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Job Safety and Risk Factors in Construction

Date: June 9, 2014

By Howard Mavity

Managing construction safety risks requires more than recognizing the most frequently cited OSHA standards or focusing on reducing the experience modification rate (EMR) and injury and illness rates.

As a starting point, risk professionals should divide their efforts into two separate (and not always related) categories:

risk as a direct safety issue; and
risk as a monetary issue.

Frustratingly, efforts to comply with OSHA standards may not meaningfully affect workplace injuries, and a focus on reducing injuries may still leave the company exposed to OSHA citations for routine compliance items. One also could add a third category, documentation, because employers may be following OSHA requirements, but they cannot document their actions.

Safety experts Bob Emmerich and Howard Mavity of Fisher & Phillips LLP say the most pressing direct safety issues are:

walking surfaces and falls from all surfaces, including ladders;
scaffolds;
bobcats/steer loaders, lifts and "independent" dump truck drivers;
steel erection;
excavation;
struck-by construction equipment, especially in site work (not just in highway work zones);
electrocution, especially involving overhead power lines; and
inappropriate use of lifting equipment, including cranes and forklifts.

Beyond serious OSHA citations, financial issues include:

the cost of injuries, including soft tissue and ergonomic-related problems;
multi-employer contract liabilities;
civil exposure to injured members of the public or another contractor's employees; and
harm to reputation, brand and bidding ability after a highly publicized incident, "willful" or "repeat" items, or enrollment in OSHA's Severe Violators Enforcement Program.

Increasingly even a modest number of injuries or a single serious OSHA citation may be enough to cost a contractor a bid worth millions of dollars.

Building A Safety Process

Strategies to manage these risks are well known; however, many employers do not follow even well-known procedures. First, every employer has a safety culture, whether or not they realize it. Employers should survey managers and

employees about safety and then compare the answers. Management almost always will be shocked to see the difference between employee and management perception of safety.

Absent an effective safety culture, even experienced employees will continue to cut corners and make bad decisions. An employer has to make a specific business plan to develop an effective safety culture. The proper culture will not simply occur, no matter how good the intentions.

The second step is to gain top leadership support. Most CEOs believe "safety is number one," but that assumption usually won't be realized unless top management has consistently focused on specifically integrating safety in all areas of the business.

Once top leadership is on board, the construction employer has to deal with the fact that its frontline supervision is promoted from within, based on their skills, and the employer has not adequately trained those supervisors to manage employees and to maintain a safety-driven culture.

The employer then has to determine what actions are predictive of safe work habits. Instead of driving a safety program by injury and illness data or the even less reliable EMR, determine which policies, procedures and attitudes result in safe work practices. Most construction employers find that leading indicators include:

documented, consistent site- and job-specific training;
supervisory involvement in safety efforts;
employee engagement in activities such as job safety analysis and safety inspections; and
maintaining effective discipline for unsafe work practices.

Enterprise Actions To Further Reduce Risks

Employers often fail to consistently involve their safety professionals in planning and bidding a job, as well as ensuring that an adequate number of safety professionals are budgeted.

Ensure an effective site safety plan is designed in coordination with the work sequence. This document should not be a boilerplate form, but it should serve as the overview of how to keep that job safe. The contractor should develop specific tasks and job safety analyses. These brief analyses of the hazards and ways to prevent harm should be the basis of toolbox safety meetings.

While many contractors do a superb job in starting the project, little thought is put into the wind down and punch list stage, when many injuries occur. Similarly, the contractor should consider the non-routine challenges posed by the site, weather, quality of the local workforce and the uniqueness of the architect and structural engineer's designs. Many fall protection issues arise because of non-routine settings. Experienced employees have a tendency to do things the way they have always done them.

Contractor management must move beyond focusing on avoiding "controlling employer" OSHA citations and emphasize how to prevent issues.

Jobs where isolated employees or crews are working without immediate supervision present other challenges. Experienced journeymen may cut corners and injure themselves by electrocution or falls when they supervise themselves. Contractors must repeatedly remind employees working alone that they must continually conduct their own basic job safety analysis, which can be summed up by "always stop and consider the hazards, then consider how to avoid them."

Real Causes Of Unsafe Behavior

Contractors must expand their concept of root cause analysis of unsafe behavior, accidents and workplace injuries. There is a clear correlation between fatigue or low blood sugar and employees exercising poor judgment. Similarly, while employers have focused on distracted driving, they often don't consider the numerous distractions present on a fixed site. Technology can cause distractions, but other factors may affect an employee's judgment and reflexes, such as reporting to work after an all-night argument with a spouse. Depression can contribute to performance issues and related workplace injuries.

