

LEGAL UPDATES

PUBLISHED: SEPTEMBER 28, 2012

## Professional

ANDREW J. WEISSLER

KANSAS CITY:

816.983.8123

AJ.WEISSLER@

HUSCHBLACKWELL.COM

## OSHA's National Emphasis Program Targets Nursing and Residential Care Facilities

In response to high rates of injuries and illness at nursing and residential care facilities, the Occupational Safety and Health Administration (OSHA) revived a National Emphasis Program (NEP) last used in 2002-2003. The NEP ([http://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_03-00-016.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_03-00-016.pdf)) is effective through April 5, 2015, and targets facilities with DART rates (days away, restricted or transferred) of 10 or above in three North American Industrial Classification System (NAICS) codes:

623110 – Nursing Care Facilities (Skilled Nursing Facilities) (SIC 8051)

623210 – Residential Intellectual and Developmental Disability Facilities (SIC 8052)

623311 – Continuing Care Retirement Communities (SIC 8059)

In order to implement the program, OSHA created an NEP-specific inspection list using the data provided by facilities on the OSHA annual survey form during the 2011 data initiative. This data covered calendar year 2010. Thus, inclusion on the NEP-specific list in 2012 is based on DART rates from 2010. (The DART rate formula is provided below.) Updated lists will be made in 2013 and 2014 using the data then available. For example, a new NEP-specific inspection list will be created in 2013 using data from the 2012 data initiative, which covers calendar year 2011.

### Which Facilities Can Expect Inspections

Placement on the NEP-specific list is not a guarantee that an NEP inspection will be conducted, nor is exclusion from the list a guarantee that one will not. Area OSHA offices will inspect nursing and residential care facilities on the

NEP-specific inspection list in a random order, and there is no requirement that they inspect every facility on the list in any year. However, during the NEP, any non-programmed inspection at a facility in one of the covered NAICS codes can be broadened to include an NEP inspection if the facility had a DART rate of 10 or over during any of the preceding three calendar years.

In 2012, for example, an inspector conducting a non-programmed inspection of a facility in response to an employee complaint will review the OSHA 300 logs for calendar years 2009, 2010 and 2011. If the DART rate in any of those years is 10 or over, the inspector will expand the scope to include the NEP inspection even if that facility was not on the NEP-specific list.

### **Scope of an NEP Inspection**

NEP inspections will cover five areas of specific concern in nursing and residential facilities:

*Ergonomics: Musculoskeletal Disorder (MSD) Risk Factors Related to Resident Handling.* The focus will be on the institution's ergonomic program management and implementation, employee training and occupational health management. Although the NEP targets risks related to resident handling, the scope of the inspection can expand to MSD risks in other areas if evidence of such risks is discovered (e.g., office work, laundry, kitchen or maintenance duties).

*Slips, Trips, and Falls.* The focus will be on the general work environments for any hazards likely to cause slips, trips or falls (e.g., wet floors, damaged stairways or missing guardrails) and policies in place to deal with wet surfaces.

*Bloodborne Pathogens.* The focus will be on a number of factors, including the facility's written exposure control plan, its implementation of appropriate engineering and work practice controls, the use of proper personal protective equipment, the proper containment of regulated waste, the facility's sharps injury log, and the proper use of an Environmental Protection Agency-approved disinfectant to clean contaminated work surfaces.

*Tuberculosis (TB).* The focus will be on whether the facility has had a suspected or confirmed TB case among residents, what procedures are in place for isolating and managing the care for residents with TB, and whether the facility tests for TB.

*Workplace Violence (WPV).* The focus will be on the specific WPV hazards to which employees are exposed, not any one event that may have caused an incident of WPV.

Although the initial scope of the inspection is set by the NEP, once on site the inspector may expand the scope if other hazards come to light through observation or employee interviews (e.g., exposure to hazardous chemicals or multiple-drug resistant organisms, such as methicillin-resistant *Staphylococcus aureus*, also known as MRSA).

