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OSHA Liability 2019: *Merrily We Roll Along*

By Mark A. Lies II*

INTRODUCTION

As 2019 gets underway, it is important to look back at what occurred in 2018 and hopefully learn from events and modify responses to scenarios that are likely to arise this year. This article will discuss several of the more salient compliance issues likely to arise in 2019 and provide recommendations.

OSHA ENFORCEMENT IN 2018

In 2018, OSHA essentially continued to operate as it had during the Obama Administration since there was no Assistant Secretary of Labor for OSHA appointed by the President and approved by Congress to replace Dr. David Michaels. As a result, the career OSHA bureaucrats continued to operate as they had in the past. For those employers with nationwide operations, it was very common to see in 2018 that the OSHA regulations were being

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enforced unevenly or inconsistently from one Regional or Area Office to another because there was a lack of central direction from Washington. This inconsistency was further complicated by the fact that OSHA continues to experience significant numbers of retirements of career Baby Boomers at the Area and Regional Office levels, as well as in the Solicitor's office which prosecutes the citations at trial.

This inconsistency is also evident within the State Plan OSHA Programs. An employer can expect to be treated with very different interpretations of the underlying Federal OSHA regulations depending on whether it is cited, for example, in Indiana, Michigan, Minnesota, Nevada, Washington and other states. Often times the State Plan regulations do not recognize Federal interpretations of Federal regulations or case law from the OSHA Review Commission or Federal courts, creating further uncertainty. Employers also need to be aware that State Plan OSHA programs have or are developing their own regulations that may create additional compliance duties.

2018 OSHA EXPERIENCE

The following discusses areas of immediate concern in 2019 based upon 2018 occurrences:

OSHA Inspections - Failure to become aware of the rights of OSHA, the employer and employees during onsite inspections. Many employers lack basic understanding of the process, especially in the area of OSHA employee interviews which are the source of 60-70% of citations. Since employers are frequently unaware of these rights, they never inform their employees of these rights or prepare their employees for the interviews or consider "debriefing" them after the interviews. Attached to this article is a summary of the process and those rights. Similarly, many employers do not know what documents they are required to maintain and produce for OSHA

and they produce documents containing information that is outside OSHA's authority or the proper scope of the OSHA inspection which results in citations. More serious is the fact that employers many times will produce documents that are "legally privileged" from disclosure because the employer has engaged legal counsel and, as a result, waive important legal privileges for documents, including post-accident investigation that were done under the direction of legal counsel. A summary of those documents to which OSHA may be entitled based on the scope of the underlying inspection is attached.

OSHA LOG PRODUCTION

During the course of OSHA inspections, the agency will typically request the OSHA 300 Log, Form 301 and Form 300A. Many employers are unaware that regulations require production of these documents within four (4) hours of the request. If they are not produced within this timeframe, or OSHA specifically confirms that it waives the requirement, the employer will receive a citation with a monetary penalty. In some jurisdictions, OSHA has cited employers with penalties up to $12,000 for not providing the Log documents in a timely fashion.

OSHA 300A SUBMISSION

On or before March 2, 2019, certain employers are required to submit their 300A injury and illness data electronically to OSHA. The directions for submitting the data are available on OSHA's website (https://www.osha.gov/injuryreporting/). OSHA Logs are maintained on the basis of individual worksites or "establishments" and not upon the entire employer's workforce.

Only a small fraction of establishments are required to electronically submit their Form 300A data to OSHA. Establishments that meet any of the following criteria DO NOT have to send their information to OSHA. Remember, these criteria apply at the establishment level, not to the employer as a whole.

- The establishment's peak employment during the previous calendar year was 19 or fewer, regardless of the establishment's industry.
- The establishment's industry is **on** this list, regardless of the size of the establishment. (The list is available on OSHA's website.)
- The establishment had a peak employment between 20 and 249 employees during the previous calendar year AND the establishment's industry is **not** on this list.

