Legal Backgrounder

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 28 No. 7 July 19, 2013

"OFF TO A STRONG START"?

OSHA'S DUBIOUS ASSESSMENT OF SEVERE VIOLATOR ENFORCEMENT PROGRAM

by
Eric J. Conn

OSHA issued a White Paper on February 26, 2013, analyzing the first 18 months of its new, controversial enforcement initiative known as the "Severe Violator Enforcement Program" ("SVEP"). The White Paper concludes that the SVEP is "off to a strong start" and "already meeting certain key goals," including:

1. Identifying recalcitrant employers whose violations of the OSH Act "demonstrate indifference to the health and safety of their employees."

2. Effectively guiding OSHA's enforcement resources toward those employers by "targeting high-emphasis hazards, facilitating inspections across multiple worksites . . . and by providing Regional and State Plan offices with a nationwide referral procedure."

3. Demonstrating its effectiveness by creating a "significant increase in follow-up inspections and enhanced settlements."

Despite OSHA's claims, however, careful scrutiny of the data available regarding the SVEP casts doubt on the program's effectiveness and reveals several glaring problems with how the SVEP is being administered. Most notably, the Severe Violator Enforcement Program:

1. Disproportionately targets small employers with enforcement rather than compliance assistance;

2. Provokes more than four times as many legal challenges to the underlying citations as compared to the average OSHA enforcement action;

3. Encounters significant obstacles in the execution of follow-up inspections of SVEP-qualified employers; and

4. Finds virtually no systemic safety issues when follow-up and related facility inspections are conducted (i.e., the Program is not capturing recalcitrant employers).

SVEP Background

OSHA instituted the SVEP on June 18, 2010. The purported purpose of SVEP has been to concentrate OSHA's enforcement resources on employers whom OSHA believes demonstrate indifference to their employees' health and safety; these employers are deemed under SVEP guidelines to be "recalcitrant" violators of their OSH Act obligations. SVEP replaced a previous, similarly problematic enforcement program known as the Enhanced Enforcement Program ("EEP"). EEP, like its successor SVEP, also aimed at channeling enforcement resources

---

Eric J. Conn heads the OSHA Group at the law firm Epstein Becker Green. He is an author of the OSHA Law Update blog (http://www.oshalawupdate.com/).

toward "severe" or "problematic" employers. A 2009 audit of EEP by the Department of Labor, Office of the Inspector General ("OIG") criticized the program for being ineffective and inefficient because its broad qualifying criteria created so many cases that OSHA struggled to conduct follow-up inspections. OSHA, therefore, discarded the EEP and instituted SVEP with supposedly narrower qualifying criteria and a better infrastructure for pursuing follow-up inspections.

Under Section XI of the SVEP's Directive, employers "qualify" as severe violators if they meet any of the following criteria:

1. Any violation categorized by OSHA as "Egregious" (essentially Willful plus);

2. One or more Willful or Repeated violation or Failure-to-Abate notice associated with a fatality or with the overnight hospitalization of three or more employees (Fatality-Catastrophe);

3. Two or more Willful or Repeated violations or Failure-to-Abate notices (or any combination thereof) in connection with a High Emphasis Hazard (e.g., falls, amputations, grain handling, and generally the other hazards that are subject of an OSHA National Emphasis Program); or

4. Three or more Willful or Repeated violations or Failure-to-Abate notices (or any combination thereof) related to Process Safety Management (i.e., avoiding the release of a highly hazardous chemical).

