Could You Be Prosecuted for Workplace Fatalities?

Richard L. Kesling

The answer depends on the extent of your authority as a safety manager.

You may not yet be concerned with the House (HR 1280) and Senate (S 575) versions of the comprehensive occupational safety-and-health reform bill. But maybe you should be. These bills would overturn two federal appeals court decisions and subject middle management to criminal prosecution for workplace injuries and fatalities.

In the two court decisions, the court held that mid-level managers weren't employers as defined by existing law. But the reform bill proposes increased fines and prison terms for job-related deaths. The House version would make middle managers subject to federal prosecution and impose prison terms of 10 to 20 years and "fines in accordance with section 3571 of title 18, United States code."

The proposed changes would make criminal prosecution more attractive to prosecutors of occupational fatalities, manslaughter and reckless endangerment cases, and push such expanded worker-protection measures as employee/management safety-and-health committees.

If you're a middle manager or safety professional and a Machiavellian CEO heads your company; your criminal liability and personal cost could increase greatly under the new legislation. Consider the attitude and behavior of upper management in these actual incidents. The names have been changed to protect the managers' identities.

Two Wrongs Don't Make a Right

While investigating an abnormally high incident rate in a coke-oven department, a safety engineer learned that many departmental employees didn't understand English. The engineer decided to have the InterAmerican Safety Council translate his employer's monthly safety newsletter into Spanish for distribution to the coke-oven employees.

When personnel manager Bob Larry learned of the plan, he ordered the safety engineer not to proceed. The engineer was told that the local human-rights commission had complained about the personnel department's practice of placing an abnormal percentage of minorities in the coke-oven department.

Larry reasoned that there was no need to confirm the human-rights commission's complaint by distributing the Spanish newsletter. By his behavior, Larry showed that he and his employer were more willing to accept injuries and illnesses than an Equal Employment Opportunity Commission citation.

Two wrongs won't make the coke-oven employees safer; but if an employee is killed or seriously injured, does the safety engineer deserve criminal prosecution?

The Cover-Your-Own-Tail Philosophy

In August 1988, a safety manager in a New Jersey-based manufacturing company met Jonathan Livingston, the company's operations manager. The safety professional asked about the status of a capital request to create three confined-space-entry kits for the company's largest facility.

Livingston replied that the request (already several months old) was on his desk and that he didn't intend to approve the expenditure. The safety manager explained to him that the equipment was required to comply with the parent chemical company's safety standards.

Livingston wasn't visibly impressed until the safety manager explained that the Occupational Safety and Health Administration would treat any confined-space-entry incident as a serious or willful violation. And since there would be a definite paper trail to Livingston, he would be the highest-ranking official with knowledge of noncompliance.

The approved capital request was returned the following week - backdated three weeks.

Protecting a Bonus, Not Employees

Unfortunately, Livingston continued to play a part in the company's safety program. On Feb. 22, 1990, he was visiting the company's northernmost facility when a maintenance employee suffered a severe concussion after he fell from an 8-foot stepladder and struck his head on the concrete floor. A rivet at the top of the fiberglass ladder broke, which tilted the ladder and caused the worker to lose his balance and fall.

Several employees witnessed the incident, which required hospitalization. An hour after the fall, Livingston told the company nurse, "We can't let this be a lost-time incident. It'll kill my bonus." Before the 3 p.m. shift change, Livingston's exact words were known throughout the plant.

Interestingly, Livingston works for a company that has adopted Praxis,31 management concepts developed by George Kenning for managers' daily use. The central theme of Praxis is management accountability. Item 26 states, "Lack of qualified personnel is indicative of failing management."

If you were on trial with the plant manager and Livingston, and Livingston's behavior and words were entered as evidence, how confident of acquittal would you be?

Machiavellian Moe

Consider the authoritarian management style of Thomas Moe, a company president who continues to make every decision and even proofreads the company's in-house newsletter.

In 1988, when OSHA began to enforce its ergonomic guidelines in the red-meat industry through application of the general-duty clause, the safety manager of the company's flagship plant recognized that OSHA would soon apply the vertical standard to all industries. Workers in three positions (sawyer, grinder/cleaner and clamper/assembler) at his facility had experienced some form of cumulative-trauma disorder.

An afternoon-shift saw operator who made 7,000 repetitive motions each shift had undergone corrective wrist surgery. Several clamper/assemblers commented that their fingers were often "numb or tingled." They said this numbness was "just part of the job." The grinder/cleaners were required to bend over into a Dumpster, pick up end cuts of plastic and feed them into a waist-high grinder that produced a noise level of approximately 105 dBA.

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On the basis of his observations and discussions with the medical staff and hourly employees, the safety manager requested $1,900.00 to hire an ergonomics consultant to study the entire plant population and recommend changes. Moe, however, refused the request. He said that he "didn't believe in cumulative-trauma disorders."

