



OSHA'S NEW ENTERPRISE-WIDE APPROACH TO ENFORCEMENT

by

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Companies that operate multiple facilities in different locations, such as national retail and grocery chains, manufacturers, and hotel groups need to be aware of four new Occupational Safety and Health Administration (OSHA) enforcement trends that have important enterprise-wide consequences:

- (1) A rise in follow-up inspections and repeat violations at sister facilities within a corporate family;
- (2) OSHA's pursuit of company-wide abatement provisions in settlement agreements;
- (3) OSHA's requests for enterprise-wide relief from the Occupational Safety and Health Review Commission; and
- (4) Implementation of OSHA's Severe Violators Enforcement Program (SVEP), which incorporates each of the above.

Follow-up Inspections and Repeat Violations

The most significant trend impacting employers with multiple locations is OSHA's recent interest in Follow-up Inspections and Repeat citations. OSHA characterizes citations as Other Than Serious (OTS), Serious, Willful, or Repeat. The maximum penalty for OTS and Serious citations is only \$7,000 per violation, but for Willful and Repeat violations, OSHA can issue penalties up to \$70,000 per violation. By actively pursuing more Repeat violations, OSHA is issuing much higher penalties.

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OSHA issues Repeat violations when an employer has been cited in the past for a substantially similar violation (generally, a citation issued under the same standard for the same violative condition). Until recently, Repeat violations were issued much less frequently because OSHA:

- historically treated workplaces as individual, independent establishments;
- limited to three years its review of employers' OSHA records for past violations to form the basis for a Repeat; and
- was less likely to revisit a workplace within a few years.

Each of these factors has changed under the Obama Administration's OSHA. Today's OSHA:

- treats related workplaces within a corporate family as one workplace for purposes of Repeat violations;
- looks back five years for past violations to form the basis for Repeats; and
- selects inspection targets with past violations (at the same or related facilities within a corporate family), with the goal of finding and citing more Repeat violations.

As a result of OSHA's new approach to Repeat violations, in the past two years, OSHA has drastically increased the number of Repeat violations it issues. This heavy use of follow-up inspections and Repeat violations is how OSHA has also tripled the number of significant enforcement actions (cases over \$100,000) over the past two years.

This practice has had serious consequences for national corporations that are vulnerable to Repeat violations throughout the country by virtue of a single citation at just one location. A company's failure to investigate and correct the same safety hazard at each of its stores or locations around the country can lead to Repeat violations and substantial penalties, even for the first citation ever issued at another location.

Revised Guidelines for Corporate-Wide Settlement Agreements

After OSHA issues citations, the most common form of resolution is for the employer and the Secretary of Labor to enter into a settlement agreement. OSHA settlement agreements typically spell out any changes to the citations (e.g., withdrawal or amendments to certain citation items, the amount of penalty reduction, and modified abatement dates), and the specific actions the employer will be required to take to abate the cited hazards. Because citations arise from an OSHA inspection at a particular workplace, the required abatement set forth in the original citation is limited to the hazardous conditions identified at that specific workplace. While the law limits to a single location the abatement OSHA can properly demand in a citation, in a settlement, OSHA can make demands beyond what it normally can require in a citation.

To amplify the impact of a single enforcement action, OSHA has begun a practice of more actively seeking corporate-wide abatement in settlement agreements. OSHA issued a [Compliance Directive regarding OSHA's use of Corporate Settlement Agreements](#) (“CSAs”), effective June 22, 2011, with the intent of expanding abatement beyond a single location. The Directive explains that OSHA may include provisions in settlement agreements to expand abatement requirements to all of a company’s locations rather than just the location where the alleged violation was found and cited. The Directive states that CSAs allow OSHA to use its resources “more efficiently by avoiding numerous inspections of like corporate locations,” resulting in “more timely reduction and uniform abatement of serious hazards at multiple worksites.”

