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HIGHLIGHTS

Court Blasts DOJ for Pressuring KPMG to Not Pay Employees' Legal Fees
A federal district judge in New York issues a scathing opinion holding that the Justice Department's policy under the Thompson Memorandum of viewing a company's payment of its employee's legal fees as an indication that the company is not cooperating violates a defendant's Sixth Amendment right to counsel and Fifth Amendment due process right to be free from government interference with their defense. **Page 367**

Siegelman, Scrushy Guilty in Federal Political Corruption Trial
A federal jury finds former Alabama Gov. Don Siegelman (D) and former HealthSouth Chief Executive Officer Richard Scrushy guilty of bribery and various other charges in a corruption trial centered on allegations of cash and gifts being swapped for political favors. **Page 375**

Restitution to Lay's Victims in Limbo After Former Enron CEO's Death
The death of former Enron Corp. Chief Executive Officer Kenneth Lay in the wake of his convictions on fraud and conspiracy charges stemming from the demise of the energy trading giant casts serious doubt on the possibility that victims in the case will ever receive restitution as the result of his convictions. **Page 381**

Judge Denies Motion to Delay Trial of W.R. Grace, Company Executives
The trial of W.R. Grace & Co. and seven current and former executives for alleged violations at the company's vermiculite mining and milling operations in Libby, Mont., will begin Sept. 11 as scheduled after the federal judge overseeing the case denies the defendants' motion for a six-month delay. **Page 373**

Tenet Reaches $900 Million Settlement of Medicare Fraud Allegations
The nation's second-largest hospital chain, Tenet Healthcare Corp., reaches a $900 million settlement agreement with the federal government to resolve allegations of unlawful Medicare billing practices. **Page 375**

Compliance Professionals Get Tips on Keeping Companies Out of Court
The U.S. Sentencing Guidelines for organizations are "almost 100 percent perfect" now that controversial language about waiving attorney-client privilege has been removed, according to U.S. Sentencing Commission vice chair Judge Ruben Castillo. **Page 381**

Analysis & Perspective

WORKPLACE SAFETY: Recent developments among a partnership of the Environmental Protection Agency, the Occupational Safety and Health Administration, and the U.S. Department of Justice promise to increase the number and extent of criminal investigations and prosecutions of crimes involving worker safety. **Page 390**

ALSO IN THE NEWS

TAX EVASION: Prominent civil rights attorney Stephen Yagman is indicted on charges of money laundering, bankruptcy fraud, and tax evasion. **Page 370**

SECURITIES FRAUD: Federal authorities arrest a New Jersey hedge fund manager and charge him with defrauding investors out of $5.8 million. **Page 370**

INSIDER TRADING: A federal court grants a motion by the Securities and Exchange Commission to dismiss an insider-trading complaint but allows the defendant to continue to use the civil discovery process to defend criminal charges. **Page 374**

GOVERNMENT CONTRACTS: Boeing Corp. and the Justice Department reach a final agreement on a $615 million settlement to resolve criminal and civil allegations. **Page 376**

ACCOUNTING FRAUD: Stuart Wolff, former chief executive officer and chairman of Homestore.com Inc., is convicted of 18 felony charges. **Page 377**

FORFEITURE: Congress did not deprive federal courts of the authority to enter in personam forfeiture orders in mail fraud cases when it enacted 18 U.S.C. § 982(a), the Third Circuit holds. **Page 379**

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Analysis&Perspective

Workplace Safety

Individual Criminal Liability for Willful OSH Act Violations: A Practice Guide for Navigating Investigation and Prosecution

BY W. WARREN HAMEL & ALICE W.W. PARHAM

Historically, federal prosecutors have rarely used the criminal provisions of the Occupational Safety and Health Act of 1970 to convict individual supervisors or employers for willful violations of Occupational Safety and Health Administration regulations that result in death of a worker. Convictions followed by sentences including a significant period of incarceration are even more rare.[1] Recent developments among a partnership of the Environmental Protection Agency, the Occupational Safety and Health Administration and the U. S. Department of Justice, however, promise to increase the number and extent of criminal investigations and prosecutions of crimes involving worker safety. Due to the unusual structure of the OSH Act criminal provisions, criminal prosecution of violations under the OSH Act are not as straightforward as even those under environmental crimes statutes, especially for prosecution of individuals. While defense counsel will continue to raise the substantive limitations of OSH Act criminal provisions to protect individuals from criminal liability, prosecutors will undoubtedly look to bring charges that relate to the underlying safety violation but that are more easily prosecuted—charges under environmental statutes or violations of Title 18 provisions such as making false statements and obstruction of justice, if applicable to the circumstances.

