

Mark S. Dreux

PARTNER

Mark is the head of the OSHA group in Arent Fox's Labor & Employment practice and is nationally recognized for his work in occupational safety and health law.



Practices

Labor & Employment

Education

Columbus School of Law at The Catholic University of America JD, 1982

Georgetown University BA, 1977

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Mark focuses on representing employers and trade associations in all aspects of the Occupational Safety and Health Act (OSH Act). His practice includes counseling clients in regulatory compliance with the standards and regulations which OSHA and the state plans have promulgated, investigating significant workplace incidents, managing OSHA inspections, contesting OSHA citations, defending employers in OSHA enforcement actions, conducting safety and health audits and due diligence reviews, and engaging in regulatory advocacy.

Recently, Mark was recognized by *EHS Today* as one of the 50 most influential leaders in the field of occupational safety and health.

Client Work

Over the last 25 years, Mark has defended employers in 35 fire and explosion incidents, 105 fatality investigations, and hundreds of citations alleging violations of the general duty clause and OSHA standards, particularly, process safety management (PSM), lockout/tagout (LOTO), hazard communication (HAZCOM), emergency response, permit required confined spaces, personal protective equipment, including respirators, recordkeeping, and guarding. From 1984 to 1987, Mark was a federal prosecutor, and he frequently combines his extensive knowledge of criminal and OSHA law to defend employers in criminal OSHA proceedings.

Significant OSHA Cases include:

- Lead counsel in drafting an amicus brief for the American Petroleum Institute to define the phrase "Recognized and Generally Accepted Good Engineering Practice ('RAGAGEP') for the purpose of the PSM standard.
- Lead counsel in a successful appeal before the Fifth Circuit regarding a number of PSM issues of first impression, including whether the statute of limitations bars OSHA from enforcing alleged PSM violations for PHA and audit findings against a current employer where its predecessor conducted the PHAs and audits years prior to its ownership; and the definition and

scope of a “process change” and “process equipment for the purpose of the PSM Standard.”

- *Secretary of Labor v. Dow Corning Corp.*, KOSHRC No. 4888-12. Following a two-day trial, the Administrative Law Judge agreed that a reciprocating pump did not need a guard and vacated the primary citation at issue for machine guarding. The OSHA defense team, led by Mark Dreux and assisted by Matt Thorne, was engaged by the employer to defend the issued machine guarding citation for failure to guard the exposed shaft of a reciprocating pump. Periodically, the pumps had to be cleaned of excess sealant that collected around the pump’s slow moving, exposed shaft. The employer had an effective lockout-tagout (LOTO) procedure in place so that employees could clean the pump safely. An employee injury occurred when the LOTO procedure was not followed and the pump the employee was cleaning was re-energized without his knowledge. At trial, the OSHA team successfully demonstrated that the exposed pump did not possess a moving-part hazard and even if it did, employees were not exposed to it due to the employer’s effective LOTO policy, the slow-moving nature of the pump, and the fact that no employees were stationed around it. As a result, the machine guarding citation was vacated and the employer was not required to sustain the significant cost of guarding its 400 pumps, nation-wide.
- *Secretary of Labor v. Delek Refining*, OSHRC Docket No. 09-0844 (July 11, 2011). Commission extended the attorney-client privilege to a draft report concerning PSM compliance by a third-party expert. In a case of first impression, the Commission established a three-part test for determining whether a third-party expert’s report is protected by the attorney-client privilege.
- *Secretary of Labor v. Interstate Brands Corporation*, OSHRC Docket No. 00-1077 (April 24, 2003). Following a trial, the administrative law judge rejected the Secretary’s argument for machine specific LOTO procedures and accepted IBC’s generalized LOTO program. Moreover, IBC successfully asserted the employee misconduct defense by a supervisor, and all citations were vacated.
- *Secretary of Labor v. Mead Coated Board*, OSHRC Docket No. 01-0551 (December 10, 2002). After an evidentiary hearing, OSHA’s experts were barred from testifying on Daubert grounds, and after a lengthy trial, 5 serious, 1 willful, and 1 repeat citations were vacated. The citations had alleged violations of the emergency response, respirator, HAZCOM, and LOTO standards.
- *American Petroleum Institute v. Secretary of Labor*, Docket No. 00-60124 (5th Cir. April 11, 2000). OSHA had issued two interpretation letters that significantly changed two exemptions to the PSM standard. At the close of the litigation, OSHA withdrew both interpretation letters.
- *Chemcentral Corp. et al. v. Occupational Safety and Health Review Commission, Secretary of Labor, et al.*, No. 97-CI-01384 (Commonwealth of Kentucky, Franklin Circuit Ct., March 30, 1998). For years, federal OSHA has interpreted the PSM standard to cover the blending of flammable liquids. Persuaded the Kentucky Labor Cabinet that federal OSHA’s interpretation of the PSM standard was incorrect, and all PSM citations were withdrawn.
- *Ben Robinson v. Texas Workers Compensation Commission*, 934 S.W.2d 149 (Tex. Ct. App. 1996). Lead counsel in a challenge to a state safety program which was declared unconstitutional. Section 18(c) of the OSH Act preempted the state program. Attorneys’ fees were awarded.
- *In re Terra International, Inc.*, No. 110123 (Iowa Dist. Ct. 3d Jud. Dist. Woodbury Cty., January 24, 1995). Co-counsel in a 10-day televised hearing in a successful challenge to an OSHA inspection warrant.
- *Secretary of Labor v. Computer Science Raytheon*, OSHRC Docket No. 93-0232 (OSHRC, November 28, 1994). Following the trial, the administrative law judge accepted the affirmative defense of reasonable alternative measures to compliance with a standard and vacated the failure to guard citations.

