

Critical Issues and Challenges Facing the Construction Safety Professional

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Presentation Overview

- **Protecting Information in Incident Investigations**
- **Meeting the Hazard Specific Equipment Training Requirement**
- **Combating Substance Abuse in the Workplace**
- **Finding Clear Direction in the Crane Safety Debate**
- **Expanding Responsibilities of Safety Professional**
- **Understanding the Impact of Recent ADA Changes on Safety**



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Protecting Information During Incident Investigations and Self-Audits

Self-Audits

- ORS 654.101 permits employers to withhold from OR-OSHA certain voluntary safety and health consultation reports including Self-Audits.
- ORS 654.101 contains some expansive exceptions to the employer's right to refuse.
 - a. Reports required under an OR-OSHA rule or standard (i.e. Accident Prevention Program evaluations, Hazard Analyses, etc.) are not protected.
 - b. Any reports that stem from investigation of occupational accidents, illnesses, or diseases are not protected.
 - c. The privilege to withhold under ORS 654.101 is limited to reports prepared by private outside consultants.
- Conclusion: Because of broad exceptions in ORS 654.101, most Self-Audits are not protectable.



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Accident Investigations

- Both State and Federal law require an employer to investigate injuries and illness and to create a written report.
- Both State and Federal law entitle OSHA to access, review and copy this report as part of its investigation.
- Conclusion: Accident reports prepared by the employer are generally not protectable.

Why Protect Information?

- Catch 22 – What happened? What caused it so we can prevent it in the future?
- Legal action today is a probability, not a mere possibility.
- Information taken out of context – assumptions, conjecture and speculation considered as fact.
- Admissions against interest – concluding what caused an accident/root cause analysis.



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Solving the Catch 22 and Protecting Information

- Separate them and limit them
- What happened? (Accident Investigation) vs. What caused it so we can prevent it in the future? (Accident Analysis)
- Accident Investigation: Just the facts – no assumptions, conjecture, speculation or conclusions.
- If accident is serious, consider having an attorney supervise the investigation from the outset. – Disclosure may be protected by Attorney Client and Work Product Privileges.
- Accident Analysis: Always have it conducted under the direction of an attorney. It is protectable.



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Meeting the Hazard Specific Equipment Training Requirement

- OSHA requires Hazard Specific Training.
- OSHA requires Equipment Training.
- Do these requirements apply to different pieces of equipment and different makes and models of the same type of equipment?
- Depends on the type of equipment
 - a) Forklifts
 - b) Man/Material Hoists
 - c) Cranes



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Meeting the Requirement

- General training on type of equipment
- Make/model specific training and awareness
- Use of 3rd party trainers or manufacturer's representatives
- Training documentation
- Obtaining training documentation from others is acceptable



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Combating Substance Abuse in the Workplace

- The cost of substance abuse in Oregon: \$5.9 billion
- Substance abuse is the single largest health and social problem in Oregon: \$1.8 billion in budget costs.
- 10% of the workforce (11.4 million workers) bring substance abuse problems into the workplace.
- 40% of workplace fatalities and 47% of workplace injuries are linked to substance abuse.
- Over 10% of workers who die on the job test positive for alcohol or other drugs.
- Over 350,000 Oregonians (1 in 10) are in need of substance abuse treatment.
- Oregon leads the nation in prescription drug abuse and ranked seventh in meth abuse.
- Oregonians rate of substance use is approximately 40% higher than the national average.
- Oregon's drug test failure rate is 50% higher than the national failure rate.
- 77% of Oregon employers say workplace substance abuse is a concern and is affecting their business.

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Prescription Drugs

- Four fold increases in prescription drug failures in 2008
- Seeing more adulterated samples to mask prescription drug abuse
- Greater use of falsified prescriptions
- Multiple prescriptions from different doctors
- Significantly greater use of OxyContin



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Medical Marijuana

- The rate of marijuana use by adult Oregonians (6%) is 50% higher than the national average (4%).
- Marijuana usage is by far the most prevalent reason for testing failure (76% of all positive tests in Oregon vs. 53% nationally).
- While Oregon's Medical Marijuana Act was designed for a few seriously ill individuals able to possess small amounts of marijuana with a pledge that employers would not be required to accommodate its use, efforts have been made and continue to be made to expand the program and require accommodation in the workplace.
- As of January 1, 2009: 20,842 patient cards (up 1200 in six months); 10,424 caregiver cards (up 750); 4500 growers.
- Each card holder can possess 24oz of dried marijuana and 6 mature plants. (up to 7½ lbs total and 3375 joints.)
- Concentrated efforts are being made to require accommodation in the workplace.



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- a) Washburn v. Columbia Forest Products
- b) Emerald Steel Fabricators
- c) Clackamas County and the Federal Drug Free Workplace
- d) HB 2497
- e) Impairment Testing

Substance Abuse Continues to be a Serious Workplace Safety Risk

- Hoffman Experience
 - 25 post accident failures each year
 - 4% follow-up failure rate
 - Direct correlation between failure rate and accident rate



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What Should Employers do?

