

Are Small Businesses Facing More Prosecutions For Technical Violations?

By Reni Gertner

Attorneys who represent small businesses claim those companies are increasingly being prosecuted for violating technical and little-known regulations – and that lawyers must be prepared to advise their clients about how to deal with this problem.

The regulations at issue cover everything from federal environmental law to the details of export laws in foreign countries. According to the attorneys who handle these cases, small business owners are frequently taken by surprise by the requirements and forced to spend significant amounts of money on legal fees – and sometimes even face time in prison.

Another problem, they say, is the enormous discretion that government lawyers have.

“Prosecutors have the discretion to either treat a violation as an administrative violation ... or use federal criminal law,” said Paul Kamenar, senior executive counsel at the Washington Legal Foundation, a public interest legal organization that supports limited restrictions on business. “You never know what they are going to do, and it’s hard to advise your clients on this.”

Doug Arnold, a partner with Alston & Bird in Atlanta, agreed.

“After a certain amount of time, the matter can take on a life of its own,” said Arnold, who represents companies in environmental criminal cases.

The depth and breadth of the laws and regulations involved only adds to the problem.

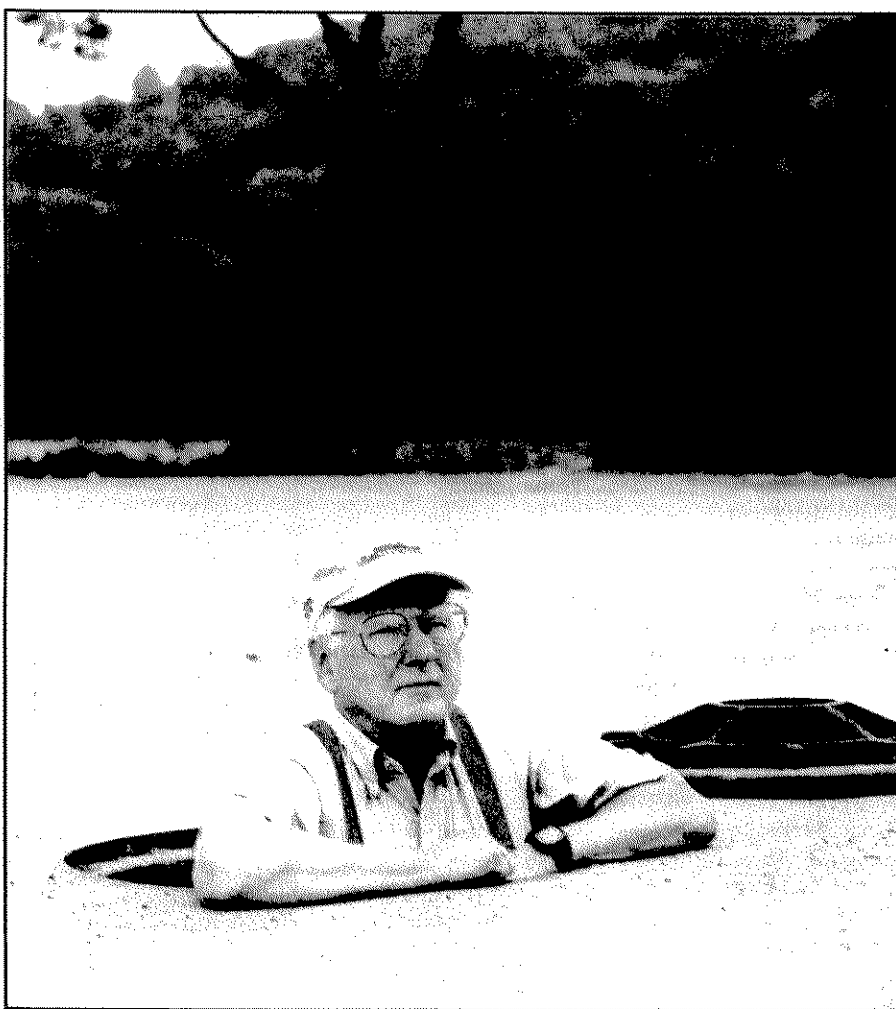
Karen Harned, executive director of the National Federation of Independent Business (NFIB), a Washington group that represents small businesses, noted that, “there are a lot of laws on the books small business owners may not even know about. And they sure wouldn’t know that if they didn’t comply with them, jail time might be attached.”

