

OSHA's General Duty Clause: A Guide to Enforcement and Legal Defenses

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Introduction

The General Duty Clause (GDC), Section 5(a)(1) of the Occupational Safety and Health Act of 1970, was intended to serve as a “gap filler” to address recognized hazards that the Occupational Safety and Health Administration (OSHA) has not yet regulated. To establish a violation of the GDC, the Secretary of Labor must prove: (1) that the employer failed to render its workplace free of a hazard which was (2) “recognized” and (3) causing or likely to cause death or serious physical harm and (4) that feasible means exist to free the workplace of the hazard. OSHA must also prove that an employee of the cited employer was actually exposed to the hazard and there is a six month statute of limitations, the same as for regular standard-specific OSHA citations.

During a recent three-year period, OSHA’s issuance of General Duty Clause violations has increased more than 15 percent: In FY 2010, the agency issued roughly 1,600 violations, up from about 1,350 in FY 2008. Although that pales in comparison with the more than 9,000 violations issued for the scaffolding standard – the No. 1 most cited violation that year – employers should understand the General Duty Clause and how OSHA uses it to cite businesses. According to the National Safety Council, in FY 2011, approximately \$7.2 million in penalties for GDC citations were proposed by OSHA and nearly 50 of the GDC citations were issued as willful or repeat. All GDC citations are serious in nature and they can only be issued if the employer’s own employees have exposure to the hazard. The Protecting America’s Workers Act, which was considered in the 113th Congress but which was not adopted, would have expanded GDC citation powers to allow citations to a host employer or general contractor even if their employees had no hazardous exposures, as long as a contractor or subcontractor on site had exposed workers. For now, according to OSHA’s Field Operations Manual, willful GDC citations cannot form the basis for a criminal prosecution under the OSH Act in the event of an employee fatality, unlike other willful citations issued under specific standards.

General Duty Clause citations are among the more expensive OSHA enforcement issuances, and in the past five years, more than 7,300 such citations have been issued by OSHA and its state counterparts. Every state must have its own version of the GDC, in order to demonstrate that the state enforcement options are equally as effective as that of the federal agency. Often, OSHA will look at whether there is a nationally recognized voluntary consensus standard on point when addressing an otherwise unregulated hazard, and use that as the basis for GDC citations. Even the participation of a company or its trade association in standards development activity can result in imputed knowledge of the standard for enforcement purposes. With respect to the General Duty Clause, OSHA states in guidance that “industry consensus standards may be evidence that a hazard is ‘recognized’ and that there is a feasible means of correcting such a hazard.” The most commonly used consensus standard for GDC

citations include the ANSI A10 construction series, a number of ASTM International Standards, and the NFPA 70E standard. Moreover, if a manufacturer (e.g., heavy equipment or ladders) cross-references a consensus standard in its manual, OSHA can rely upon that to impute knowledge of the standard to the employer.

A typical example of a GDC citation that incorporates a consensus standard by reference would be the following:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to falls from being lifted on the forks of the forklift: a) Warehouse - On or about February 4, 2015, employees were being raised on the forks of the Raymond High reach forklift and Clark forklift to access the upper level of the racking system. Among other methods, a feasible and acceptable means to abate these hazards is to follow ITSDF B56.1-2005 entitled, "Safety Standard for Low Lift and High Lift Trucks," Section 4.17 Elevating Personnel, which states, "Only operator-up high lift trucks have been designed to lift personnel. If a work platform is used on trucks designed and intended for handling materials, the requirements of paragraphs 4.17.2 and 4.17.3 shall be met for the protection of personnel."

In recent years, OSHA has used its GDC powers to address a wide range of potential workplace health and safety hazards. These include, but are not limited to: workplace violence, on-the-job impairment with drugs or alcohol, ergonomic conditions, combustible dust, hazards associated with off-road equipment operations, heat-related illness risks, and even occupational exposure to the Ebola virus. Even some unlikely situations are cited under the GDC, including missing safety latches on hooks, missing gas regulators, and failure to enforce the use of seatbelts in forklifts that are equipped with them. OSHA is currently considering how to deal with the issue of outdated or missing Permissible Exposure Limits (PELs) for air contaminants, as well as for emergent hazards associated with nano materials. In its Request for Information, OSHA has specifically elicited comment on whether utilization of the GDC is appropriate to deal with such occupational health hazards.