POST INCIDENT DRUG TESTING

In 2018, OSHA modified its previous policy which significantly restricted an employer's rights to conduct post incident drug testing. For years, OSHA's position on post-incident drug testing confounded employers, and employers faced complicated questions in the stressful hours following workplace safety incidents involving accidents where there had been employee injury. The Standard Interpretation now clarifies that "most instances of workplace drug testing are permissible," including:

- "Random drug testing";
- "Drug testing unrelated to the reporting of a work-related injury or illness";
- "Drug testing under a state workers' compensation law";
- "Drug testing under other federal law, such as a U.S. Department of Transportation rule"; and
- "Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries."

Accordingly, employers may lawfully implement, random drug testing programs, DOT drug testing programs, drug testing programs under a Collective Bargaining Agreement, and post-incident (also "post-accident") drug-testing programs. Post-incident drug testing should be conducted consistently on any employee whose conduct may have contributed to the accident, and not merely the employee who was injured in an accident. For example, if a forklift operator

collides with a pedestrian and injures the pedestrian, both the operator and pedestrian should be drug tested. OSHA reiterated that employers may not use a post-injury drug testing program, which the Agency would view as retaliatory, to discipline an employee solely because the employee sustained injury. Discipline merely for sustaining a workplace injury may also expose an employer to worker's compensation retaliation claims. Any discipline should focus on violation of the employer's policy prohibiting an employee from using drugs or being impaired, as well as the violation of safety policies, and not on the fact that the employee sustained an injury.

EMPLOYER SAFETY INCENTIVE PROGRAMS

The Standard interpretation also reverses course on the 2016 retaliation regulation's prohibition of safety incentive programs. With limited adjustments, OSHA now permits employers to bring back reporting-based safety programs, which the Standard Interpretation lauds as an "important tool to promote workplace safety and health." The Standard Interpretation permits a program which offers a prize or bonus at the end of an injury-free month. OSHA's new position thus permits employers to bring back cash bonuses or the much-criticized monthly pizza party. The Standard Interpretation also permits programs that evaluate managers based on their work unit's lack of injuries.

However, to lawfully implement such a safety program, the employer must implement "adequate precautions" to ensure that employees feel free to report an injury or illness and are not discouraged from reporting. OSHA's primary concern is discouraging employees from reporting injuries because they do not want to forfeit the prize or other benefit. According to OSHA, a mere statement that employees are encouraged to report and will not face retaliation is

insufficient. Employers need to undertake their choice of additional "adequate precautions," which will undercut any inference of a retaliatory motive, such as:

- "An incentive program that rewards employees for identifying unsafe conditions in the workplace:'
- A training program for all employees to reinforce reporting rights and responsibilities and emphasizes the employer's non-retaliation policy;" or
- "A mechanism for accurately evaluating employees' willingness to report injuries and illnesses."
- A statement that the employer will investigate the accident and if the investigation reveals that the accident was not due to the employee violating the employer's safety and health policies, the prize or other benefit will be reinstated.

The Standard Interpretation thus permits and encourages safety incentive programs that reward employees for identifying unsafe conditions in the workplace. A second precaution, a brief training on reporting illnesses and injuries, would be simple for employers to conduct and add to onboarding orientation for new hires. The "mechanism for accurately evaluating employees willingness to report" could be a regularly scheduled, random questionnaire on employee willingness to report injuries and illnesses. Accordingly, if employers adopt these low-burden precautionary measures, they may now bring back or adopt safety programs that are popular and effective at reducing workplace injury rates.

OSHA CITATION PENALTIES

OSHA has announced that it will evaluate its proposed penalty structure on an annual basis. While no employer wants to accept citations that are not factually or legally correct, but sometimes do so for expediency, employers must be aware that every citation that it accepts (including Other-Than-Serious) can be used as a basis for Repeat citations in the subsequent five years fi there is another "substantially similar" violation or for a Willful violation.

In 2019, OSHA revised its penalty structure with increases in the penalty amounts.

