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OSHA AND THE Farmer

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**Joint Agricultural Economics
Law Research Project**

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FOREWORD

The Agricultural Economics/Law Research Program, a cooperative venture between the School of Law at the University of North Dakota and the Department of Agricultural Economics at North Dakota State University has been in operation since 1960. The effort is funded by the North Dakota Agricultural Experiment Station Research Project No. ND 3319. Designed to research various aspects of North Dakota law and to report the findings in published form readily available to all North Dakotans, the program has been successful in producing numerous reports. Among those published as Department of Agricultural Economics Miscellaneous Reports are:

- 5 Drainage Law in North Dakota
- 6 Condemnation of Farmland for Highways
- 7 Farm Fence Laws
- 8 Wildlife and the North Dakota Farmer
- 12 North Dakota Noxious Weeds Law and Regulations
- 18 Severed Mineral Rights
- 19 An Introduction to Easements
- 24 Coal Leasing Practices and Surface Owner Protection Acts
- 34 OSHA and the North Dakota Farmer
- 35 The Cooperative-Corporation as a Form of Business Organization

Soon to be available:

- Family Estate Planning (revised)
- Water Rights (revised)
- Weather Modification (revised)

OSHA AND THE FARMER

by
JEROME E. JOHNSON and RANDALL K. HANSON*

Congress passed the Occupational Safety and Health Act (OSHA) in 1970. Its purpose is to assure a safe and healthy working environment for all American workers, including farm workers. OSHA applies to any farmer engaged in an agricultural activity who employs one or more employees (not including family members). However, OSHA currently has been appropriated no funds to enforce OSHA regulations against employers of 10 or less farm employees. Until Congress appropriates money to OSHA to enforce the regulations, no sanctions will be issued by OSHA against employers of 10 or less farm employees.

Farm work is a potentially dangerous occupation with its high accident and death rates. The injury rate for agricultural workers exceeds that of all major occupational groups except for coal miners and construction workers. A recent study indicates that farm workers were injured or killed at a rate of 67 per 100,000; while the average for all industries is 18 per 100,000. Farm worker problems may be even more serious than the statistics indicate. The life expectancy of a farm worker is less than that of the average worker, which suggests unreported medical problems of inadequate health and safety conditions on jobsites.

OSHA FORMAT

OSHA has a "general duty" clause which requires each employer to furnish each of his employees employment and a place of employment free from recognized hazards that may cause death or serious physical harm. All employers are covered by this general duty clause. Employers are unhappy with this clause because there is really no way he can learn what is required of him. The Act does not define recognized hazards and employers act at their own peril as to whether hazards exist or not. OSHA inspectors have considerable discretion in interpreting what is required by the general duty clause, which may vary from one inspector to the next.

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The Act directs the U.S. Secretary of Labor to develop, promulgate, and enforce occupational safety and health standards. Standards can be detailed to cover (1) a specific industry—agriculture, (2) a specific problem common to all industries—sanitary facilities, and (3) a type of machine used in many industries—conveyors.

The Secretary of Labor has two methods of developing safety standards. If he determines that employees are being exposed to serious danger from toxic or physically harmful substances so that an emergency standard is necessary to protect those employees, he may immediately issue an "emergency temporary standard" which is effective for six months. The Secretary can also develop permanent standards. This process involves public notice, the opportunity for comment and a public hearing, and a determination that a final standard will or will not be issued. The Secretary in developing permanent standards is governed by legislative timetables and is allowed 14 months to make a final determination after deciding a standard is necessary.

EFFECT ON AGRICULTURE

The enactment of OSHA may be the most significant safety legislation ever enacted. OSHA has affected many businesses and industries, but has had only a minimal effect on agriculture so far. Since 1970, except for the general duty clause, only seven agricultural standards have been promulgated. This is surprising when so many standards govern other industries. The seven agricultural standards are:

1. Sanitation in Temporary Labor Camps. Although the term "temporary labor camp" is not clearly defined, it appears to refer to facilities used as living or cooking quarters by seasonal farm employees. Regulations cover such matters as site, shelter, water supply, toilet facilities, sewage facilities, laundry and bathing set-ups, lighting, cooking and dining facilities, insect and rodent control, refuse disposal, first aid, and reporting of communicable diseases. This standard in North Dakota would have its greatest impact on the Red River Valley farmers who house migrant

workers in the spring and summer for weeding work.

2. Storage and Handling of Anhydrous Ammonia. This standard covers approved types of equipment; location and marking of storage containers; approved types of pumps, hoses, valves, gauges, and safety relief devices; training for personnel using the ammonia; methods for filling the containers; transfer of contents; and installation requirements.