In May 2005 the U.S. Department of Justice, U.S. Department of Labor Occupational Safety and Health Administration, and the U.S. Environmental Protection Agency announced an initiative to increase interagency coordination and prosecution of worker-safety violations through the use of charges under relevant environmental statutes. DOJ's Environmental and Natural Resources Division-Environmental Crimes Section is leading the initiative, which involves, among other things, ECS attorneys training OSHA compliance officers to recognize and refer potential environmental violations to EPA and DOJ. The ECS hopes to raise awareness among OSHA regulators of the potential for criminal prosecutions, to give regulators a basic grounding in environmental statutes that may be relevant, and to assure them that ECS is interested in pursuing a vigorous enforcement program of OSH Act violations as part of its overall environmental crimes mission.[2]

Perhaps the best recent example of criminal prosecution involving environmental and worker safety violations is *United States v. Elias*, 2000 WL 1099977 (D. Idaho, April 26, 2000) (unpublished decision), in which Alan Elias was convicted of three counts of violating the Resource Conservation and Recovery Act, including knowingly exposing employees to hazardous waste and making a material false statement under the OSH Act. The jury found that Elias had exposed his workers to cyanide waste when they were cleaning a storage tank, and one of those workers suffered permanent brain damage. He then made false statements to responders attempting to aid the stricken worker. Elias was sentenced to serve a period of incarceration of 17 years, the longest sentence imposed on an individual in an environmental crimes case.[3]

[1] Between 1982 and 2002, the Occupational Safety and Health Administration declined to seek prosecution in 93 percent of the 1,242 cases where workers were killed due to willful safety violations. In the last 20 years, fewer than three dozen criminal convictions under the OSH Act have sent employers to jail. *See* David Barstow & Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws*, New York Times, May 2, 2005.

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[2] The potential connection between enforcement of environmental regulations and workplace-safety regulations was first made in the 1990s through two memorandums of understanding between OSHA and EPA. This early alliance included conducting joint inspections and investigations, sharing of data, inter-agency training, and issuing reports on major chemical accidents.

[3] The Ninth Circuit upheld the sentence of incarceration at 269 F.3d 1003 (9th Cir. 2001), while remanding the case for further proceedings relating to the $6 million restitution pay-

More cases have followed recently. For instance, in February 2005, a federal grand jury returned a 10-count indictment charging W.R. Grace & Co. and seven corporate officials with conspiracy, Clean Air Act violations, wire fraud, and obstruction of justice in connection with the company's vermiculite mine in Libby, Montana. *United States v. W.R. Grace* (D. Mont., No. CR 05-07).[4] The indictment alleges that the company endangered its workers, customers, and the residents of Libby by exposing them to high levels of asbestos and by covering up the potential dangers associated with mining and using asbestos-tainted vermiculite mined in Libby. In September 2005, the Union Foundry Company, a division of McWane Inc., pleaded guilty to a two-count information charging it with willful violation of an OSHA regulation that resulted in the death of one of its employees, and with treating hazardous waste without a permit in violation of RCRA. The company agreed to pay a criminal fine of $3.5 million and to fund $750,000 in environmental community service projects in the Anniston, Ala., area. *United States v. Union Foundry Co.* (N.D. Ala., No. 2:05-cr-00299, plea entered Sept. 6, 2005).