Type of Violation	Penalty
Serious Other-Than-Serious Posting Requirements	$13,260 per violation
Failure to Abate	$13,260 per day beyond the abatement date
Willful or Repeated	$132,598 per violation

PARTICULAR HAZARDS

Some of the more frequent hazards encountered in 2018 include:

Lockout Tagout (LOTO)/Machine Guarding - In most cases, employers are required to have a written LOTO procedure for each piece of equipment where energy sources must be de-energized prior to performing servicing or maintenance. In 2018, many employers were found to be lacking these procedures, they were not current as to the correct procedure or employees were never trained how to use them. Other employers did not conduct the required annual periodic inspections and maintain the required documentation. Regarding machine guarding, many employers failed to conduct a job hazard assessment (JHA) to identify whether guarding was necessary or adequate or, worse, failure to enforce keeping guards in place. As a result, there were many fatalities and amputation type injuries.

Powered Industrial Trucks (PITS) - Employers cannot allow employees to operate PITS unless and until they have been trained, authorized and certified with supporting documentation. Employees must also be recertified every three years and retrained after an accident or near miss. Employers were cited for failure to train the PITS operators or to enforce

the safe operation of the equipment. In addition, many employers allowed outside contractors or temporary employees to operate the equipment without training. PIT accidents frequently result in serious injury or death.

Personal Protective Equipment (PPE) - Employers are required to conduct a written hazard assessment to identify hazards which require PPE (gloves, eye protection, foot protection, etc.), to certify the assessment and certify that the PPE was provided. In addition, employers must enforce the use of PPE. Many employees sustained serious injury because PPE was never provided, employees were not trained how to use it or the employer did not enforce its use.

Fall Protection - Employers are required to protect employees against the hazard of a fall. OSHA has extensive regulations requiring the use of fall protection (guardrails, safety nets or personal fall protection) when employees perform elevated work. This year saw many tragic accidents where employees fell off of roofs, mobile equipment, interior structures, machinery, truck trailers, towers and other elevated equipment.

Hazardous Substances (Employee Right To Know) - Employers must provide Hazard Communication training to employees working with hazardous substances and document such training. There are also requirements for labeling. The failure to provide this training has resulted in employee exposure to hazardous chemicals or other substances that may be in the worksite. Employers are cited for failing to train employees about how to understand the Safety Data Sheet (SDS), where they are located and how to access them. Employer's also fail to maintain an inventory of the SDS for all hazardous substances at the worksite.

Multi-Employer Worksites - Another significant liability that manty employers are unaware of is the "multi-employer worksite" doctrine. Multi-employer worksites exist where there are a number of employers at the same worksite. Each employer has OSHA duties not only

to its own employees but also to other employer's employees at the site depending on whether the employer is one of the following:

- employer who creates the hazard for other employees
- employer who exposes the other employee to the hazard
- employer who is responsible to correct the hazard to which the other employees may be exposed
- employer who has control over the worksite or a particular hazard, typically the owner of the worksite, a general contractor or a subcontractor with a sub subcontractor.

Many employers are totally unaware of these liabilities and fail to take appropriate action to protect other employees who may be at the worksite, including:

- independent contractor employees
- temporary staffing employees

GENERAL DUTY CLAUSE - EXPANDING LIABILITY

In addition to its formal regulations, OSHA can site employers for "recognized hazards" likely to cause serious injury or death. To be compliant, an employer must be vigilant to such hazards and develop feasible means to protect its employees. There has been considerable OSHA citation liability for hazards, including:

- Workplace Violence (several states have developed regulations to address this hazard)
- Heat Illness (heat rash, heat cramps, heat exhaustion, heat stroke)
- Electric Arc Flash/Blast (exposure to energized electrical equipment)

- Ergonomic Stressors (repetitive motion, awkward motions, extreme temperature environment)

Employers are required to maintain their OSHA 300 Log for such illnesses when recordable. The General Duty Clause also requires employers to investigate each incident and take feasible corrective action.

OSHA INFORMAL CONFERENCES

Many employers fail to adequately prepare for the OSHA informal conference after citations are issued. Unfortunately, many let the typical fifteen (15) working day period (State Plan program time periods may vary) to attend a conference or file a written contest or appeal to the citation and it becomes a final court order. In other instances, employers do not adequately prepare for the conference to assert their factual and legal defenses and when they attend they cannot articulate the defenses and OSHA is not motivated to vacate or amend the citations. Worse yet, many attend and make "admissions" of liability which support the violation.

