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May 2nd 2012

LEGAL ALERT

OSHA Criticizes Safety-Incentive Programs, Encourages Whistleblowers

For several years, we have encouraged employers to move away from safety-management programs which primarily track the program's effectiveness based upon recordable injuries, and which utilize monetary-incentive programs based on the number of recordable workplace injuries. Our principal reason for discouraging such programs is that recordable incidents focus on "lagging" indicators, may not identify causes, and may be affected by the capriciousness of timing and "bad luck."

But employers now have another reason to increasingly shift away from programs primarily driven by recordables. Even before the current Administration took office, its leaders questioned the accuracy of employer recordkeeping and asserted that employees underreport workplace injuries in order to participate in safety incentive programs, or as a result of pressure imposed upon them by employers.

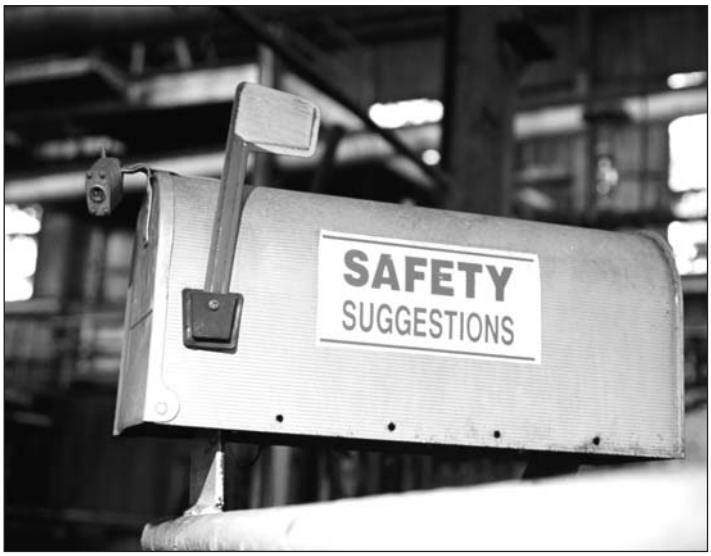
Moreover, all branches of the U.S. Labor Department have steadily escalated their emphasis on the prosecution of whistleblower claims. OSHA has actively encouraged employees to be sensitive to possible retaliation and discrimination on the basis of protected behavior, including safety-related activities, especially "reporting recordable injuries." Numerous court decisions have come out in the last few years in which OSHA claimed that terminations for safety violations associated with injuries were a pretext for retaliation.

OSHA's Focus On Incentive Programs Is Increasing

Last June, Assistant Secretary Dr. Michaels, issued a memorandum stating that "a company whose incentive program has the potential to discourage worker reporting fails to meet the Voluntary Protection Programs (VPP) safety and health management system requirements." While OSHA's official position is that it would only refuse VPP approval if an incentive program discourages employees from reporting injuries, OSHA's public and private comments since that time indicate that the Agency may view all such programs negatively.

Then, on September 21, 2011, following the VPP announcement, OSHA issued an updated Whistleblower Investigation Manual, and followed up on March 1 of this year with a major restructuring of the "Office of Whistleblower Protection Programs," which officially further elevated the importance of whistleblower enforcement.

The Office now reports directly to the Head of OSHA, Assistant Secretary of Labor, Dr. Michaels. This move, along with the substitution of employer rights and whistleblower information for safety subjects in the widely required OSHA_10 safety training program have caused observers to question why OSHA is so emphasizing whistleblower claims when its core safety enforcement efforts cry out for more resources.



What Your Response Should Be

With these concerns in mind, we recommend that employers carefully review the March 12, 2012 Memorandum on "Employer Safety Incentive and Disincentive Policies and Practices." Recognize that OSHA considers "reporting an injury to always be a protected activity," and will be suspicious if an employee is disciplined, terminated, or suffers other adverse action after reporting a workplace injury. OSHA considers a policy to discipline *all* employees who are injured, regardless of fault, to be discriminatory.

OSHA also states that it will "carefully scrutinize" situations where an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. OSHA grudgingly recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries, but emphasizes that employers should not "unduly burden the employee's right and ability to report."

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In the context of disciplining employees for not following reporting procedures, OSHA will consider 1) whether an employee's deviation was minor, inadvertent, or deliberate; 2) whether the employee had a reasonable basis for acting as he or she did; 3) whether the employer can show the importance of the rule and its enforcement; and 4) whether the discipline imposed appears disproportionate to the employer's interest.