When the plant manager was told of the decision, his only comment was "Moe can afford not to believe in cumulative-trauma disorders. He's not the one who'll go to jail." The plant manager found the $1,900 to conduct the survey.

When Fear is a Motivator

In 1990, one of Moe's competitors announced that his company would offer free physicals to all employees and former employees who had been exposed to ethyl acrylate during their employment. Ethyl Acrylate is carcinogenic in experimental animals at dose levels considered relevant to worker exposure.

Moe decided not to announce the competitor's decision or to offer similar exams to his employees. Company industrial-hygiene sampling results for that period don't exist, and many employees still comment about the smell of ethyl acrylate from washing the floor with open buckets of chemical during the 1960's.

By fiat, Moe placed such emphasis on incident prevention that employees initially declined to report several OSHA recordable cases. On March 21, 1990, while cutting metal banding on a roll of paper masking, a fork-truck operator severed his right radial artery near the thumb. He wrapped a cloth rag around the rapidly bleeding cut and continued to work for approximately seven minutes.

When asked why he didn't report the incident immediately, he said that corporate had placed so much emphasis on reducing injuries that he was afraid of losing his job if he had an injury.

On June 8, 1990, a syrup-room operator climbed into a mixing vat to remove a buildup of plastic on the agitator. Because the nonsparking chisel became dull, the employee used a paint scraper and a five-pound hammer to beat on the buildup. The scraper's plastic handle broke and exposed the edge.

When the pourer tried to strike the missing handle, his right thumb struck the steel edge, lacerating the thumb and tendon. He asked for another pair of leather gloves to cover the blood from his injury. When he was asked why he continued to work after being injured, he stated that he "didn't want his supervisor to have to make out all the paperwork associated with an incident."

When the plant manager was informed of these opinions, he simply said, "I'd rather see the entire plant go down for 24 hours than report an OSHA recordable to Moe."

Is this type of fear a legitimate motivator in safety matters? If the plant receives a citation and penalty for an unrecorded case, who would be responsible?

Captain Chaos Is in Charge

Finally, consider Steve Curly, plant manager of a northern chemical plant. When he reversed each decision after corporate had simply questioned it, hourly workers nicknamed him Captain Chaos. And he once lost three separate originals of the same memo.

In 1988, the company's new safety manager informed Curly that the maintenance department uniforms were a flammable polyester/cotton blend and given the plant's highly combustible base feed stock, it would be prudent to change the uniforms to a flame-resistant material. Curly told the safety manager not to bring up the subject again. "It would cost money to change uniforms."

The parent company required Curly to make a safety inspection each month with a guest auditor and the safety manager. The inspections were scheduled for 9:30 a.m. on the second Tuesday of each month - and rescheduled and rescheduled.

Finally, the safety manager made the inspections himself.

In March 1990, the safety department's secretary told her supervisor that Curly had turned in his monthly inspection and that the objects cited were the same as the items employees had brought up during the plant-safety committee meeting a day earlier. This type of "inspection" continued for three months.

Worse still, Curly ordered the explosive-gas detection monitors in the pouring room relocated because they were constantly alarming employees and causing them to evacuate the area, thereby stopping production. The gas monitors were originally located on the room's ceiling to measure a gas heavier than air. Curly, ever fond of semantics, said the gas alarms were a "concern, not a problem."

If maintenance employees are burned because their company supplies a uniform that fosters combustion, is it proper to criminally prosecute the safety manager, or should only the plant manager be charged?

If a fire or explosion occurs because the gas monitor was relocated, who is the person criminally negligent - the plant manager for ordering the relocation, the department manager for acquiescing to the plant manager's request, or the plant engineer for relocating the device despite knowing of the chemical's properties?

From Pinstripes to Pen Stripes

Many safety directors oppose the growing trend of criminal liability for occupational injuries. But given the economic climate of 1993-94, do safety managers stand up to their company's Livingstons, Larrys, Moes and Curlys?

With increased probability of criminal prosecution, jail terms and financial penalties, how many middle managers can afford to work for senior managers whose styles are like those of Livingston, Larry, Moe or Curly, and who obviously place their employees second or third?

An indemnification and hold-harmless clause for middle managers would be useless because both bills hold "any employer or officer, management official or supervisor having direction, management control..." responsible for violations of "any standard, rule or order promulgated."

Further, both bills state, "If a penalty or fine is imposed on a director, officer or agent of an employer..such penalty or fine shall not be paid out of the assets of the employer on behalf of that individual."

Criminal liability for occupational injuries and fatalities will be debated and voted on soon. The Congress may well hold middle managers responsible for occupational injuries. Given the safety-and-health philosophy of these managers, would any jury find middle managers guilty because of the company's management philosophy?

Location, salary and benefits are no longer the prime considerations for applicants for safety-manager jobs. A six-figure income means nothing if you're forced to spend it on legal representation so that you don't go from pinstripes to pen stripes.

Editor's note: This article represents the independent viewpoint of the author.

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