Many employers are unaware that every citation which is accepted creates a five year period going forward during which any subsequent violation during that period which is "substantially similar" can result in a Repeat citation with significant penalties. In so doing, they accept citations which should have been contested for expediency and have no conception of the potential legal minefield that may be created in the next five years.

CONCLUSION

Hopefully, we all can learn from our own unfortunate experiences or those of others in 2018 to avoid repeating errors which result in accidents or regulatory liability in order to avoid these liabilities in 2019. If you have any questions about these issues or have an interest in

received, please do not hesitate to contact the undersigned. Hopefully, the New Year is a safe and prosperous one.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, or is interested in training on these topics, please contact Mark A. Lies, II at mlies@seyfarth.com to be added to the address list.

Employee Rights During An OSHA Inspection

The following information is intended to provide general information regarding employee rights during an OSHA inspection. Please note that the Company is committed to the safety and health of our employees and is providing you this information because the OSHA inspector may not inform you of your rights and the Company wants you to be aware of this information so you can exercise your rights in an informed and voluntary manner.

From time to time, Company facilities may be inspected by the Occupational Safety and Health Administration (OSHA). During those inspections, the OSHA inspector may ask to speak with you about your experiences with or training regarding the Company's safety and health programs, or about certain events that have taken place at your Company location. You are entitled to certain rights and subject to certain obligations during an OSHA inspection as follows:

YOUR RIGHTS

- You have the right to speak with the OSHA inspector. You also have the right not to speak with the OSHA inspector. It is ***your decision*** whether to voluntarily speak with the inspector or not.

- You have a right to be interviewed at the Company's location and can decline to answer questions from an inspector who may contact you at home by telephone or in person. You can tell the inspector to arrange the interview at the Company's location.

- Your participation in an OSHA inspection is considered "protected activity," and the Company cannot and will not retaliate against you ***in any way*** because of your participation in an OSHA inspection.

- If you decide to speak to the OSHA inspector, it is ***your decision*** whether to speak with the inspector in private or with someone else present. You have the right to ask another partner or a member of Company Management to be present during your interview.

- You have the right to take a break or end the interview at any time for any reason. The interview is not supposed to take an undue period of time. Remember, it is ***your decision*** whether to speak voluntarily with the inspector at all.

- If you decide to speak to the OSHA inspector, you have the right to understand the questions being asked of you. If you do not understand a question, you may ask the OSHA inspector to repeat the question. The inspector is supposed to ask you for information and not to tell you that you must agree to certain information. If you have difficulty speaking or understanding English, you may request that an interpreter be provided for you. You also have a right to have another individual of your choice present to act as your interpreter.

- You have a right to decide whether to sign a statement at the end of your interview. You may decline to sign a statement if you so choose. You may sign a statement if

you so choose. If you do decide to sign the statement, you are entitled to receive a copy at the time of the interview and **do not sign it** until the inspector tells you he or she will provide you a copy at the end of the interview. If you decide to sign a statement, make sure that you read it and tell the compliance officer to correct any errors or mistakes before you sign it.

- If the inspector wants to ask you questions about information contained in a written document, such as training records, safety programs or policies, you have a right to ask to be shown the document before answering the question or you can decline to answer any questions regarding any written document.

- You have a right to decide whether to be voluntarily photographed, videotaped, or recorded during your interview. You may agree to be photographed or recorded. You may decline to be photographed, videotaped or recorded.

YOUR OBLIGATIONS

- If you decide to voluntarily speak with the OSHA inspector, you ***must*** answer his or her questions ***truthfully***.

- You can decline to answer any particular question during the interview and do not have to explain the reason for your refusal to answer.

- If you decide to voluntarily speak with the OSHA inspector, you must answer his or her questions based on ***your own personal knowledge*** and ***to the best of your recollection***. You must not speculate about any events which you did not personally observe or for which you were not actually present to observe. You also must not relate "hearsay" (i.e. gossip or rumor) which may not be truthful or accurate.