Contractors also must consider the problems posed by increasingly unhealthy new workers and an aging skilled workforce. This concern has contributed to employers' renewed interest in devising effective fitness for duty programs. Any fitness for duty program must be carefully devised and must not permit supervisors to make knee-jerk decisions about whether a new or returning employee can perform the essential functions of the job with or without reasonable accommodation.

Concerns For The Future

Fisher & Phillips safety professionals Kathi Dobson, Jim Goss, Howard Mavity and Bob Emmerich list developing concerns as cranes, silica and increase in lead, asbestos and other industrial hygiene issues presented when working in existing buildings. From a legal standpoint, OSHA's continued focus on the "corporation" instead of a single jobsite can only cause more problems. Finally, don't be caught off guard by OSHA's determined promotion of retaliation and whistleblower claims.

This article appeared on June 9, 2014 on Construction Executive.

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Articles

The Ongoing Struggle to Implement Workplace Anti-Bullying Policies

Date: June 10, 2014

By Howard Mavity

Workplace and school violence events have contributed to our increasing national conversation about "bullying."

Recently, NPR quoted a Zogby poll in which more than a quarter of American workers reported that they have experienced abusive conduct at work.

Some 64 percent of respondents to a Monster Global Poll felt that they had been "bullied, either physically hurt, driven to tears, or had their work performance harmed."
Legislation is pending in a number of states and the topic regularly shows up in several media discussions.
Hard to legislate against "being a jerk"

We would be interested in how many of you are actually implementing workplace anti-bullying policies, whether they are separate from your no-discrimination/no harassment efforts, and whether you are seeing a positive effect?

Both practical and legal problems impede developing effective policies. As an example, how do you define "bullying" and how do you distinguish this objectionable conduct from the sort of workplace banter and teasing that men often use to bond with one another?

Michael Aitken, Vice President of Government Affairs for the Society of Human Resource Management, pointed out that, "It's tough, if not impossible, to legislate against someone being a jerk." However, employers may be able to develop an effective Code of Conduct and Effective Anti-Bullying Policy based upon requiring employees to use "good judgment" and to be a "professional."

NLRB decisions make it harder to draft policies

There are new challenges to employer policies every time the National Labor Relations Board opens its doors. The NLRB has (incredibly) broadly attacked Rules of Conduct as "tending to chill employees in the exercise of their Section VII rights." Although the U.S. Court of Appeals for the D.C. Circuit and the Board itself have observed "that threatening and abusive language are not inherent aspects of union organizing or other Section VII activities," the NLRB nonetheless strikes down many policies as too vague.

Any policy has to be read as a whole, and a single statement may be lawful or unlawful depending upon the purpose of and the context of the policy. Thus, some of the language set out below has been found lawful in certain context or in conjunction with other policies. Nevertheless, the NLRB has found the rules below as overbroad in recent cases:

A rule prohibiting "making false, vicious, profane or malicious statements toward or concerning the hotel or any employee;"
Verbal comments or physical gestures directed to others that exceed the bounds of fair criticism and behavior that is counter to promoting teamwork;
Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork;

Prohibiting "loud, abusive, or foul language;"
Discipline for "the inability or unwillingness to work harmoniously with other employees;"
Prohibiting negativity, any type of negative energy or attitudes;
Engage in any activity which could harm the image or reputation of the company; and,
A rule prohibiting "negative conversations" about employees or managers.

Defining "abusive conduct"

The decisions are not consistent and it is difficult to find clear patterns. One response may be to utilize the language in some of the proposed state anti-bullying statutes. One proposed statute defines "abusive conduct," as:

Acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature and frequency of the conduct, including, but is not limited to: repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee's work performance. It shall be considered an aggregating factor if the conduct exploited an employee's known psychological or physical illness or disability. A single act normally shall not constitute abusive conduct, but an especially severe and egregious act may meet this standard;

Abusive work environment" means, an employee condition when an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects the employee to abusive conduct that causes physical harm, psychological harm, or both."

Time to review your handbooks– again

I would be interested in comments on how readers are addressing bullying in the workplace.

I also encourage you to obtain legal review of your employee handbooks and policies, even if you did so in 2013.

Yes, the NLRB has changed things that much. But more on that subject in a future post.