The CSA Directive lists as one of its “significant changes” that OSHA may initiate negotiations of CSAs “on a broader range of enforcement cases.” Specifically, the Directive extends the range of cases in which OSHA may proactively pursue a CSA from only “egregious” citations to any case in which OSHA believes the employer “has or may have” a significant pattern of non-compliance across multiple locations, including egregious citations, significant penalty matters, Severe Violator Enforcement Program cases, inspections related to fatalities or catastrophes, extensive recordkeeping deficiency cases, and High Gravity Serious Citation cases with a company history of violations or accident or fatality trends.

Furthermore, the Directive instructs OSHA that “when appropriate, OSHA *shall* consider going *beyond* the subject of the citations to include additional safety and health program enhancements in the CSA.” Thus, OSHA would be permitted to include company-wide “safety and health program enhancements” for conditions that were not even the subject of the citation in the baseline inspection.

Enterprise-Wide Relief from the Review Commission

Despite what seems to be settled law and clear language in the OSH Act – that abatement must be limited to the location where the violation was identified by OSHA during an inspection – OSHA has recently begun to pursue enterprise-wide mandatory abatement; not only in settlement agreements, but also in relief sought in complaints filed with the Occupational Safety and Health Review Commission (the “Review Commission”).

Under 29 U.S.C. § 659(c), the Review Commission is authorized to “issue an order . . . affirming, modifying or vacating the Secretary’s citation or proposed penalty *or directing other appropriate relief . . .*” Based on this authority to grant “other appropriate relief,” OSHA has now requested on at least two occasions in the past two years that the Review Commission order enterprise-wide abatement based on the findings at a single location inspection – once in July 2010 against the U.S. Postal Service, and again in January of this year against a grocery store chain.

In a [January 18, 2012 press release](#), OSHA reported that the Department of Labor sought enterprise-wide relief at more than 60 of the grocery store chain’s separate locations based on hazards issued at only two of its stores. OSHA stated in its Complaint that “upon information and belief,” the employees at the approximately 58 stores that did not receive citations “were exposed or likely to be exposed to” similar hazards. Similarly, OSHA’s complaint against the U.S. Postal Service (USPS) requested that the Review Commission exercise its authority to grant “other

appropriate relief” to order enterprise-wide abatement with regard to electrical safety practices at all USPS Processing and Distribution Centers.

Severe Violators Enforcement Program (SVEP)

In 2010, OSHA rolled out a new initiative called [the Severe Violators Enforcement Program](#) (SVEP). The SVEP focuses enforcement resources on employers whom OSHA believes have demonstrated recalcitrance or indifference to their Occupational Safety and Health Act obligations. OSHA believes this behavior is demonstrated by (and therefore “qualifies” employers for SVEP) findings of Willful, Repeated, or Failure-to-Abate violations in various circumstances, including fatality inspections and citations related to certain enumerated “high emphasis hazards.”

OSHA’s SVEP incorporates elements of all of the above enterprise-wide enforcement trends. OSHA’s SVEP Directive requires Area Offices to consider including in every settlement: (1) enterprise-wide abatement requirements; (2) provisions requiring employers to identify all of its current or future jobsites; and (3) consent to inspections at other locations (i.e., waiving the warrant requirement). With regard to Follow-up Inspections and Repeat violations, the primary consequence of employers “qualifying” for the SVEP is that OSHA will conduct mandatory Follow-up Inspections at related facilities (as many as ten sister facilities in the first wave). Finally, both of the instances in which OSHA has pursued enterprise-wide relief from the Review Commission have been in SVEP cases.

Conclusion

Given these trends in enterprise-wide enforcement, companies operating multiple sites must take seriously every citation they receive, regardless of the size of the penalty. Often the first citation is issued with an innocuous characterization (e.g., Other Than Serious) and a low or no penalty, or OSHA agrees in a settlement to reduce more serious violations to lower characterizations or lower penalties. Employers must be careful to weigh the benefit of such settlement terms against the potential cost of Repeat violations and costly company-wide abatement requirements that may arise due to Follow-up Inspections at related facilities.