

Writer's direct phone
(312) 460-5877

Writer's e-mail
mlies@seyfarth.com

Writer's direct fax
(312) 460-7877



131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

EMPLOYER JOB HAZARD ASSESSMENTS UNDER ATTACK: BEST PRACTICES FOR CONDUCTING A COMPLIANT HAZARD ASSESSMENT

By Mark A. Lies¹
And
Elizabeth Leifel Ash²

INTRODUCTION

As employers expand and diversify their operations across a number of worksites, there can emerge a disconnect between the corporate headquarters and each individual location throughout the country. Sometimes, this disconnect manifests itself as a mindset in the employer's health and safety programs such that a "one size fits all" solution to a workplace hazard generated by the corporate office does not accurately reflect hazardous conditions at satellite or field locations. Often, particularly in the construction industry, employees in these satellite or field locations are exposed to unique hazards that health and safety professionals in the corporate office are not aware of.

A recent case from the OSH Review Commission confirms the importance of developing a hazard assessment that accurately reflects the hazards encountered by employees at each individual location, regardless of operational or design similarities

¹ Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment and civil litigation.

² Elizabeth Leifel Ash is an associate with Seyfarth Shaw, (312) 460-5845, eash@seyfarth.com. Her practice focuses on regulatory compliance and litigation, including occupational safety and health and environmental matters.

across numerous facilities. *Sec. of Labor v. Wal-Mart Distribution Center #6016*, OSHRC Docket No. 08-1292 (A.L.J. Dec. 4, 2009).³ In that case, OSHA cited a Wal-Mart distribution center in New Braunfels, Texas for failing to assess the workplace for hazards and for failing to provide employees with appropriate personal protective equipment.

There are two important lessons to be drawn from the Wal-Mart case that apply across multiple industries. First, the Administrative Law Judge rejected Wal-Mart's "cookie cutter" approach to its job hazard assessment under 29 C.F.R. § 1910.132(d)(1), finding that Wal-Mart should have conducted a hazard assessment specific to the New Braunfels distribution center. Second, the Administrative Law Judge found that Wal-Mart should have required eye and face protection because it was "customary" in the warehousing industry to do so and, therefore, Wal-Mart was on notice that a hazard to employees' eyes and faces existed.

REQUIRING A SITE-SPECIFIC HAZARD ASSESSMENT FOR PPE

In the Wal-Mart case, OSHA cited the distribution center for failing to conduct a workplace hazard assessment under 29 C.F.R. 1910.132(d)(1), which requires employers to assess the workplace to determine if hazards are present, or are likely to be present, that necessitate the use of personal protective equipment. Wal-Mart did not dispute that the cited standard applied. Rather, the Company argued that it had, in fact, conducted a hazard assessment. The Company argued that it had conducted a hazard assessment of a "virtually identical" distribution center in Searcy, Arkansas. Because the operations were nearly identical to the cited distribution center, Wal-Mart argued, the Searcy assessment

³ Both parties have appealed the Judge's decision.

satisfied the requirements of Section 1910.132(d)(1) as to the cited distribution center. Among other things, Wal-Mart argued that the hazard assessment standard is performance-based, and that the standard gives employers wide latitude in determining how best to achieve compliance with the standard.

OSHA has acknowledged in interpretive guidance that where operations are identical across multiple locations, an employer's hazard analysis across similar locations will produce similar results. However, OSHA argued that Wal-Mart's "global" hazard assessment was inadequate under the standard. OSHA argued that the use of the phrase "the workplace" in the standard means that an employer must evaluate the potential hazards at *each* specific work site location at which the employer has exposed employees.

The Judge agreed with OSHA's position, finding that the regulatory history behind the hazard assessment requirement confirmed the agency's intent to require employers to assess the hazards at a particular workplace. The Judge also determined that Wal-Mart's "cookie cutter" approach to hazard assessment was inappropriate because the Company had not engaged anyone to conduct a comparison of operations at each distribution center to confirm similarity of operations. Rather, the Judge found, Wal-Mart had "simply assumed a uniformity of workplace and thus hazards" based on a similarity between the two facilities' layouts. The Judge affirmed the citation.