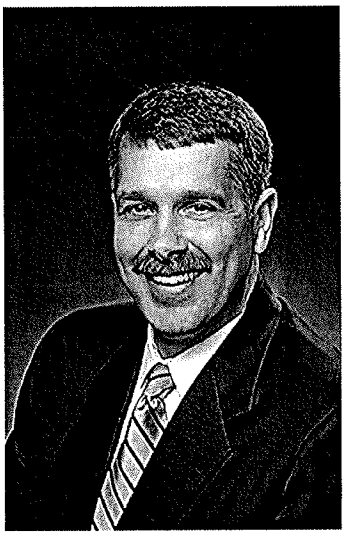
This article appeared on June 10, 2014 on *TLNT.com* and originally appeared on Fisher & Phillips *Workplace Safety and Health Law Blog.*

Published on *Industrial Distribution* (http://www.inddist.com)

Distribution & Supply Chains In the Crosshairs: The DOL's Focus On Contractors & Temps

Howard Mavity, Partner, Fisher & Phillips LLP

In my first article [1], I described efforts by unions and third parties to attack and embarrass distribution employers. This article will discuss the U.S. Department of Labor and other federal and state government agencies' focus on supply chain management and distribution. The Administration, unions, and many academics do not like the methods by which manufacturers manage their supply chain or the way in which distributors handle the product. They distrust the shift of non-core functions from large, often unionized, vertically integrated manufacturers to specialized companies.



The theory is that the contractors are under such competitive pressure that they will ignore OSHA requirements and will fail to pay for all hours worked or for overtime premiums. The assumption is that part of the reason manufacturers hand off certain functions is to escape liability for wage and safety violations. Moreover, critics believe that temporary and other non-traditional employees receive inadequate supervision and safety training. As I typed this article, I saw a legal alert that summed up the attitude of the government:

"California lawmakers are swiftly pushing forward a bill designed to curb the practice of employers hiding behind staffing agencies to shield themselves from workers compensation and wage violations..."

Or how about this explanation from OSHA's head, David Michaels, for OSHA's focus on temporary employees and employers who use them:

"Host employers need to treat temporary workers as they treat existing employees. Temporary employers share control over the employee and are therefore jointly responsible for temp employees' safety..."

Managing Temporary, Lumpers, Contractors, and Other Non-Routine Employees

Many distributors use temporary workers or logistics companies to manage seasonal and other workforce fluctuations. OSHA is concerned, not without reason, that temps may not receive the same supervision and training as full time employees. Similarly, many employers use temps in the warehouse setting as temp-to-perm, which is basically an audition period for full-time employment. So here are a few tips:

- **The employer supervising** the temp employee records an injury on the OSHA 30 even if an agency handles the worker's compensation claims.
- **Safety hazards are the same** for a temp and a full-time employee performing the same duties, so they should receive exactly the same training and PPE, as well as participate in the same safety meetings and in all ways be held to the same safety standards.
- **Many temps work for months and years** at a time with the same employer and must be included in any respiratory protection or hearing conservation programs (such as for certain work areas around conveyors).
- **Speaking of those temps who may work** for you for longer periods than some full-time employees, you should audit your workforce because (a) you may not know how many such workers you use, and (b) may realize just how long they have been with you.
- **You may not have a clear grasp** of the role of non-routine employees and may not be using them effectively.
- **If you use lumper or other logistics** providers on site, you still retain some degree of what OSHA calls controlling employer responsibility to monitor or take some steps to require your on site provider to comply with OSHA standards. Often the provider has supervision on site and you do not want to interfere with themeans and methods of how they do their job. Nevertheless, you should take steps to ensure that the provider has effective safety procedures in place during your prequalification of the provider. Require that the provider document site-specific "Job Safety Analysis" (JSAs) that they have prepared for each job requiring PPE. Ask for documentation of training. Do not take on responsibility to review their training materials and programs, but do make them document their efforts. The provider may be a separate employer with its own supervisors, but if their employees are hurt or if they are cited for OSHA violations, the odds are that in some fashion you will be drawn into the fray.

Wage and Discrimination Issues

The tests for joint employer vary according to the state or federal law, and in most cases you want to avoid joint employer status for contractor employees working where they are supervised by the provider. But don't assume that your efforts are adequate. As set out in the new Fed Wage-Hour Director's book, *The Fissured Workplace: Why Work Became Back So Bad For So Many And What Can Be Done To Improve It,* government agencies are straining to hold the large companies using contractors responsible for wage and other violations by their contractors.

Workers engaging in harassment or creating a hostile work environmentdo not distinguish between temporary and full-time employees and limit their bad behavior to one group. Your temp employees may not be as aware of your anti-discrimination policies or complaint procedures as longer term employees. They may seek assistance from the EEOC or a plaintiff lawyer rather than using your open door policy. The modern worker's sensitivity to bullying is behind many same-sax and other harassment claims. Employees do not tolerate the same level of horseplay and rough teasing that those of us in our 50s endured. When you see a claim that a male coworker photographed and shared photos of another worker in a shower or hung a noose "as a joke" in a work area, that outrageous

conduct did not occur overnight. There was a gradual loss of professionalism in the workplace.

