Legal Corner

Employer Defenses to OSHA Citations

By Lisa M. Bitter; Esq.

The Occupational Safety and Health Administration (OSHA) is conducting over 50,000 inspections per year of workplaces covered by the Occupational Safety and Health Act of 1970. In a significant number of those cases, businesses are being issued citations which include civil penalties (e.g., fines) and, in many of those instances, the businesses involved are simply accepting those sanctions without question. What they do not realize is that, under appropriate circumstances, there may be bona fide defenses available to them which, if raised, may cause the citation to be vacated.

The objective of this article is to make businesses aware of those legally-recognized defenses which may be available to them. (It should not be implied from the subject or content of this article that the author in any way wishes to encourage non-compliance with the OSHA standards which apply to its readers.)

Employee Misconduct

The “employee misconduct” defense is the most important of all substantive defenses. It has been referred to as the “isolated incident,” “isolated occurrence,” and “isolated misconduct” defense. Regardless of the name, the basic premise of this defense is that it would be unfair and would not promote employee safety and health to penalize an employer for conditions caused by an employee that were unpreventable and not likely to recur.

In order to establish the “employee misconduct” defense, an employer must be able to demonstrate that (1) the violation charged resulted exclusively from the employee’s conduct; (2) the violation was not participated in, observed by, or performed with the knowledge and/or consent of any supervisory personnel; and (3) that the employee’s conduct contravened a well-established company policy or work rule which was in effect at the time, well-publicized to the employees, and actively enforced through disciplinary action or other appropriate procedures. Moreover, the employer must be able to prove that he has a specific program for instructing employees in safe work practices. Furthermore, the burden is upon the employer to establish that the safety program exists and is enforced.

There are numerous cases in which the employee misconduct defense has been raised. The frequency with which this defense appears and meets with success indicates that whenever an employer arguably can raise the employee misconduct defense, it should do so.

The Impossibility of Compliance Defense

Another defense which has been frequently raised by employers is the “impossibility of compliance” defense. The essence of this defense is the argument that compliance with the standard is impossible because of the nature of the specific work in progress. If an employer impliedly admits that compliance is possible, the defense will falter.

In order to establish the “impossibility of compliance” defense, an employer is required to prove that (1) compliance with the standard was functionally impossible or would preclude performance of required work, and (2) alternative means of employee protection are unavailable or in use. The Occupational Safety and Health Commission has held that it is not enough for the employer to show that compliance was difficult, expensive, would require changes in production methods, or that one means of compliance was unsuccessful.

Greater Hazard in Compliance

Another factual defense which has been appearing with relative frequent
is that compliance with the OSH Act would create a greater hazard than non-compliance. The OSHA Commission will vacate a citation under the greater hazard defense if the employer can prove (1) the hazards of compliance are greater than the hazards of non-compliance; (2) alternative means of protecting employees are unavailable; and (3) a variance application would be inappropriate. This three-part test has received widespread judicial approval.

While the “greater hazard in compliance” defense can be extremely useful, the employer has a heavy evidentiary burden in demonstrating its applicability. The employer must affirmatively demonstrate, by a preponderance of the evidence, the elements stated above. If compliance would create a greater hazard then would be invoked with non-compliance, but that hazard can be controlled, the defense will probably not succeed.

**Lack of Employer Knowledge**

In order to sustain an OSHA citation against an employer, OSHA must prove that the employer had knowledge of the condition(s) for which the employer has been cited. This requirement can be established either by proving (1) actual knowledge of the employer, or (2) with the exercise of reasonable diligence, the employer should have known of the violative conditions. Although technically the employer’s knowledge of the cited condition is an element which OSHA must prove as part of its case, its converse has frequently been treated as a defense. Therefore, if OSHA has no proof of the employer’s knowledge, the lack of employer knowledge should be raised as a defense.