In addition, OSHA will seek to determine if it appears that injured employees are disciplined more frequently or severely than uninjured employees who act in an unsafe manner. The Memorandum states that it will consider whether the employer actively monitors the workplace for compliance with the work rules "in the absence of an injury."

OSHA also will carefully scrutinize "vague rules, such as a requirement that employees maintain situational awareness or work carefully."Such a focus makes it essential that employers review and make effective near-miss, self-reporting, safety-observation and similar programs.

Finally, be careful not to establish "programs that unintentionally or intentionally provide employees an incentive to not report injuries." For example, programs awarding prizes or money to employees or a team of employees if no one from the team is injured over a certain period of time are not automatically illegal, but are frowned upon by OSHA. It is better to provide incentives to employees who use safe practices, get involved, obtain additional training, etc.

While there are countless effective ways to track and reward safe behaviors and to engage employees, employers have a legitimate desire want to track and consider recordables and related subjects in incentive and tracking programs. OSHA has provided little guidance on the balance and mix of actions.

This Memorandum, if viewed in the context of current OSHA whistleblower actions against employers raises other questions which employers should carefully consider, including:

- what is the role of recordable injuries and measuring the effectiveness of safety management processes and incentivizing employees?
- should an employer include recordable injuries as one of a number of factors in an incentive program?
- is it lawful to include recordable injuries along with other safety and non-safety factors in bonuses which consider productivity, quality, safety, and other operational factors?
- what "leading indicators" should be tracked and incentivized, and by what process?
- has the employer reviewed supervisor and management bonuses to determine if such bonuses may unintentionally discourage employees from reporting injuries, or be perceived as a discouragement by OSHA?

We hardly need another reason to encourage clients to review and revamp incentive programs or be wary of increased risks associated with whistleblower claims, but these developments certainly increase the sense of urgency.

For more information, visit the Fisher & Phillips website at www.laborlawyers.com or contact your regular Fisher & Phillips attorney or any of the lawyers in our Workplace Safety and Catastrophe Management Group.

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May 21, 2013

LEGAL ALERT

OSHA Opens Worksites to Allow Union Representatives to Participate in Walk-around Inspections of Non-Union Companies

In a new letter of interpretation publically released on April 5, 2013 (originally dated February 5, 2013), the Occupational Safety and Health Administration (OSHA) announced for the first time that during an OSHA inspection of non-union worksites, employees can be represented by anyone selected by the employees including outside union agents.

Background

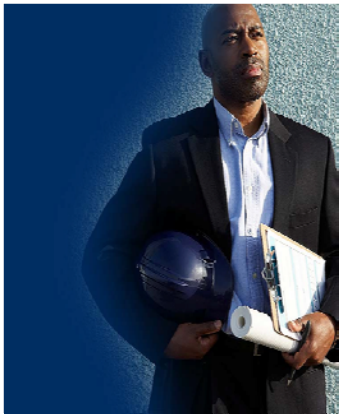
Until now, OSHA's policy has been to allow union representatives to be the "employee representative" but only when the inspection involves a "union" workplace. Section 8(e) of the Occupational Safety and Health Act of 1970 ("The Act") specifically stated the following regarding worksite inspections and third-party representatives:

> "Subject to regulations issued by the ... [OSHA], a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the ... [OSHA] representative during the physical inspection of the workplace ... for the purpose of aiding the inspection. Where there is no authorized employee representative, the... [OSHA] representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace." (Emphasis Added)

In other words, historically under the Act, the union had to be a "recognized" or "certified" representative for purposes of collective bargaining under the National Labor Relations Act to act as the employee representative in an OSHA inspection.

OSHA's New Union Supported Policy

According to OSHA's new interpretation, non-union employees can select a person who is affiliated with a union or a community organization to act as their "personal representative" in filing complaints on the employees' behalf, requesting workplace inspections, participating in informal conferences to discuss citations, and challenging the abatement period in citations being contested by an employer. The interpretation letter goes on to state that "a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative."



OSHA, in its February 5th letter, utilizes a novel analysis of Section 1903.8(c), in justifying its new determination that the Act and OSHA inspection regulations explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such representation is "reasonably necessary to the conduct of an effective and thorough physical inspection."

Under this expansive interpretation (which fails to specifically define who is "a person" affiliated with a union or community representative), not only can union organizers be designated as the "employee representative" but also individuals such as community activists or perhaps even plaintiff lawyers could participate in an OSHA inspection on behalf of some of the employees. Obviously, there is concern that OSHA's new policy may encourage unions to get involved in OSHA inspections and complaints in non-organized facilities as a means to gain access to the facility, which they normally would not have access. This change in policy could be a big boost to union organizing and has been widely applauded by most, if not all, labor union organizations.