Bullying, Professionalism, And The NLRB

Many employers are issuing "No Bullying" policies and/or training supervisors to address unprofessional workplace behavior before it rises to a legal claim. Many companies have issued civility or code of conduct policies. However, the NLRB has quite literally declared war on any policy which the board believes in any way might discourage employees from exercising their rights to organize or discuss wages, benefits and terms and conditions of employment. Although the board itself has acknowledged that union organizing and disputes are not synonymous with cursing and uncooperative or abusive behavior, they strike down most policies they review.

Howard Mavity is a partner in the Atlanta office of Fisher & Phillips LLP and co-chairs the firm's Workplace Safety and Catastrophe Management Practice Group. He draws upon his past business experience in transportation, logistics, construction, and industrial supply to work with clients as a business partner, and focuses on eliminating employee problems by commonsense management. Mavity has provided counsel for more than 225 occasions of union activity, guided unionized companies and has managed some 500 OSHA fatality cases in construction and general industry, varying from dust explosions to building collapses, in virtually every state. For more information, please visit http://www.laborlawyers.com/hmavity [2].

Links:
[1] http://www.inddist.com/blogs/2014/05/preparing-union-embarrassment-tactics
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Claims Management More Like This

'Boys Will Be Boys' Isn't a Defense

By Howard Mavity
Published On: Tuesday, September 2, 2014 10:42 AM

Labor lawyers often hear, "that just won't work in the real world" and are accused of being impractical, especially regarding civility and professionalism in the workplace. "People cuss, people tease, language has changed, snark is in. Do you want a frigid workplace? Lighten up." The fact is, these things make employment law claims more likely.

The problem is that the truly awful harassment cases (e.g., a noose hung by a toolbox, repeatedly calling someone a faggot or employees showing porn to their colleagues) were not based on one isolated incident that came out of the blue. Most egregious situations started with seemingly harmless teasing and "normal" workplace cursing. Behavior worsened over time. Jokes became cruder. Teasing turned mean.

WHY ARE SUCH THINGS STILL HAPPENING?

Employers maintain no-harassment policies and complaint lines. They conduct sensitivity training and regulate electronic communications. But problems still arise. Consider a few factors that contribute to harassment, discrimination and retaliation claims.

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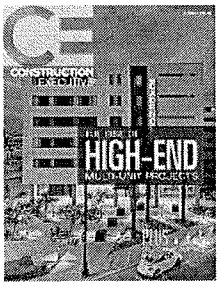

- Do not base anti-discrimination and harassment efforts on the assumption that ...ployees, inc... ...gers ... alw... ...omp...
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- ...Vorkers n... ...pe... ...info... ...are ... ...sitive ... ...eal o... perceived slights.
- "Bullying" behavior won't be tolerated; nor should it.
- Social media has multiplied the opportunities to hurt or offend others, while simultaneously contributed to employees sharing unprofessional personal matters at work.
- More harassment and hostile environment claims are raised based on race and national origin than gender.
- Employers have not effectively and consistently trained and developed frontline supervision.
- Management edicts rule, but don't model professional behavior.

Beyond recognizing the above challenges, what should one do?

ADAPT TO THE CHANGES

Commit to actively demanding "professionalism" and "good judgment" from employees. No shop, factory floor or construction site is too crude to demonstrate professionalism. No work is too crude to be treated professionally. Set an example and demand more from employees than not violating the no harassment policy. Connect customer service with workplace behavior. Because of recent National Labor Relations Board challenges of conduct codes, give clearly define examples of unprofessional work behaviors.

Deal with workplace bullying. Horseplay and teasing often trigger employee claims that they were mistreated because of their disability condition, race, sex or other protected characteristic. Few states have enacted anti-bullying laws, and about the only way to sue an employer is to frame bad treatment as "discrimination." So don't be surprised when acting abusively gets the employer sued.

Bullying is difficult to define. It's more than just being a "jerk." Workable definitions were set out in recent surveys, including a Monster Global poll that determined that 64 percent of respondents believed that they had been bullied – either physically hurt, driven to tears or suffered harm to their work performance.

Train supervisors to catch teasing and horseplay before it goes too far. One occasion of cursing or telling an off-color joke should not create a hostile environment. It is doubtful that any workplace will ever be devoid of cursing and horseplay. Instead of looking for a line that must not be crossed, remind employees to keep it work-like.

Someone may indeed be "over-sensitive." The company may be exonerated after a lengthy trial, but no employee wants to go through a humiliating investigation and trial. Teach employees, especially frontline supervisors, to recognize that not everyone wants to play, and often the ones who most dish it out are the ones who can't take it. So they sue.

