

## PETA's Push To Expand Limits Of Worker Safety Laws

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In the wake of a 2010 Occupational Safety and Health Administration fine levied against SeaWorld for a trainer's death, animal rights groups stepped up their use of the Occupational Safety and Health Act to advance their animal rights agenda and increase regulatory scrutiny over industries that use or display animals. Notwithstanding OSHA's citation of SeaWorld, use of the OSH Act to advance animal rights results in a profound regulatory mismatch and an unfortunate distraction from OSHA's worker protection mission.

The OSH Act was enacted in 1970 with the goal of protecting employees across industries and in both the public and private sectors from recognized hazards such as hazardous materials, noise exposure, fire and fall risks, and other potential dangers. OSHA was established within the U.S. Department of Labor to administer the OSH Act and to fulfill its capacious worker protection mandate.

People for the Ethical Treatment of Animals, however, has stretched the boundaries of "workplace hazards" to request specific and targeted regulations of industries that utilize or display animals. While employees in these industries are entitled to the same OSHA protections as employees in other industries, animal rights organizations' motivations are arguably entirely distinct from worker health and safety.

This article provides two examples of PETA's use of the OSH Act to advance an animal rights agenda: (1) a petition requesting a standard on the horse racing industry related to disclosing medications administered to horses; and (2) a petition asking OSHA to prohibit free-contact management of elephants.

### An Introduction to OSHA Regulation

Given the large and diverse array of industries required to be regulated by the OSH Act, OSHA simply does not have sufficient capacity to craft regulations specific to each type of industry. With the exception of a handful of areas, including logging operations, commercial diving operations, and grain handling facilities, OSHA utilizes regulations with general applicability or for specific hazards present in multiple industries, such as machinery and machine guarding, personal protective equipment, and walking-working surfaces.

Even more generally, OSH Act Section 5(a)(1) requires that employers furnish their employees



Wayne J. D'Angelo



Catherine Wilmarth

“employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”[1] This clause is commonly referred to as the “general duty clause” and serves as a catch-all provision for OSHA to investigate and cite any condition at a workplace that endangers workers, even if the risk is not specifically regulated.

OSHA has the authority to inspect, enforce health and safety standards at, and issue citations and fines for zoos, circuses, aquariums, meat processing facilities, and other workplaces that may become targets of animal rights groups. Following incidents involving animals or learning of other information, animal rights groups have filed complaints with OSHA, prompting on-site inspections and the issuance of citations and fines.[2] These citations are usually issued under the general duty clause.

While OSHA has ample authority to issue new regulations, including nuanced industry-specific regulations like those discussed below, promulgating such regulations is very costly and time consuming. The OSH Act imparts high thresholds for promulgating standards by mandating that OSHA provide detailed demonstrations of risk and the economic and technological feasibility of the standards.[3] Engaging in such a time-consuming and costly process in response to petitions that are not credibly based on risks to workers is therefore not in the interest of OSHA or of workers.

### **Petition for a Horse Racing Industry Standard**

On Oct. 28, 2015, PETA submitted to OSHA a petition requesting a standard requiring “employers in the horse racing industry to disclose to riders in their employ all medications recently administered to horses prior to racing, training or exercising.”[4] In the alternative, PETA asked for enforcement guidance on the issue explaining that failing to disclose that information is a violation of the general duty clause. Although PETA argues that “[p]rohibiting employers from using drugs that may have the effect of concealing horses’ injuries is both safer for riders and more humane for animals,” PETA clearly states its true interest “in the administration of drugs to horses, which can have deadly consequences for animals.” It aims to discourage the horse racing industry through increasing the stringency of regulations and generating public scrutiny.

### **Petitions to Bar Direct Contact with Elephants**

In 2011 and again in 2015, PETA petitioned OSHA to request that the agency prohibit free-contact management of elephants. Both petitions followed high-profile elephant fatalities, but once again, PETA’s real interest in animal well-being, instead of worker safety, was made plain in its blog post on the most recent petition: “Free contact — which allows humans to work in direct contact with elephants who are capable of easily crushing or killing them — also subjects elephants to intimidation, beatings and other forms of abuse, including from bullhooks.”[5] While PETA is quick to use these unfortunate incidents to petition for worker safety, the organization is arguably more interested in using the high-profile nature of the incidents to provide a rallying point for its animal rights advocacy and to advance restrictions on circuses, zoos and other public exhibition venues.