The “lack of employer knowledge” defense is closely related to the “employee misconduct” defense. Indeed, the two defenses frequently overlap. However, the two defenses are distinguishable in that the employee misconduct defense is an affirmative defense for which the employer bears the burden of proof. In contrast, employer knowledge is an element of any OSHA violation. Accordingly, OSHA has the initial burden of proving the existence of actual or conclusive knowledge.

**Employer’s Employee Had No Exposure to the Hazard**

Another defense available to the employer is the defense that the employer’s employees had no exposure to the hazard. For OSHA to sustain a citation against the employer, it must establish proof that at least one employee of this cited employer was exposed to, or had access to, the alleged condition(s) for which the employer was cited. If no such proof is presented, the citation should be vacated.

**The Cited Equipment Is Not in Use**

An additional affirmative defense which has been raised in OSHA cases is that the equipment cited in violation of an OSHA standard was not in use. Some of the cases in which that defense has been used have involved the following facts: a ladder with a broken side rail had been taken out of service; opened cans containing flammable liquids were being kept in a fireproof spray paint room located in an isolated part of the building; and an inoperable tool was in the process of being repaired. In all of the above examples, the citation was vacated.

**No Hazard**

The promulgation of an OSHA standard presupposes the existence of a hazard. Yet there are instances in
which the existence of a hazard must be proved. If OSHA does not prove that a direct and immediate danger to employers exists, then it will not have met its burden of proof and the citation should be vacated.

Violation Not Within Scope of Employment

Employers should not be liable if violations result from employee conduct that would be deemed a frolic or detour from the employee’s scope of employment. While this defense is closely related to unpreventable employee misconduct, the focus here is more on the overall nature of the employee’s activity at the time of the violative conduct, rather than the conduct itself. The most common use of the “scope of employment” defense is where employees are working beyond their normal work area.

Wrong Employer Cited

One of the essential elements of an OSHA complaint is naming the correct employer. Where a totally incorrect party has been cited and that party raises this defense, the case will be dismissed. More commonly, OSHA will fail to use an employer’s technically correct name. In these situations, the Commission will usually permit OSHA to amend the Complaint to name the proper party.

Any business which does receive a citation should take steps to determine whether defense is available.

Other Defenses

The preceding defenses are the most frequently used and effective. However, there are other defenses which are available and which may, under the proper circumstances, be successful.

In some cases, employers have alleged that they were harassed by frequent OSHA inspections, or that they have been singled out from a number of employers in a particular industry. Most courts and the OSHA Commission have rejected the harassment defense.

Another related defense that has not been successful is “selected enforcement.” The OSHA Commission has held that the decision of which employers to inspect is a discretionary enforcement function available to OSHA.

The OSHA Commission has also rejected the argument that OSHA is estopped from citing an employer
where, on a previous inspection, an OSHA inspector had indicated that the condition was not in violation. The reasoning is that an OSHA inspector's opinion about the applicability of a standard is not binding on OSHA or the Commission. Yet, in some situations the Commission has reduced or vacated proposed penalties under the estoppel defense.

Contractual agreements between an employer and another party, stipulating that one party will be solely responsible for the safety of the other's employees, will not negate the original employer's obligation to abide by OSHA regulations and does not constitute a defense to an OSHA citation. These “hold harmless” clauses will have no effect on OSHA liability but are usually valid under state law and may give rise to an action for breach of contract.

Some OSHA standards containing general language have been attacked because they are allegedly too vague to give employers an adequate explanation of what conduct is required. Although vagueness challenges have been common, they have not met with much success at either the Commission or judicial level. Nonetheless, the Commission has held that vagueness is an affirmative defense and must be raised in the notice of contest or answer, or it will be deemed waived.

**Conclusion**

The best defense to an OSHA citation is, of course, to comply with OSHA’s standards before a citation is ever issued. Barring that manner of avoiding a citation, if one is actually issued, a business may still, in appropriate instances, escape its sanctions through the use of one or more of the above-described defenses. Consequently, any business which does receive a citation should carefully review the facts of its case to determine whether any of such defenses are available.

**About the author:**

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