OSHA's new interpretation also goes directly against its own inspection regulation. Section 1903.8 of the OSHA inspection regulations states in part that:

(a) "Compliance Safety and Health Officers shall be in charge of inspections and questioning of persons. A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection."

(b) "...If there is no authorized representative of employees, or if the Compliance Safety and Health Officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace."

(c) "The representative(s) authorized by employees shall be an employee(s) of the employer...is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such

third party may accompany the Compliance Safety and Health Officer during the inspection."

In addition, OSHA's current Field Operations Manual (FOM) also does not support its new interpretation. With respect to walkaround rights, the FOM states:

VII. Walkaround Inspection.

A. Walkaround Representatives.

Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employee.

1. Employees Represented by a Certified or Recognized Bargaining Agent.
During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in a walkaround.

2. No Certified or Recognized Bargaining Agent.
Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for OSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on a walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.

3. Safety Committee.
Employee members of an established plant safety committee or employees at large may designate an employee representative for OSHA inspection purposes."

The new interpretation letter also raises many questions that have not yet been addressed and may lead to legal issues including:

- Who is an appropriate employee representative?
- Who makes the determination that the selected individual(s) is an appropriate employee representative?
- Do the employees get to vote for the employee representative and does the selected individual have to receive a majority of the employee votes at the facility?
- If one or more employees object to the selected representative, does it void the selection?
- Do different groups of employees get to select their own representative? How many employee representatives can be present during an investigation?
- What rights do the non-employee representatives have during the inspection? (i.e. Being present during managers and supervisor's interviews).

Employers Proactive Approach to OSHA's New Interpretation

It is important to note that worksites that have formal safety committees in place may be less susceptible to the application of this new interpretation in its OSHA walkaround inspection process. Under the form, the safety committees can designate the employee representatives for the facility, which would make it more difficult for the OSHA inspector to choose an outside union organization. If a company does not have a safety committee already in place, employers may want to consider establishing one as that committee arguably would hold the "representative" role in walkaround inspections. Employers setting up safety committees should be aware of the National Labor Relations Act and unfair labor practice (ULP) pitfalls if the safety committee is not properly implemented. Employers should also consider what trade secret, confidentiality and safety and health measures should be in place before allowing any third party to have access to the worksite. If the OSHA inspector does attempt to bring in a third-party as a part of the inspection, the employer should attempt to ascertain the reasons for that third-party selection and "why is the person's presence "reasonably necessary" in conducting the OSHA inspection.

What many employers do not know, is that they have the right to refuse a walkaround inspection on any basis and require OSHA to get a warrant. One option for employers is to advise the OSHA compliance officer that it will permit OSHA to conduct its inspection but it is refusing entry of any third party. OSHA may treat this as a "refusal of entry" and seek a warrant. Since OSHA's request directly contradicts the Act and OSHA regulations, the federal district court judge reviewing the request for the warrant may not issue it. Employers should know that they will not be allowed to participate in or argue on their behalf in the "ex parte" warrant application proceedings . If the warrant is issued, however, the employer would have to decide whether to move to quash the warrant or otherwise oppose the warrant if OSHA attempts to enforce the warrant in federal court. While requiring a warrant might not be the most favorable approach for some employers, it may prevent the excess use of walkaround inspections for organizing non-union workforces if the warrant is ultimately quashed.

The major reaction by the business community to this new interpretation letter is that it is a payback by OSHA for the union support in past elections. The facts are clear that the new interpretation letter directly contradicts the express language of the Act and OSHA's regulation, as well as adds little, if anything, to improve safety and health in the workplace. What it does is to open the door for potentially allowing an OSHA inspection to be improperly utilized as a union organizing tactic. This is one more reason why all employers must know all of their legal rights during an OSHA worksite inspection.

Fisher & Phillips has developed a detailed strategy and protocol for its clients to respond to either OSHA or an employee's request for participation of non-employee representations during an OSHA inspection. For more information, visit the Fisher & Phillips LLP web site at www.laborlawyers.com. For help with ensuring that your business or company are in compliance or for advice concerning any of OSHA's safety and health standards, contact your regular Fisher & Phillips attorney or any of the lawyers in our Workplace Safety and Catastrophe Management Group.