Additional cases are likely as ECS ramps up its training program and OSHA and EPA regulators become more comfortable working together and sharing information. Thus, no longer can companies afford to give short shrift to potential safety violations when EPA inspectors are on site, or to pay less attention to possible environmental problems when OSHA inspectors call. The agencies will be working hand-in-glove, and agency regulators will know that they have the support of the Environmental Crimes Section if they stumble upon what they consider to be evidence of a crime.

OSH Act Criminal Provisions

Violations of the OSH Act and regulations promulgated pursuant to the Act are not, however, easy to pursue as criminal cases, nor do the criminal provisions of the Act carry a substantial penalty. Under 29 U.S.C. § 666(e), an employer who "willfully" violates any OSHA standard, rule, or order, which violation results in the death of an employee, is guilty of a crime. A first-time charge under the statute is a Class B misdemeanor, with a maximum a fine of $10,000 and/or imprisonment of up to six months; a second or subsequent charge is a Class A misdemeanor with a maximum fine of $20,000 and imprisonment for up to a year. The statute provides:

> Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

Thus, the government must prove that (a) an employer (b) willfully (c) violated a standard, rule, or order promulgated pursuant to Section 655 of the OSH Act, or any OSHA regulation, and (d) the violation caused the death of an employee.

The obstacles to prosecution, especially of individuals, lay in the "willful" standard of knowledge and the definition of "employer," a term with a specific and narrow definition under the statute that severely limits the range of individuals whose status allows them to be prosecuted in a criminal case. Given the comparatively modest penalties associated with a violation, especially one that results in an employee's death, and the obstacles to prosecution embedded in the statute itself, prosecutors may choose not to seek OSH Act criminal charges. Instead, the government will look for charges under related environmental statutes that can be linked to the conduct resulting in the death, or that arise from efforts to cover up the original crime. In either case, the challenge for both prosecutor and defense counsel alike is to conduct a careful analysis of the facts of the case and whether they fit the criminal charges that are, in effect, standing in for an OSH Act prosecution.

Willfulness: More Than 'Knowing' Conduct

Section 666(e) requires the government to show that the employer acted "willfully" in violating the statute, regulation, standard, or work practice. Willfulness, sometimes referred to as specific intent, is a higher standard of knowledge than the typical "knowing" or general intent standard, and poses a modest additional challenge to the government in a criminal OSH Act prosecution. As the Supreme Court held in *United States v. Bryan*, 520 U.S. 184 (1998), a willful standard of conduct requires the government to prove that the defendant knew that his conduct was unlawful at the time he committed the offense. Of course, the government need not prove that the defendant knew the details of the law that he violated, or even the specific law itself. (Willfulness requirement does not "carve out an exception to the traditional rule that ignorance of the law is no excuse.") As the court concluded: "[K]nowledge that the conduct is unlawful is all that is required."

Courts addressing willfulness in the OSH Act context have further refined the standard as including "intentional disregard" of OSHA standards or "plain indifference" to OSHA regulations. *Chao v. Occupational Safety and Health Review Com'n*, 401 F.3d 355(5th Cir. 2005); *Valdak Corp. v. Occupational Safety and Health Review Com'n*, 73 F.3d 1466 (8th Cir. 1996); *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149 (11th Cir. 1994). An employer may not avoid a finding of willfulness by proving lack of bad faith or malice. *United States v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998). Even a good-faith belief that an alternative program meets the objectives of OSHA regulations is irrelevant. *Fluor Daniel v. Occupational Safety and Health Review Com'n*, 295 F.3d 1232 (11th Cir. 2002). The statute does, however, specify that the regulations violated be under Section 665; there are no criminal penalties for violation of the "general duty" clause of the statute, 29 U.S.C. § 654(a)(1).[5] Of course, one would assume that

ment that the District Court had ordered Elias to pay to the family of the injured employee.

[4] Stephen P. Solow, *The State of Environmental Crime Enforcement: An Annual Survey*, ABA Conference on Environmental Law, March 9-12, 2006.

[5] "Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause

in the great majority of cases that are referred to DOJ for potential criminal prosecution, some evidence will point to "intentional disregard" of or "plain indifference" to the relevant OSHA regulations, so in practice this somewhat heightened mens rea requirement will not likely prove a significant obstacle to the government in many cases.

