

Week of **February 17, 2014**

## OSHA Issues Warning to Communications Tower Industry

OSHA has issued a specific warning to the communications tower industry on its safety practices.

The industry has had four fatalities this year and 13 deaths in 2013 at communication tower worksites, OSHA chief Dr. David Michaels noted in a February 10th letter to some 100 members of the National Association of Tower Erectors. This is many more deaths than occurred in the previous two years combined.

"I am writing to remind you that it is your responsibility to prevent workers from being injured or killed while working on communication towers," Michaels said. Most fatalities have resulted from falls, indicating no fall protection is being offered or employers are not assuring protection is being used properly. In addition, tower workers have been injured and killed by falling objects, equipment failure and the structural collapse of towers, according to Michaels.

He offered suggestions for improvement, including providing proper training, especially regarding fall prevention and monitoring to assure safe work practices are being followed. "OSHA will consider issuing willful citations, in appropriate cases, for a failure to provide and use fall protection," he warned.

He added that employers should select contractors carefully and provide close oversight. "Simple 'check the box' contract language" may not be enough to assure contractors work safely, he stated. Inspectors will pay particular attention to contract oversight issues, including identifying all potentially responsible parties in the contracting chain.

"For the sake of your employees and your business, I strongly urge you to do everything you can to prevent these needless injuries and deaths before anyone else is hurt, and before OSHA issues additional financial penalties," Michaels said.



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## OSHA Forecasts Nearly 38,000 Inspections This Year

OSHA has received all the money it requested for inspection activities this fiscal year, but less for its burgeoning whistleblower program.

An agency spokesperson said OSHA would conduct 37,635 inspections this year on a budget of \$207.8 million. Originally, the agency proposed doing 39,250 inspections, but the 16-day government shutdown in October, 2013 cut that number by about 1,400 visits.

The agency plans to use its 2014 inspection experience to develop a "weighting" system for use in the future. Some inspections, such as process safety reviews, can take up to six months, while a construction worksite inspection may last only six hours. Either type of inspection is weighted the same by OSHA. However, using a differentiated weighting approach would allow the agency to measure and assign its limited resources more accurately for the different types of inspections it carries out.

OSHA has not disclosed details of a weighting system, but Assistant Secretary Dr. David Michaels is known to prefer

inspections that take more time. If that happened, it would come at a cost of fewer inspections overall.

Unlike the inspectorate, OSHA's whistleblower program received just \$2 million in new money, far less than the \$6.9 million requested. The agency wanted the money to augment its existing 115-member whistleblower staff with 47 new hires. The agency said it needs the new positions to help reduce a case backlog and deal with additional work created by recent laws, including the Affordable Care Act. An agency spokesperson said no decisions have been reached on how many new positions the \$2 million would create.

OSHA's budget request predicted a backlog of 2,385 whistleblower requests in 2014. Last year, 82 percent of the 2,272 then-unresolved cases had been open for more than three months, with the average case pending for 13.6 months. Federal law calls for completing complaint investigations within one to three months, depending on the statute involved.

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## Employment Law Q&A

**Q:**

**One of our employees did not show up for work on Monday morning. We learned later that day that the employee was arrested over the weekend for assaulting his girlfriend, and was not released from jail until Monday afternoon. He did not call on Monday, but came to work on Tuesday. The employee's supervisor wants to fire him to protect the safety of other employees, but we have heard that employees cannot be fired for arrests that did not result in conviction. What should we do?**

**A:**

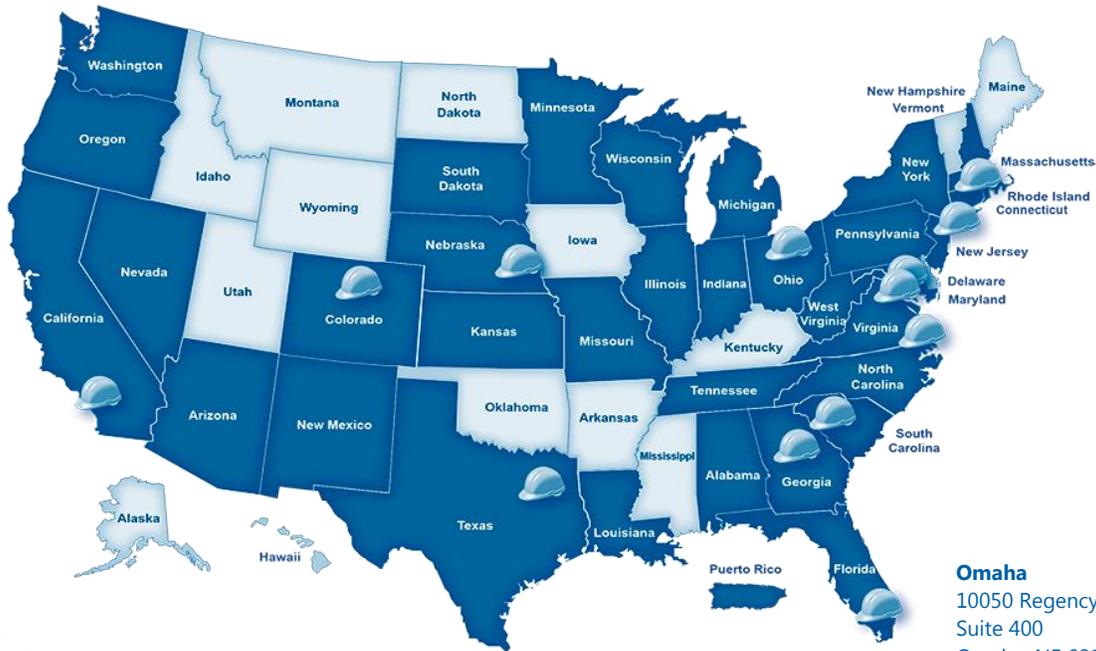
First, you can send the employee home while you decide your next steps. If the employee is exempt from overtime pay under the Fair Labor Standards Act (FLSA), he should be paid for the day. A non-exempt employee can be sent home without pay, but your company may want to send him home with pay for the day, as a show of good faith, since there is not enough information yet to determine what happened, whether the employee is guilty of anything, and the next steps the company should take.