Explain in a straightforward fashion the ways that social media can cause trouble. Instagram and texts are more worrisome than Facebook, although extraordinarily bad stuff continues to be posted on Facebook. The electronic word is tone-deaf. The reader may not recognize one's witty humor.

So what's a test for good behavior? Tell an employee or manager to describe some coarse joking, cursing and pranking, involving men and women or people of different ethnicities. Now ask the employee to imagine standing before an irritated judge and jury and defending his actions by explaining, either "you had to be there" or "I was just playing." It doesn't work. Managers and employees must know that any email or conversation could end up as evidence, so don't say anything that could be used as evidence.

Leave a Comment

THE EDITOR

Marla McIntyre
For more than 25 years, Marla has educated contractors, subcontractors, bankers, public and private owners, legislators, educators, insurers, and attorneys on contract surety bonding and construction issues. She's the author of more than 100 articles, including an award-winning series for the Risk Management Association, and has written books, directories, informational brochures, and reports. Her extensive construction and risk management background includes stints as executive director the American Subcontractors Association of Metro Washington and the Surety Information Office. She also worked for Associated General Contractors of America, National Conference of States on Building Codes & Standards, Association of Major City Building Officials, and National Concrete Masonry Association. She served on the boards of the Construction Writers Association, and American Council for Construction Education and was active in the Construction Owners Association of America.

Submit an Article

Howard Ma[illegible]

Howard Mavity is a [illegible]r with [illegible] of the nati[illegible] and [illegible] firms [illegible] employe[illegible] [illegible]-chairs the firm's Workpla[illegible] [illegible]astro[illegible] management [illegible] on his vast business expe[illegible] in tr[illegible]atio[illegible] construc[illegible] [illegible]stri[illegible] [illegible]nts a[illegible] business [illegible] commonsense management. He is also co-editor of the firm's Workplace Safety and Health Law Blog and can be reached at 404-240-4204 or hmavity@laborlawyers.com.

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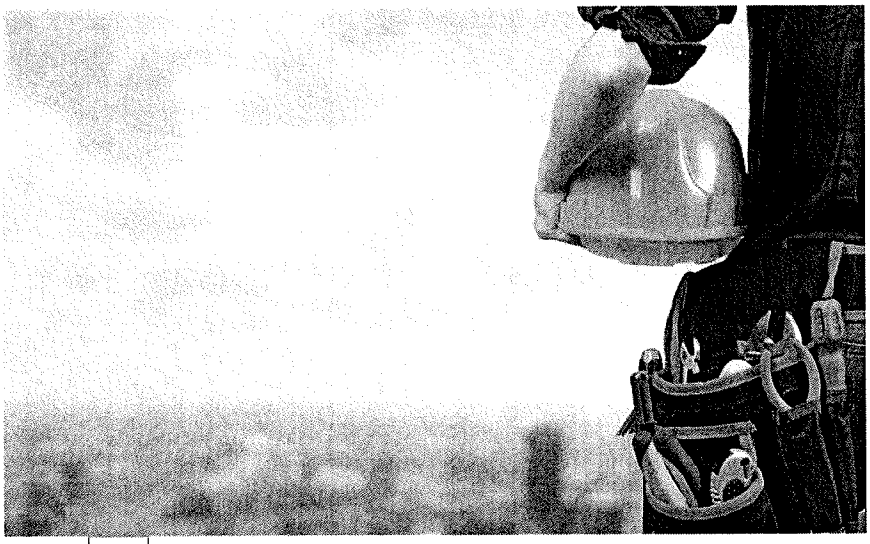
CONSTRUCTION EXECUTIVE
RISK MANAGEMENT

Best Practices

Creating a Construction Workplace Where Women Can Succeed

By Howard Mavity
Published On: Wednesday, October 8, 2014 12:35 PM



The construction industry is faced with a significant shortage of employees ranging from craft workers to safety professionals, with the problem expected to become much worse. In order to attract women to construction, the industry must create a workplace where they can succeed.

Addressing factors that affect women's success will improve the overall operation for men and women. It is just not about "political correctness." It would behoove employers to encourage women to pursue skilled crafts and to take steps to improve their chances of success.

AVOID GENERALIZATIONS

Generalizations get employers sued. Do not automatically assume a woman cannot perform certain tasks or would be uncomfortable in a certain setting. Maybe the candidate cannot perform some of the physical tasks, but engage in a defensible individualized analysis before making that conclusion.

Because of Americans with Disabilities Act and workers' compensation concerns, employers should apply an individualized analysis of an employee's ability to perform the essential functions of a job. In order to perform an objective analysis, one must have accurate (not speculative or unrealistic) job descriptions.

