



# **King & Ballow**

## **Workers' Compensation & OSHA**

### **Breakfast Briefing**

**July 9, 2010**

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*Please let the cameraman know if you object to being filmed*

Welcome to the July 9, 2010 Breakfast Briefing presented by the law firm of King & Ballow in Nashville, Tennessee and La Jolla, California. Today's Breakfast Briefing will identify the workers' compensation and OSHA issues that are implicated by company's actions. Log onto *www.kingballow.com* for more information on the next Breakfast Briefing or our past Breakfast Briefings.

I am Howard Kastrinsky, your host for this morning's Breakfast Briefing and the partner-in-charge of King & Ballow's Employment Discrimination Section.

Our presenters today are Kathleen Henderson, a partner in our Litigation and Health Care Practice, and Alisha Wyatt an associate in our Litigation Section.

# Recent Developments

- Plan/Prevent/Protect
  - Wage & Hour division
  - OSHA
  - OFCCP
- FMLA leave for child when no legal or biological parent-child relationship





# Quick Mix Meets Workers' Comp and TOSHA/OSHA

*Presented by*  
Kathleen Henderson  
Alisha Wyatt

# Quick Mix - Background Story



# BACKGROUND VIDEO



# Quick Mix Background



## Attorney Discussion

- Workers' Compensation (WC) issues
- TOSHA/OSHA issues

# Quick Mix Background - Positive Factors

- QM has written safety procedures
- QM has assigned OSHA responsibilities to management
- QM only has one OTS violation in its history



# Quick Mix Background- Potential Problems

- Safety Manual last update '01 – “out of sight, out of mind?”
- Is the OSHA Manager engaged in safety?
- Increase employees = potential increase in penalties
- Other employees on-site
- Employee complaints about newly assigned tasks – training & safety issues? WC claims?
- Possible referral to Wage & Hour?
- QM has prior violations = potential willful/repeat



# OSHA Sample Programs

*[www.osha.gov/dcsp/compliance\\_assistance/sampleprograms.html](http://www.osha.gov/dcsp/compliance_assistance/sampleprograms.html)*

- Bloodborne Pathogens
- Fall Protection
- General Safety & Health
- Hazard Communication Standard
- Lockout/Tagout
- Powered Industrial Trucks
- Respiratory Protection
- Shipyard Employment
- Tuberculosis
- Workplace Violence
- OSHA eTools for Customized Programs





# Safety Program Tool Box

- Written safety program
- Make it proactive!
- Management & supervisory action
- Enforcement
- Training



# Written Safety Program

- OSHA requirements
- Include OSHA/TOSHA & industry standards
- Employee signed acknowledgement for receipt and obligations under the safety program
- Review and updated regularly
- Written checklists for employee use
- Provide copies to employees
- Make the written program readily accessible





# Make Your Program Proactive

- Assign OSHA responsibilities
- Review OSHA website regularly - weekly recommended
- Review WC reports of injury for trends & hazards
- Review OSHA accident/injury logs for trends & hazards
- OSHA Opinion letters & standards
- Trade associations in your industry





# Management & Supervisory Action

- Set forth management expectations on safety & health compliance
- Include safety & health compliance in evaluations
- Designate “competent persons”
- Commend employees for detecting and correcting hazards
- Management must know their safety & health program
- Regular and routine inspections and walk-arounds
- Review/get updates on accidents & injuries





# Training & Enforcement

- Regular safety meetings, with signed attendance sheets
- Written record of enforcement
- Effective training programs
- Written training records
- Conduct regular training reviews
- Involve employees in training

# Post Inspection Action

- Timely contest
- Ask for informal conference
- Post the citation
- Correct the violation
- Pay the penalty
- Review safety & health policies for corrective action as necessary
- Train employees
- Disciplinary action?
- Whistleblower compliance



# WC: Minimizing Injuries and Costs

- Training
- Training
- Training!
- Implement disciplinary measures for safety violations
- Implement employee wellness program
- Address complaints of discomfort early



# WC: Contractor Issues

- Is this worker an employee or an independent contractor?
  - Relevant factors
    - Right to control the conduct of the work
    - Right of termination
    - Freedom to select and hire helpers
    - Furnishing of tool and equipment
    - Self scheduling of work hours
    - Freedom to offer service other entities
- Carefully select all contractors
  - Licensed
  - Insured
  - Review contract terms carefully



# WC: Insurance Requirements

- Workers' Compensation insurance is mandatory for employers with more than 5 employees.
- Any person engaged in the construction industry must have workers' compensation coverage for themselves and all workers, including subcontractors not otherwise covered.
- June 30, 2010 Amendment.
  - Sole Proprietors, Partners, Officers of Corporations, Members of Limited Liability Companies engaged in the construction industry as contractors may exempt themselves if this person:
    - Owns at least 30% of the organization, and
    - Only serves a supervisory role on the worksite.
  - Must file exemption paperwork every two years.