It is true that EEOC guidance strongly discourages employers from discharging employees due to an arrest that has not resulted in conviction. This is because the EEOC's data shows that African-American and Latino men are more likely to be arrested than Whites and women, so a "no arrests" rule would have a disproportionate impact on these protected groups. Also, the EEOC reasons that someone who is arrested should be presumed to be innocent until proven guilty. Many states have similar guidelines, and some state laws prevent an employer from taking action against an employee due to arrests that have not resulted in conviction.

However, your company has a legitimate interest in protecting coworkers, customers and visitors from violence and in maintaining a safe workplace, so an investigation is warranted. Rather than focus on the fact that the employee was arrested, focus on the *underlying conduct*: obtain a copy of the police report and any other publicly available documents describing the incident, and ask the employee what occurred. The employee also should be permitted to provide any information or documents he believes is relevant to the investigation. (As a general rule, employees should not be discharged for misconduct without giving them an opportunity to respond to the allegations and provide information). Gather all of the information you can, ask questions of the employee, and then decide whether to continue to employ this individual. Employment is at-will, after all, and the fact that the employee committed an act of violence is a legitimate reason for termination, even if it did not occur at work. Your investigation need not be perfect, but it should be conducted in good faith and without bias. Always check state laws to make sure your actions are compliant. Finally, make sure that the termination does not violate any company policies, is consistent with precedent, and will set a future precedent that the company is willing to live with in the future.



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**Atlanta**

1155 Peachtree St. N.E.  
Suite 1000  
Atlanta, GA 30309  
*Dion Y. Kohler, Esq.*

**Boston**

75 Park Plaza, 4th Floor  
Boston, MA 02116  
*Stephen T. Paterniti, Esq.*

**Cleveland**

6100 Oak Tree Blvd.  
Suite 400  
Cleveland, OH 44131  
*Vincent J. Tersigni, Esq.*

**Dallas**

3811 Turtle Creek Blvd.  
Suite 500  
Dallas, TX 75219  
*William L. Davis, Esq.*

**Denver**

950 17th Street  
Suite 2600  
Denver, CO 80202  
*Donna Vetrano Pryor, Esq.*  
*Mark N. Savit, Esq.*

**Greenville**

55 Beattie Place  
One Liberty Square  
Suite 800  
Greenville, SC 29601  
*Robert M. Wood, Esq.*

**Los Angeles**

725 South Figueroa Street  
Suite 2500  
Los Angeles, CA 90017  
*David S. Allen, Esq.*  
*Benjamin J. Kim, Esq.*

**Metro New York**

58 South Service Road  
Suite 410  
Melville, NY 11747  
*Ian B. Bogaty, Esq.*  
*Roger S. Kaplan, Esq.*

**Miami**

One Biscayne Tower  
2 South Biscayne Blvd.,  
Suite 3500  
Miami, FL 33131  
*Pedro P. Forment, Esq.*

**Norfolk**

500 E. Main Street  
Suite 800  
Norfolk, VA 23510  
*Thomas M. Lucas, Esq.*  
*Kristina H. Vaquera, Esq.*

**Omaha**

10050 Regency Circle  
Suite 400  
Omaha, NE 68114  
*Kelvin C. Berens, Esq.*  
*Joseph S. Dreesen, Esq.*

**Orlando**

390 N. Orange Avenue  
Suite 1285  
Orlando, FL 32801  
*Lillian C. Moon, Esq.*

**Washington, D.C. Region**

10701 Parkridge Blvd.  
Suite 300  
Reston, VA 20191  
*Henry Chajet, Esq.*  
*Tressi L. Cordaro, Esq.*  
*Garen E. Dodge, Esq.*  
*Bradford T. Hammock, Esq.*  
*R. Brian Hendrix, Esq.*  
*Avidan Meyerstein, Esq.*  
*Michael T. Taylor, Esq.*

## Jackson|Lewis

For more information on any of the issues discussed in this newsletter, please contact:

Brad Hammock at [HammockB@jacksonlewis.com](mailto:HammockB@jacksonlewis.com)  
or (703) 483-8316, Henry Chajet at  
[henry.chajet@jacksonlewis.com](mailto:henry.chajet@jacksonlewis.com) or (703) 483-8381,  
Mark Savit at [mark.savit@jacksonlewis.com](mailto:mark.savit@jacksonlewis.com) or  
(303) 876-2203, or the Jackson Lewis attorney with  
whom you normally work.

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