- Who decides if OSHA got it right?
- Informal conference.
- Notice of Contest
 - Must be written and filed within 15 working days from date received.
 - May be mailed, but must be postmarked.
 - Cannot be extended.
- Employers may contest any aspect of the citation.
- Employees may contest reasonableness of the proposed abatement period.
- Hearing and appeals.

Defenses

- Coverage
- Procedural
 - Limitations
 - Lack of reasonable promptness
- Substantive
 - Greater hazard
 - Employee misconduct
 - Lack of exposure/knowledge
 - Existence of more specific standard

What Is Workplace Violence?

Workplace violence is violence or the threat of violence against workers. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide.

https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf

The workplace may be permanent or temporary (including field locations and clients' homes)

Staggering Statistics

- Effects between 1.5-2 million U.S. workers annually
- Homicide is the fourth leading cause of fatal occupational injuries in the workplace in the U.S.
- Murder is leading cause of death for women in the workplace
- Workplace incident costs an average of \$800,000
- From the Bureau of Labor Statistics, Census of Fatal Injuries Summary, 2016:

<https://www.bls.gov/news.release/cfoi.nr0.htm>

Occupational Safety and Health Act of 1970

- To assure safe and healthful working conditions for working men and women; authorizing enforcement of the standards developed under the Act...
- **General Duty Clause:**

SEC. 5. DUTIES

(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;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(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.

Employer Duties: Specific Standards

- Legislation in nine states (California, Connecticut, Illinois, Maine, Maryland, New York, New Jersey, Oregon, and Washington) mandates that certain types of healthcare facilities implement workplace violence prevention programs
- OSHA: Most health care employers covered by the General Industry Standards found in 29 CFR § 1910
- There is no Federal OSHA Industry Standard addressing workplace violence...yet.

Federal Measures - Proposed

- [House Resolution 1309](#), the Workplace Violence Prevention for Health Care and Social Service Workers Act, introduced by Rep. Joe Courtney (D-CT).
- Would force OSHA to issue an occupational safety and health standard that requires covered employers within the healthcare and social service industries to develop and implement comprehensive workplace violence prevention plans.
- Would give teeth to OSHA's [Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers](#)

Federal Measures – Proposed, Continued

- The bill would require each workplace violence prevention plan to include:
 - designation of individual responsible for implementation
 - risk assessments and identification of potential workplace violence hazards (informed by specific past incidents)
 - annual evaluations
 - “[h]azard prevention, engineering controls, or work practice controls to correct, in a timely manner, hazards that the employer creates or controls applying industrial hygiene principles of the hierarchy of controls”

Federal Measures – Proposed, Continued

- “[r]eporting, incident response, and post-incident investigation procedures”
- “[p]rocedures for emergency response, including procedures for threats of mass casualties and . . . incidents involving a firearm or a dangerous weapon”
- employee training
- “[p]rocedures for coordination of risk assessment efforts, [p]lan development, and implementation of the [p]lan with other employers”

Secretary of Labor v. Integra Health Management, Inc., OSHRC No. 13-1124

- The case involves a General Duty Clause citation over the death of a health care service coordinator provider, whose employee checked in on a mentally-ill member with a criminal history that included acts of violence. OSHA cited Integra for exposing employees “to the hazard of being physically assaulted by members with a history of violent behavior.”
- The client had a criminal record (grand theft of a motor vehicle in 1981, battery in 1992, aggravated battery with a deadly weapon in 1990, and aggravated assault with a weapon in 1995).
- Stabbed the employee nine times.

Legal Framework – Employer Liability

- OSHA – General Duty Clause
- Workers' Compensation
- Tort
- State Law and Statutory Claims
- Disability discrimination claims



Best Practices



- Conduct background screening
- **Craft a tough, consistently enforced anti-violence policy and train employees**
- Establish a crisis management team
- Important to have written plan and escalation procedures, emergency action plan (EAP)
 - Involvement and partnership with local police departments (many have workplace violence units)
 - Do regular drills, include active shooter protocols
 - Use of technology for first alert system

Overtime Issues for Contractors

- Exemptions
- 1. Duties
 - Executive
 - Administrative
 - Professional
 - Outside Sales
 - Difficult Positions: Estimators, Project Engineers, Dispatchers
- 2. Salary Basis
 - New Minimum is \$35,568 annually; \$684 weekly

Overtime Issues for Non-exempt Employees

- Commuting
- Travel
- Lunch Breaks
- Other Breaks
- Prove it!

Who Cares?