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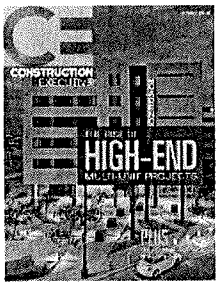

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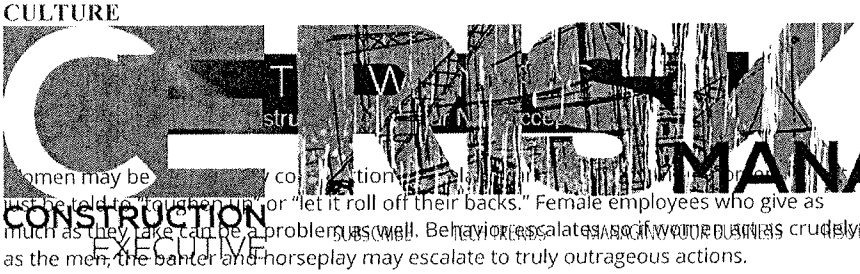

...omen may be ... co...ation ... just be told to "suck it up" or "let it roll off their backs." Female employees who give as much as they take can be a problem as well. Behavior escalates as if women are guys as crudely as the men, the banter and horseplay may escalate to truly outrageous actions.

Keep in mind that construction employers are seeing an increase in claims by men stemming from bullying and crude and mean-spirited horseplay. Males increasingly expect a different environment than in the past. Horseplay is an everyday occurrence on a construction site. However, analysis of these bullying and harassment-driven legal claims shows an escalation over time to a continuous mean-spirited attack.

The obvious solution is to catch teasing and horseplay before it progresses to harassment or intimidation. The not-so-obvious answer is how to do so. Educate employees. Give them examples of how they may be personally liable when behavior goes too far. Emphasize that just because one employee dishes it out, does not mean that the recipient can or should tease back, nor does the recipient have to endure harassment. The problem arises when one gives that advice to someone who is overly sensitive or is a "walking lawsuit." Employers and supervisors should think about their actions and words and how a jury might perceive them. Explanations such as, "you had to be there" or "boys will be boys," don't work. Even winning a lawsuit or undergoing an Equal Employment Opportunity Commission or Office of Federal Contract Compliance Programs investigation costs money.

BATHROOMS

OSHA standard 1926.51 requires employers to provide accessible sanitary facilities for all personnel and to ensure that these facilities are maintained in an appropriately clean and sanitary condition. While employers may not be expressly required to provide separate portable toilets for women, it is still a good idea. If not, make sure that there are an adequate number of clean facilities and that hand sanitizer is available. Men appreciate those same things. If the site operates at night, ensure that facilities are in an open and well-lit area. Not providing adequate facilities can be the basis for a discrimination or harassment complaint:

The OFCCP found that the contractor did not provide adequate restroom facilities for female employees. At times, the contractor provided no restrooms for women, and female employees were forced to relieve themselves outdoors, even in the presence of male colleagues. When a restroom was available, it was not separate from the men's restroom and was not clean. Investigators also found that female workers were subjected to unwelcome, sexually charged comments, teasing, jokes and pressure to go out on dates.

Some contractors erroneously assume that all construction sites are under OSHA's rules for "mobile crews," which require "having transportation readily available to nearby toilet facilities." OSHA's 2005 interpretation defines "Mobile Crews" as "workers who continually or frequently move from jobsite to jobsite on a daily or hourly basis." Workers who report to a conventional construction project, where they work for more extended periods of time (days, weeks, or longer), are not "mobile crews" for purposes of the sanitation standard, so adequate facilities must be provided.

PERSONAL PROTECTIVE EQUIPMENT AND WORK PRACTICES

Personal protective equipment (PPE) present unique challenges for women. Poor fitting fall protection gear can gravely injure men and women. Make sure that gear properly fits women, as well as unusually small or overweight men. Check gloves and reflective vests. A woman's size and physiology also may necessitate more "ergonomic" analysis or even different tools.

Most training is not provided in a classroom setting. New employees learn from more senior employees. Women have reported that they receive fewer practical tips and ways to perform tasks more easily than new male workers. It's already hard to ensure consistent mentoring and training, and this knowledge transfer is more difficult from female workers. Build a culture in which employees will raise safety and work concerns to supervisors. Female workers must feel comfortable raising concerns unique to women.

VIEWS FROM THE SITE

THE EDITOR

Marla McIntyre

For more than 25 years, Marla has educated contractors, subcontractors, bankers, public and private owners, legislators, educators, insurers, and attorneys on contract surety bonding and construction issues. She's the author of more than 100 articles, including an award-winning series for the Risk Management Association, and has written books, directories, informational brochures, and reports. Her extensive construction and risk management background includes stints as executive director the American Subcontractors Association of Metro Washington and the Surety Information Office. She also worked for Associated General Contractors of America, National Conference of States on Building Codes & Standards, Association of Major City Building Officials, and National Concrete Masonry Association. She served on the boards of the Construction Writers Association, and American Council for Construction Education and was active in the Construction Owners Association of America.