One concern that often comes up in conjunction with GDC citations -- particularly in cases involving personal injury -- is the impact that accepting a GDC citation will have on possible related tort litigation (personal injury or wrongful death) and also in worker's compensation cases. In some states, if gross negligence is involved with a worker's injury, there can be a multiplier effect (heightened compensation under worker's comp laws) or the injured worker or his family can go around the "exclusive remedy" and sue in tort despite an employer-employee relationship. Congress was mindful of the fact that state law, not federal, was intended to inform those principles of law which govern eligibility for payments of workers' compensation, and the liability of wrongdoers for personal injuries, and stated that "Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. section 4(b)(4)

OSHA views it as outside its role to foster or foil the efforts of plaintiff's attorneys in state court proceedings. However, if a GDC citation is upheld at trial (or accepted by the employer as part of a settlement), and there is a related personal injury action that could be affected by the employer's level of negligence, it could be admitted as proof of negligence per se or even willful disregard for a "recognized" safety or health hazard. Admissibility of OSHA citations that are finally adjudicated is determined by the laws of the individual states. Pending (unproven) OSHA citations may be barred from consideration,

depending on how a court rules on the defendant's Motion in Limine. But in any injury case, GDC citations must be carefully considered in terms of potential impact and aggressively defended if unfounded.

This paper will explore some of the legal issues associated with enforcement through the GDC and the advantages and disadvantages of this approach to occupational safety and health management.

What Constitutes a "Recognized Hazard" for GDC Purposes?

In some respects, General Duty Clause citations are easier for an employer to defend against than those issued under specific standards, because OSHA has the burden of showing that the cited hazard was "recognized" by the employer. There are three types of recognition used by OSHA to support its allegations: employer recognition, industry recognition, and "common sense" recognition. As in all OSHA cases, the agency carries the burden of proving the violation occurred and was properly classified, while the employer has the burden of providing any proffered affirmative defenses. These can include unpreventable employee misconduct (where the company has rules, trains on the rules, enforces the rules, and the misconduct was by a rank-and-file worker and not a supervisor), lack of fair notice and due process, and impermissible vagueness in the allegations. Clearly, if OSHA cannot demonstrate through evidence or testimony that the hazard was recognized by the employer in advance of the inspection or accident, the GDC citation would have to be vacated.

In its Field Operations Manual, OSHA acknowledges that it cannot engage in "20/20 hindsight" enforcement under the GDC. It states: "The occurrence of an accident/incident does not necessarily mean that the employer has violated Section 5(a)(1), although the accident/incident may be evidence of a hazard. In some cases a Section 5(a)(1) violation may be unrelated to the cause of the accident/incident. Although accident/incident facts may be relevant and shall be documented, the citation shall address the hazard in the workplace that existed prior to the accident/incident, not the particular facts that led to the occurrence of the accident/incident." The hazard for which a GDC citation is issued must be "reasonably foreseeable."

To demonstrate "employer recognition," OSHA will often use its subpoena power to obtain documents (pre-citation) for this purpose, if it has not already secured sufficient evidence through employee statements or employer's admissions against interest (e.g., signed statements of management representatives). The documents demanded can include: company safety policies, handbooks, memoranda, standard operating procedures, operations manuals, collective bargaining agreements and contracts, Job Safety Analysis forms, safety audits, actual prior incidents, near misses known to the employer, injury and illness reports, or workers' compensation data. Employer awareness of a hazard may also be demonstrated by prior Federal OSHA or OSHA State Plan State inspection history which involved the same hazard. Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments. Finally, an employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

"Industry recognition" can be imputed to the employer through correspondence received from a trade association, "best practices" delineated by an organization for a specific industry sector or for work practices or equipment, or from an industry association's work in developing national consensus standards. In addition, where state or local agencies have adopted safety standards that address hazards not covered by federal OSHA standards, the Area Director, upon consultation with the Regional Administrator or designee, shall determine whether the hazard is to be cited under Section 5(a)(1) or

referred to the appropriate local agency for enforcement. If other members of the same industry sector have adopted the protective practices or equipment that OSHA cites another employer for under the GDC, this can be used to show feasibility of abatement. "Common sense" recognition stems from a hazard so obvious that any reasonable person would recognize the danger.

