

In-House Compliance

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OSHA Compliance And Enforcement Go Beyond Safety Regulations

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The Occupational Safety and Health Act of 1970 (29 U.S.C. §651, et seq.) hasn't changed much in 40 years. Although there have been sparse statutory amendments, the Occupational Safety and Health Administration (OSHA) has promulgated a vast body of safety and health regulations, and the agency has regularly enhanced and refined its enforcement tactics.

As OSHA matures into its forties, it is broadening its safety vision by incorporating non-regulatory guidance as a component of its enforcement practices. Among other things, OSHA is delving into safety issues that arise from contemporary lifestyle and a faster-paced business environment. It regularly issues warnings of potential General Duty Clause¹ violations for failure to recognize and protect against certain safety risks that OSHA has identified, even though OSHA has not adopted a specific governing safety regulation. All of this means greater exposure to employers, a need to be more vigilant in recognizing safety and health hazards, and prompt discipline of employees who fail to comply with workplace safety rules and training.

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Enforcement Approach

OSHA's modern approach to enforcement tends to be methodical, calculated, and self-publicized. The agency sets the groundwork for future enforcement activities well in advance of the time employers ultimately feel the impact. OSHA is now building upon its established base of safety regulations to set the stage for and undertake a more aggressive enforcement campaign, particularly with respect to Repeat violations, high hazard work, and efforts to make examples of large businesses that operate multiple stores or facilities.

Two years ago, on Oct. 1, 2010, OSHA put into effect several "administrative" changes that ratchet up the exposure and long-term consequences to employers who commit OSHA violations. Section 17 of the Occupational Safety and Health Act, last amended in 1990, details minimum and maximum statutory penalties for various types of OSHA violations, but contemplates an exercise of discretion in fashioning the amount depending upon the circumstances. Section 17(j) identifies adjustment factors to be considered, including "due consideration to the appropriateness of the penalty with respect to the size of the employer



being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."² While OSHA still utilizes those factors in formulating penalties, it has modified some of the criteria underlying them and changed the calculus by which they are totaled.³ The net result in most cases is a significant increase in the proposed penalty for any given violation, all else being equal, which is further compounded by the number of overall violations.

Coupled with changes to the penalty calculations, OSHA also modified its "look back" period from three to five years for purposes of both the penalty adjustment credit associated with a clean OSHA citation history and for issuance of Repeat violations.⁴ And for good measure, OSHA added a new 10 percent penalty upcharge if the employer his-

tory includes a high gravity Serious, Willful, or Repeat violation.

OSHA also cancelled its prior Enhanced Enforcement Program in 2010. The agency replaced it with the Severe Violator Enforcement Program,⁵ which targets High-Emphasis Hazards⁶ and focuses on employers who have committed Willful, Repeat, and Failure-to-Abate violations. The Area Office is charged with the responsibility to actively track, monitor, and target severe violators. A variety of tactics are available to accomplish this, including mandatory follow-up inspections to verify abatement and compliance, enhanced settlement provisions, corporate awareness (e.g., letters to executives, news releases, notices to headquarters), corporate-wide agreements, national referrals, and direct federal court enforcement of settlements. OSHA is also implementing a Severe Violator database to facilitate the tracking and monitoring process, which should come online by the end of OSHA's 2013 fiscal year.⁷ The message: OSHA will hound those employers who meet the Severe Violator criteria.

To facilitate these enforcement efforts, OSHA increased its corps of Compliance Safety and Health Officers (CSHOs). Over 100 new CSHO positions were budgeted for 2010-2011, with 25 more in 2012. OSHA's FY 2013 budget acknowledges that it is only now in 2012 that full deployment of these new CSHOs is being realized as they complete their technical training.⁸

With more CSHOs entering the field and gaining experience, employers should expect to more readily see the impact of the 2010 changes in 2012-2013. Statistical information on the issuance of Repeat violations over 2011-2012 is not yet available. Anecdotally and experientially, however, it seems Repeats are on the rise. OSHA has also already started to become more heavy-handed with issuing and publicizing the Repeat violations it issued, particularly with respect to large corporations where the employer was found to have committed prior similar violations at other plants, facilities, or stores.

For example, OSHA issued four citations and proposed penalties of \$365,000 to Walmart in January 2012 following an inspection of a Rochester store. The ten alleged Repeat violations, which accounted for \$288,000 of the proposed penalties, were based on a broad panoply of previous violations stemming from inspections of stores in at least nine different states in 2008-2010. A few months later, an inspection of a Cobleskill Walmart netted three more Repeats borne out of violations

found at stores in five other states, tacking on another \$48,200 in proposed fines. In May 2012, a Rite Aid store in Brooklyn received citations that included three Repeat violations for alleged unstable stacking of merchandise, partially blocked exits, and missing railings. The Repeats, which OSHA assessed at \$104,500, were predicated on final Orders entered against two of Rite Aid's upstate stores in 2007 and 2008. A few other large manufacturers across New York State also underwent process safety management inspections in 2011-2012 that culminated with issuance of multiple Repeat violations and six-figure penalties to several of them. The Repeats were likewise grounded in similar violations found during prior inspections conducted at other company-operated facilities both within and outside New York State. Walmart, Rite Aid, and several other hard-hit companies have contested the violations and proposed penalties.

