

OSHA FORECAST FOR 2012: CLOUDY WITH POSSIBLE STORMS

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Strategic changes at the Occupational Safety and Health Review Agency in the last several years have resulted in stricter enforcement, larger penalties, greater compliance requirements and new regulations. This year we expect to see many of the proposed rules and initiatives that OSHA has been pushing make significant progress within the regulatory process, and maybe even come to life.

Things to be on the lookout for in 2012 include:

THE GLOBALLY HARMONIZED SYSTEM

In 2003, the United Nations adopted the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). Since that time, many countries have adopted its use. These systems may be similar in content and approach to OSHA Hazard Communication Standards, but their differences are significant enough to require multiple classifications, labels, and safety data sheets for the same product when marketed in different countries, or even in the same country when parts of the life cycle are covered by different regulatory authorities. In an attempt to align OSHA's Hazard Communication standard with the GHS, OSHA published a proposed rulemaking on September 30, 2009 to adopt the GHS system.

The GHS itself is not a regulation nor a standard. GHS establishes standard hazard classification and communication provisions with explanatory information on how to apply the system. The elements in the GHS supply a mechanism to meet the basic requirement of any hazard communication system, which is to decide if the chemical product manufactured or supplied is hazardous, and to prepare a label or Safety Data Sheet as appropriate. In adopting the GHS, OSHA would thus take the agreed

criteria and provisions, and implement them through their own regulatory process and procedures rather than simply incorporating the text of the GHS into their requirements.

Revision of the Hazard Communication standards based on GHS will bring some important changes such as a new form of safety data sheets, changes in labeling requirements and changes in hazard identification keys. Implementation will require training to ensure employees understand the new system.

THE INJURY AND ILLNESS PREVENTION PROGRAM (I2P2)

An injury and illness prevention program is a proactive process to help employers find and fix workplace hazards before workers are hurt. This “find-and-fix” requirement applies regardless of whether the hazard relates to an existing OSHA standard. The goal of the program is to reduce injuries, illnesses, and fatalities by preventing them in the first place through a systematic approach. Of course, it also provides another means for the Agency to impose fines against already overwhelmed employers.

The I2P2 Rule is currently going before a Small Business Regulatory Enforcement Fairness Act Panel review. This is a crucial step in the regulatory process where small business representatives will review and comment on an actual draft of the I2P2 regulatory text that OSHA would intend to publish as a proposed rule. OSHA has reviewed state plans with I2P2’s already in place and believes that states with I2P2’s have shown reduction in their illness and injury numbers.

Currently 34 states and many nations around the world require or encourage employers to implement such programs. It is likely that the regulatory language will reflect some of the guidance previously established for voluntary programs and that of successful state programs.

OSHA published an [Injury and Illness Prevention Programs White Paper](#) on its website describing how injury and illness prevention programs work, presenting studies on their success, reviewing existing I2P2 requirements under various OSHA-approved state programs, and describing issues related to their implementation for small businesses, as well as costs associated with implementing I2P2 programs.

INCREASED FOLLOW-UP INSPECTIONS AND MORE REPEAT VIOLATIONS

While repeat violations were historically rarely issued, the current administration’s agenda has specifically focused on selecting inspection targets with past violations (at the same facility or another facility of that employer). Keep in mind, OSHA can look back five years at the citation history of any facility to issue a repeat citation. If

your company has a history of OSHA citations in the past five years, be extra diligent about ensuring you are in compliance and the hazards previously cited have been and remain corrected.

Also, a Repeat does not have to be for the same exact situation, and can be cited in any other facility. Therefore, if you received a citation for failure to have a guard on a machine press in your Chicago plant four years ago, you could (and likely would) be cited for a Repeat at your Atlanta plant this year for a guard missing on your rollers. Think globally when auditing for potential repeat violations. Repeat violations can get very expensive at up to \$70,000 per violation.

Many Repeat citations will come from an increase in follow-up inspections. Historically, OSHA performed very few follow-up inspections unless there was a complaint or reason to think the employer was not in compliance. The new agenda calls for a significant increase in follow ups. Again, if you have received prior citations be sure to carefully maintain your abatement and be prepared for a knock at your door at any time.

POSSIBLE CHANGES IN RECORDKEEPING AND REPORTING

OSHA is looking to change who must keep illness and injury 300 logs based on a review of more recent injury and illness rates under current SIC and NAICS codes. If their proposed changes are implemented, some industries which are currently required to keep injury and illness records (electronics and appliance stores, recording studios, death care services, and others) will no longer need to comply.

Others, who historically have not had to keep 300 logs (automobile dealers, specialty food stores, museums, consumer goods rental stores and others), will have to comply with the recordkeeping requirements. The Agency is also looking to modernize recordkeeping through the use of an electronic system. The on-again/off-again proposal for a separate column on the 300 log for musculoskeletal injuries is once again, off the agenda.

Under the current rules, employers are required to contact OSHA within eight hours of any incident that results in a fatality or the in-patient hospitalization of three or more employees. The proposed rule would require employers to report any incident that results in a fatality, the in-patient hospitalization of even a single employee, or any incident that results in any form of amputation. Of course, more reporting means more inspections as well.

REVISIONS TO PELS

Permissible Exposure Limits, PELs, are the limits for how long an employee can be exposed to a hazardous substance without experiencing harmful effects. Many have not been updated since the early 1970's. Scientific progress, medical breakthroughs and evidence that suggests the current PELs are insufficient to truly protect workers has fostered OSHA's continued efforts to re-evaluate permissible exposure limits (PELs) based on new information gathered over the last forty years. OSHA is preparing a Request for Information, due out in August 2012, to seek "input from the public to help the Agency identify effective ways to address occupational exposure to chemicals."

INCREASED WHISTLEBLOWER COMPLAINTS

OSHA administers the employee protection or "whistleblower" provisions of 17 statutes. Under the Act, employees may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for exercising any right afforded by the OSHA act, such as complaining to the employer, union, OSHA, or any other government agency about workplace safety or health hazards; or for participating in OSHA inspection conferences, hearings, or other OSHA-related activities.

OSHA has dedicated additional funds to training its investigators to more accurately and thoroughly investigate whistleblower claims which will likely lead to more follow-up on complaints and increased litigation. It has also reassigned responsibility for the Whistleblower Program directly to the Office of the Assistant Secretary of Labor for greater oversight of the program.

Always consider employee relations when making employment and safety decisions to avoid complaints to the extent possible. Be extremely careful when considering any adverse action against an employee who has made a complaint about safety or has engaged in other protected activity, and consult your attorney if action appears necessary.

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