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## Court Upholds OSHA Right to Issue Fines on a Per Employee Basis

By Deborah I. Hollander, Esq.

In 2008, OSHA issued rules which allow it to treat company-wide practices as a separate violation for each employee. The use of personal protective equipment, ("PPE") including respirators, is often necessary to protect employees from injury or illness caused by exposure to toxic substances and other workplace hazards. Many OSHA standards, including many affecting the construction trade, require employers to provide PPE to their employees and ensure that the employees use them. OSHA interprets its PPE rules "to impose a duty upon the employer to comply for each and every employee subject to the requirement, regardless of whether the provision expressly states that PPE or training must be provided to 'each employee'."

This rule making here came in response to a decision from a case involving a building contractor named Ho. Ho had hired eleven workers to renovate a building containing asbestos. He failed to train them or to provide them with respirators. The Secretary of Labor cited Ho for eleven violations of the asbestos training standard and eleven violations of the respirator standard. The Occupational Safety and Health Review Commission, (which hears appeals by employers of citations) rejected the Secretary's employee-by-employee approach held that OSHA's own standards required the employer to institute a single training program and to provide respirators to employees as a group. Thus, it was, ultimately, ruled that only two violations occurred.

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## The United States Environmental Protection Agency Limits the Storm Water Rules, But Contractors Should Still Expect Federal Regulations Will Come

The United States Environmental Protection Agency ("EPA") has promulgated rules to control storm water runoff from construction sites. However, on August 13, 2010, the EPA formally stated that it intended to withdraw and re-write the most burdensome features of those rules, specific numerical limitations on the quantity of particulates in run-off.

The EPA has the power and the duty to

control storm water discharges, including those associated with construction and other industrial activities, and in December of 2009, issued what it called a final rule containing a three stage phase imposition of regulations. Under the Rule, as originally promulgated, beginning in August 2010, construction sites would have had to abide limits on the concentration of particulate in heavy rain, and would have to carry out testing and

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Employers' victory under this ruling was short-lived. In 2008, OSHA revised over thirty standards (including those requiring the issuance of PPE's and standards requiring employees receive safety training), so that a willful failure to comply with safety requirements may be considered as a separate violation for each employee affected. OSHA now specifies that:

Compliance duties owed to each employee:

(1) Personal protective equipment.

Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(2) Training.

Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

29 C.F.R. § 1926.20(f)

On April 16, 2010, the Court of Appeals upheld these new standards, and firmly rejected the National Association of Home Builder's challenge to the regulations. *National Ass'n. of Home Builders v. Occupational Safety & Health Admin.*, 602 F.3d 464 (D.C. 2010)

The impact of per employee fines can be extremely severe. When the Secretary discovers that an employer has violated a standard, she may issue a citation and propose a financial penalty. Penalties vary with the severity of the violation: up to \$7,000 for serious and other-than-serious violations, up to \$70,000 for repeat violations, and between \$5,000 and \$70,000 for willful violations. If these current rules were applied to the Ho case, Ho could have been subjected to \$770,000.00 in fines.

The rules do not require the OSHA inspector to issue per employee, (rather than group employees together in a single fine) whenever they detect a violation. However, when announcing the 2008 Rule, OSHA refused to identify specific factors it would use in deciding whether to issue a citation for each employee or a single fine for a group of employees. Although the Court of Appeals cited OSHA's Field Manual as demonstrating that generally only a single citation will issue for each standard an employer violates, so only when the employer's behavior is willful and egregious will OSHA contemplate multiple citations. (OSHA Instruction CPL 2.80, Handling of Cases To Be Proposed for Violation-By-Violation Penalties (October 21, 1990)). However, when OSHA issued its final "Per Employee" Rules in 2008, it specifically refused to state it would follow the Field Manual for these rules.

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## TIP FOR CONTRACTORS

Obviously, contractors should comply with all OSHA requirements. In addition to being subject to fines, and placing employees at risk, violating standards can be a basis for termination by a general contractor or project owner, and be used as evidence in a lawsuit if an accident does occur. If any contractor wishes to have a copy of the OSHA regulations or field manual, please call Deborah Hollander, Esq., Sheak & Korzun, P.C., (609) 737-6885.