Some attorneys contend that when small businesses are involved, government agencies are more likely to pursue criminal prosecution than civil enforcement.

“It’s much easier to go after a smaller company that doesn’t have the money to fight the government,” charged Grapevine, Texas, solo practitioner Walter D. James, chair of the ABA committee on environmental crimes and enforcement.

Lee D. Hoffman, an attorney who practices environmental law with Pullman & Comley in Hartford, Conn., agreed.

“Individual U.S. attorneys are realizing that you can get felony convictions for strict liability crimes and are pursuing them ag-



James Knott of Northbridge, Mass., was charged with releasing untreated acidic wastewater into a municipal sewer system. A jury acquitted him.

gressively,” he said, although he acknowledged that the government is offering more assistance with regulatory compliance, despite the prosecutions against businesses.

David Uhlmann, chief of the environmental crimes section of the Department of Justice, told Lawyers Weekly USA that the department doesn’t single out small businesses. Rather, he said the government prosecutes environmental crimes based on the facts of the case – not the size of the business.

“The same factors apply whether it’s a corporation – regardless of the size – or an individual,” said Uhlmann, noting that criminal prosecutions of large companies have greater “deterrent value.”

According to Uhlmann, the factors the Justice Department considers in determining whether to prosecute an individual or business for an environmental crime include:

- The nature of the conduct;
- The degree to which the alleged conduct

is knowing or intentional;

- The harm that resulted or how great a risk of harm there was;
- Any history of violations by the same party or failure to respond to other civil or regulatory enforcement; and
- Whether a jury is likely to convict the party.

Kevin O’Connor, U.S. Attorney for Connecticut, said that criminal prosecution in the environmental arena plays an important role in sending a message to businesses.

“It is important [for] prosecutors not to be reticent,” he said. “Sometimes a criminal prosecution is the only way to deter criminal environmental conduct. Otherwise, we run the risk that violating environmental laws will be seen as a cost of doing business.”

Lots Of Regs

Attorneys who handle these cases said that lawyers must make sure their business clients are aware of the vast number of reg-

ulations that exist.

However, actually knowing every regulatory issue that could arise might be next to impossible.

There are more than 4,000 federal criminal laws on the books and an uncountable number of federal regulations, not to mention foreign laws, that could be used to charge a business, said Paul Rosenzweig, a senior legal research fellow of the Heritage Foundation, a conservative think tank in Washington, who has written an amicus brief on behalf of the NFIB in a case.

Harned said the various requirements are widely scattered, “such that people who are well meaning can be caught unawares.”

However, Uhlmann asserted the prosecutions the government brings center on clear legal violations.

“These aren’t well-intentioned people who ran afoul of an arcane regulation. The cases we bring are about deliberate violations of the law,” he said.

The majority of the relevant regulations involve environmental issues. Other areas that can lead to problems include safety rules under the Occupational Safety and Health Act, agricultural regulations and foreign laws.

One thing lawyers say can make it harder for smaller businesses to remain in compliance is that they rarely have enough staff to maintain experts on each area of regulatory requirements.

Such businesses also “may or may not have enough experience to work through these regulatory schemes,” said James.

Here’s a look at some recent instances of small businesses being criminally prosecuted for regulatory violations:

• Short Lobsters

Robert Blandford and Abner Schoenwetter were owners of small businesses that imported lobster tails and shrimp largely from Honduras, through Honduran lobster exporter David McNab. Diane Huang was a distributor who purchased the lobster tails and sold them to major seafood restaurant chains.

A little known law in Honduras states that lobsters being exported can’t be shorter than 5 ½ inches in length and must be packaged in cardboard boxes.

In this case, some of the lobsters fell short of the required length – and they were shipped packed in plastic bags instead of boxes.

The National Marine Fisheries Service claimed that because the U.S. business owners violated Honduran requirements on lobster exports, they also violated the federal

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