

LEGAL UPDATES

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OSHA Enhanced Enforcement Efforts Signal Significant Changes for Employers

While legislation intended to expand and strengthen the Occupational Safety and Health (OSH) Act remains pending in Congress, it is clear that the Occupational Safety and Health Administration (OSHA) has undertaken substantial steps to increase enforcement activity and increase penalties for violations, with a particular focus on repeat offenders. One of the most significant changes is the recently announced Severe Violator Enforcement Program (SVEP) that will become effective in early June 2010.

OSHA Enhances Enforcement with New Programs and Penalties

The Protecting America's Workers Act (PAWA) was re-introduced in both the Senate and House in early 2009. If enacted, PAWA would extend OSHA coverage to all private and public sector American employees, significantly increase civil and criminal penalties, and provide whistleblower and non-retaliation protection to covered employees. While passage of PAWA is problematic in the near future, the Department of Labor and OSHA have been very active in raising the ante for violations of the current statute.

OSHA recently launched a significant program designed to identify and penalize those employers deemed "severe violators" of the OSH Act. This Program, announced on April 22, 2010, as SVEP, replaces OSHA's Enhanced Enforcement Plan (EEP) and provides for substantial enforcement and higher penalties for "employers who have demonstrated recalcitrance or indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations." These employers will face mandatory follow-up inspections, nationwide inspections, higher-profile inspections, increased company/corporate and union awareness of OSHA enforcement, corporate-

wide agreements, broader settlement provisions and federal court enforcement.

Criteria for Determining Affected Employers

The SVEP concentrates on four areas of employer indifference to workplace safety obligations: (1) a fatality or catastrophe situation; (2) plant operations or processes that expose employees to the most severe occupational hazards, including those identified as “High-Emphasis Hazards”; (3) employees exposed to hazards related to the potential release of a highly hazardous chemical; and (4) egregious enforcement actions.

Fatality/Catastrophe Criterion

OSHA inspection that finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to an employee death or three or more hospitalizations. These violations do not have to be High-Emphasis Hazards.

Non-Fatality/Catastrophe Criterion Related to High-Emphasis Hazards

OSHA inspection that finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to a High-Emphasis Hazard.

Non-Fatality/Catastrophe Criterion for Hazards due to the Potential Release of a Highly Hazardous Chemical

OSHA inspection that finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards due to the potential release of a highly hazardous chemical.

Egregious Criterion

All egregious enforcement actions (e.g., per-instance citations) will be considered SVEP cases.

OSHA has determined that employer indifference to compliance responsibilities under the OSH Act “may be indicative of broader patterns of non-compliance at related employer worksites.”

Consequently, OSHA will inspect related worksites of the same employer if the agency concludes there are reasonable grounds to believe that compliance problems identified in the initial inspection may be representative of a broader pattern of non-compliance.

To ensure visibility of a SVEP case, OSHA will notify the employer’s national headquarters of the enforcement action if the employer has more than one fixed establishment, and OSHA will provide employee representatives (e.g., unions) with a copy of the Citations and Notifications of Penalty that

is sent to the employer's national headquarters. OSHA regional offices also have discretion to issue news releases related to SVEP cases.

OSHA will consider the following settlement provisions to ensure future compliance at cited facilities: (1) requiring the employer to hire an independent safety and health consultant; (2) applying settlement agreements company-wide; (3) imposing interim abatement controls if final abatement cannot be accomplished in a short period; (4) in construction and where appropriate, in general industry, using settlement agreements to obtain from the employer a list of its current jobsites, or future jobsites within a specified time period; (5) requiring employers to report work-related injuries and illnesses on a quarterly basis and consent to inspections based on that information; and (6) requiring employers to report for a specific time period any serious injury or illness requiring medical attention, and to consent to inspections based on that data.

According to a U.S. Department of Labor News Release, the SVEP will become effective no later than June 6, 2010.

Enhanced Enforcement Penalties

On April 23, 2010, OSHA also announced changes to its Field Operating Manual to provide for significant increases in the penalties assessed for violations, increases that OSHA Administrator David Michaels anticipated in a April 22, 2010, memorandum to his Regional Administrators. The memorandum stated the change would increase the average maximum penalty assessed for a serious violation from \$1,000 to between \$3,000 and \$4,000. Other changes in the Field Operations Manual include:

raising the minimum gravity-based penalty to \$3,000 (from \$1,500);

raising the minimum proposed penalty for a posting violation to \$250 (from \$100) and a serious violation to \$500 (from \$100);

reducing employer size-based penalty reduction levels from 60 percent to 40 percent for employers with one to 25 employees; from 40 percent to 30 percent for employers with between 26 and 100 employees; from 20 percent to 10 percent for employers with between 101 and 250 employees; eliminating entirely size-based reductions for employers with more than 250 employees;

denying reductions via an informal conference if the employer owes an outstanding balance to OSHA unless the employer is making timely payments on a penalty payment plan;

increasing penalties by 10 percent if the employer has been cited for a high-gravity serious, willful, repeat or failure-to-abate violation in the past five years;

decreasing reductions by extending the violation-free time frame required to qualify for reductions from three years to five years;

eliminating the 10 percent good faith reduction for employers enrolled in OSHA's Strategic Partnership Program;

potentially decreasing reductions by requiring an OSHA regional administrator to approve penalty reductions of more than 30 percent; and

changing the Penalty Calculation Policy from a summed total to a serial application of the penalty adjustment factors that will result in higher penalties up to the statutory limit of \$7,000.

What This Means To You

OSHA's introduction of these initiatives, coupled with a record pace of investigations, will lead to increased enforcement and higher penalties for those employers found to be in violation of the OSH Act and regulations. Employers will be well served to examine their existing compliance procedures and the impact that these changes may have on their businesses and develop strategies to deal with these serious changes in the enforcement approach of the agency.

Special attention should be given to conditions that have been the basis of citation in the past three years. Those conditions are candidates for repeat citations exposing the company to the new SVEP initiative. Employers with more than one location must also be mindful that a citation at one facility can form the basis for a repeat citations at all other facilities.

Contact Information

If you have any questions about this or other employment matters, please contact your Husch Blackwell Sanders attorney.

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