Marijuana Regulation & Workplace

- Federal prohibition (1937 to present)
 - Controlled Substances Act (1970)
- Medical use (1996 to present)
 - Some states allow employers to enforce drug-free workplace policies
 - Some states have anti-discrimination provisions
 - Individuals who suffer from a “debilitating medical condition” are authorized to use medical marijuana upon the receipt of a “registry identification card”
 - A “debilitating medical condition” can meet the definition of a disability under applicable state and/or federal law
- Recreational use (2012 to present)
 - A growing number of states permit recreational use
 - One in four Americans lives in a state where use is legal without a doctor letter
- The Food and Drug Administration approved the first cannabis-derived drug in June 2018 (Epidiolex; treats childhood epilepsy using CBD)

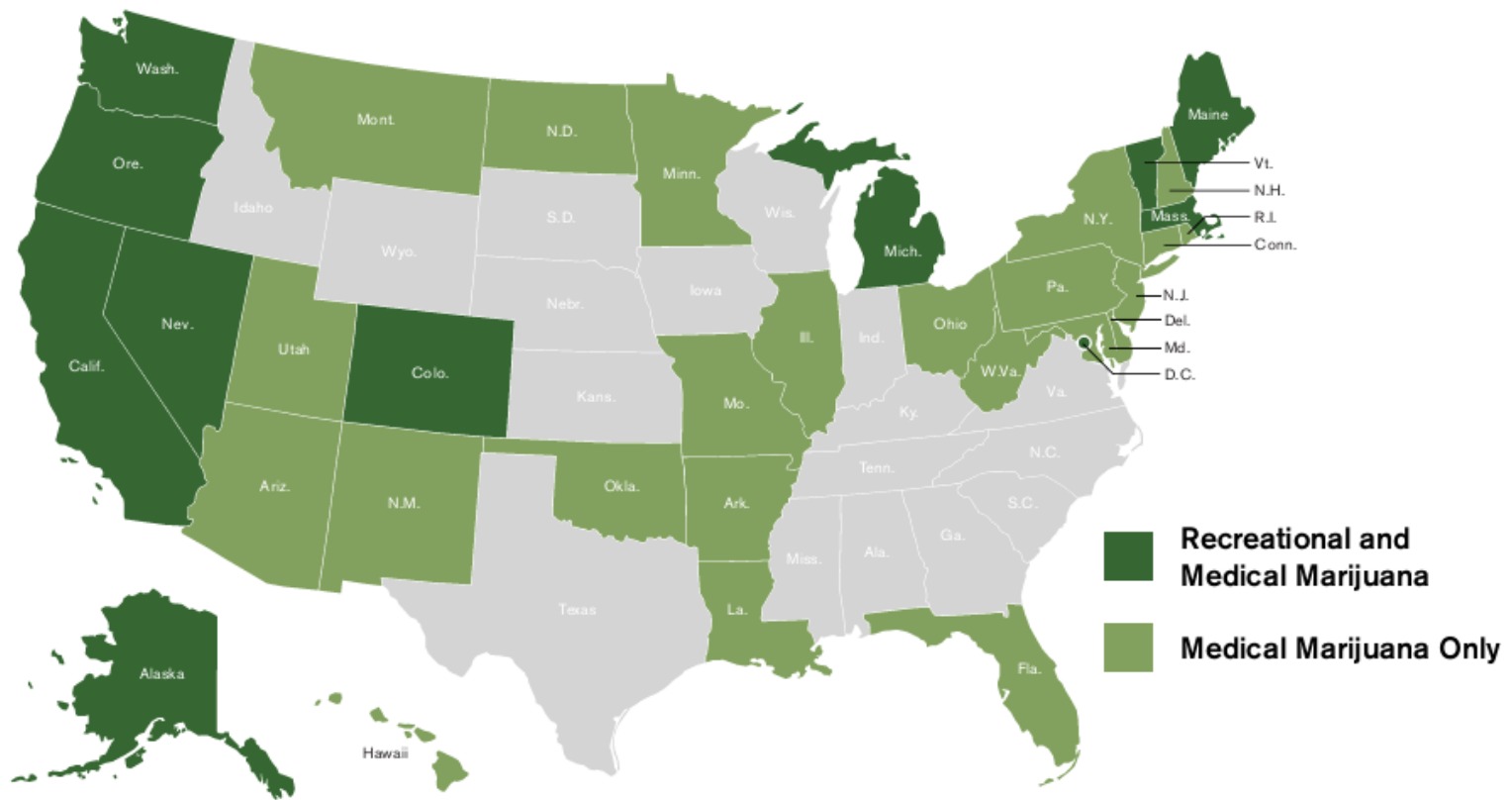


Federal Drug Free Workplace Act of 1988

- USDOL ended the Drug Free Workplace Act of 1988 in 2010, at least in its general application to all manners of private and public practice
- There is no requirement for most private employers to have a drug-free workplace policy of any kind
- Today, federal drug and alcohol testing policies are applicable to federal contractors including safety and security industries and positions

Legalized Marijuana by the Numbers

The patchwork of marijuana-related laws across the United States has created compliance complications for multistate employers. This map highlights the states that allow medical and/or recreational marijuana.



