



The Lucky 13

13 Strategies To Improve Safety, Reduce Exposure, And Improve Profits

By Ed Foulke and Howard Mavity (Atlanta)

The new administration's focus at OSHA, and other government agencies, focuses less on compliance and increasingly more on enforcement. That means more inspections, more audits, and more fines. Here are some ways you can help your company stay out of trouble.

1. **Prioritize Your Vulnerability**

First determine which OSHA standards are applicable to your operation. Then, find your SIC classification, which may determine which of OSHA's 140+ "priority" efforts affect you, and comply with the requirements of those national and local emphasis programs. Finally, ensure that your facility is prepared to handle an OSHA inspection and that your managers know their legal rights during and after an inspection.

2. **Review Your Company's OSHA Recordkeeping, Especially Form 300**

Recordkeeping is one of the cornerstones of your safety program and a driver of OSHA's new enforcement efforts. In addition to the OSHA National Emphasis Program of Recordkeeping Audits, OSHA has instructed its compliance officers to more carefully review the OSHA 300 Logs when conducting inspections. An employer may experience a full-blown OSHA safety or recordkeeping audit if there are deficiencies in the logs. Audit and correct your last five years of logs, looking at insurance and other records, as OSHA might do, and also begin to look for "patterns" of injuries – which OSHA will also do!

3. **Do A "Routine" Audit**

OSHA is looking for the "low-hanging fruit" or more-common safety and health violations, such as: blocked exits and electric panels; improper materials handling and racks; personal protective equipment violations; recordkeeping errors; housekeeping problems; etc. These "routine" violations are challenging to prevent, and in the case of employers with many locations, may quickly result in multiple repeat citations.

OSHA's focus on such routine items, as well as the use of its "egregious" policy, is generating six-figure penalties. OSHA's proposed penalty calculation guidance is intended to raise the average penalty approximately 300%. Multi-location employers are especially at risk, and only improved and consistently enforced safety rules, self-audits, and supervisor accountability will reduce exposure.

4. **Review Abatement Of All Past OSHA Citations**

Prepare for OSHA's proposed change to consider past citations for the *last five* years, not the current three years, in issuing "repeat" citations. Also, OSHA may cite for "failure-to-abate" if you cannot document past abatements of items again out of compliance.

5. **Get Comfortable With Ergonomics Enforcement**

OSHA has proposed adding a column to 300 Logs specifically

for musculoskeletal disorders, which may include 75% of your workplace injuries. OSHA is currently utilizing the General Duty clause to issue ergonomic citations and has announced its intention to more widely use these General Duty citations. Collecting information about musculoskeletal disorders may be used by OSHA to move forward with additional ergonomic enforcement efforts.

6. **Use Job Safety Analysis To Focus Your Overall Safety And Health Strategy**

OSHA has proposed development of a standard requiring a comprehensive safety management program. This would require employers to determine all hazards, and (even if there is not an applicable OSHA standard) to develop procedures and training – and OSHA would cite the employer for failure to do so. Use your data to focus on training, supervisor involvement, and safety oversight.

7. **Turn Good Intentions Into A Workable Plan**

By developing a comprehensive safety and health management system which includes management commitment and employee involvement, a company can genuinely change its safety and health culture; but this effort requires more than a written plan.

8. **Profit From Your Safety Efforts**

Beyond reducing workers' compensation claims, well thought out safety and health management programs can become a "profit center" for a company, allowing it to be more competitive in the local, national or global marketplace. Connect safety to quality; use it along with "green" and similar efforts as a marketing tool, and as a way to increase employee involvement and satisfaction.

9. **Develop Emergency Action Plans To Deal With The Inevitable**

Companies must maintain emergency-action or emergency-response plans which will focus on natural disasters, including pandemics, as well as dealing with Katrina-like events and man-made disasters. These plans should tie in with an enhanced emphasis on evacuation plans, exit and egress compliance, and training. Pandemic preparation in 2009 revealed many gaps in employer planning. Moreover, OSHA is especially emphasizing exit and evacuation planning for citations. Your plans should also consider "non-safety" issues, such as business continuation, management of leaves and benefits, remote work and wage-hour compliance, etc.

10. **Keep Your Company's Wellness Plan Healthy**

A wellness plan offering more than just smoking cessation benefits is essential for dealing with an increasingly older and heavier workforce. Although new employment regulations, including GINA and the ADA, have increased the pitfalls associated with wellness programs, they can be effectively and lawfully managed.

