



OSHA Imposes Reflective Vests on Construction Industry Without Rulemaking

OSHA recently announced that all highway and road construction workers – not just flaggers – must wear reflective vests. It did this even though no OSHA standard imposes such a requirement and even though its standards only recommend reflective vests for non-flaggers.

BY ARTHUR G. SAPPER

The Occupational Safety and Health Act of 1970 imposes two basic duties on employers: to obey OSHA's standards and, if none applies, to obey the General Duty Clause, which requires feasible steps against serious "recognized" hazards.

As to flaggers at road construction sites, an OSHA standard (29 C.F.R. § 1926.201(a)) incorporates by reference the provisions on "warning garments" of the 2000 edition of the Manual on Uniform Traffic Control Devices of the Federal Highway Administration (FHWA), often known as the 2000 MUTCD. Section 6E.02 of the 2000 MUTCD requires high-visibility clothing only for "flaggers."

As to non-flaggers, no generally applicable OSHA standard requires them to wear reflective clothing. Indeed, § 6D.02 of the 2000 MUTCD states only that "workers close to the motor vehicle traveled[-]way should wear bright, highly-visible clothing." (Emphasis added.) OSHA's own regulation (§ 1910.32(r)) defines "should" as meaning only "recommended."

Does the presence in the 2000 MUTCD of only a recommendation for reflective vests for non-flaggers mean that OSHA can issue citations under the catch-all General Duty Clause if non-flaggers don't wear reflective vests? Or does the OSHA-endorsed distinction drawn between flaggers and non-flaggers mean that such citations may not be issued?

In 2006, an independent court-like agency, the Occupational Safety and Health Review Commission, resolved some of the issues lurking around this controversy. In *Ruhlin Co.*, 21 BNA OSHC 1779 (2006), held that only "standards" could preempt the General Duty Clause and that a non-mandatory pro-

vision was not such a "standard." The commission pointed to an OSHA regulation stating that "[o]nly the mandatory provisions (i.e., provisions containing the word "shall" or other mandatory language) of standards incorporated by reference are adopted as standards ..." Thus, because the "should" provision was not adopted as a "standard," it could not preempt the General Duty Clause.

But the commission threw out the citation on a different ground – that a 2004 OSHA interpretation letter issued to the American Road and Transportation Builders Association had deprived employers of constitutionally required fair notice that non-flaggers must wear reflective vests. That letter pointed employers to the 2000 MUTCD for guidance on whether the General Duty Clause requires reflective vests for non-flaggers. Yet, because it uses the word "should," employers "could not have been sufficiently apprised" that there was a requirement under the General Duty Clause for non-flaggers to wear reflective vests.

OSHA'S REACTION

On Aug. 5, 2009, OSHA withdrew the 2004 letter and issued to the same recipient a new interpretation letter – one that does not rely on the 2000 MUTCD. It asserts that failing to require construction workers to wear reflective vests in highway/road construction work zones would violate the General Duty Clause because such workers are "exposed to the danger of being struck by the vehicles operating near them."

But how does OSHA's new interpretation letter provide to employers the fair notice of such a requirement that the

2000 MUTCD's use of the word "should" earlier had deprived them? And how does OSHA establish that the hazard is a "recognized" one under the General Duty Clause?

OSHA pointed to a 2006 FHWA regulation (23 C.F.R. § 634.3) that states: "All workers within the right-of-way of a Federal-aid highway who are exposed either to traffic ... or to construction equipment within the work area shall wear high-visibility safety apparel." (After the FHWA adopted this regulation, it approved a similar change to the 2009 MUTCD.) This new FHWA regulation, OSHA states, "demonstrates the need for all workers who are exposed either to public traffic or to construction vehicles and equipment to wear high-visibility apparel." In a footnote, OSHA acknowledged that this regulation applies only to highways built with federal funds but stated that "the FHWA's reasoning makes clear that all employees who work near road traffic need the protection provided by high visibility garments."