# Quick Mix - Notice of Employee Injuries



# NOTICE OF EMPLOYEE INJURIES VIDEO



# Quick Mix Notice of Employee Injuries



## Attorney Discussion

- Workers' Compensation (WC) issues
- TOSHA/OSHA issues

# WC: What Injuries are Covered

- Covered injuries are all injuries within the “course and scope” of employment.
- If an employer comes to you with an injury, you must initiate the workers’ compensation process.
- Employers are responsible for medical bills, temporary total disability payments, permanent partial disability payments, and permanent total disability payments.



# WC: What Injuries are Covered

- Covered Recreational Activity Injuries:
  - Activity expressly or implicitly required
  - Produced a direct benefit to the employer
    - Not including employee health and morale
  - During work hours and part of employee's work duties
  - Occurred due to unsafe conditions that the employer had knowledge of and failed to fix



# WC: Quick Mix Notice Of Employee Injury

- What should the manager do?
- Is this injury covered?



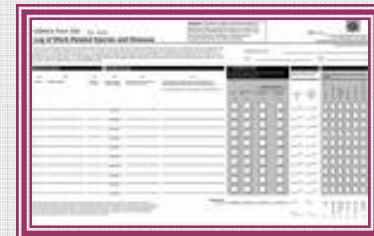
# OSHA Recordkeeping

OSHA 301 Form - Injury and Illness Incident Report  
(complete within 7 days)

OSHA 300 Form - Log of Work-Related Injuries and Illnesses (complete within 7 days & continuously update)

OSHA 300-A Form - Summary of Work-Related Injuries and Illnesses (Post from Feb 1 - April 30 the following CY)

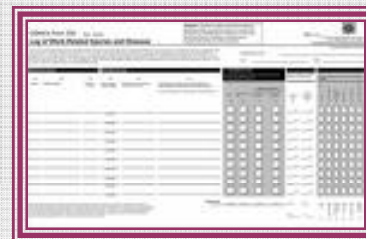
*Retain all of the above for 5 years.*



# If Non-exempt What Has to be Recorded?

The following must be recorded on both OSHA 300 Log & OSHA 301 Incident Report:

- each recordable fatality, injury and illness;
- that is work related; and
- that is a new case.



# What Illnesses/Injuries are Recordable?

- Death
- Days away from work
- Restricted work / transfer to another job
- Medical treatment beyond first aid
- Loss of consciousness
- A significant injury or illness diagnosed by a physician / licensed health professional



# **Quick Mix - Employee Injuries and Workplace Hazards**



# VIDEO EMPLOYEE INJURIES AND WORKPLACE HAZARDS



# Quick Mix Employee Injuries & Workplace Hazards



## Attorney Discussion

- Workers' Compensation (WC) issues
- TOSHA/OSHA issues

# WC: Minimizing Injuries and Costs More Suggestions

- Offer eye exams
- Ask an expert
- Early return to work programs
- Drug-free work programs



# Common Signs of Workers' Compensation Fraud

- Lack of witnesses
- Contradictory stories
- Dissatisfied employees
- Time of the injury
- Inconsistent injury
- Inconsistent reporting procedure
- Lack of cooperation
- Newer employees



# What are the OSHA Standards?

- Section 5(a)(1) standards
- Section 5(a)(2) standards:
  - Industry standards incorporated by reference at 29 CFR 1910.6
  - OSHA standards promulgated after notice and comment procedures



# OSHA Citations

- Elements of a citation
  - Nature of the violation & reference to a standard
  - Characterization of the standard
  - Abatement date
  - Penalty



# Due Diligence

- Know OR
- Should have known of the violative condition



# OSHA Citations (cont.)

- Statute of Limitations – 6 months from the date of occurrence
- Employer contest – must provide OSHA with written notice of contest within 15 working days from the date of receipt of the citations or it will be deemed a final order



# Quick Mix - TOSHA Inspection



# VIDEO TOSHA INSPECTION



# Quick Mix TOSHA Inspection



## Attorney Discussion

- Workers' Compensation (WC) issues
- TOSHA/OSHA issues

# WC: Return to Work Issues

- The employee must return to a position at a wage equal to or greater than the wage the employee received at the time of the injury.
- Meaningful return to work is based upon a totality of all the circumstances, including: other affected employees, the length of the employee's return to work, the continuation of employee benefits, the employee's vocational impairment, and the employee's rate of compensation.
  - Cap multiplier
- "Body as a whole injury" settlements can be reconsidered if the employee is no longer employed by the employer within 400 weeks of his injury.



# WC: Return to Work Issues

An employee who returned to work from workers' compensation leave and agreed to participate in a voluntary layoff 10 months after she returned to work did not have a meaningful return to work and was entitled to the higher cap on her permanent partial disability award. Here the court noted that even if the employee had not volunteered for the layoff, she would have lost her job when her employer went out of business two years after the layoff; therefore, it would have been impossible for her to have a meaningful return to work with this employer.

