

GETTING OFF OSHA'S "BLACK LIST"

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After two years of uncertainty, employers have finally been given some guidance on how to be removed from OSHA's Severe Violator Enforcement Program (SVEP). On August 16, 2012, the Directorate of Enforcement Programs (DEP) issued a memorandum detailing the removal criteria for the SVEP, clarifying a process that has not been clear since the implementation of the program in June 2010.

WHAT IS THE SVEP, ANYWAY?

If you do not know what the SVEP is yet, consider your company lucky. The SVEP was created by OSHA to "focus enforcement efforts on significant hazards and violations by concentrating inspection 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. An employer may be put in the SVEP for violations involving fatalities or catastrophes, the identification of severe hazards, exposure to highly hazardous chemicals, and all other "egregious" enforcement actions.

As its name suggests, the SVEP involves much more invasive enforcement of the OSH Act. Employers on the SVEP can expect enhanced follow-up inspections, nationwide inspections of related workplaces, and increased publicity of OSHA enforcement, both within the company and externally. Additionally, OSHA may order the employer: to hire a safety and health consultant to develop a new safety program; submit to the Area Director a log of work-related injuries and illnesses on a quarterly basis; notify

Related People



Matthew R. Korn

Partner

[803.740.7652](tel:803.740.7652)

OSHA of any serious injury or illness requiring medical attention, and; consent to OSHA inspections based on this information.

GETTING OFF THE SVEP

Prior to August 16, the only certain way to be removed from the SVEP was to have the SVEP-qualifying citation vacated by the Review Commission or to enter a settlement agreement with OSHA that withdrew the citation. Obviously, a company cannot ensure a favorable outcome under either of these methods. But the newly-released removal criteria identifies a process to get off the SVEP that allows companies to have more control over their status.

Now, an employer on the SVEP can be removed after three years from the date of final disposition of the SVEP-qualifying citation. Final disposition can be accomplished through either a failure to contest, a settlement agreement, or a Review Commission decision. But removal is not automatic after three years. To be removed from the program, an employer must: 1) abate all SVEP-related hazards affirmed as violations; 2) pay all final penalties; 3) abide by and complete all settlement provisions; and 4) not have received any additional serious citations related to the hazards identified in the SVEP inspection at the initial establishment or any related establishments.

If an employer fails to meet these criteria, the company will remain on the SVEP log for an additional three years and will be re-evaluated. Removal from the SVEP program will be at the discretion of the Regional Administrator, unless a national corporate-wide settlement is involved, in which case the DEP will make the determination regarding the employer's removal from the Program.

AND STAYING OFF

As a practical matter, the existence of the SVEP, the relatively easy requirements to be placed on it, and the difficulty in being removed from the list, make it even more important that employers: 1) carefully manage OSHA inspections to minimize the number of citations or lay the groundwork for later appeals; 2) not be hesitant to "contest" citations; 3) build good will throughout an inspection, and demonstrate your commitment to safety; 4) talk to legal counsel about "creative" alternatives to traditional citations;

and 5) get even more serious about proactive safety-management processes which engage employees.

For more information, contact the author at MKorn@fisherphillips.com or 803.255.0000.