The Judge's decision serves as a reminder that employers cannot fashion a "one size fits all" approach to workplace hazards. While the employer is free to create a baseline hazard assessment that generally fits multiple locations (and should seriously consider developing a standardized template for this purpose as a benchmark for conducting meaningful hazard assessments), the employer must seek input from

individuals who have actual knowledge of the hazards and potential hazards at *each* individual work site so that each work site has a job hazard assessment that accurately reflects the conditions at that site.

**USING INDUSTRY CUSTOM TO ESTABLISH
EMPLOYER KNOWLEDGE OF A HAZARD**

In addition to a citation for failure to perform a hazard assessment for the New Braunfels distribution center, OSHA cited Wal-Mart for failing to provide employees with appropriate personal protective equipment. Specifically, OSHA alleged that employees who were filling orders at the distribution center were required to wear eye, face, hand and foot protection. Wal-Mart argued that in order to affirm the citations, OSHA had to prove that Wal-Mart had actual or constructive knowledge that employees faced a “substantial probability of serious harm” in the absence of the personal protective equipment. Wal-Mart argued that, based on the distribution center’s low employee injury rate, the Company had no actual or constructive knowledge that any of its employees at the New Braunfels distribution center were exposed to a “substantial probability of serious harm.”

The Judge ultimately found that OSHA had shown a “substantial probability of serious harm” with respect to the absence of eye or face protection. Although Wal-Mart presented evidence of a low employee injury rate at the New Braunfels distribution center, the Judge credited testimony from the OSHA compliance officer who had inspected other employers’ warehouses that there was industry custom which required employees to wear eye and face protection such as safety glasses. Further, the Judge found that while the New Braunfels distribution center had a low injury rate, there was

evidence of some (albeit few) actual injuries. The Judge held that where the *severity* of the injury is high, OSHA need not establish that there be a high *probability* of injury in order to sustain a citation. The Judge affirmed the citation, finding that OSHA had sufficiently proven Wal-Mart's constructive knowledge of a hazard. The case is pending review by the Review Commission.

CONCLUSION AND RECOMMENDATIONS

The Wal-Mart case represents several important lessons for employers.

Obviously, the liability findings may be modified on appeal. In order to address these issues, it is recommended that employers:

- Conduct a job hazard assessment of each worksite to identify potential and actual hazards to employees. While the employer should consider developing a standardized template to be utilized at each location for conducting a job hazard assessment, it should be wary of a “cookie cutter” approach to such hazard assessments that assume hazards will be the same across facilities that are similar in size, layout, and operation. While such an approach may be appropriate to begin the process, employers must have input from individuals who are familiar with the unique conditions of each particular workplace in order to ensure that each location's hazard assessment is accurate.
- Develop a means for the employer to collect data across its universe of worksites regarding potential hazards (from sources such as worksite OSHA 300 Logs, Workers' Compensation claims, post accident/near miss investigations) and disseminate it to its various worksites to be considered and included, if applicable, in their individual job hazard assessments at each worksite.
- Become involved within the employer's business or industry groups or trade associations to obtain injury or illness data information on hazards associated with its industry and industry safety “customs” or “practices,” including the use of personal protective equipment, which may need to be utilized by the employer at its locations.
- Ensure that actual hazards are corrected as soon as possible, or where certain hazards cannot be completely eliminated, that employees are given sufficient personal protective equipment to protect them from injury.

- Ensure that employees are appropriately trained to recognize and avoid hazards in the workplace. In addition, specific training may be necessary for particular activities such as forklift operation, accessing electrical equipment, or confined space entry.
- In addition to effective training, ensure that safety-related policies and procedures are consistently and vigorously enforced through coaching, additional training, and/or appropriate disciplinary measures.