Employers designated as severe violators experience an expanded range of sanctions, beyond OSHA's traditional penalty structure. An SVEP-qualifying OSHA citation subjects employers to:

1. Mandatory follow-up inspections at the same facility (SVEP Directive, section XV(A));

2. Nationwide inspections of related worksites within the same corporate enterprise when OSHA believes the underlying compliance issues "may be indicative of a broader pattern of non-compliance," (section XV(B));

3. Required enhanced abatement and settlement terms, including third party safety audits, mandatory injury and illness reporting by the employer, and corporate-wide settlement agreements (section XV(D));

4. Federal court enforcement of abatement orders and settlement agreements under Section 11(b) of the OSH Act (section XV(E)); and

5. Embarrassing news releases and other forms of public shaming for each SVEP citation (section XV(C)).

With every SVEP citation, OSHA publishes a public press release that includes an inflammatory quote from a high-ranking OSHA or Department of Labor official about the employer. The Assistant Secretary of Labor for OSHA and his senior staff refer to these press releases as a campaign of "Regulation by Shaming." In addition to these press releases, OSHA also maintains a public log of SVEP-cited employers on its website (SVEP Directive, section XVI.)

However, while OSHA indicates in its February 2013 SVEP White Paper that these enhanced enforcement consequences are meant to encourage compliance and abatement, and that they have resulted in greater awareness by employers of OSHA enforcement actions, the problem remains that many employers cited under SVEP do not belong in the program. The most fundamentally flawed (and seemingly unlawful) element of the SVEP is the timing under which OSHA qualifies employers for the Program. As OSHA describes in the White Paper, "[a]n inspection becomes an SVEP case upon the *issuance* of qualifying citations," not upon a Final Order of the OSH Review Commission. That means that OSHA has taken upon itself the authority to qualify employers for an extra-punitive program and publicly brand an employer as a severe violator, *before* OSHA has proven that the employer has violated the law at all, let alone in the egregious manner proscribed by the SVEP. As we have written about extensively, this timing under SVEP seems to be a clear violation of constitutional due process.

OSHA compounds this premature branding by locking employers into SVEP until the employers can either disprove the underlying citations through the contest process, which often can take years, or maneuver through a multi-year, nearly impossible set of exit criteria if the citations are ultimately proven valid. Under removal criteria announced in August 2012, to get out of the SVEP, "[e]mployers must have abated all SVEP–related hazards affirmed as violations, paid all final penalties, abided by and completed all settlement provisions, *and not received any additional serious citations* related to the hazards identified in the SVEP inspection *at the initial establishment or at any related establishments*" for *three years* following the "date of *final disposition*" of their SVEP citation. Even for employers who fulfill all of those criteria, final removal from SVEP is contingent upon the discretion of the OSHA Regional Administrator.

OSHA's SVEP White Paper

OSHA's White Paper analyzed data associated with the 191 SVEP cases as of September 30, 2011, the end of FY 2011. The White Paper breaks-down SVEP cases based on various measures, including:

1. SVEP qualifying criteria;

2. Industry type (construction and non-construction);

3. Employer size (by number of employees); and

4. Whether a follow-up inspection had been conducted or attempted.

The data reveals that alleged violations related to "High-Emphasis Hazards" represent the majority of SVEP cases (126 cases, 65% of total), whereas only one Process Safety Management case had qualified for SVEP. Fatality-Catastrophe was the second largest category of SVEP qualifiers, with 36 cases (21% of total). The data also shows that construction companies represent 60% of SVEP employers, with manufacturing of all types the second largest contingent, including employers in the grain/food and wood/paper industries.

Finally, OSHA is mandated to conduct follow-up inspections at every SVEP-designated employer. By September 30, 2011, only 48% of the 191 SVEP cases were eligible for follow-up inspections (OSHA will not conduct a follow-up inspection while the underlying case remains in the contest phase). Of that 48%, more than half had received follow-ups or "attempted" follow-ups. By February 29, 2012, however, nearly all of the SVEP cases eligible for follow-up inspections had follow-ups or attempted follow-ups.

The Reality of SVEP

Contrary to OSHA's claims, the SVEP data presented in the White Paper and otherwise publicly available actually reinforces the serious concerns that many employers have raised about the program since its inception.

1. SVEP Disproportionately Targets Small Employers

The majority of SVEP-qualifying employers are small businesses. Of the 191 cases analyzed in the White Paper, 50% (96 cases) involved employers with between 1 and 25 employees, and an additional 24% (46 cases) involved employers with between 26 and 100 employees. Only 17% of cases (33 out of 191) involved employers with more than 250 employees.