**What this Means to You**

Inspections under the NEP take place without OSHA warning. Therefore, nursing homes and residential care facilities should evaluate their likelihood of being targeted by calculating their DART rate for calendar years 2009, 2010 and 2011. They should continue to monitor their rates for each calendar year through the end of the NEP. The DART rate is calculated using the following formula:

$$(N \div EH) \times 200,000$$

N stands for the number of cases involving days away from work and/or restricted work activity and/or job transfers. EH is the total number of hours worked by all employees (including management, temporary and leased employees) during the calendar year. The 200,000 corresponds to the base number of hours worked by 100 full-time equivalent employees. For example, if a nursing home had eight injury and illness cases last year involving days away, restricted work and/or transfers, and employees at the facility worked a total of 169,612 hours, that facility had a DART rate of 9.43 because  $(8 \div 169,612) \times 200,000 = 9.43$ . If needed, a facility should seek assistance in completing OSHA 300 logs or calculating DART rates.

Nursing homes and residential care facilities should prepare for any potential inspection by studying the inspection process described in the NEP to ensure they have adequate policies and protocols in place for the covered hazards. Management should clearly communicate those policies and protocols to staff members at each facility and instruct them how to handle an unannounced OSHA inspection. Management should also be aware of the most commonly cited standards in OSHA enforcement procedures in their industry. The following table consists of the top 10 commonly cited standards for nursing and residential care facilities in the NEP-covered codes from October 2010 through September 2011.

	<b>NAICS 623110 SIC8051</b>	<b>NAICS 623210 SIC 8052</b>	<b>NAICS 623311 SIC 8059</b>
<b>1.</b>	(Standard) 1910.1030 <i>Bloodborne pathogens</i>	1910.1030 <i>Bloodborne pathogens</i>	1910.1030 <i>Bloodborne pathogens</i>

2.	1904.0029 <i>Forms</i>	1910.0303 <i>General requirements</i>	1910.0146 <i>Permit-required confined spaces</i>
3.	1904.0007 <i>General recording criteria</i>	1910.0151 <i>Medical services and first aid</i>	1910.0303 <i>General requirements</i>
4.	1904.0032 <i>Annual summary</i>	1910.0305 <i>Wiring methods, components and equipment for general use</i>	1904.0041 <i>Annual survey</i>
5.	1910.1200 <i>Hazard communication</i>	1904.0041 <i>Annual survey</i>	1910.1200 <i>Hazard communication</i>
6.	1910.0303 <i>General requirements</i>	1910.0303 <i>General requirements</i>	1904.0029 <i>Forms</i>
7.	1910.0305 <i>Wiring methods, components and equipment for general use</i>	1910.1200 <i>Hazard communication</i>	1904.0032 <i>Annual summary</i>
8.	1910.0151 <i>Medical services and first aid</i>	1910.0134 <i>Respiratory protection</i>	1910.0304 <i>Wiring design and protection</i>
9.	1910.0004 <i>Recording criteria</i>	1910.0037 <i>Maintenance, safeguards and operational features</i>	1910.0023 <i>Guarding floor and wall</i>

		<i>for exit routes</i>	<i>openings and holes</i>
<b>10.</b>	1910.0008 <i>Recording criteria for needle-stick and sharps injuries</i>	1910.0212 <i>General requirements for all machines</i>	1910.0037 <i>Maintenance, safeguards and operational features for exit routes</i>

**Contact Info**

For additional information about this development, please contact your Husch Blackwell attorney, Harvey Tettlebaum at 573.761.1107 or Brad Hiles at 314.345.6489.

Husch Blackwell LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters or request a printed copy.

Husch Blackwell encourages you to reprint this material. Please include the statement, "Reprinted with permission from Husch Blackwell LLP, copyright 2012, www.huschblackwell.com" at the end of any reprints. Please also email [info@huschblackwell.com](mailto:info@huschblackwell.com) to tell us of your reprint.

This information is intended only to provide general information in summary form on legal and business topics of the day. The contents hereof do not constitute legal advice and should not be relied on as such. Specific legal advice should be sought in particular matters.