Consider these comments and recommendations from successful woman in the industry:

- *Tre[illegible] if they have a[illegible] as in an und[illegible]gs and know h[illegible] sign[illegible]*
- *A[illegible] asked[illegible] can[illegible] notes[illegible] cial gene[illegible] for "taking mee[illegible]nin[illegible]*
- *As a manager[illegible]n q[illegible], don[illegible]*
- *I see tradeswomen, especially apprentices, performing menial tasks and running errands when their apprentice (male) counterparts are actually getting hands-on experience.*
- *Giving women an opportunity to excel is important; we all have to start somewhere, and we'll all make mistakes. Mentor women so that they don't make critical mistakes. Don't assume that because one woman couldn't make it that no woman will succeed.*
- *Within one well-run company, in 15 years, I have not met a woman who has been asked to be a foreman, GF or superintendent. I know they're out there, but they have to be given the opportunity to be developed and to try out for the position.*
- *Don't assume that because a woman is of child-bearing years that she will not make a great leader in the trades or in the professional side of construction. Offer her the same opportunities – if she turns them down, then so be it. But it has to be offered.*

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Howard Mavity

Howard Mavity is a partner with Fisher & Phillips LLP, one of the nation's leading labor and employment firms representing employers. He is a partner in the Atlanta office. He co-chairs the firm's Workplace Safety and Catastrophe Management Practice Group. He draws upon his past business experience in transportation, logistics, construction, and industrial supply to work with clients as a business partner, and focuses on eliminating employee problems by commonsense management. He is also co-editor of the firm's Workplace Safety and Health Law Blog and can be reached at 404-240-4204 or hmavity@laborlawyers.com.

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EHSToday.com Interview: Attorney Howard Mavity Discusses Leading and Lagging Indicators and OSHA

Sandy Smith

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Attorney Howard Mavity has a lot of ideas about improving workplace safety for someone who is not a safety professional by trade. Perhaps it's because Mavity often has a front row seat to what can go wrong when employees and/or employers forget to keep safety front of mind.

Howard Mavity probably has tried more worker death cases than any other U.S. attorney. "I've tried 460-something death cases," he notes, "and it makes you think about how they could be prevented."

According to Mavity, as many as 70 percent of the death cases he's represented involved "skilled, experienced employees making errors. Anecdotally, these were 'good people,' with families, who were considered reliable and trusted by their coworkers. But they got nonchalant – casual –about safety."

Mavity, a partner in the Atlanta law office of Fisher & Phillips LLC, suggests that one of the biggest mistakes his clients can make is to allow repetition – a same thing/different day attitude – to permeate their safety culture and workplace. "They continually should be introducing new methods to remind employees about safety," he suggests.

Leading vs. Lagging Indicators

Companies that rely on canned, off-the-shelf "tool box talks" risk making their pre-shift meetings irrelevant or boring for workers, he notes. Such talks need to be job- and site-specific, Mavity suggests, especially for employers like construction contractors, where weather conditions, a continuously evolving workspace and a fluctuating number of workers and trades on the site greatly can impact safety day-to-day. Mavity considers job- and site-specific training programs and pre-shift meetings a leading indicator of companies that are world-class.

However, he says, his clients, who are some of the largest manufacturing and construction companies in the country, remain focused on injury and illness rates. While most of them agree that lagging indictors, such as injury and illness rates, are not the best measure of safety culture, no one can seem to find a consistent and adequate replacement to measure safety performance.

"People are addicted to these numbers," says Mavity. "I'm an economics major and I know that if you torture a number enough and it can say anything."

He suggests employers examine true employee involvement in safety as a leading indictor. We're not talking about participating on a safety committee, says Mavity, "because everyone has a safety committee – but employees who actually lead toolbox talks and make suggestions to improve safety in the

workplace. Formally evaluating management on safety performance – and tying it to compensation – also is a leading indicator, says Mavity.

Another leading indicator is good housekeeping. Mavity says that in a high percentage of the death cases he's taken to trial, and for companies that have received willful OSHA violations or have been placed in the Severe Violator Program, housekeeping – or a lack of it – is an obvious issue. "If it's a manufacturing facility, you walk in there and it's just messy," says Mavity. "Broken tools, broken windows, dust buildup on machinery and windowsills. If it's a construction site, you see materials piled up, cords snaking around, trip and fall hazards everywhere. Good housekeeping is one of the best predictors of safety, and is a leading indictor."