## TRENTON WATCH 2010

### Unemployment Relief

The State has capped the increase of unemployment fund assessments per employee. Because of the high unemployment rate and extended benefits, rate increases are necessary. However, the cap limits would have been approximately an increase of over 50% per employee to an average rate of about \$130.00.

Of equal importance to employers, new legislation has set out examples of the "severe misconduct" which can disqualify a fired employee from collecting benefits for eight weeks. "Severe misconduct" is defined as a person who has been fired for repeated violation of attendance or timeliness requirements after the employee received a written warning, falsification of records, assault, misuse of benefits or sick time, "theft of time," theft of employer property and intoxication while at work and deliberate or malicious misbehavior. Note that if an employer is contemplating firing a frequently absent or late employee and wants to avoid paying benefits, the employer should have a specific attendance policy and give written warning to the employee that he/she must shape up or risk being fired. P.L. 2010 Chapter 37. An employee who is discharged for gross

misconduct "connected with the work" which would be a crime, such as assault, the employee may be barred from ever collecting benefits for unemployment following that discharge. An employee who leaves work "voluntarily" is also disqualified from benefits.

The unemployment bureau has a several stage process for determining whether a discharge was for disqualifying misconduct. These hearings may have an impact beyond the issue of the former employee's attempt to collect unemployment insurance. The New Jersey Supreme Court has previously ruled that if an employee later brings a wrongful discharge lawsuit, the actual determination of whether the employee is entitled to benefits, will not be admissible. However, several court cases have indicated the statements which the employer and the former employee make to the unemployment agency may be admitted. Therefore, if an employer has any concern that either an employee's misconduct may lead to liability issues or a possible lawsuit by the employee for wrongful filing, then the employer may wish to carefully consider the information which it provides the unemployment investigators.

### Two Way Radio Relief for Commercial Vehicles

The State has exempted drivers of vehicles registered as commercial vehicles equipped with VHF two way radios from the motor vehicles laws against use of cell phones. P.L. 2010 Chapter 40. Construction firms which still use this more traditional "call in" and dispatch systems need not worry about getting tickets for cell phone use.

### Policy Initiatives by Governor Christie

Governor Christie has extended "Pay to Play" restrictions to labor unions (and their political action committees) that contract directly with government agencies. (2010, Executive Order No. 7). He has also proposed

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extending it to the Delaware River Port Authority and banning employees of the Authority from obtaining a job from any vendor or independent contractor to the Authority for two years after leaving the Authority.

The Governor also appointed a committee to prepare a report on opportunities for privatization with New Jersey government, *i.e.*, awarding contracts to provide services currently being carried out by direct government employees. Unlike most privatization reports, this one directly discusses privatization as a way of cutting back on the civil service system. Among the services and programs, which the Report suggests may be privatized affecting the Construction Industry are:

#### 1. Highway Maintenance Contracts

Although the State, the Turnpike Authority and the Parkway Authority each contract specific services for highway maintenance, such as specific re-paving or fence repair, the Privatization Task Force proposes contracting out "total asset management" or "fence-to-fence contracts". These contracts would cover every part of the road or highway and include all maintenance managing the "total asset." The contracts specify minimum performance standards. Payment would be based on achievement, rewarding contractors for high or exceptional performance with bonus payments, and penalizing them with fines for poor performance.

#### 2. Elimination of Early Childhood Education Center construction projects for local school districts:

The Report recommends that the state provide pre-kindergarten education by giving vouchers to parents to enroll their children in

private programs, rather than have school districts offer pre-kindergarten education directly. The Supreme Court has ordered that "Abbott" districts, (ones with predominantly low income families), provide pre-kindergarten education to three and four year olds. The Task Force recommended that the state provide vouchers to parents to select their own programs and, therefore, allow the state and school districts to halt all construction of Public Early Education Centers and pre-school classrooms.

#### 3. Outsourcing at least a portion of the Department of Community Affairs Uniform Code Enforcement.

Some municipalities do not have their own building code officials. Review of complex buildings, such as apartment buildings, state facilities, healthcare facilities and casinos, as well as elevator inspections, are carried out directly by the Department of Community Affairs which has a large backlog. The Proposal suggests that plan review be outsourced to New Jersey licensed architects and engineers and out-source the field inspection of multiple unit residential buildings.