### **Outcome of PETA’s OSHA Strategy to Date**

So far, OSHA has not promulgated any regulations in response to the petitioning. And given OSHA’s limited capacity to promulgate new rules, we do not expect the petitions to result in new rules. While parties have, in the past, successfully sued OSHA for failing to promulgate new health and safety standards, we do not view OSHA as being particularly vulnerable to suit over the PETA petitions. Were PETA to bring an action over the failure to promulgate rules in response to their petitions, OSHA should

have little trouble convincing a court that it is irrational to devote its limited resources to developing highly specific rules with little or no occupational health and safety benefit simply to advance the interests of an organization with no demonstrated interest in worker health and safety.

Nonetheless, OSHA's presumed unwillingness to issue new regulations does not necessarily mean that OSHA will take no action in response to petitions like those we discussed. OSHA wields fairly broad enforcement authority even in the absence of specific standards through use of the general duty clause. In order for OSHA to use the general duty clause to cite an employer for a practice or condition that does not violate any specific OSHA standard, OSHA must show that the employer recognized and could have addressed the hazard but did not.

To establish employer recognition, OSHA will frequently issue hazard alerts or send notification letters. In OSHA's view, once the employer recognizes the hazard through publication of an alert or transmittal of a notice letter, the OSH Act's general duty clause imposes on employers an affirmative duty to take all feasible steps to eliminate the hazard.

Because hazard alerts and notice letters do not need to be promulgated according to rigorous standards, need not meet any lofty data requirements, and do not require notice-and-comment rulemaking, OSHA can issue them far more frequently and easily than standards and regulations. Not surprisingly, OSHA often responds to requests for increased regulations by relying on these nonregulatory actions.

That was precisely the mechanism OSHA utilized following PETA's initial petition to ban direct contact with elephants. OSHA issued a hazard alert to Hope Elephants, the employer of a trainer that was crushed while working with elephants. OSHA recommended that Hope Elephants take steps to minimize direct contact with elephants, develop direct contact protocols, and utilize the Association of Zoos & Aquarium's standards for barriers and constraints.

The most noteworthy aspect of the hazard alert letter, however, is that it was issued to Hope Elephants after the employer announced that it no longer posed elephants. Clearly, OSHA's intended audience was not just the employer involved in the incident, but all elephant care providers. The hazard alert letter was, in fact, a warning to industry that its employers failing to adopt the recommendations contained therein would face enforcement.

## **Conclusion**

PETA's second "elephant petition" followed the OSHA's issuance of the hazard alert. One could argue that it was filed less out of a concern for continuing worker safety, and more out of frustration that OSHA did not ban all types of elephant management that allow elephant care facilities to operate.

Notwithstanding PETA's frustration over the "elephant petition," it is clear that petitioning for regulation to achieve wholly unrelated policy goals has been somewhat effective for animal rights groups. While OSHA can fairly readily reject calls to promulgate new standards and regulations, it can, and does, leverage its "general duty" authority to impose requirements on employers that, for compliance purposes, are not much different than duly promulgated regulations.

Accordingly, employers in industries covered by petitions like these should not take comfort in OSHA's discretion to reject calls for new regulations. Given the real prospect that OSHA will issue a hazard alert and attempt to leverage its "general duty" authority, employers would be well-served to work with

OSHA and apprise OSHA staff of the practices they already have in place to protect their employees. The petitioners may not have a genuine interest in worker safety — but OSHA does.

—By Wayne J. D'Angelo and Catherine Wilmarth, Kelley Drye & Warren LLP

*Wayne D'Angelo is a partner in Kelley Drye's Washington, D.C., office and is co-chairman of the firm's energy practice. He previously served as counsel to the American Petroleum Institute. Catherine Wilmarth is an associate in the Kelley Drye's Washington, D.C., office.*

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[1] 29 U.S.C. § 654(a)(1).

[2] E.g., Animal Legal Defense Fund Complaint Results in OSHA Fine for Miami Seaquarium, Animal Legal Defense Fund (July 23, 2014), <http://aldf.org/press-room/press-releases/animal-legal-defense-fund-complaint-results-in-osh-fine-for-miami-seaquarium/>.

[3] See 29 U.S.C. § 655.

[4] Petition for Rulemaking, People for the Ethical Treatment of Animals (Oct. 28, 2015), available at <http://www.mediapeta.com/peta/PDF/OSHA%20Petition%20for%20Rulemaking%20on%20Disclosure%20of%20Drugs%20in%20Horse%20Racing.pdf>.

[5] PETA Petitions OSHA to Bar Direct Contact with Elephants, People for the Ethical Treatment of Animals (July 27, 2015), <http://www.peta.org/blog/peta-petitions-osh-to-bar-direct-contact-with-elephants/>.