COMPLIANCE CHECKLIST

1. Control of Hazardous Energy – Lockout/Tagout (LOTO)	29 CFR 1910.147 – requires the employer to develop procedures to protect employees who service or maintain its machines against unexpected energization or startup of equipment or release of stored energy. 29 CFR 1910.147(c)(7) – the employer must train its "authorized" employees how perform LOTO with these procedures, as well as "affected" employees who may be exposed to the equipment. 29 CFR 1910.147(f)(2) – requires the on-site employer and outside employer to inform each other of their respective lockout or tagout procedures. **Document retention**: The LOTO standard requires employers to certify that periodic inspections have been performed at least annually. Accordingly, employers should retain certifications for 1 year, or until a new certification is created. It is also advisable that employers retain employee LOTO training records for the duration of employment.	☐ Yes ☐ No Comments ☐ Yes ☐ No Comments ☐ Yes ☐ No Comments
2. Occupational Noise Exposure	29 CFR 1910.95 – requires the employer to provide a hearing conservation program (education, annual audiograms, hearing protection) for employees who are exposed to noise levels equal to or exceeding an 8 hour time weighted average (TWA) of 85 decibels on the A scale. The employer must conduct a noise survey to determine those jobs which may require employees to be included in the program. Employees who suffer hearing loss at certain frequencies must be included on the OSHA 300 Log. The employer must develop a written program and administer it. **Document retention**: Employers must retain noise exposure measurement records for two years. Employers must also retain audiometric test records for the duration of the affected employee's employment.	☐ Yes ☐ No Comments

3. Personal Protective Equipment (PPE)	29 CFR 1910.132 – the employer must conduct an initial certified hazard assessment of the workplace to determine if hazards are present which require personal protective equipment for eyes, face, head and extremities to protect against injury. The employer must provide each employee with the necessary PPE, train the employee in the use of PPE and enforce its use. The employer must pay for the PPE with limited exceptions. **Document retention:** Employers should retain the written certifications of a hazard assessment and employee training for the duration of employment for all employees exposed to identified hazards. It is also advisable for employers to retain employee PPE training records for the duration of employment.	☐ Yes ☐ No Comments
4. Hazard Communication (Employee Right to Know)	29 CFR 1910.1200 – requires the employer to develop a written hazard communication program to protect employees against any hazardous chemical which presents a physical or health hazard. The employer is required to conduct an assessment to determine which hazardous chemicals may be present, to inform employees of the presence of the hazardous chemicals, train employees on how to read a Safety Data Sheet (SDS) for each hazardous chemical. Employers are entitled to access to the SDS and to obtain copies. **Document retention:** Employers must retain SDSs for the duration of employment plus 30 years for all employees exposed to the chemical in question, unless there is some other record of the identity of the substance or chemical, where it was used and when it was used. The employer must also be sure it has a copy of all SDSs for all chemicals that are currently in use. It is also advisable for employers to retain employee hazard communication training records for the duration of employment.	☐ Yes ☐ No Comments
5. Process Safety Management	29 CFR 1910.119 – requires employers who utilize certain toxic, reactive, flammable or explosive chemicals in certain quantities, to develop a written	☐ Yes ☐ No Comments

	fourteen (14) part PSM program. The PSM program addresses all aspects of work around the covered "process" that utilizes the chemicals. 29 CFR 1910.119(h) – requires training of contractor employees who perform certain work around the covered process concerning the hazards and elements of the PSM program. **Document retention:** Employers must retain process hazard analyses (PHAs) for the life of the covered process. In addition, the employer must prepare a written record that each employee who is involved in the operation of the process was trained and understood the training. These verification records should be retained for the length of the employee's employment. We recommend that employers also retain all process safety information (PSI) used for developing, maintaining, auditing, and otherwise managing all processes for the life of the processes. Any incident investigations conducted under the PSM standard must be retained for 5 years. Additionally, employers must retain the two most recent compliance audit reports conducted under the PSM standard.	☐ Yes ☐ No Comments
6. Emergency Action Plans	29 CFR 1910.38 – requires the employer to develop an emergency action plan to protect employees against the hazards of fires or other emergencies. The EAP must include provisions for reporting a fire or other emergency, evacuation procedures and the alarm system. The employer must train each employee. 29 CFR 1910.38(e). **Document retention**: There are no specific document retention requirements under 29 CFR 1910.38, aside from the requirement that employers develop and maintain a written EAP. If the employer has ten (10) or fewer employees, the plan does not have to be in writing.	☐ Yes ☐ No Comments
7. Fire Extinguishers	29 CFR 1910.157 – requires the employer to provide fire extinguishers and mount, locate and identify them so that they are readily accessible to employees. If employees are expected to use the fire	☐ Yes ☐ No Comments