A Limitation on Prosecuting Individuals: Who is an 'Employer'?

The OSH Act draws a bright-line distinction between an "employer" and an "employee" for purposes of determining rights and responsibilities under the act, and the narrow definition of "employer," along with caselaw interpreting the reach of congressional intent to areas of derivative culpability such as aiding and abetting, has severely restricted the universe of individuals who can be subjected to criminal prosecution under Section 666(e). Section 652(5) of the OSH Act defines an employer as "a *person* engaged in a business affecting commerce *who has employees*, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State" (emphasis provided). A person is defined by the act as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652 (4). Thus, an employer is an individual or business entity that has employees, and employers are required to provide employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" and to comply with all OSHA standards and regulations. 29 U.S.C. § 654(a). By contrast, employees are governed by Section 654(b), which provides that employees must comply with OSHA standards, rules, and regulations, but imposes no requirement to provide a safe workplace.

Caselaw interpreting the statute and legislative history has made clear that "employer" encompasses a very narrow class when applied to individual persons. In essence, an individual person must be an owner, senior officer, director, or principal—that is, one who is in fact the direct employer or whose interests are coincident with the business entity that serves as the employer. Thus, supervisors and managers who are not formal officers of a business entity are not "employers" for purposes of criminal prosecution. For instance, in *United States v. Doig*, 950 F.2d 411 (7th Cir. 1991), the U.S. Court of Appeals for the Seventh Circuit stated plainly that individual liability is limited to corporate officers and directors under the statute:

> A corporate officer or director acting as a corporation's agent could be sanctioned under § 666(e) as a principal, because, arguably an officer or director would be an employer. Of course, the corporation would also be responsible for its officer's actions. We hold that an employee who is not a corporate officer, and thus not an employer, cannot be sanctioned under § 666(e).

The government had charged Doig and the company that employed him with 12 counts of violating Section § 666(e) for the deaths of three employees. Doig managed a sewage tunnel building project on behalf of his employer, a contractor for the Milwaukee Metropolitan Sewage District's pollution abatement program. The court relied on a prior Third Circuit decision finding that neither the Occupational Health Review Commission nor the Secretary of Labor has the power to sanction employees, reasoning that the OSH Act's stated purpose is to compel employers to provide a safe working condition for employees, not to "punish employees whose reckless or willful actions injure their coworkers." (*citing Atlantic & Gulf Stevedores v. Occupational Safety & Health Review Comm'n*, 534 F.2d 541 (3rd Cir. 1976) (holding that Congress did not intend to confer the power to sanction employees on the Secretary or the Commission, and stating that the OSH Act's enforcement scheme is directed only against employers). See also *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) ("an employee who is not a corporate officer, and thus not an employer, cannot be sanctioned under § 666(e).")

Other courts have followed suit. For example, in *United States v. Cusack*, 806 F. Supp. 47 (D.N.J. 1992), the district court interpreted the definition of employer to include corporate officers or directors under some circumstances. The court reasoned that an officer's or director's role in an organization may be so all-encompassing that the officer or director is in fact the employer and thus can be held personally liable under Section 666(e). John Cusack was the president, director and only officer of Quality Steel, was the sole decision maker for the company, had "unrestricted discretion" in controlling the company's operations, and had unlimited access to the company's funds. The court refused to dismiss the indictment against Cusack, finding that if the government could prove "that defendant played a role in Quality Steel which [was] alleged in the indictment, he [would fall] within the meaning of 'employer' as used in § 666(e), and that interpretation of the statute [would] not violate defendant's right to due process." Relying on cases from the Fifth and Seventh Circuits, the *Cusack* court observed that:

> To conclude that such a person cannot be held liable under the OSH Act's criminal provisions would strip § 666(e) of much of its force when applied to closely held corporations where, as in the present case, the owner and principle officer is also the person actively supervising the work in which OSHA regulations were violated. In such a case it would seem that Congress' intent is implemented by recognizing the reality of the situation and treating the officer and director as the employer.