3. Pulpwood Logging. This standard does not concern North Dakota farmers.

4. Slow-Moving Vehicles. This standard requires that vehicles which by design travel at less than 25 miles per hour on public roads must display a slow-moving vehicle emblem. The emblem is a fluorescent yellow-orange triangle with a dark red reflective border. This standard is probably the most widely recognized contribution OSHA has made.

5. ROPS - Roll-Over Protective Structures for Tractors. Tractors which have been rolled over on farm workers have been a major cause of injuries. OSHA developed a standard requiring farm employers to equip certain farm tractors with roll-over protective structures and seat belts to alleviate this problem. The standard applies to tractors of over 20-engine horsepower manufactured after October 25, 1976.

OSHA realized that the roll-over structures would not be feasible in some farming operations. The standard allows farm employers to remove the roll bars when clearance is a substantial problem, such as in orchards, vineyards, hopyards, or inside farm buildings. ROPS also can be removed when tractors must be operated with incompatible mounted equipment, such as corn pickers.

If a farm employer removes the ROPS for a reason not provided in the regulations, only he can operate the tractor. The ROPS must be reinstalled before an employee can operate the tractor. This regulation also requires that employees be given specific operating instructions when initially assigned to the tractor and at least annually thereafter.

6. Guarding of Farm Field Equipment. Accidents with farm machinery cause a large percentage of the farm injuries. OSHA recognized this in developing a standard requiring various safety devices on farm equipment. The standard requires a variety of guards, shields, and access doors to protect employees from the hazards associated with moving machinery parts.

7. Pesticides. In 1973 the Secretary of Labor issued a temporary emergency standard on the use of pesticides. This standard was invalidated

by the courts for a lack of a showing of an emergency situation. After this action, it appears that OSHA has ceded its authority in this area to the Environmental Protection Agency.

OSHA PROCEDURES

The Secretary of Labor and his representatives have the duty to enforce OSHA. They are authorized to inspect and investigate the jobsites of almost all working men and women in the United States. OSHA officials generally rely on unannounced inspections to determine if employers are providing a safe working environment. The Act prohibits giving advance notice of any inspection and backs up this prohibition with a criminal penalty for any violators. In addition to unannounced inspections, an employee has a right to request OSHA to perform an inspection if the employee believes that a violation of a safety or health standard threatens physical harm or that an imminent danger exists. Also, any violation may be brought to the attention of OSHA officials by an employee prior to or during an inspection.

When a work site inspection reveals that an employer has violated either the general duty clause or specific standards or regulations, OSHA inspectors can issue both a citation and a proposed penalty. The citation must be posted at or near the place of violation to protect employees. An abatement period is set for the removal of the hazard. Employees can seek a review of a refusal to issue a citation regarding an alleged violation and can challenge the abatement period fixed by an issued citation as unreasonably long. Employees are protected from retaliation by the employer. A worker may not be discharged or discriminated against in any way for filing a complaint or for initiating any proceeding related to the Act. The employer cannot retaliate for harmful testimony if an employee is called to testify in a proceeding. If an employee believes discrimination has been practiced, he or she can file a complaint with the Department of Labor which will investigate and seek relief for the employee if discrimination is found.

Employers are required to post notices in the places of employment informing employees of their rights under the Act. An employer has the opportunity to contest a citation, penalty, or abatement period. The employer also can seek a variance from a standard or regulation if a legitimate reason can be shown why compliance should not be required.

TYPES OF VIOLATIONS

The type of citation and penalty issued depends on the type of violation discovered.

1. If a substantial probability exists that serious physical harm or death will result from the violation and if the employer knew or should have known of the hazard, then the violation is termed "serious." When a serious violation is found, a "Citation for Serious Violation" is issued.

2. If a potentially hazardous situation has a direct and immediate relationship to the health and safety of employees, but is not sufficiently dangerous to cause serious physical harm, then the violation is other than serious. When an investigation reveals a nonserious violation, a form entitled "Citation" is issued.

3. If the violation is of a standard which has no immediate or direct relationship to safety and health, OSHA issues a "De Minimis Notice," which is not a citation and has no proposed penalty.

Citations are to be issued with reasonable promptness after an inspection, but no later than six months after the occurrence of any alleged violation.

ABATEMENT PERIOD

A reasonable time must be allowed to the employer to remove a hazard. Reasonable time will depend on the seriousness of the violation, the number of exposed employees, and the availability of personnel and equipment necessary to correct the situation. In certain instances, with the approval of the compliance officer and the OSHA area director, an employee may establish his own abatement program and determine a reasonable abatement date. Employers must submit progress reports advising the area director of specific corrective action taken with respect to each violation and the date of such action.