As to whether the hazard is "recognized," OSHA asserted: "Road and construction traffic poses an obvious and well-recognized hazard to highway/road construction work zone employees." The basis for this assertion was that the FHWA had recognized such a hazard in the preamble to its regulation: The FHWA had there stated that visibility "is recognized as a critical issue for worker safety." From this, OSHA extracted the idea that "the construction industry" recognizes such a hazard: "The FHWA's recent mandatory standard ... shows that struck-by hazards in highway/road construction work zones are well recognized by the construction industry."

SERIOUS QUESTIONS

OSHA's 2009 interpretation letter presents some serious questions.

As to constitutionally required fair notice, it is difficult to see how an FHWA regulation that applies only to federally financed highway construction can provide employers with fair notice of a requirement for non-federally financed projects.

To employers, the limit on the FHWA regulation's applicability speaks just as loudly as the safety policy it partially reflects. Employers might conclude from the FHWA regulation that the federal government is willing to require and

absorb the cost of reflective vests because it is excessively cautious or lacks fiscal discipline – not because vests are needed, cost-effective or economically feasible. Employers also might believe that companies performing federally financed highway work had less incentive to resist the proposed version of the FHWA regulation; companies performing such work know that they safely can add the cost to their bids, knowing that the federal government would absorb it.

Most importantly, the continuing presence of the "should" provision in the MUTCD's 2000 edition – the edition still referenced by OSHA's standards – speaks most loudly of all. In determining their OSHA obligations, employers logically look first to OSHA's standards and the manuals they incorporate by reference. Employers are entitled to conclude that if an express "should" provision resides in such a manual, they are not required to implement that recommendation and are not expected to abide by a requirement in inapplicable regulations of another agency.

OSHA's reliance on FHWA regulations also constitutes an end run around the OSH Act's rulemaking provisions. Those provisions afford all employers – not just those building federally financed highways – the opportunity to comment on proposed safety requirements, and they impose substantive limitations specific to the OSH Act. OSHA's conduct here undermines OSH Act rulemaking, attempts to make enforceable regulations that did not meet its strictures, and perpetuates the lack of fair notice that the commission found in Ruhl.

As to whether a hazard is recognized under the General Duty Clause, it is difficult to see how OSHA can cite an inapplicable FHWA regulation, or FHWA's recognition of a hazard, to show that a hazard is "recognized" under the OSH Act's General Duty Clause.

To understand why, it is necessary to first ask: Recognized by whom? When the General Duty Clause says that employers must protect employees against "recognized" hazards, who must do the recognizing? Case law generally has held that a hazard must be recognized by either the employer or its industry. These holdings reflected Congress's intent that the General Duty Clause be applied only when employers have not merely had fair notice that a condition poses a hazard, but such strong notice that that they or their competitors actually have recognized the condition as

posing a hazard. That is why Congress permitted OSHA for its first 2 years to adopt without rulemaking a so-called "national consensus standard" if it was "adopted ... by a nationally recognized standards-producing organization under procedures [such that] persons interested and affected by ... the standard have reached substantial agreement on its adoption." Regulations of a government agency such as the FHWA evidence no such recognition, for they show only that the agency recognizes a hazard, not that an employer or its industry does.

The idea that a hazard is "recognized" because it is "obvious" also is highly questionable. Nothing in the text or legislative history of the General Duty Clause indicates that the congressional purpose in limiting the clause to "recognized" hazards is met by an OSHA inspector's subjective testimony that to him or her, the hazard is "obvious." If the traffic hazard is obvious and reflective vests are necessary for non-flaggers –

➤ Why does OSHA's own standard distinguish between flaggers and non-flaggers with respect to reflective vests?

➤ Why does the version of the MUTCD referenced by OSHA's own standards only recommend reflective vests?

➤ Why doesn't OSHA adopt a reflective vest standard in a rulemaking? Why rely on inapplicable FHWCA regulations? If the hazard truly was obvious and widespread, this would not be difficult. In trenching and excavation work, OSHA already has adopted a standard (29 CFR § 1926.651(d)) requiring reflective vests for "[e]mployees exposed to public vehicular traffic."

It is unfortunate that the OSHA has attempted this end run around the OSH Act's rulemaking process, avoiding the protections of the General Duty Clause and the fair notice doctrine. Employers facing reflective vest citations based on OSHA's latest interpretations might consider contesting them on this basis. **EHS**



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