The government has recognized this limitation on its power to prosecute individuals under the OSH Act. The United States Attorneys Criminal Resource Manual defines "employer" for civil OSH Act purposes as "generally encompass[ing] only the employing business entity, whether it be a corporation, a partnership or sole proprietorship." The manual goes on to state:

> For purposes of criminal enforcement, however, an individual who is a corporate officer or director, may be an "employer" within the meaning of the Act. *United States v. Doig*, 950 F.2d 411, 415 (7th Cir. 1991) (dicta). This is particularly the case where the officer's role in operating the company is pervasive as in the case of *United States v. Cusack*, 806 F. Supp. 47 (D.N.J. 1992), where the company's officer ran the corporation as if it were a sole proprietorship.

United States Attorneys Criminal Resource Manual 2012, October 1997.

death or serious physical harm to his employees . . . ." 29 U.S.C. § 654(a)(1).

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Derivative Liability: Aiding and Abetting and Conspiracy to Violate Section 666(e)

Prosecutors have attempted to make an end run around the limitations embedded in the statute by charging individuals who are not owners, directors, or officers with aiding and abetting the employer in committing a violation of Section 666(e). In the limited number of cases addressing the issue, the courts have rejected this strategy. In the *Doig* case, the government contended that, because of his role as manager for the tunnel project, Doig could be prosecuted as an aider and abettor under 18 U.S.C. § 2(a),[6] even though his status and responsibilities did not qualify him as an "employer" under the statute. The court rejected the government's effort to draw Doig back into the ambit of criminal liability by charging his conduct in terms of aiding and abetting, and held that the congressional policy of placing the burden of workplace safety on employers necessitates the conclusion that an employee may not be charged with aiding and abetting an employer's criminal violation under the OSH Act.

The *Doig* court relied on the *Atlantic & Gulf Stevedores* decision, which discussed a Senate report that stated that Section 654(b), defining employee duties under the OSH Act, does not diminish employer responsibilities under Section 654(a). Id. at 413 (citing *Atlantic & Gulf Stevedores*, 534 F.2d at 554, quoting S. Rep. No. 91-1282, U.S.C.C.A.N. 5171, p. 5187 (1970)). The court concluded that employee liability as aider and abettor "is as inconsistent with the legislative purpose of OSHA as subjecting employees to direct sanction would be." *Id.* at 414. Finally, the *Doig* court noted that the government's contentions that the employer was criminally responsible for OSH Act violations committed through its "agent" (Doig), while simultaneously arguing that Doig was criminally responsible for aiding and abetting the employer, were "logically inconsistent."

Similarly in *Shear*, the government charged the individual defendant as an aider and abettor under 18 U.S.C. § 2(a). In rejecting this charge, the court explained that Congress must have considered that the majority of Section 666(e) violations would be committed by employees of the covered employer. The court analogized the *Shear* case to *Gebardi v. United States*, 287 U.S. 112 (1932), which held that a woman who consented to be transported in interstate commerce for immoral purposes could not be convicted of conspiring with the person who transported her in violation of the Mann Act, because of an affirmative legislative intent embodied in the act to exclude a woman's consent from criminal sanction. The *Shear* court used *Gebardi's* reasoning to conclude that the OSH Act's "affirmative legislative intent" is not to punish employees who aid and abet their employer's criminal violations of the act by "committing, or participating or assisting in, the acts or conduct constituting the employer's violation." Id.

Although there appear to be no cases directly addressing an indictment charging a conspiracy between an employer and its employees under Section 666(e), the *Shear* court noted that the *Gebardi* decision, which dealt with the general conspiracy statute, "is not materially different than the aiding and abetting issue as the logic of the argument is the same." Thus, the reasoning of *Shear* and *Doig* prohibits charging a nonemployer individual with either conspiracy to violate Section 666(e) or with aiding and abetting such a crime. Indeed, the U.S. Attorney's Criminal Resource Manual specifically acknowledges this conclusion with regard to aiding and abetting: "Although corporate officers or directors may be charged as principals, they cannot be charged as aiders and abettors under 18 U.S.C. § 2(a) (1991). *See United States v. Doig*, 950 F.2d at 415; *United States v. Shear*, 962 F.2d 488, 493-96 (5th Cir. 1992)."