	extinguishers, the employer must provide training upon initial employment and at least annually thereafter. The employer must develop an educational program if it expects the employees to use the fire extinguishers. Many employers specifically prohibit employees from using the fire extinguishers to avoid this training obligation. If the employer permits the employees to use the fire extinguishers, the educational program and training should be in writing and maintained for the length of employment.	
8. Permit-Required Confined Spaces	29 CFR 1910.146 – requires the employer to identify all confined spaces within the workplace that employees or outside contractors may be required to enter and contain a hazardous atmosphere, engulfment hazard, an internal configuration that could trap or asphyxiate an entrant or other serious safety or health hazard. The employer must develop a written program and procedures for employees who enter the confined spaces. Only trained and authorized employees can enter the space. 1910.146(c)(8) – requires the host-employer to provide certain information to other contractors who will have their employees enter the space. **Document retention**: Employers must retain each canceled entry permit for at least 1 year and review them within one year after each entry. It is also advisable to retain employee confined space training records for the duration of employment.	☐ Yes ☐ No Comments
9. Bloodborne Pathogens	29 CFR 1910.1030 – requires an employer to develop a written program to protect employees at the workplace who are reasonably expected to have occupational exposure to bloodborne pathogens, i.e., bloodborne diseases. The employer is required to assess all jobs to determine if there is such exposure and if so, to train employees in the hazards, provide PPE and to develop procedures for medical evaluation and treatment if an employee has actual exposure. **Document retention**: Employers must	☐ Yes ☐ No Comments

	retain employee exposure records for the duration of employment plus 30 years. Training records must be retained for 3 years from the date on which the training occurred, although it is advisable to retain training records for the duration of employment.	
10. Respiratory Protection	29 CFR 1910.134 – requires the employer to conduct an assessment of the workplace to determine if there are harmful dusts, fumes, mists, sprays or vapors which may create a respiratory health hazard. If there are such hazards, the employer is required to develop a written respiratory protection program, to evaluate employees to determine if they are physically capable of wearing a respirator, to provide such respiratory protection, at the employer's cost, and train employees how to wear and maintain respiratory protection. The employer must enforce use of the respiratory protection. **Document retention**: Employers must retain records of employee medical evaluations for the duration of employment plus 30 years. Employers must also retain fit test records for respirator users until the next fit test is administered.	☐ Yes ☐ No Comments
11. Electrical Safety (Safety-Related Work Practices)	29 CFR 1910.331-.335 – requires an employer who will permit its employees to perform work on or in the vicinity of exposed energized parts (which cannot be locked out and tagged out) to provide extensive training in the hazards of working or in the vicinity of live electrical equipment, protective clothing and insulated tools and devices. The employer must designate employees as "authorized" in order to perform such work or "unqualified" in which case such employees cannot perform such work. The employer may be required to conduct an electrical exposure hazard survey of electrical equipment under NFPA 70E in order to determine what PPE should be used, what training is necessary, and to otherwise be in compliance with OSHA safety requirements. **Document retention**: OSHA's electrical	☐ Yes ☐ No Comments