While everyone agrees that tracking near misses is a leading indicator of world-class safety, "There is a lack of consistent definition for how to define a near miss," says Mavity, adding that the person who can create a universally accepted definition of a near miss "would be doing everyone a great service."

Mavity believes that discipline for safety violations is another leading indicator, one that is ignored by many employers. "Most employers don't discipline employees for safety violations," he says. "If they do, it's because of an injury. It's not punishment – although OSHA doesn't see it that way – but because something happened that revealed violations of safety policies."

OSHA and Whistleblower Protections

As the co-chair of Fisher & Phillips' Workplace Safety and Catastrophe Management Practice Group, Mavity often works with companies facing citations from OSHA or the Department of Labor's Wage and Hour Division. He's represented companies that are being dinged by OSHA for firing employees who have been injured on the job, when in the employees actually were fired for committing unsafe acts. From OSHA's perspective, the employee got hurt and was fired for reporting the injury; a big no-no. Mavity says that in reality, the employee reported an injury, the employer investigated and conducted a root cause analysis of the incident, and determined that the employee violated corporate safety policies.

According to Mavity, OSHA will seek to determine if it appears that injured employees are disciplined more frequently or severely than uninjured employees who also acted in an unsafe manner. OSHA will consider whether an employer actively monitors the workplace for compliance with the work rules "in the absence of an injury." The agency also will take a hard line when it comes to "vague rules, such as a requirement that employees maintain situational awareness or work carefully."

This increased scrutiny by OSHA makes it even more important for companies to focus on leading indicators and adopt a safety strategy that utilizes them.

Such a focus still might be a long way off. Mavity recently attended a meeting where nationally recognized executives, academics, association representatives and insurance professionals gathered to informally discuss overhauling workplace safety incentive programs, since OSHA has indicated such programs have the potential to discourage worker injury reporting, a activity that the agency considers "protected" under whistleblower laws. Many of those attending the meeting acknowledges they rely on lagging indicators, even though they know that leading indicators are a better barometer of safety culture.

Mavity conducted a survey of larger construction contractors that shows 60 percent of them still rely on injury and illness data. "They all believe in theory of using leading indicators, but we still rely on lagging indicators," admits Mavity. "That has to change."

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Survey Offers a Glimpse Into the Safety Culture of General Contractors

Sandy Smith
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A recent survey of general contractors conducted by law firm Fisher & Phillips LLC offers a glimpse into the safety culture at general contractors around the country.

Attorney Howard Mavity, who co-chairs Fisher & Phillips' Workplace Safety and Catastrophe Management Practice Group, said that a recent survey was distributed to the Associated General Contractors (AGC) – National Safety committee, AGC Chapters in Missouri, Texas, Georgia, the Carolinas and to a large percentage of the larger U.S. general contractors. Almost 100 contractors responded.

He said that employers agreed that OSHA is opposed to safety incentive programs that are based on injury and illness rates because they believe that such programs discourage employees from reporting workplace injuries.

"After dozens of six-figure awards, OSHA has made it clear that it views discipline for violating safety rules as often being a pretext for retaliation against employees who reported workplace injuries," noted Mavity, who analyzed the survey results along with researcher Shanae Bradley.

Both OSHA and the general contractors surveyed agree that employers increasingly should focus on leading indicators and behavioral factors that may prevent accidents. However, Mavity noted, construction contractors also are concerned that their customers evaluate contractor safety performance based on workplace injury rates, which focus on lagging indicators rather than the leading indicators that predict the effectiveness of safety programs.

Fisher & Phillips surveyed employers to determine which leading indicators should be utilized, as well as other strategies that improve safety processes. F&P surveyed an audience of sophisticated general contractors because these employers tend to have strong safety cultures.

Other interesting findings of the survey include:

- 83 percent of respondents informally or formally include safety in supervisor or management performance evaluations.
- 75 percent include safety criteria in non-management employee performance evaluations.
- 87 percent provide job-specific safety requirements for subcontractors, and 65 percent track subcontractor safety performance.
- 76 percent said they conduct a pre-job safety analysis or other program to individually analyze safety associated with each step of the work sequence at a project.

- 88 percent said they do not discuss specific safety issues of the day's tasks at morning or daily pre-work meetings.

While many of the contractors surveyed utilize leading indicators like near miss tracking, including safety in performance evaluations and safety observations, there was no agreement as to the leading indicators that should be used to judge safety culture.

"Until employers agree on certain leading indicators, they will be reluctant to shift their focus from relying on injury and illness data," said Mavity. "As many as 60 percent of respondents [in construction] to some degree still rely on injury rates. Our interviews and other studies indicate that 70 to 80 percent of manufacturers may still rely on injury and illness rates to incentivize and drive safety processes.

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