#### 4. Sell the New Jersey New Homeowner Warranty Program to a private insurer.

Under this program, every contractor who builds new homes must register and must buy or provide a warranty program for the repair of a set of specified construction issues. Homeowners may elect to go through a state claim and arbitration as an alternative to suing their contractor. The proposal is being suggested as a primary way to bring cash to the state government.

monitoring programs to ensure that these limits were not breached. However, several business associations, including the National Homebuilders Association, challenged the manner in which EPA determined these numbers and limits. On August 13, 2010, EPA notified the Federal Court that it wished to withdraw and reconsider that portion of the rule setting the maximum limit. EPA, however, stated that any changes in the rule would be a "narrowly-tailored" revision to that limit. EPA, otherwise, at least for now, intends to defend the remainder of the Rule.

Even before EPA's back tracking, New Jersey contractors were protected from immediate impact. Ultimately, they will have to follow requirements, whether those are in the form of strict limits or in mandated construction procedures, not to mention New Jersey's existing storm water rules and local ordinances.

New Jersey already regulates storm water discharge from construction sites, and EPA will continue to defer to the state permits for about eleven more months. New Jersey projects, with pre-existing permits, will only be governed by the state regulations until June 2011. However, projects with new permits, (or projects which are "LEEDS" certified green projects which contractually adopt the federal EPA requirements regardless of existing permits), will become subject to the EPA program.

The EPA is phasing in its regulations, with the more stringent applications becoming first applicable to large and then to smaller construction sites.

#### Best Practices under EPA

From February 2010 through July 2011, the EPA will not limit discharge to specific quantities. However, it does require that the contractors adopt "best practices" to limit run

off, including the following:

- Control storm water volumes and velocity
- Control total storm water discharge and peak flow rates
- Minimize the amount of soil exposed during construction
- Minimize the disturbance of steep slopes
- Ensure the design, installation and maintenance of erosion and sediment controls
- Direct storm water to vegetated areas, unless infeasible
- Minimize soil compaction, unless infeasible, and preserve topsoil
- Stabilize disturbed areas immediately after earth disturbing activities have ceased or are temporarily ceased on any portion of the site for fourteen days or more

In New Jersey, details for many of the above activities on new construction should be included within the storm water management plans filed with development applications, and incorporated within Soil Conservation District and other Permits.

The following are prohibited under Best Practices:

- Discharge of wastewater from washout and clean-out of stucco, release of petroleum and oil, curing products and other construction materials
- Discharge of soaps or solvents used in vehicle and equipment washing; other washing waters must be treated in sediment basin
- Discharge of fuels, oils and other pollutants from vehicle operation and maintenance
- Uncontrolled discharge of wastewater from concrete washout
- Uncontrolled discharge from de-watering activities

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These are fairly similar to New Jersey's own best practice standards.

### The Time Table for Quantitative Limits

EPA had originally proposed that from August 2011 until January 2014, in addition to the requirement to follow best practices, quantitative limits on discharge would apply to sites where twenty or more acres are disturbed. Then, in 2014, the 280 NTU limit would apply to sites with 10 acres or more. It is unclear whether EPA will keep this timetable, but issue a new regulation establishing a different limit.

### Tips for the Contractor

Regardless of how the EPA modifies its regulations, it is probable that some federal requirements will begin to apply, and will affect site contractors and site work subcontractors most heavily. However, other trades may be affected as well. For instance, limitations on washout discharge and vehicle cleaning can also affect any contractor on the site. General contractors should prohibit such cleaning or provide facilities for it.

To the extent that projects can be begun before existing state permits expire, that would be advantageous. Any project with an approved site plan should include erosion control details and specifications as part of the planning process. Beginning in 2011, when federal regulations begin to apply, and certainly if new quantitative limits become operative, thought should be given to phasing the construction or site work, so that less than twenty acres (and ultimately less than ten acres) are disturbed at any given time, if possible. However, this limitation might then create scheduling and other impacts. A

shortage of acreage may limit the storage of construction materials on site.

Compliance with the federal regulations will include some added responsibilities and costs, and consideration for these costs should be included within the bid price.

It remains to be seen how state storm water management standards can be reconciled with these new stringent requirements.

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