It is certainly a fact that small businesses lack the same resources as their larger competitors, which often means they possess less sophisticated safety programs. The harshly punitive SVEP enforcement scheme, however, will only further harm these businesses' ability to compete in a tough economic climate. Rather than using SVEP to disproportionately focus enforcement resources and punish small businesses, the Department of Labor would exercise better judgment by instead allocating greater compliance assistance resources to these small employers.

2. SVEP Cases Have High Rates of Contest and Take Extraordinarily Long to Resolve

Based on data from the April 1, 2013 update of the SVEP log, an analysis of the rate of contest and the duration of open SVEP cases shows an alarming trend. Of the 355 cases on the SVEP log, nearly 50% of the employers contested the qualifying citations. That compares to a national contest average of only 8%. Of those

contested cases, 105 (30% of total) remained in active contests without a final order establishing the facts of the SVEP-qualifying citation.

The longest-duration case, originally cited on July 15, 2010, had been open for nearly three years without a final order on the underlying citation. Not a single employer as of that date had been removed from SVEP following a final order affirming an SVEP-qualifying citation. The high contest rate for SVEP cases, and drawn out challenges of those contests, is particularly problematic because of OSHA's policy of branding employers as "Severe Violators" before the contest is resolved.

3. OSHA Faces Obstacles Conducting SVEP Follow-up Inspections

OSHA has faced significant challenges in conducting follow-up inspections of many SVEP employers. The biggest obstacle has been finding small construction employers due to the short-term nature of their jobs, mobility in the nature of their work, and their small size.

During the period covered by the White Paper, OSHA could not locate 52 construction companies for follow-up inspections. Other failed attempts to re-inspect have been a result of the cited employer going out of business.

OSHA bases much of its "strong start" claim on the number of follow-up inspections and related facility inspections that it has conducted or attempted under SVEP. Indeed, the White Paper boasts that of SVEP employers that were eligible for a follow-up inspection, "nearly all" were subject to either a follow-up inspection or an *attempted* follow-up inspection. As attempted follow-up inspections outnumbered completed follow-up inspections by nearly 50% (56 attempted versus 39 completed), it is unclear why OSHA views that as a success.

4. Follow-up Inspection Data Indicates SVEP Targets Wrong Employers

The purpose of the follow-up inspections, of course, is to validate that OSHA has targeted the truly bad actors, i.e., to demonstrate the recalcitrance of SVEP-cited employers based on their failure to improve their companies' safety compliance. The results of the few successful SVEP follow-up inspections and related facility inspections, however, demonstrate the opposite – that SVEP employers are actually not recidivists, they are not bad actors, and they are not indifferent to their OSH Act obligations.

To say nothing of the more than 20 employers whom OSHA now admits never belonged in SVEP (i.e., OSHA has withdrawn or "lined out" the qualifying citations as mistakes of fact or law), the SVEP White Paper reports that "no follow-up inspection to date has itself been designated as an SVEP case." Likewise, of the 21 inspections conducted at related facilities, 19 resulted in no violations or only minor violations. Accordingly, not only are the SVEP follow-up inspections not revealing recalcitrant employers, they are revealing safer-than-average workplaces. 46% (57 out of 125) of SVEP follow-up inspections have been "in compliance" inspections; i.e., no citations were issued at all, which compares to a national average rate of 25% "in compliance" for all other OSHA inspections. Based on this data, it is clear that SVEP is failing to channel inspection resources toward employers with systemic safety issues.

Conclusion

SVEP is a program based on admirable principles; certainly OSHA should focus its enforcement resources on bad actors. As it is being implemented, however, the Program prematurely punishes employers, and in many instances, punishes the wrong employers altogether. In order for SVEP to avoid failing like its predecessor, EEP, OSHA needs to make significant changes to the selection process, the timing for implementing the Program, and the manner in which implements the Program.

  ISBN 1056 3059