FISHER & PHILLIPS LLP
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June 1, 2013

LEGAL ALERT

OSHA Increases Focus on Safety for Temporary Employees

In a recent memorandum from the national office to its Regional Administrators, OSHA set forth new issues that Compliance Officers should examine when they inspect worksites where temporary employees are working. The information to be documented includes determining whether the employees are exposed to conditions in violation of OSHA rules or other safety and health hazards and whether the employees received safety and health training "in a language and vocabulary they understand" as well as the supervising structure under which the temporary employees are reporting (i.e. who is supervising the temporary employees at the worksites).

Who falls under "Temporary Worker"?

The memorandum identifies temporary employees as "those who are paid by a temporary help agency, whether or not their job is temporary." The memo instructs compliance officers that if there are temporary employees, the inspector should "document" the name and location of the employees' staffing agencies. In addition, inspectors should also record "the extent to which the temporary workers are being supervised on a day-to-day basis either by the host employer or the staffing agency."

In addition, it is important to note that employees are not defined by OSHA based on who pays them. Instead, OSHA looks at whether there is an employer-employee relationship between the parties. Criteria OSHA uses to determine that relationship include:

- The nature and degree of control the hiring party asserts over the manner in which the work is done.
- The degree of skill and independent judgment the temporary employee is expected to apply.
- The extent to which the services provided are an integral part of the employer's business.
- The right of the employer to assign new tasks to the employee.
- Control over when the work is performed and how long it takes.

The Reason Behind the Memorandum

According to OSHA, in recent months there have been a series of reports of temporary employees suffering serious injuries. In some cases, the host employer failed to provide safety training or, if some instruction was given, it inadequately addressed the hazard believing that the temporary employee agency was providing the appropriate safety and health training.

Because of the number of temporary employees being utilized in worksites throughout the country, and the recent increase in the number of severe incidents, OSHA stated they wanted to "... increase the unified effort using enforcement, outreach and training to assure that temporary workers are protected from workplace hazards."

OSHA's Plan for Temporary Employees

The memo calls on OSHA compliance officers to use a newly created code in the agency's information system to denote when temporary employees are exposed to safety and health violations and further directs investigators to review records and conduct interviews to assess whether temporary employees have received the required training in a language and vocabulary they can understand. In a statement announcing the new initiative, OSHA officials stated that the agency has also started working with the American Staffing Association and with employers that use staffing agencies to promote best practices to protect temporary employees from hazards on the job.

Conclusion

Any employer utilizing temporary employees must be aware that no matter what its contract states as to the temporary employee provider responsibility to conduct OSHA safety and health training, the host employer will still be responsible for ensuring that its temporary employees have been properly trained and aware of all safety and health hazards at the worksite. This is especially true if the host employer is supervising the temporary employees, Also, under the OSHA multi-employer citation policy, the host employer will not likely be considered the controlling employer and may be cited for safety and health violations created by the temporary employees. This is a complex issue and employees utilizing a temporary employee provider should look closely at the contract with the provider to ensure that it is indemnified for any safety or health violations created by the temporary employee provider.

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June 17, 2013

LEGAL ALERT

Getting Off OSHA's Severe Violator's Enforcement Program "Black List"

After several years of received employer's requests, OSHA's Directorate of Enforcement Programs (DEP) issued a memorandum detailing the removal criteria for those employers currently under OSHA's Severe Violator Enforcement Program (SVEP). This memorandum provides employers guidance on how to be removed from the SVEP, a process that has been unclear since the program was first implemented.

What is SVEP?

The SVEP is a program originally implemented by OSHA on June 18, 2010 that was designed to focus its enforcement resources on "employers who have demonstrated recalcitrance or indifference to their OSH Act obligations by committing willful, repeated or failure-to-abate violations" in certain defined circumstances.

How do employers get put into the SVEP?

The OSHA SVEP Enforcement Directive sets forth what employer actions could put them into SVEP. According to this Directive, there are 4 types of accidents or violations that will bring a company under the SVEP, including:

1.) Fatalities or catastrophes involving an employee death or 3 more hospitalizations
2.) Non-fatalities or catastrophes involving high emphasis hazards
3.) Non-fatalities or catastrophes due to potential release of highly hazardous substances
4.) All "egregious" violations

Employers that are put into the SVEP must be prepared to adhere to increased invasive enforcement of the OSH Act. These enforcement acts include enhanced follow-up inspections, nationwide inspections of related workplaces, and increased publicity of OSHA enforcement both internally and externally. Additionally, OSHA may order the employer to hire a safety and health consultant to help develop a new safety program for the company or submit to the area director a log of work-related injuries and illnesses on a quarterly basis.