Congress, too, has recognized the limitations of the OSH Act's criminal provisions and made attempts in the 1990s to "fix" the limitations identified by *Doig* and *Shear*. Those efforts failed. In 1992, the Committee on Education and Labor sought to amend H.R. 3160 to specifically overrule *Doig* "so individual managers can be held criminally liable" and also to force individuals convicted of OSH Act offenses to be "personally liable for any criminal fines assessed against them." H.R. Rep. 102-663(I). Not long after, the Senate Committee on Labor and Human Resources similarly recommended that the OSH Act be amended to "overrule[ ] *U.S. v. Doig* to permit OSHA to prosecute individual managers for criminal violations" and to make individuals personally liable for criminal fines assessed against them. S. Rep. 102-453.

In 1994, the Committee on Education and Labor, through the proposed Comprehensive Occupational Safety and Health Reform Act, again addressed the issue of individual criminal liability. The committee report reveals Congress' understanding of the current jurisprudence on the OSH Act's criminal provisions:

> The narrow definition of "employer" in the OSH Act means that individuals who do not personally engage in commerce and employ workers cannot be held liable criminally. *See United States v. Doig*, 950 F.2d 411 (7th Cir. 1991) (only employer and corporate officers may be held criminally responsible under OSHA; project manager not subject to criminal prosecution.); *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) (construction company superintendent not subject to criminal prosecution).

H.R. Rep. 103-825(I).

In an apparent effort to overrule existing case law, the committee explained its proposed amendment as follows:

> H.R. 1280 provides that officers, managers and supervisors of employers who have the authority to prevent violations of safety and health standards, but who nevertheless willfully violate such standards, are subject to the criminal penalties of the Act. . . . The Committee amendment also makes clear that the managers potentially subject to criminal liability are only those managers who have the authority to correct the OSH Act violation which gives rise to the liability. Thus, an industrial hygiene manager who monitors toxic exposure levels in a factory, but who has no authority to implement controls to reduce exposure would not be criminally responsible if a violation of an OSH permissible exposure limit resulted in an employee's death.

Thus, Section 666(e) stands as originally enacted, posing a significant challenge to prosecutors pursuing charges against an individual for criminal violations of OSH Act.

[6] 18 U.S.C. § 2(a) reads: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Likely Strategies for Prosecuting Individuals for Worker Safety Violations

Of course, limitations on the specific criminal provisions in the OSH Act will not be the end of the story for federal enforcement. Prosecutors will likely seek creative methods to reach wrongful conduct by non-"employer" personnel involved in worker safety violations by other means. For instance, a worker safety violation involving exposure to a hazardous waste might allow the government to seek charges under the RCRA knowing-endangerment provision, 42 U.S.C. § 6928(e). Other environmental statutes carry provisions that would serve to accomplish the same end, depending on the media.

Likewise, investigators and prosecutors will be searching for evidence of a cover-up or efforts to block an investigation, to prosecute as a surrogate for the underlying worker safety violation. As in many other instances, prosecutions may include charges of false statement under 18 U.S.C. § 1001, or under the OSH Act itself, if false statements are made to regulators investigating the incident. If the evidence shows destruction, alteration, or modification of a document or tangible object in contemplation of a federal investigation, the government can bring charges under 18 U.S.C. § 1519, enacted as part of the Sarbanes-Oxley Act. Any efforts on the part of employees to influence testimony or obstruct an investigation of an incident involving worker safety would be subject to prosecution under 18 U.S.C. § 1505. And if the government weaves a post-incident course of conduct and the original conduct leading to the death of an employee into a wide-ranging conspiracy count, it will be difficult indeed to untangle the allegations such that the letter and spirit of Section 666(e), *Doig*, and *Shear* are given full force.

Conclusion

In summary, while the limitations of the OSH Act criminal provisions pose serious challenges to prosecutors, defense counsel should expect a full court press of creative strategies from the government to overcome those limitations and to pursue a robust enforcement agenda that blends environmental and worker safety prosecutions.