PENALTIES

OSHA is granted the power to impose severe penalties. The employer may be assessed a civil penalty for violation of either the general duty clause or specific standards. Criminal fines and sentences are also authorized. Unless the situation is de minimis, the area director sends a notification by certified mail of the proposed penalty within a reasonable time following issuance of the citation.

CLASSES OF VIOLATIONS

1. Willful or Repeated Violations. The maximum

penalty for each willful or repeated violation is \$10,000. A willful violation is where the evidence shows:

a. The employer committed an intentional and knowing violation of the Act and the employer is conscious of the fact that what he is doing constitutes a violation of the Act; or

b. Even though the employer was not consciously violating the Act, he was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition. The violation need not be done with an evil intent; it is sufficient that the act was deliberate, voluntary, or intentional as distinguished from those which were inadvertent, accidental, or ordinarily negligent.

A repeated violation occurs when an employer is again cited for a violation for which he previously had been cited and had abated.

2. Willful Violations Involving Death. The Act provides for criminal penalties of not more than \$10,000 or imprisonment for up to six months, or both, for a willful violation causing the death of an employee. An employer may be fined up to \$20,000 or imprisoned for up to one year, or both, upon a second conviction for a willful violation involving death.

3. Serious Violations. Citations for serious violation subject the employer to a potential penalty of up to \$1,000. Several things can reduce the amount of the penalty. The employer's history of previous violations, the size of his business, and his good faith are considered in determining the amount of the actual penalty.

4. Nonserious Violations. A discretionary assessment of up to \$1,000 for each violation may be imposed. The penalty will depend on the probability of injury occurring and the severity of the possible injury.

5. Procedural Violations. Failure to correct a cited violation within the time allotted for abatement may result in a penalty of up to \$1,000 per day for as long as the violation continues.

a. The penalty for giving unauthorized advance notice of an inspection is a fine of not more than \$10,000 or imprisonment for not more than six months, or both. The same penalty applies to individuals who knowingly perjure themselves in any OSHA documentation.

b. A civil penalty of up to \$1,000 may be assessed for each violation of the posting requirements established in OSHA.

EMPLOYER'S RIGHTS

An employer who receives notice of a citation and proposed penalty may contest either or both

by notifying the Secretary of Labor. The Secretary notifies a Commissioner who conducts hearings for employees. The employer has the responsibility for initiating this procedure. The procedures are complex and the right to appeal can be lost if the appeal is not correctly made; consequently, the employer is well advised to consult an attorney. The employer in certain cases can appeal a decision to the circuit court of appeals.

RECORDS AND REPORTS

OSHA requires every employer covered under the Act to maintain occupational injury and illness records for his employees. It is the employer's responsibility to determine whether an accident or illness is reportable and to keep all records related to an accident. This responsibility may not be delegated. Employers with no more than seven employees at any one time during the year immediately preceding the current calendar year need not comply with the recording requirements except fatalities or multiple hospitalization accidents must be reported. Only work-related injuries or illnesses need to be reported.

Failure to comply with the Department of Labor's record keeping and reporting requirements may result in a citation and fine. The willful falsification of a report may result in a criminal penalty.

The three purposes of record keeping requirements are: (1) to promote the enforcement of the law; (2) to assist with research by providing the figures necessary to determine the frequency, causes, and ways of preventing accidents; and (3) to show employee exposure to harmful substances.

There are three main standard reporting forms:

1. OSHA Form 100. This is a log of occupational injuries and illnesses. Each reportable occupational injury and illness must be recorded on this form within six days after receiving information that it has occurred. The form requires that the following

be reported: name of employee injured, date of injury, job which he was performing, the injury or illness, number of lost workdays, and whether or not the employee was transferred to another job after the injury. The employer must classify each incident as fatal, lost workday, or nonfatal without lost workday.

2. OSHA Form 101. This form is used to record in detail the circumstances surrounding each reportable injury or illness recorded on OSHA Form 100. This form requires full identification and description of the injured employee; the place where the accident or illness occurred; a description of the specific activity in which the employee was engaged when the accident or illness occurred; the nature of the injury or illness; the body parts affected; the name and address of the treating physician, if any; and the date on which the report was prepared.

3. OSHA Form 102. This is an annual summary which must be completed no later than one month after the close of each calendar year. Form 102 summarizes the injuries and illnesses recorded on Form 100. This form must be posted for employees to see.

CONCLUSION

The high rate of injury, death, and disease indicates that agriculture is one of the most hazardous occupations. Even though agriculture is dangerous, OSHA has not closely regulated farming operations. In the future it is probable that Congress will appropriate more funds to OSHA to enforce the regulations against employers of one or more employees. It is also probable that OSHA will develop more standards in the agricultural area and will conduct more farm inspections to uncover violations. Farmers will have to become increasingly aware of OSHA procedures and regulations as more standards are developed.