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H-1B Labor Condition Application Violations Could Cost Your Company Millions

By Shanon R. Stevenson (Atlanta)

Nothing weighs down an employer more than an investigation by the Wage and Hour Division of the U.S. Department of Labor. Just ask the following information technology companies who failed to properly pay their H-1B workers and ended up paying a lot more in back pay and penalties:

Date	Company	Back Pay Determination	Other Penalties	# of Affected Employees
02/23/10	Peri Software Solutions Inc.	\$1,456,422	\$439,000 penalty for willful violation & debarment from H-1B program for two years	163 Computer Analysts
04/06/09	Cognizant Technology Solutions	\$509,607	N/A	67 Computer Professionals on H-1Bs
10/30/08	GlobalCynex, Inc.	\$1,683,585	N/A	343 Systems Analysts
06/2007	Patni Computer Systems Limited	\$2,400,000	N/A	607 Computer Professionals on H-1Bs
11/28/05	Computech Corporation	\$2,250,000	\$400,000 penalty & debarment from H-1B program for 18 months	232 Computer Professionals on H-1Bs

The H-1B work visa is an indispensable tool used by employers to hire talented foreign workers to fill professional or “specialty occupation” positions, such as engineers, accountants, architects, scientists, managers, teachers and computer programmers. In order to qualify for the H-1B the position must require a minimum of a bachelor’s degree or the equivalent.

Exhibit 1: The Labor Condition Application

Before you submit an H-1B petition, you first must obtain certification of a Labor Condition Application (LCA) from the U.S. Department of Labor. The LCA regulations require that you pay your H-1B workers the required wage, which is defined as the greater of the actual wage level you pay to all other individuals with similar experience and qualifications for the position, or the prevailing wage for the occupation in the area of intended employment.¹ Among other requirements, the LCA regulations also require that you provide working conditions (i.e. hours, shifts, vacation periods, and fringe benefits) for H-1B workers that will not adversely affect other similarly-employed workers.

Sometimes employers do not realize that they are not complying with the terms of the LCA (e.g. paying H-1B workers on 1099s or on commissions). Other times, employers intentionally fail to pay as required. Ignoring the cautions listed on the LCA that fraudulent representations can lead to civil or criminal action can be costly. After all, every USDOL determination of H-1B wage violations begins with the LCA.

Investigation Triggers

In September 2008, U.S. Citizenship and Immigration Services (CIS) released the results of an H-1B Fraud and Compliance Assessment study. This study revealed a 21% baseline fraud and technical violations rate for H-1B petitions. In 27% of the cases where CIS found fraud and technical violations, the employer failed to pay the H-1B worker the required wage.

¹ The prevailing wage is determined by the collective bargaining agreement (CBA), if one exists for that occupation. If there is no CBA, the State Workforce Agency makes the prevailing wage determination. Alternatively, you may provide a prevailing wage based on the Davis Bacon Act, the Service Contract Act, or a survey conducted by an independent authoritative source.

² Employers involved in changes in structure, “single employers” as defined by the Internal Revenue Code, H-1B dependent employers, and willful violators have additional public access file requirements.

In an effort to combat the fraud, CIS initiated the Administrative Site Visit and Verification Program. The primary goal is to substantiate that the working conditions stated in the H-1B petition actually exist. CIS has engaged outside contractors to conduct thousands of on-site visits to H-1B employers. Among the many questions CIS directs the Site Inspector to ask both the employer and the H-1B worker in its five-page Compliance Review Report is whether the employer is paying the H-1B worker the required salary as indicated on the LCA. The Site Inspector is also required to review W-2s and pay stubs to verify that the stated salary is paid.

The Site Inspector may conclude the site visit with a recommendation for further inquiry by CIS. Penalties for noncompliance could be revocation of the underlying H-1B petition, civil and criminal penalties, and an order to pay back wages, civil monetary penalties from \$1000 to \$35,000 per violation and debarment from participating in the H-1B and other immigration programs for up to two years.

Disgruntled employees can also be the trigger for an investigation by DOL. In fact, the DOL often sends out a four-page questionnaire to present and former H-1B employees to determine whether the employer is honoring the terms of the LCA. It is believed that the DOL used evidence from such completed questionnaires to assess penalties of over \$1.5 million against Peri Software Solutions, Inc. for violations of the H-1B wage requirements.