Significance

The obvious message underlying such enforcement is increased corporate accountability for safety on a massively broad scale. OSHA is setting examples by flexing its enforcement muscle with Repeats against corporate behemoths, and the agency is getting their attention. But it is more than that. From an employer's point of view there is an overwhelming unfairness to the new Repeat criteria, but many employers are unwilling or financially unable to battle the agency on these issues. Big corporate is perceived as having the money to challenge the rules and fight for principle, and if OSHA can bend or break the giants, what does that say to small and mid-sized employers? For these reasons, the ultimate outcome of early challenges to the new Repeat criteria will have significance to OSHA as well as any employer with a prior OSHA history.

Regardless of how, when, or if that battle is fought to conclusion, employers are well advised in the present to evaluate—as part of ongoing compliance efforts—their own prior OSHA history and that of any facility, store, or business operated through the same corporate management. This is particularly true for those employers who are likely to be the subject of programmed inspections under any of the National or Local Emphasis Programs, employers who are at risk of being classified as a Severe Violator based on the type and nature of past violations, and employers who have higher than average DART (Days Away Restricted and Transfer) or DAFWII (Days Away

From Work Injury and Illness) rates. Each year in March, OSHA publishes a list of approximately 14,000 to 15,000 non-construction employers whose DART rate exceeds the national average by a certain amount. The agency issues letters to these employers advising that their DART rates exceed the national average.⁹ A subset of about 2,500 of these employers (i.e., those whose rates exceed a selected threshold in particular industry classifications) are selected for inclusion in the agency's annual Site Specific Targeting inspection program.

In addition to the targeted enforcement and expanded Repeat liability, OSHA has been broadening employer exposure to potential General Duty Clause violations by actively issuing non-regulatory "guidance," fact-sheets, and informational letters to employers on a variety of subjects, while avoiding the strictures of the formal rulemaking process. The breadth and scope of such information on the OSHA website is extensive. In fact, it can be downright overwhelming. OSHA's obvious purpose, however, is to use this public forum to give "notice" of all kinds of perceived safety hazards, and leave it to employers to take appropriate corrective action. After self-publicizing the hazards and giving warnings about particular topics, OSHA then proceeds to treat the safety exposure as a "recognized hazard in the workplace," a key predicate for a General Duty Clause violation.

New Developments

One developing example is Distracted Driving/Texting. To be fair, the hazard has gained general societal recognition as a hot topic over the past few years, especially as it relates to teenagers. But how many employers recognize driving while texting as a workplace safety hazard or potential OSHA violation? Probably very few, especially in the absence of a formally published safety regulation. But OSHA started an initiative in 2010 to raise awareness. On Oct. 4, 2010, OSHA publicized an open letter to employers raising concerns about distracted driving and advising that employers have an obligation to prohibit employees from texting while driving. It followed this with a brochure in early 2011 that contains the following warning:

"When OSHA receives a credible complaint that an employer requires texting while driving or organizes work so that texting is a practical necessity, we will investigate and will issue citations and penalties where necessary to end this practice."¹⁰

The brochure recommends that employers implement a formal Distracted Driving/No Texting policy where driving is among required work duties.

Distracted driving/texting, of course, has much broader implications to employers and employees, including motor vehicle liability, insurance coverage, Vehicle and Traffic Law violations, and potential criminal liability in accident cases. For these reasons, OSHA's recommendation for employers to implement a policy on Distracted Driving is sound advice, regardless of the potential for OSHA violations.

Workplace Violence is another hot topic on OSHA's agenda for 2012-2013. Again, there is no published regulatory standard, but over the past decade OSHA has issued numerous publications offering guidance and recommendations to employers to implement formal policies on workplace violence prevention. And in September 2011, OSHA issued a directive setting forth procedures for investigating workplace violence cases.¹¹ The agency recently took it a step further.

In April 2012, OSHA initiated a National Emphasis Program (NEP) for Nursing and Residential Care Facilities.¹² The NEP is somewhat of a revival of a similar NEP from 2002, but is notable for its broader scope. Not only does it target enforcement of established safety regulations like blood-borne pathogens and walking/working surfaces, but it also encompasses patient lifting (i.e., ergonomics) and workplace violence for which no published standards exist. This broader emphasis is a clear example of OSHA testing the bounds of its enforcement reach beyond formal safety regulations. It is also a good example of the culmination of years of planning for future enforcement.