While the GDC is not normally to be used to enforce requirements stricter than a codified OSHA standard, an exception to this rule may apply if it can be proven that "an employer knows a particular safety or health standard is inadequate to protect his employees against the specific hazard it is intended to address." See, *Int. Union UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir. 1987). Such cases are always subject to pre-citation review by the area office. The general duty clause may also be applicable to some types of employment that are inherently dangerous (fire brigades, emergency rescue operations, confined space entry, etc.). Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. These steps include an assessment of hazards that may be encountered, providing appropriate protective equipment, and any training, instruction, or necessary equipment. If the employer fails to take such steps and allows its employees to be exposed to a hazard, it may be cited under the general duty clause.

The GDC and Permissible Exposure Limits

On July 31, 2014, OSHA announced that Fiberdome, Inc., a Wisconsin employer, agreed to pay a \$2,000 penalty for a general duty clause citation issued by the agency for worker exposures to styrene that were below OSHA's permissible exposure limit (PEL) of 100 ppm but were above its industry's recognized 50 ppm level. The employer agreed to abate the citation by adhering to the styrene industry's 1996 agreement to voluntarily adopt the lower exposure limit for an 8 hour time-weighted average. If the 50 ppm level cannot be reached through engineering and administrative controls, then an effective respiratory protection program will also be required.

The case is highly significant because there was technical compliance with the legally enforceable OSHA PEL, and because the agency has enforced what was a voluntary proactive initiative by an industry against one of its member employers. This settlement will likely encourage similar citations in industries where "best practices" have been adopted that go beyond technical compliance with OSHA standards, many of which are outdated and do not reflect the best technology or science concerning chemical exposures. The impact on industry alliances with OSHA, where a number of such "best practice" work products have been generated, remains to be seen.

To substantiate employer knowledge of a "recognized" hazard that has potential to cause death or serious bodily injury, OSHA looks at the employer's own documents, contractual materials, industry guidance, voluntary consensus standards, manufacturer's recommendations, and also "common sense" factors, among others. A 2003 OSHA enforcement memo is relevant to the action taken in *Fiberdome*. It maintains that the agency cannot enforce a stricter limit than that adopted by OSHA, unless the "employer knows" that the standard is inadequate to protect workers. There was also a *General Dynamics* case (815 F.2d 1570, DC Cir. 1987) in which the US Court of Appeals reversed OSHRC and reinstated a GDC citation where workers were exposed to Freon at levels below those in 29 CFR 1900.1000. In that case, the DC Circuit held that a standard does not preempt the applicability of the GDC "if an employer knows that [the] specific standard will not protect his workers against a particular hazard." Previously, the OSHRC had held that a GDC citation would not lie where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act.

When no specific standard entirely protects against the hazard alleged, citation under Section 5(a)(1) is proper.

In applauding the *Fiberdome* settlement, OSHA's area director stated: "OSHA believes that employers have the responsibility to further limit exposure to chemicals that can harm employees even if the level of such exposure is below OSHA permissible exposure limits." At the time that the citation was issued, in September 2013, OSHA also issued a news release, which noted: "Companies must be aware of the hazards that exist in their facilities and take all possible precautions to minimize the risk of illness." In *Fiberdome*, the inspection was triggered by a referral with information that workers were becoming ill from styrene exposure even at the legal limits. The *Fiberdome* enforcement action also raises the potential for OSHA to use guidance on chemical manufacturers' Safety Data Sheets (SDSs) as a basis for imputing knowledge to employers in the future, if the SDS recommends exposure limits more protective than those adopted by OSHA in its air contaminants rules, or where OSHA lacks any PEL for a chemical substance.

OSHA's PELs, which are regulatory limits on the amount or concentration of a substance in the air, are intended to protect workers against the adverse health effects of exposure to hazardous substances. Ninety-five percent of OSHA's current PELs, which cover fewer than 500 chemicals, have not been updated since their adoption in 1971. The agency's current PELs cover only a small fraction of the tens of thousands of chemicals used in commerce, many of which are suspected of being harmful. Substantial resources are required to issue new exposure limits or update existing workplace exposure limits, as courts have required complex analyses for each proposed PEL.