Significant Rulemaking

Mark has represented employers and major industry associations in rulemaking proceedings on OSHA standards, including lockout/tagout, process safety management, ergonomics, electronic submission of the injury and illness data, the draft Silica Rule, and hearing protection.

Previous Work

Before entering private practice, Mark was an assistant US attorney with the United States Attorney's Office in the District of Columbia, where he was first chair in 38 criminal trials. He also served as a law clerk to the Honorable Bruce S. Mencher, Superior Court, Civil Division, Washington, DC. Finally, he served as a law clerk to the Honorable Marvin G. Bober, Assistant Chief Judge, Office of Administrative Law Judges, United States Department of Labor, Washington, DC.

Professional Activities

Mark is a member of the American Bar Association, Labor and Employment Law Section, and the Committee on Occupational Safety and Health.

Publications, Presentations & Recognitions

Mark is a member of the Editorial Advisory Board and a contributing editor to the *Occupational Hazard Magazine*. He has written several articles concerning recurring issues in OSHA criminal enforcement actions, including challenging warrants, defending prosecutions for false statements to OSHA, and using privilege to protect safety and health audits.

Mark frequently speaks at conferences for the petrochemical, ammonia refrigeration, pulp and paper, and manufacturing industries about an employer's obligations under the OSH Act, an employer's rights, duties and obligations during an OSHA inspection, managing an OSHA inspection to limit liability, defending OSHA citations, and the collateral consequences of those citations upon related civil and criminal litigation.

Mark has also been recognized by *EHS Today* twice as one of the 50 most influential leaders in the field of occupational safety and health.

A list of Mark's articles and presentations is below.

Selected Articles

- *Protecting Your Audits From Compelled Disclosure*
- *Protecting Audits Using Third-Part Experts with the Attorney-Client Privilege*
- *The Warrant Issue: When OSHA Knocks, Should an Employer Demand a Warrant?*
- *Prosecutions of Individuals for False Statements to EPA and OSHA Officials*
- *Risk, Reliability, and Due Diligence*
- *Use of and Challenges to Experts in OSHA Proceedings Following Daubert*
- *Lessons Learned from Incident Investigations*
- *Indemnification: An EHS Professional's Right to Have His Corporate Employer Pay Reasonable Litigation Expenses*

Facility Siting Requirements in OSHA's PSM Standard

- *OSHA Enforcement Actions for and the Defense of Facility Siting Citations*
- *A Facility Siting Checklist Based on OSHA's Citations and Its PSM Audit Guidelines*
- *OSHA's New Interpretation of the Atmospheric Storage Exemption in the PSM Standard*
- *EPA's Risk Management Program: An Overview*
- *Chemical Releases: Joint EPA/OSHA Investigations Raise Concerns*
- *Texas Court Upholds Preemption Defense to Texas Extrahazardous Employer Program*
- *Pre-emption: A Defense Against Dual Regulation of Safety and Health Issues*
- *The Proposed OSHA Ergonomics Program Standard - Extraordinary Cost for Unproven Benefit?*
- *Building an 'Effective Program' Against Corporate Criminal Liability*
- *The Proposed Federal Sentencing Guidelines for Environmental Crimes*
- *OSHA's Failure to Regulate Reactives in a Coherent Strategy*

Selected Courses and Presentations

OSHA General Presentations:

- An Overview of the Occupational Safety and Health Act of 1970
- Citations, Penalties and Enforcement Actions Under the OSHA Act
- Managing an OSHA Inspection - A Review of an Employer's Rights, Duties and Obligations and a Strategy to Minimize Liability
- Managing the Legal Issues Arising from a Catastrophic Incident
- Collateral Consequences of OSHA Enforcement Actions Upon Related Civil and Criminal Litigation
- Managing a Fatality Inspection of a Contractor Employee Losing the Workers' Comp Bar
- Managing Contractor Safety
- OSHA's Multi-Employer Worksite Policy: No Good Deed Goes Unpunished
- Contractor Safety and Potential Liability: OSHA's Multi-Employer Policy, Due Diligence and Independent Contractor Defense
- Privilege and the Protection of Safety and Health Audits
- Mergers and Acquisitions: Evaluating Safety and Health Compliance
- Use of and Challenges To Experts in OSHA Proceedings Following Daubert
- OSHA Citation Patterns and Enforcement Trends Against General Industry
- OSHA Citation Patterns Against the Petrochemical Industry and Common Defenses
- OSHA Citation Patterns under the Loto, Hazcom and Confined Space Standards and Common Defenses
- OSHA Citations Patterns for the Paper Industry
- OSHA Enforcement Practices under the Hazwoper Standard
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Using OSHA Citations as a Measurement Tool for Industry Progress