In addition to the earlier NEP, OSHA made repeated attempts in years past to develop a workable ergonomic standard, but was unable to do so. Undeterred, OSHA continued its campaign of emphasizing ergonomic reform in a multitude of ways. In 2003, OSHA issued ergonomic guidance to nursing homes for patient handling, which it updated and revised in 2009.¹³ As for workplace violence, public employers and state agencies in New York have, since 2007, been legally required to have workplace violence prevention programs.¹⁴ Workplace violence incidents stemming from employee disputes, combative or uncontrollable patients, and disgruntled family members have gained significant media atten-

tion and prominence over the past few years. And last year OSHA issued a new Compliance Directive on the topic.¹⁵

Ergonomics and workplace violence have now been rolled into the NEP for enforcement purposes on the agency's implicit presumption that these healthcare facilities should, by now, be well aware of these safety and health risks and have done something to protect employees. That approach to enforcement is a harbinger of things to come.

Employers in general are far less proactive than reactive when it comes to identifying safety risks and monitoring compliance, a mindset that OSHA is actively attempting to change with its ongoing efforts to establish a regulation requiring employers to implement an Injury and Illness Prevention Program (dubbed I2P2). An I2P2 is a type of individualized safety and health management system that requires employers to take a proactive and investigative approach to identifying and correcting safety and health issues in the workplace, including those that may not be specifically governed by an identifiable regulation. Perhaps as expected, the responses to OSHA's May 2010 notice of proposed I2P2 rulemaking¹⁶ were divisive.

OSHA has spent the last few years soliciting input to develop a proposed regulation, a process that has been criticized and delayed several times. In January 2012, OSHA offered its own White Paper, but little else has happened in the first half of 2012. The July 2012 release of the revised ANSI/AIHA/ASSE Z10 consensus Standard for Occupational Safety and Health Management Systems may be what OSHA was waiting on to move forward, as some speculate that a final rulemaking may be a simplified version of the consensus standard. Time will tell what the I2P2 rulemaking will look like and whether OSHA can meet its goal of adopting it in 2013. Perhaps the controversy, politics, and skepticism surrounding I2P2 will table it indefinitely. But if and when such rule comes into play, it would necessitate a fundamental shift in how employers perceive and address safety and health in the workplace. OSHA compliance obligations would likely transcend established regulatory requirements to encompass a more nebulous "find and fix" obligation.

Conclusion

In the meantime, employers must face the reality that OSHA investigations and safety and health compliance obligations are evolving beyond the established text and topics of the safety regulations themselves. And while

this evolution will prompt legal challenges to OSHA's methods and enforcement practices, rulings on such issues take years and offer no certainty of outcome. So as OSHA's strategies change, employers need to adapt not only their approach to compliance, but how they plan, prepare for, and defend against an OSHA inspection. Employers would do well to consult with their OSHA-compliance attorney proactively to evaluate their risk of an inspection and develop and implement an internal procedure governing how the company will handle OSHA investigations in the event a CSHO one day knocks on the door. Those employers who know their rights and are prepared in advance to handle an inspection will be better able to protect themselves from potentially overreaching enforcement. That's one safety policy that all employers should have, though OSHA is unlikely to ever mandate it.



1. Section 5(a)(1) of the Occupational Safety and Health Act requires each employer to "furnish to each of his employees 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 to his employees." 29 U.S.C. §654(a)(1).

2. 29 U.S.C. §666(j).

3. OSHA Administrative Penalty Bulletin, Effective Oct. 1, 2010 for Federal OSHA.

4. Note, however, that OSHA's updated Field Operations Manual issued on April 22, 2011 still states the look back period for Repeat violations is three years from the date of final order or abatement, whichever is later. See CPL 02-00-150, p. 4-34.

5. Severe Violator Enforcement Program (SVEP), CPL 02-00-149 (effective June 18, 2010).

6. The High-Emphasis Hazards generally include fall hazards, amputation hazards, combustible dust hazards, crystalline silica hazards, lead hazards, excavation/trenching hazards, and shipbreaking hazards that are the subject of ongoing National Emphasis Programs. The targeted regulations, programs, and criteria are detailed more specifically in the SVEP Compliance Directive.

7. FY 2013 Congressional Budget Justification, Occupational Safety and Health Administration, p. 38.

8. FY 2013 Congressional Budget Justification, Occupational Safety and Health Administration, p. 36.

9. The annual campaign is based on data for the calendar year two years prior as a result of the time necessary to collect and process the data. The 2012 letter is based on 2010 data. The 2010 national average was 1.8 per 100 workers. Letters issued to those employers with a DART of 2.0 or higher per 100 workers.

10. Distracted Driving: No Texting, OSHA Publication No. 3416-02N-11 (2011).

11. Enforcement Procedures for Investigating Workplace Violence Incidents, CPL 01-02-052 (Sept. 8, 2011).

12. National Emphasis Program (NEP) for Nursing and Residential Care Facilities, CPL 03-00-016 (effective April 5, 2012).

13. Guidelines for Nursing Homes, Ergonomics for the Prevention of Musculoskeletal Disorders, OSHA Publication No. 3182-3R (2009).

14. New York Labor Law §27-b (effective March 4, 2007); Governor Eliot Spitzer's Executive Order #19 of Oct. 22, 2007.

15. Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents, CPL 02-01-052 (Sept. 8, 2011).

16. Federal Register 75:23637-23640 (May 4, 2010).