How To Get Into Compliance

Here are some simple steps you can take to avoid penalties similar to those assessed against other companies:

1. Pay your H-1B employees the required wages and benefits:
 - Wages are compensation treated as earnings for income tax and FICA purposes. The value of fringe benefits cannot be used in the wage calculation. And if you require the H-1B worker to pay the fees and costs associated with the H-1B petition, DOL may consider these payments as unauthorized deductions if they act to reduce the wage below the prevailing wage.
 - Under no circumstances should you require the H-1B worker to pay the H-1B training fee of \$750 (\$1500 if your company employs 25 or more employees) because the employer is required by law to pay it. Finally, if an H-1B worker is in non-productive status at your direction, such as on furlough, you must continue to pay the H-1B worker.
2. Maintain and audit public access files:
 - All H-1B employers are required by law to maintain a public access file for each H-1B worker and must make the file available for public examination within one working day after the LCA is filed with DOL. The public access files for most employers² must contain:
 - a copy of the certified LCA;
 - documentation of the wage rate to be paid to the H-1B worker;
 - an explanation of how the actual wage was calculated (e.g. a copy of the employer’s pay scale);
 - documentation used to establish the prevailing wage for the position;
 - a copy of the internal notice of posting given to the union/employees; and
 - a summary of the benefits offered to U.S. workers in the same occupation as the H-1B worker and an explanation of any differentiation in benefits.

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Part 2: Are Your Employees Really Important Business Partners?

Or Are You Just Kidding?

By John McLachlan (San Francisco)

In our last article we took a hard look at the easy-to-say concept that companies “value their employees” or that employees “are our most important asset.” Easy to say, yes. But the reality is a bit more difficult – and time consuming. In Part 2 we’ll look at this idea in more detail.

Many Messages To Manage

What does it mean to treat employees as valued business partners? To gain insights into this question, think about how you interact with individuals you view as important in your life. Do you treat them with respect or do you order them around? Do you listen to their views on issues that are important to you? Do you share necessary information with them? Do you show them courtesies? Do you tell them you think highly of them? Do you take their insights and observations seriously?

If those are expected behaviors towards important people, and, if you view employees as important people in your company’s business life, it follows that the same kinds of treatment should work in this area as well. And we believe that similar actions by management will work equally well with workforces as they do between individuals away from the business environment.

However, it’s not so easy as all that because there is not just one member of management dealing with employees. A number of different individuals influence employees’ perceptions of the company. The company has many faces and personalities throughout management ranks, all of whom count in varying degrees in employee perception. There are first-line supervisors, HR and safety representatives, administrative staff, mid-level managers, top management, and others who have varying degrees of visibility to employees. All these individuals have varying impacts on the message the company is trying to send and there must be congruence in the messages sent.

For example, a totally committed CEO’s efforts to improve employee involvement can be rendered meaningless by a supervisor who considers employees as lower forms of life and treats them that way. Employees do not see the CEO everyday. They may never see or interact with the CEO. They see and deal with the supervisor every day. Whose message do you think will have the greater impact?

So a decision to recognize employees and to find ways to incorporate their input into the business model isn’t nearly as easy as

just making the decision to do so. There has to be buy-in from many different levels of management and one of the most important levels is the one that is typically ignored when speaking of management initiatives – first line supervision.

If your first line supervisors aren’t recognizing employee contributions, if they aren’t asking for and listening to employee input, if they don’t recognize the importance of employee ideas and insights, a meaningful employee involvement program will not take root and flourish. Perhaps upper management can make it work for a little while just by force of its authority in the organization, but it will never really work or achieve maximum effectiveness without complete involvement and buy-in from those in management who have the greatest impact on employees’ work lives.

Getting Specific

Let’s assume that management has made the decision that greater employee involvement is important and that the organization should begin moving in that direction. Where do you start?

It seems to us that a very good place to start involves learning what your employees think and understand about the business. What do they know about the conditions that drive your business, what do they understand about the company’s strategic objectives, and what performance metrics are most significant determinants of the company’s success? If you have been playing make-believe up to now about your attention to employees, it is likely that employees will not know the answers to these questions.

Other pieces of knowledge you will want to gather include what employees think about how the business is being run from a departmental to plant to corporate level, how employees view their supervisors and managers, what they think about their pay and benefits, what aspects of the job they find really irritating or rewarding. An employee attitude survey is one way to begin learning this information, although it is not the only way. Small group meetings with neutral organizations such as HR can also begin to fill in the knowledge gaps in this regard as well.

A word about employee attitude surveys of whatever stripe. We believe that they can be of significant value to help an organization to understand how well it is meeting employee expectations and needs. But an attitude survey is like fire. Used carefully it can contribute to an improved environment. Used poorly, it can do great harm. It can contribute to increased employee alienation and confirm employee suspicions that management really doesn’t care.

By using an employee attitude survey poorly we mean that management does not respond to employee concerns brought to light in the survey. That doesn’t mean that management must immediately solve each and every problem raised in the survey or even try to do so. That would be impossible. But you must let employees know at least generally the issues addressed and management must demonstrate its willingness to address key issues brought to light by the survey results. Employees in this day and age have pretty much figured out that management does not have any magic wand that allows it to immediately make everything better. Employees do expect that management will take feedback seriously and not ignore it. They don’t expect miracles.