- "Participating in the Brave New World of Right-To-Know: Meeting Real Public Information Needs" - OSHA and Our In-Plant Community: Material Safety Data Sheets
- Dual Regulation: The Unconstitutionality of the TWCC's Extra Hazardous Employer Program
- OSHA's Proposed Safety and Health Program Rule
- Tuberculosis and Liability Associated with Nosocomial Transmission
- Tuberculosis and OSHA Respiratory Protection Policy
- Legal Considerations for Complying with Changing Regulations and Consensus Standards
- OSHA's Current Enforcement Agenda: Regulatory and Legislative Update - (5/11/10)

OSHA Process Safety Management (PSM) Presentations:

- An Overview of the Requirements of the PSM Standard
- OSHA's PSM Citation Patterns and Traps for the Unwary
- Federal Enforcement of the PSM Standard and Defenses for PSM Citations
- OSHA Enforcement Actions for and the Defense of Facility Siting Citations
- Facility Siting - Risk Assessment and Minimizing Liability
- Facility Siting - OSHA Enforcement Practices for Facility Siting Citations
- PSM Citations Patterns, Privilege, and Safety and Health Audits
- PSM Citations Patterns and Due Diligence Reviews
- PSM Examining the Regulatory Burden
- Chemical Safety and Hazard Investigation Board
- A Critique of Joint EPA/OSHA Investigations under Their Memorandum of Understanding (MOU)
- PSM Compliance Issues Foretell RMP Compliance Issues
- OSHA's National Emphasis Program for Refining and the Baker and CSB Reports
- Managing an NEP Inspection
- Preparing for an NEP Inspection: Auditing and Common Day-To-Day Issues
- Preparing for and Managing a Refinery NEP
- Preparing for and Managing a Chemical NEP
- Practical Applications of PSM Lessons Learned and Industry Best Practices
- NEP Inspections, Employee Participation and the Disgruntled Employee
- Lessons Learned From OSHA's NEP for Refining
- How OSHA's NPRM Globally Harmonized System Affects PSM - (5/20/10)
- How OSHA's NPRM Globally Harmonized System Affects PSM
- Major Changes Proposed for the PSM Standard: OSHA Issues Request for Comment on 14 Potential Revisions to the PSM Standard that Could Fundamentally Alter Industry Practices
- OSHA's Request for Information to Revise PSM Standard - A Regulatory

Update and Discussion of Proposed Revisions

- OSHA's Request for Information to Revise PSM Standard - Discussion of Eight of Seventeen Proposed Revisions
- Recent Critical PSM Enforcement Issues and OSHA Regulatory Update
- Recent Critical PSM Enforcement Issues: Modernizing PSM/RMP and EPA's RFI and Industry's Comments to EPA & Annual OSHA Regulatory Update
- Case Law Update: Pending Cases Involving Critical PSM Issues
- OSHA's and EPA's Plans to Modernize PSM and RMP
- Executive Order 13650 Working Group Report to the President - May 2014
- Regulatory Update: Modernizing PSM/RMP and EPA's RFI
- Regulatory Update: Modernizing PSM/RMP and EPA's RFI and AFPM's Comments to EPA
- Regulatory Update: Modernizing PSM/RMP and EPA's RFI and Industry's Comments to EPA

OSHA Ergonomics Presentations:

- OSHA's Draft Ergonomic Standard
- Ergonomics and Health Care Industries
- Organized Labor's Petition for an Emergency Temporary Standard for Cumulative Trauma Disorders in the Work Place
- Redesigning the Workplace - OSHA's Emphasis on Ergonomics

Criminal Presentations:

- Defending Workplace Incidents From Criminal Prosecution
- Recurring Issues in OSHA Criminal Enforcement Actions
- Criminal Liability Arising Out of Safety and Health Responsibilities of Corporate Officers, Directors and Managers
- Rights, Duties and Obligations of a Corporation and Its Agents During a Grand Jury Investigation
- The Fifth Amendment and the Grand Jury Subpoena for Documents
- Criminal Liability for False Statements to OSHA And EPA
- Chicago Magnet Wire: The Potential for Criminal Liability
- Federal Sentencing Guidelines for Individuals
- Federal Sentencing Guidelines and Environmental Offenses
- Comments on the Proposed Federal Sentencing Guidelines for Organizations
- Federal Sentencing Guidelines: Potential Sanctions Against Organizations and Their Agents

Environmental Presentations:

- EPA's Risk Management Program: An Overview
- EPA's General Duty Clause and Comparison to OSHA's General Duty Clause
- Legal Issues Associated with 112 (R) of the Clean Air Act Amendments
- An Overview of Section 112(R)(1) in the Clean Air Act Amendments: EPA's General Duty Clause

EPA's Amendments to the RMP Rule

- EPA's RMP Delay Rule
- EPA's RMP Rescission Rule

Bar Admissions

District of Columbia

Maryland