In 2014, OSHA published on its website "permissible exposure limits annotated tables," intended to provide employers and workers with alternate occupational exposure limits that may protect employees better than OSHA's adopted PELs. These include Cal/OSHA PELs, the NIOSH Recommended Exposure Limits (RELs), and the most current ACGIH Threshold Limit Values (TLVs) among others. Whether OSHA will seek to enforce these more protective standards through the GDC in light of the agency's success in *Fiberdome*, by imputing knowledge to the regulated community through their publication on the OSHA website, remains uncertain.

In October 2014, OSHA issued a Request for Information on how to address the issue of outdated PELs. The comment deadline was recently extended until October 9, 2015. Among the options under consideration are use of control banding and also enhanced use of the GDC. If the GDC approach to enforcing more protective exposure limits proves successful, it could be a solution to OSHA's quandary of updating hundreds of PELs individually through the laborious rulemaking process. It remains to be seen whether OSHA could selectively enforce more protective exposure limits for substances such as respirable crystalline silica at ready-mix operations or in construction and demolition, based on some industry-adopted best practices that urge maintaining levels below the enforceable PEL. Given the significant legal challenges expected to the forthcoming revised PEL for silica, this could well be the trial balloon that OSHA attempts to bridge the gap in the interim while the rulemaking and eventual litigation are in progress.

Ergonomics and the GDC

At the end of the Clinton Administration, OSHA enacted a far-reaching ergonomics standard. It was strongly opposed by the business community and was also criticized by many in the safety field. When Congress convened at the start of the next Administration, one of its first acts was to pass Senate Joint Resolution 6, which rescinded the original ergonomics rule, and under the Congressional Review Act, prohibits the agency from issuing a rule that is substantially the same as the former one. As a result,

OSHA has only the General Duty Clause left in its enforcement arsenal to address ergonomics hazards in the workplace. To satisfy the "employer recognition" requirement, OSHA developed industry specific guidelines to provide specific guidance for abatement to assist employees and employers in minimizing injuries. These guidelines are also intended to demonstrate the feasibility of corrective actions.

In general policy explanation, OSHA notes: "Even if there are no guidelines specific to your industry, as an employer you still have an obligation under the General Duty Clause, Section 5(a)(1) to keep your workplace free from recognized serious hazards, including ergonomic hazards. OSHA will cite for ergonomic hazards under the General Duty Clause or issue ergonomic hazard letters where appropriate as part of its overall enforcement program." OSHA also refers employers to the www.osha.gov website as well as to resources developed by the National Institute for Occupational Safety and Health (NIOSH) and by various industry and labor organizations on how to establish an effective ergonomics program. OSHA stresses that the requirement to keep the workplace free from ergonomic hazards exists regardless of whether there are voluntary industry guidelines.

OSHA also assesses ergonomic-related issues (e.g., musculoskeletal disorders) in complaints, referrals, and targeted inspections. Just as OSHA evaluates the findings of its inspections and issues General Duty Clause citations or hazard alert letters for ergonomics hazards where appropriate, OSHA does the same when responding to worker complaints.

With respect to the "hazard alert letters," these are typically issued during a general inspection where OSHA observes (or gets reports of) ergonomic hazards but no penalties or citations are issued. However, the letters provide "notice" to the subject employer and OSHA will conduct follow-up inspections or investigations within 12 months of certain employers who receive ergonomic hazard alert letters. If the employer has failed to address the ergonomic hazards listed in these initial letters, the GDC citations can be classified as willful. Therefore, even though these are "no impact" letters in terms of fines or history, they cannot simply be ignored. Unfortunately, other than discussing the letters with the area manager, there is no real mechanism for contesting the OSHA "findings" and they can be used against the employer in future enforcement actions. Consequently, if the employer disagrees with OSHA's workplace assessment, the best defensive strategy is to conduct a private ergonomics audit (preferably using a third party safety and health professional who is qualified to provide expert testimony, as needed), and implement and maintain appropriate corrective actions to show that the employer acted in good faith and exercised due diligence.