- Implement drug & alcohol policies
- Require pre-employment and post employment testing
- Develop a Medical Marijuana policy
- Develop a Prescription Drug policy
- Train employees on signs of substance abuse



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Finding Clear Direction in the Crane Safety Debate

- Rash of Reported Crane Accidents



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Bellevue



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New York



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Miami



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Other



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- **What Caused Them?**
 - a) Bellevue – Flawed tower crane base design
 - b) New York (at least twice) – Rigging failure/counterfeit parts
 - c) Miami – Rigging failure
 - d) Other - Inadequate base support
- **Primary Causes of Crane Accidents**
 - a) Rigging failures – Load drop
 - b) Inadequate base support/design – collapse or overturning
 - c) Part failure – Improper/fatigue/counterfeit
 - d) Improper operation – exceed load capacities/movement/operator error
- **Regulatory Initiatives**
 - a) Crane operator certification (WA)
 - b) Crane inspections (OR)
 - c) Review of Tower Crane base designs (Portland)



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Counterfeit Demag crane
manufactured in China

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- **What is missing?**
 - a) Rigging standards
 - b) Third party review of base designs
 - c) “Competent Person” erection monitoring and inspections
 - d) Manufacturer certification of replacement parts and modifications



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Expanding Responsibilities of Safety Professionals

- Employers are expanding the responsibilities and involvement of Safety Professionals beyond traditional safety duties.
- Why?
 - a) Investigatory capabilities
 - b) Familiarity and constant contact with workforce
 - c) Expanding workplace requirements
 - d) Integrated nature of workplace requirements and safety
- EEO and Harassment Claims
 - a) Notification of senior management
 - b) Interviewing witnesses
 - c) Developing reports
 - d) Preparing corrective action plans
 - e) Integrated nature of workplace requirements and safety



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- Fleet Management
 - a) Monitoring performance and identifying repairs
 - b) DMV reviews
 - c) Controlling usage – kids/personal use
 - d) Arranging repairs & maintenance while on site
- Guns and Violence
 - a) 2 million violent crimes occur at work each year.
 - b) Violence in workplace accounts for 17% of workplace deaths.
 - c) Current economic crisis has increased stress and anger.
 - d) Employers may face significant legal liability for not taking adequate steps to prevent workplace violence.
 - e) Some states are considering authorizing employees to store guns in their cars in the wake of the Supreme Court's recent decision in District of Columbia v. Heller, 128 S.Ct. 2783 (2008)
 - f) Case from Oklahoma is on appeal to determine whether OSHA's general duty clause pre-empts a state statute authorizing guns in the workplace.

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- g) Warning signs of workplace violence hazards
 - 1) Past conflicts and confrontations
 - 2) History of violent behavior
 - 3) Gang membership
 - 4) Substance abusers
 - 5) Negative attitudes and anger
 - 6) Workplace bullying
 - 7) Alienation
 - 8) Mental illness symptoms and depression
 - 9) Welcomed or unwelcomed romantic attention
- h) Take action even if you turn out to be wrong and notify management.



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- Family Medical Leave and Light Duty
 - a) Worker's comp leave is not automatically counted as FMLA leave.
 - FMLA leave and Worker's Comp leave can run together if the absence is due to a qualifying serious illness or injury and the employer properly notified the employee that the leave will be counted as FMLA leave.
 - In the absence of those conditions, employee is entitled to Worker's Comp leave plus FMLA leave.
 - b) In the past employers could count light duty work against FMLA leave. Not any more.
 - If the employee voluntarily opts for light duty work, that employee is not on FMLA leave nor does the employee waive any right to job restoration.



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Understanding the Impact of Recent ADA Changes on Safety

- The ADA has been expanded to apply to a much wider range of employees and disabilities.
- **Change #1**
 - a) Specifically rejected the Supreme Court ruling in Toyota v. Williams
 - b) In Toyota v. Williams the Supreme Court ruled that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment must also be permanent or long term.”
 - c) Key conclusions of this case: working is not a major life activity; inability to perform manual tasks of a job is not of itself a disability; and impairment must be more than short-term.
 - d) Congress’ ADA Amendments:
 - i) Major life activities now include “working” and “manual tasks”.
 - ii) Excludes “transitory impairment” and defines it as an impairment with an actual or expected duration of 6 months.
 - iii) Leaves it to the EEOC to revise regulations to redefine the term “substantially limits” as “significantly restricted”.



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e) Implications: Must now consider whether someone is covered under the ADA because an impairment “expected to last more than six months substantially restricts their ability to perform the manual tasks of the work to be performed.”

- **Change #2**

- a) Specifically rejected the Supreme Court ruling in Sutton v. United Airlines.
- b) In Sutton v. United Airlines the Supreme Court ruled that “the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment.”
- c) Key conclusion of this case: If you have a “correctable condition” you are not disabled under the ADA.
- d) Congress’ ADA Amendments:
 - i) Must ignore ameliorative effects of mitigating measures.
 - ii) Exception: Ordinary eyeglasses and contact lenses.
- e) Implications: Cannot take into consideration whether impairment is correctable.



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- **Change #3**

- a) Significantly expands list of “major life activity” and authorizes EEOC to add more by regulation.
- b) Congress’ ADA Amendments:
 - i) Performing manual tasks and working
 - ii) Standing, lifting, bending
 - iii) Caring for one’s self, breathing, learning and thinking
 - iv) Operation of any “major bodily function”
- c) Implications: Impairment and disability is so broad that virtually anyone can claim an impairment requiring a reasonable accommodation.

- **Change #4**

- a) Significantly broadens “regarded as”
- b) Removes the old definition of “regarded as substantially limited in one or more major life activities” and replaces it with “regarded as having a physical or mental impairment.”
- c) Implications: Perceived impairment now gives rise to protection. Because of the subjective nature of perceptions, expect a lot of litigation.



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Conclusions

- Expect to grant many more requests for accommodations.
- Make sure job descriptions are up to date.
- Update policies.
- Train on amendments.



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Closing Message

Safety Professionals will be asked to do more related work.

- Keep current.
- Identify experts you can contact.
- Document, document, document.
- Don't be afraid to ask for assistance and direction.