	safety standards do not have any specific record retention requirements, however it is advisable to retain employee training records under these standards for the duration of employment. If an employer conducts an electrical exposure hazard survey, the employer should retain it for as long as the hazard exists.	
12. Access to Employee Exposure and Medical Records	29 CFR 1910.1020 – requires employer to inform employees of their right to have access to all records maintained by the employer that reflect an employee's exposure to any toxic substance or harmful physical agent (e.g., chemicals, dusts, vapors, noise, mold, etc.) or any medical records which the employer maintains on an employee, except for certain exceptions. Employees are entitled to have access and to obtain a copy at the employer's expense. **Document retention**: Employers must retain employee exposure records for the duration of employment plus 30 years. If the employer maintains certain employee medical records, the employer must retain them for the duration of employment plus 30 years.	☐ Yes ☐ No Comments
13. Powered Industrial Trucks	29 CFR 1910.178 – requires an employer to develop a written program to train all employees who will be required and authorized to operate powered industrial trucks (including forklifts, manlifts, etc.) as to the hazards of such equipment and to certify their training after they receive classroom-type training and are actually observed operating the equipment under the physical conditions at the workplace, such as aisles, ramps, etc. The employee must be retrained and recertified every three years, at minimum, or after an accident or "near miss" which resulted from an unsafe act. **Document retention**: The powered industrial truck standard does not specify how long training certifications must be retained after the initial certification or the certification required every three years or after a "near miss". It is advisable that employers retain the training certifications for the duration of employment for each	☐ Yes ☐ No Comments

	employee.	
14. OSHA 300 Log of Work-Related Fatalities, Injuries and Illness	29 CFR 1904.0 – the OSHA 300 Log must be maintained by employers unless there is an exemption, based on the NAICS code or the size of the employer. The employer is required to record on the Log, within seven (7) calendar days, each fatality, injury or illness that is recordable under OSHA definitions. The host employer is required to enter into its Log the injuries or illnesses of outside employees at the worksite under certain conditions, for example, temporary employees who are under the direction and control of the host employer. The OSHA 300 Log must be maintained and certified by the employer on an annual basis. For each entry on the Log, there must be an OSHA 301 Incident Report form, or its equivalent, which can be the employer's First Report of Injury or Illness form required by the State worker's compensation law. An annual summary must be prepared and posted using the 300-A annual summary form or an equivalent. In order to comply with OSHA's recordkeeping requirements, it is critical that employees are trained from their initial employment that they must immediately report any occupational injury or illness to determine if it is recordable. **Document retention**: The OSHA Log, the annual summary, and the OSHA Incident Report forms must be retained by employers for 5 years following the end of the calendar year that these records cover. The OSHA Log must be maintained on an "establishment basis" based on NAICS codes. It is possible that employers may have some "establishments" where a Log must be maintained, and others where maintaining a Log is not necessary.	☐ Yes ☐ No Comments

15. General Duty Clause	Section 5(a)(1) of the OSHA Act requires an employer to identify "recognized hazards likely to cause serious injury or death" to an employee, which hazards may not be regulated by a specific OSHA regulation, and to take "feasible" actions to abate or correct such hazards. This duty can be based upon the "recognition" of the hazard in the employer's own, existing programs, or within the employer's industry. Some examples of this legal obligation may be: Ergonomics Heat illness Workplace violence Combustible dust Arc Flash/Arc Blast **Document retention**: While there are no specific standards for "recognized hazards" covered under the General Duty Clause, and thus no specific record retention requirements, it is advisable for employers to retain any training records it has developed addressing any "recognized hazards" for the duration of employment, including the written policy, training records and documents that evidence discipline for violation of the policy. Remember that certain documents related to General Duty Clause obligations may also fall under exposure/medical record-keeping requirements (see #11 above).	☐ Yes ☐ No Comments
16. Disciplinary Records	There is no regulation that requires an employer to maintain written records of employee discipline for violations of the employer's safety and health policies. If, however, the employer wants to credibly assert the "unavoidable employee misconduct" defense to avoid liability for OSHA citations, the employer is highly recommended to maintain written records of discipline indicating the nature of the violation, the date, the name of the employee who committed the violation and the name of the supervisor who imposed the discipline. This same documentation can be useful in the event that the employer has to defend an employment discrimination or wrongful	☐ Yes ☐ No Comments

	termination action by being able to prove that the action was based on a legitimate non-discriminatory reason, that is, violation of safety and health policies.	