Medical Marijuana and Job Protections

States That Prohibit Discrimination Against Employees Based on Their Status as Medical Marijuana Cardholders or Based on Detectable Levels of Marijuana in Their System



Medical Marijuana and Job Protections

- ***In states with anti-discrimination provisions***, merely possessing a medical marijuana card, or testing positive for marijuana on a random or pre-employment drug screen is generally not sufficient cause for automatic adverse action against employee
 - In most cases, employer must demonstrate that the employee used, possessed, or was impaired by the drug at work
 - Maine – protections may extend to recreational use
- So far, no laws prohibit enforcing workplace rules prohibiting using, possessing, or being under the influence of marijuana, alcohol, or other controlled substances ***while at work***

Disability-Related Inquiries and Medical Exams, Including Drug and Alcohol Testing

- Different rules for different stages of employment relationship: pre-offer; post-offer, pre-employment; active employee: reasonable suspicion, random, or post-accident testing
 - Questions about legal drug use/current medications are impermissible at the pre-offer stage
- Generally, employers may not ask about employee's use of prescription drugs
- Must be able to demonstrate job-related and consistent with business necessity

Reasonable Accommodation

- Remember, the FMLA and ADA are federal laws and marijuana is still illegal under federal law
- Under the ADA, employers are generally required to engage in an interactive process with individuals with qualifying disabilities and, absent undue hardship, provide reasonable accommodations
- Modified work schedule/leave of absence is the most typical accommodation for drug and alcohol abuse
 - Rehabilitation
 - Support group meetings

What Should Employers Do Now?

Plan ahead:

- Review / consider drug testing policy (generally no “one size fits all” policy for nationwide compliance)
- Implement supervisor and employee training
- Provide employee education and offer employee assistance
- No state currently restricts employer prohibition on recreational use, but beware of “lawful off-duty conduct” litigation
- Uniformly enforce drug testing policies to avoid discrimination claims
- Get qualified assistance as necessary

#metoo: 2 years later

- Sexual harassment charges increased in 2018 by more than 12% over prior year.
- Sexual harassment lawsuits filed by the EEOC's attorneys increased by 50% over prior year.
- Monetary awards in sexual harassment cases increased by more than 22% over prior year.
- The total amount of money awarded to employees in sexual harassment cases settled or conciliated at the EEOC stage was \$70 million.

Federal Law – No Change

Title VII of the Civil Rights Act of 1964

- Continues to prevent discrimination on the basis of sex.
- Harassment is a form of discrimination.
- Prevents quid pro quo harassment and hostile work environment based on sex.
- Limited defenses when a supervisor is harasser.

Federal Measures - Enacted

Tax Cuts and Jobs Act of 2017: Effective 1/1/2018

Section 162(q): prohibits employers from deducting costs/fees for sexual assault and harassment complaint settlements subject to non-disclosure agreements.

Federal Measures – Proposed

H.R. 4495: Settlement Tax Deductions are Over for Predators (STOP Act) -- No deductions for judgments/settlements originating from claims of sexual abuse or harassment.

H.R. 4729: Ending Secrecy About Workplace Sexual Harassment Act -- Imposes additional EEO-1 disclosure requirements regarding sex discrimination and harassment settlements.

H.R. 4734/S. 2203: Ending Forced Arbitration of Sexual Harassment Act -- Amends Federal Arbitration Act to invalidate predispute agreements requiring arbitration of sexual harassment or sex discrimination claims under Title VII.

State and Local Measures - Enacted

Ten states enacted legislation addressing at least one aspect of sexual harassment in the workplace in 2018

California		Arizona		Illinois
			Vermont	
	Delaware			Washington
Tennessee			Georgia	
		Maryland		New York

State and Local Measures - Enacted

[illegible]

Now What?

REVIEW

Policies
Procedures
Practices

UPDATE

Policies
Procedures
Practices

IMPLEMENT

Policies
Procedures
Practices

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Written Policies – What to Include

- Anti-harassment statement
- Description & examples of prohibited conduct
- Information about statutory provisions and remedies, local laws, as required
- Clear reporting mechanism
- Complaint form
- Description of investigation process: prompt, thorough, and impartial (sample checklist included in materials)
 - Confidential to fullest extent possible
 - Employees encouraged to cooperate in an investigation
 - Employer will take prompt, remedial action if needed
- Anti-retaliation statement
- Harassment is a form of employee misconduct

Written Policies, Continued

- Posted in visible, central location
- Include in all languages commonly used by employees
- Reviewed periodically
- Given to new employees, redistributed periodically
- Provide contact information for state/local agencies
 - only if required by state law

Training – Best Practices

- Conducted by qualified trainers
- Supervisors and non-supervisors alike
- Interactive (in-person or online) and easy to understand
- Regularly scheduled at least every two years
- Employees sign-off on attendance
- Evaluated by participants

Audit Template Agreements

- Employment Agreements
- Arbitration Agreements
- Settlement Agreements
- Confidentiality Agreements

Consider whether your various agreements include legal/appropriate provisions based on federal NDA law and applicable state law.