- *Wilson v. Consolidated Freightways, Inc.* (Supreme Court of Tennessee)



# Return to Work Programs

- Early return to work programs
  - Increase morale
  - Deters other employees from abusing system
  - Increase success of complete return to work
  - Minimize workers' compensation insurance expenses



# Return to Work Restrictions

- Follow return to work restrictions carefully
- Ask physicians for clarification
- Review with employee
- Discipline employee for failure to follow restrictions



# What you Should do BEFORE OSHA Shows up:

- Ensure OSHA logs of reportable injuries are up to date & review and address recurring problems
- Develop and implement a written safety program!
- Ensure written programs are updated and employees know about them
- Have regular safety meetings and document them
- Document and enforce safety standards
- Establish a safety inspection program, document the inspections and follow through on deficiencies
- Ensure OSHA poster is displayed



# What to do When OSHA Shows up?

- Ask for credentials.
- Once you know OSHA is on-site, make sure your staff and personnel are ready OR are getting ready for the OSHA inspector.
- Do not allow an opening conference or begin the inspection without management.
- Ask for the basis and scope of the inspection.
- If the inspection is based on a complaint, ask for a copy of the complaint.



# What to do When OSHA Shows up? (cont)

- Make sure a knowledgeable company representative is with the OSHA inspector at all times.
- Do not volunteer information.
- Write down OSHA's questions and check the facts before you respond.
- ALWAYS TELL THE TRUTH.
- Record your recollections of the inspection.
- Be courteous, but careful with the OSHA inspector.
- At closing ask for findings and the basis for those findings, check the facts before you respond.



# Penalties

## Type

Serious - \$7,000 max

Other Than Serious - \$1,000 max

Willful & Repeat - \$70,000 max

De Minimis - typically no penalty

Criminal Willful - \$10,000 max and/or 6 months imprisonment

## Factors

Probability and severity

## Adjustment Factors

Size, history, good faith



# Quick Mix - Retaliation Claim



# VIDEO RETALIATION CLAIM



# Quick Mix Retaliation Claim



## Attorney Discussion

- Workers' Compensation (WC) issues
- TOSHA/OSHA issues

# WC: Retaliation

- Key Factor:
  - Was the employee's claim for workers' compensation benefits a substantial factor in issuing an adverse employment action?
  - Proof of this key factor:
    - Timing
    - Direct statements of retaliation or discrimination
    - Comparison to similarly situated employees



# WC: Cap Multiplier

Disability rating of 5% permanent partial injury to back:

- If Employee returns to work:
  - $\{(5\% \times \underline{1.5}) \times 400 \text{ weeks}\} \times \$500 = \$15,000$
- If the Employee does not return to work:
  - $\{(5\% \times \underline{6}) \times 400 \text{ weeks}\} \times \$500 = \$60,000$



# Whistleblower Provisions

- Illegal to discriminate for exercising rights under the OSH Act
- Do not ask about identity of employee complaints
- Make no adverse comments about employee complaints



# Quick Mix - Contractor Employee Death



# VIDEO CONTRACTOR EMPLOYEE DEATH



# Quick Mix – Contractor Employee Death



## Attorney Discussion

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# WC: Contractor Issues

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    - Owns at least 30% of the organization, and
    - Only serves a supervisory role on the worksite.
  - Must file exemption paperwork every two years.



# WC: Employer Penalty

- Penalty for not maintaining proper workers' compensation insurance:
  - Monetary sanction of up to 2.5 times the average yearly workers' compensation premium
  - Court ordered closure of business until proper coverage is obtained



# Fatality Reporting

- Report all workplace fatalities or catastrophes involving hospitalization of 3 or more employees
- Report within (8) eight hours of occurrence
- Report to 1-800-249-8510



# Willful Violation

- Intentional disregard **OR**
- Plain indifference
- Willful Penalty Calculation
  - Underlying violation adjusted for size & history
  - Multiplied x 7



# Repeat Violation

- Violation of Substantially Similar Condition, and
- Either the repeat citation is issued within 3 years of prior citation, **OR**

the repeat citation is issued within 3 years of the final abatement date of the previous citation, **whichever is later.**



# Failure to Abate

- Potential penalty issued for each day violation continues
- Penalty is the amount of initial penalty (up to \$7K)
- Partial abatement reduction 25-75%



# Employee Misconduct Defense

- Work rules to prevent the violation;
- Adequately communicated those work rules to employees;
- Taken steps to discover violations; **AND**
- Effective enforcement the rules when violations have been discovered.



# Independent Contractor or Employee?

- Control of the work environment & equipment
- Supervision and control of the manner in which work is done
- Skill required for the work
- Is the work a regular part of the employer's business?
- Degree of profit or loss in doing the job
- Independent initiative, judgment and planning
- Permanent relationship
- Degree of dependence for continued work
- Does it look like an employee/employer relationship?





# Questions & Answers

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