Workplace Violence and GDC Enforcement

OSHA has no standards regulating workplace violence prevention but it does have plenty of guidance that has been issued and which can form the basis for classifying this as a recognized hazard, depending upon the nature of the operation and its history on the subject. Industries that have exposure for GDC citations related to workplace violence include, but are not limited to, hospitals and other health care facilities such as nursing homes, social workers, prisons, and late night retail establishments.

In OSHA's view, an employer that has experienced acts of workplace violence, or becomes aware of threats, intimidation, or other indicators showing that the potential for violence in the workplace exists, would be on notice of the risk of workplace violence and should implement a workplace violence prevention program combined with engineering controls, administrative controls, and training. Required abatement can range from hiring a security guard to having security systems in place, as well as creating and enforcing policies on guns and other weapons in the workplace, and even addressing issues such as dealing with employees who are protected under restraining orders or who have been the victims of domestic violence (because that too often spills over into the workplace).

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, one of the leading causes of job-related deaths. However it manifests itself, workplace violence is a growing concern for employers and employees nationwide.

Infectious Disease Control in the Workplace

When Ebola reached the United States as a result of health care workers being transported from Africa to receive treatment and, later, from an infected individual further infecting nurses at a Texas hospital where he was receiving treatment, there was initial panic and overreaction by state governments and federal officials. In the midst of the "crisis," OSHA determined that it was appropriate to issue guidance on preventative actions that could be taken in health care settings and by other potentially affected employers.

This was not the first time, however. In 2009, when there was an anticipated influenza pandemic, OSHA also publicized its views on what would be considered the employer's responsibilities in helping to curb the spread of disease. That template was resurrected in 2014 for Ebola. OSHA also has used the GDC to cite employers who fail to take appropriate action to halt the spread of other communicable diseases, such as tuberculosis, in the workplace. While OSHA now has an infectious disease rulemaking underway to supplement its existing bloodborne pathogens standard (29 CFR 1910.1030), for now the GDC is the enforcement mechanism of choice.

Guidance on the subject included recommendations for employers to train employees on hand hygiene, cough etiquette and social distancing techniques. Under the GDC, employers were expected to understand and develop work practice and engineering controls that could provide additional protection to their employees and customers, such as: drive-through service windows, clear plastic sneeze barriers, ventilation, and the proper selection, use and disposal of personal protective equipment. In the case of Ebola, OSHA determined that adherence to the bloodborne pathogen standard would not be sufficient to protect workers. While citations could be issued under that regulation if it was not followed, as well as for personal protective equipment and respiratory protection standards, OSHA concluded: "Employers would likely need to comply with provisions from a combination of OSHA standards and CDC guidance in order to implement a comprehensive worker protection program." The CDC guidance would be enforced via the General Duty Clause.

Conclusion

Each workplace is going to have unique hazards that cannot be fully addressed by individual OSHA standards, and use of the General Duty Clause by OSHA as an enforcement methodology can be appropriate to ensure protection of employees working in these discrete work environments. Most OSHA standards date back to the 1960s consensus standards from which they were drawn, and it is well-evident that there are emergent hazards that cannot be fully captured by these outdated rules. In the health arena, particularly, there are thousands of chemicals for which OSHA lacks any permissible exposure limit, and many more for which OSHA's enforceable PELs are clearly inadequate and obsolete.

The General Duty Clause allows OSHA the flexibility to respond to such novel situations, where it would not be feasible to undertake a formal rulemaking (which, in many cases, can take a decade or more to come to fruition). However, from the employer's perspective, receiving a GDC citation based on information imputed to it from third party sources - or being cited based on the employer's own actions in the past or at other worksites where dictated by unique state requirements - can feel like a "gotcha" game.

General Duty Clause citation use is properly limited to serious situations where the hazard is capable of causing death or serious bodily harm. Employers cannot play ostrich in ignoring such hazards simply because OSHA does not have a specific rule on point to address it. Neither should employers shy away from disputing GDC citations that they feel were erroneously issued because the stakes can be quite high from a legal and monetary perspective.