How do employers get off the SVEP?

According to the DEP memorandum, OSHA will consider removing an employer from the SVEP after 3 years from the date it was placed into SVEP (by either failure to contest, a settle agreement, or Review Commission decision). However, the removal is not automatic after 3 years, OSHA Regional Administrators will perform additional follow-up inspections and analysis of IMIS/OIS data and determine whether all SVEP related violations have been abated, all outstanding penalties paid, all settlement provisions have been complied with, and the employer has not received any additional serious citations related to the hazards identified in the SVEP inspection at the initial establishment or any related establishment. If so, the Regional Administrator will have discretion to remove the employer from SVEP. If the employer is found not to have carried out its abatement and settlement obligations, it'll be placed back into SVEP for another 3 years.

As a practical matter, the existence of the SVEP, the relatively easy requirements to be place on it, and the difficulty in being removed from the list make it even more important that employers carefully manage OSHA inspections to minimize citations or lay the groundwork for (1) future appeals; (2) "contest" citations; and (3) talk to legal counsel about defenses to any potential citations.

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September 18th 2014

LEGAL ALERT

OSHA Announces Final Rule On Recordkeeping Dramatically Increases Employers' Reporting Requirements Which OSHA Will Make Public

On September 18, 2014, OSHA published its final rule for Occupational Injury and Illness Recording and Reporting Requirements. The rule, which takes effect on January 1, 2015, makes several important changes that significantly expands reporting requirements for all employers while publishing the employer provided information on the OSHA website.

First, the new reporting requirements expand the list of severe injuries that employers must report. Currently, employers must notify OSHA of all work-related fatalities and work-related hospitalizations of three or more employees within eight hours of the incident. Under the new rule, employers will be required to report all work-related fatalities, in addition to the following: 1) all work-related inpatient hospitalizations of one or more employees; 2) all work-related amputations; and 3) all work-related losses of an eye.

The new rule retains the requirement for reporting all work-related fatalities within eight hours of an incident, but it imposes a 24-hour reporting window for work-related inpatient hospitalizations, amputations, and losses of an eye. All employers are subject to these reporting requirements, even those employers who are otherwise exempt from routinely keeping OSHA 300 Logs.

You can report these incidents to OSHA over the phone by calling the local OSHA Area Office site or the 24-hour OSHA hotline or, alternatively, electronically on OSHA's public website. Additional information is available on OSHA's webpage: https://www.osha.gov/recordkeeping2014.

The new recordkeeping rule also updates the list of industries that are partially exempt from OSHA recordkeeping requirements. Under the current regulations, two classes of employers are partially exempt from routinely keeping records of serious employee injuries and illnesses, including employers with 10 or fewer employees and employers in certain low-hazard industries, as classified by the Standard Industrial Classification (SIC) system.

The new rule retains the exemption for employers with 10 or fewer employees, but it relies on the North American Industry Classification System (NAICS) to categorize an industry as low hazard. As a result, employers in 25 industries previously exempt, who now do not fit within the new NAICS list of exempt industries must now comply with all OSHA's recordkeeping requirements.

Conversely, employers in a small number of industries who previously had to comply with the recordkeeping requirements will now be

exempted under the new NAICS exemption list. A list of the industries previously exempt that now will be required to keep OSHA injury and illness records can be found at https://www.osha.gov/recordkeeping2014/reporting_industries.html. For step-by-step instructions to determine whether your company is categorized as an exempt industry under the new rule, visit https://www.osha.gov/recordkeeping2014/OSHA3746.pdf.

In a surprise move, OSHA's Assistant Secretary, Dr. David Michaels, announced that the fatality and injury reports will be posted online on the OSHA website. Online posting was not mentioned by OSHA during the three year-long rulemaking process. Michaels indicated that publishing severe injury and illness reports on the OSHA website was in part to publicly shame or "nudge" employers to take steps to prevent injuries so they are not seen as unsafe places to work.

OSHA intends for its new rule to have far-reaching implications to address concerns about serious hazards in the workplace. In the press statement accompanying the release of the final rule, OSHA representatives stated that OSHA would not send inspectors to investigate every reported incident, but it will question the employer about the cause of the injury and the steps the employer plans to take to prevent future injuries.

For more information, visit our website at www.laborlawyers.com or contact your regular Fisher & Phillips attorney.