There are many more aspects to the caring-about-employees program and we will cover those details in a future commentary. If any reader has any good stories of how improved employee involvement has impacted your business, I would be glad to hear about them and to perhaps share them with readers.

For more information, contact the author at jmclachlan@laborlawyers.com or 415.490.9000.

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11. Understand OSHA's Multi-Employer Citation Policy

Recognize and respond to how contractors, customers, and vendors can expose you to OSHA violations or harm your employees, including employees working away from your site.

12. Avoid Membership In OSHA's Severe Violators Enforcement Program (SVEP)

Consider how to avoid "membership" in the new SVEP, and other programs which may target all or some of a company's facilities for increased inspections and scrutiny.

13. Solve Other Problems By Solving Safety Problems

Showing employees you care, and involving them in safety management, can prevent a multitude of legal problems. As an example, surveys have shown that, if safety is the primary issue in union organizing drives, the union success rate in those drives is approximately 68%, the highest for any issue. Not surprisingly, safety problems may be a very public and embarrassing issue during labor disputes.

Use the necessary increased safety efforts to create a workplace where employees do not experience the issues which often spawn lawsuits, union organizing, or conflict in an already unionized setting. Training and audits can correct a wide range of legal and HR vulnerability, including wage-hour and other problems.

For more information contact the authors: efulke@laborlawyers.com, hmavity@laborlawyers.com, or call 404.231.1400.

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Office Locations

Atlanta phone 404.231.1400	Houston phone 713.292.0150	Philadelphia phone 610.230.2150
Charlotte phone 704.334.4565	Irvine phone 949.851.2424	Phoenix phone 602.281.3400
Chicago phone 312.346.8061	Kansas City phone 816.842.8770	Portland, ME phone 207.774.6001
Columbia phone 803.255.0000	Las Vegas phone 702.252.3131	Portland, OR phone 503.242.4262
Dallas phone 214.220.9100	Louisville phone 502.561.3990	San Diego phone 858.597.9600
Denver phone 303.218.3650	New Jersey phone 908.516.1050	San Francisco phone 415.490.9000
Fort Lauderdale phone 954.525.4800	New Orleans phone 504.522.3303	Tampa phone 813.769.7500
	Orlando phone 407.541.0888	Washington, DC phone 202.429.3707

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You must retain all records one year beyond the end date on the LCA or, if a complaint is filed, until the complaint is resolved. To avoid additional scrutiny from the government, you should keep your Public Access files separate from I-9s, personnel files and other immigration-related employee files.

3. Withdraw H-1Bs and LCAs when an H-1B worker is no longer employed:

If you terminate an H-1B worker or the worker resigns before the end of the 3-year period of authorized admission, you should notify USCIS in writing of the end of the employment and withdraw the underlying LCA with USDOL to avoid accrual of front pay and back pay damages.

You are also required by law to pay for the reasonable cost of the terminated H-1B worker's return transportation to his or her home country.

4. Prepare for unexpected company:

Develop and disseminate an immigration-related notification and response policy so all employees know how to handle unannounced government visits.

5. Take a hands-on approach to filing an H-1B petition:

You are the H-1B petitioner and you sign the application under the penalty of perjury.

Do not allow the H-1B candidate to take the lead on finding an immigration attorney and providing the information required for the petition. You should consult an immigration attorney that will fully inform you about your legal obligations as an H-1B employer.

6. Surf the net:

Monitor what your H-1B employees are saying about your company on the internet – the DOL is. For an example, take a look at the website www.desicrunch.com.

7. In case of emergency, break glass:

Don't wait until DOL renders a determination against your company to consult immigration and employment attorneys.

Although the Wage and Hour Division's attorneys often have a thorough understanding of the Fair Labor Standards Act, they do not always have a comprehensive understanding of immigration law. This leaves room for negotiating penalties associated with the H-1B program. For instance, DOL takes the position that the H-1B worker cannot pay any part of the statutory \$500 fraud protection and detection fee imposed by CIS for H-1B petitions. CIS, on the other hand, takes the stance that the petitioning employer or the H-1B worker may submit this fee as long as the fee does not take the H-1B worker's salary below the required wage.

One DOL official has even stated that if there is only one H-1B worker in the position at the worksite, that individual's wage is the actual wage. Thus, any deductions of H-1B fees and costs would drop the wage below the required wage and are impermissible. This view is ripe for challenge in a DOL enforcement proceeding. The bottom line is that there is always room for negotiating with DOL, including requesting flexible payment options, and the option of seeking an Administrative hearing before a judge.

Complying with the above-listed recommendations will allow you to maintain your valuable H-1B program.

For more information contact sstevenson@laborlawyers.com or 404.231.1400.