Top 10 Employers Mistakes

1. Failure to be aware of relevant employment laws.
2. Poor hiring practices.
3. Failure to be brutally honest when evaluating employees.
4. Communication failures among decision-makers.
5. Not addressing quid pro quo harassment.

Top 10 Employers Mistakes

- 
6. Not addressing hostile work environment harassment.
 7. Unintentional modification of at-will employment.
 8. Failure to be aware of retaliation claims.
 9. Failure to accommodate.
 10. Not properly managing FMLA leave.

December 4-6, 2019
New Orleans
JW Marriott

Workplace Safety Symposium: Managing OSHA Liability

WORKPLACE SAFETY SYMPOSIUM

MANAGING OSHA LIABILITY IN A DANGEROUS WORLD

DECEMBER 4-6, 2019 • JW MARRIOTT

PRESENTED BY Ogletree
Deakins

NEW ORLEANS, LA



WEDNESDAY, DECEMBER 4, 2019

2:00 – 4:00 p.m.

PRE-CONFERENCE BONUS SESSIONS

OSHA 101: A PRIMER

This session is designed for attendees who want to round out their baseline OSHA knowledge. In this session, we will discuss how OSHA operates, how the agency conducts inspections, how the settlement process works, how to contest citations, and more. Attendees will get a comprehensive overview of what they need to know to deal with an OSHA issue when it arises. Attendees will also have ample opportunity to ask questions.

Speakers: Matthew Linton (Denver), William S. Rutchow (Nashville), Karen F. Tynan (Sacramento)

THE HOTTEST OSHA TOPICS IN HEALTHCARE

Healthcare employers face a challenging array of workplace safety issues, to say the least. Our experienced panel will help healthcare employers address many of those issues, including the two most frequently cited areas—workplace violence and failure to report—as well as the rapidly developing issue of radiation exposure and other hot topics, such as bloodborne pathogens, recordkeeping, and infectious diseases.

Speakers: Valerie N. Butera (Detroit (Metro)), Elvige Cassard (New Orleans),
Dee Anna D. Hays (Tampa)

THE ART OF DRAFTING EFFECTIVE SAFETY POLICIES

Employers go to great lengths to train employees on their policies. But OSHA still issues citations because employees say they don't understand the policies! Help your company avoid such a citation by learning the techniques of concise policy writing to ensure employee understanding and compliance. The session will also focus on the most frequently cited standards and offer tips for simplifying your existing policies.

Speakers: John C. Artz (Pittsburgh), Frank D. Davis (Dallas), Shontell Powell (Atlanta)

CONDUCTING PERIODIC INSPECTIONS UNDER THE LOCKOUT/TAGOUT STANDARD

Are your lockout/tagout periodic inspections fully compliant with OSHA requirements? The speakers will provide information that will assist you in assuring that your equipment, procedures, and authorized employees comply with OSHA's requirements under 29 CFR 1910.147(c)(6). This session will provide best practices to inspect ALL of your company's machine-specific procedures efficiently and ALL of your authorized employees.

Speakers: J. Carin Burford (Birmingham), Eric E. Hobbs (Milwaukee), Dean F. Kelley (Milwaukee)

CONSTRUCTING AND DECONSTRUCTING: WHAT'S NEW IN CONSTRUCTION ENFORCEMENT AND THE LAW?

Fatalities and catastrophic injuries on construction job sites continue to increase, along with aggressive enforcement by Federal OSHA and State Plans. This session will help attendees better understand OSHA's regulatory focus on trenching and excavation, silica, cranes and derricks, and other areas. The speakers will share best practices for handling OSHA's on-site inspection and investigation activities that are specific to construction job sites, including document requests, employee and supervisor interviews, and the involvement of third parties such as experts and law enforcement. The speakers will also discuss several high-profile construction cases, such as the Florida International University pedestrian bridge collapse, and explore the lessons learned from them. Attendees will leave this session better prepared to respond to OSHA inspections involving construction job sites.

Speakers: Kevin D. Bland (Orange County), Merritt B. Chastain, III (Houston),
Phillip B. Russell (Tampa)

5:00 – 7:00 p.m.

REGISTRATION AND COCKTAIL RECEPTION

Thank You

Phillip B. Russell

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