Dealing With OSHA's New Enforcement Landscape

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The Occupational Safety and Health Administration has revved up rulemaking and workplace inspection initiatives, changing the enforcement landscape more during the past two years than we saw in the preceding 30. Employers, general counsels and human resource departments should steel themselves for new complexity in dealing with OSHA and Occupational Safety and Health Act compliance. Those who do not comply may not only face significant frustration, but also considerable economic liability.

OSHA is enforcing the nation's workplace safety laws through a variety of new approaches. These include expanding the scope of remedies sought to uninspected premises (in geographically dispersed operations); seeking information that is unrelated to employee complaints that brought OSHA to the worksite in the first place; substantially increasing maximum penalties; and significantly increasing employer responsibilities for injury and illness recordkeeping and reporting.

Taking an Aggressive Approach
The recent decision in Secretary of Labor v. Central Transport LLC stunned the business community with the breadth of remedial action sought by OSHA. What began as a safety inspection at the one of the company's facilities, ultimately led to OSHA seeking abatement of industrial truck hazards at 170 additional locations — worksites that OSHA had not even inspected. This case serves to highlight how a location and circumstance-specific allegation of a safety violation may morph into a systemic compliance scenario. Further, if a geographically dispersed employer does not agree to settle with OSHA, the matter may become a protracted and expensive litigation nightmare.

Likewise, expanded OSHA investigations are taking place every day. Consider, for example, an employee who works outside and complains to OSHA about being subjected to injurious heat stress. When an OSHA inspector comes to the facility to make inquiry, the employer may reasonably agree to an inspection so long as it is limited to workplace conditions associated with the heat stress complaint. But what does the employer do if OSHA asks them to provide comprehensive documentation (likely covering multiple years) concerning programs about electrical lockout/tagout, machine guarding, fall protection, occupational noise, employee training, and process safety management where hazardous chemicals may be present at the worksite? Are these requests relevant? Are they legal? Must the employer comply with demands for information that are unrelated to the underlying heat stress complaint? The answer to these questions lies in a delicate balancing act that weighs legal rights against practical realities.

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This issue was first addressed in the U.S. Supreme Court's 1978 ruling in Marshall v. Barlow's Inc. There, the high court found that government inspections of a business were subject to the Fourth Amendment's prohibition against unreasonable searches and seizures. Later, a number of federal appeals courts ruled that complaint-based inspections by OSHA had to be reasonably proportionate in scope to the hazards cited in complaints. In other words, a complaint about a specific work condition was not authorization for a "wall-to-wall" safety inspection, or unbounded requests for documents. The 11th Circuit's 1982 decision in Donovan v. Sarasota Concrete Co. built on the same logic, holding that when it comes to investigation of employee complaints, OSHA inspections are limited to the reasonable scope of issues implicated in the complaint. Then 12 years later, the 6th Circuit ruled similarly in Trinity Construction v. Secretary of Labor, stating that, "Given the increased danger of abuse of discretion and intrusiveness presented by such searches, we agree with those circuits that have explicitly recognized that a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint."

Though employers may feel comforted by the commonsense boundaries these rulings seem to embody, in recent times, OSHA has frequently pursued investigation beyond issues implicated by employee complaints. Indeed, in an Oct. 28, 2015, guidance memorandum for inspection of poultry processing facilities, OSHA specifically authorized investigative personnel to inspect for broad-based safety compliance regardless of the reason for visiting the worksite.

While that 2015 policy directive was limited to poultry processing facilities, there is little doubt OSHA is applying the same rationale in other complaint-originated investigations. The legality of any expanded OSHA investigation may be debatable, but when an OSHA inspector appears at an employer's facility and makes broad-based informational demands, a practical decision must be made as to whether OSHA will or will not be challenged for this practice. This may involve a high stakes risk versus reward analysis that can differ in each unique situation. The point is that the employer must make this decision with full knowledge of the consequences associated with selection of a particular response option. Is a potentially expensive dispute with OSHA worth the effort to narrow the scope of an investigation? Here, the involvement of an attorney well versed in OSH Act compliance and dealing with OSHA enforcement personnel often will be critical.

Monetary Penalties to Increase

OSHA is set to increase maximum penalties for health and safety violations for the first time since 1990. The new penalty structure will be announced by July 1, 2016, with implementation set for Aug. 1, 2016. Under this new structure, OSHA is to consider "catch-up adjustments" to maximum penalty amounts in order to account for inflation, with future increases that similarly will be inflation-driven.

If the maximum catch-up is implemented, the current penalty for repeat and willful violations will increase from $70,000 to $125,438. The maximum penalty for serious and failure-to-abate violations will increase from $7,000 to $12,744.

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However, OSHA also will have the option of assessing smaller penalties if it concludes that assessment of maximums: (1) would have a "negative economic impact" or the "social costs" of increase would outweigh the benefits, and (2) the Office of Management and Budget agrees with OSHA's determination to assess a reduced penalty. No one can predict how the "small penalties" option will ultimately play out.

Recordkeeping Requirements

OSHA's recordkeeping and reporting requirements have changed significantly. Very recently, the agency finalized its new electronic reporting rule. While we got a hint of what was coming last year when OSHA announced its plan to require that companies post fatality and injury reports online, the business community was caught off guard by other details when the new rule became final in May.

According to OSHA, data accumulated through the new electronic reporting system will provide public health analysts with tools to conduct advanced research into injury and illness causation and prevention. OSHA also says the new reporting system will assist in identifying workplace safety hazards, fixing problems, and preventing additional injuries and illnesses.

While the new reporting rules purport to guarantee the agency will remove personal identifiers before accumulated data is made public on its website, that assurance does not necessarily comfort all employers. Many believe the new data accumulation and distribution protocol may result in public revelation of confidential business information, which may end up in unintended hands to the unreasonable and unwarranted detriment of the submitting employer.

The new reporting rule also strengthens the whistleblower protections of OSH Act Section 11c, which prevents retaliation against those who report injury and illnesses. The final rule contains three key anti-retaliation provisions: (1) employers must inform employees about their right to report work-related injury and illness; (2) reporting procedures must be reasonable and not deter or discourage employees from reporting; and (3) employers must not retaliate against employees who report work-related injury or illness.

Under this regimen, employers may be cited for retaliation under the recordkeeping standard and, at the same time, employees can file Section 11c retaliation complaints. This may greatly increase the probability of retaliation-based disputes against employers who administer discipline to employees who may violate safety rules.

The electronic reporting rule arrived on the heels of OSHA's final rule on Occupational Injury and Illness Recording and Reporting Requirements, which took effect Jan. 1, 2015. The January 2015 revisions expanded the list of reportable injuries. By way of example, the amputation reporting obligation is triggered when an employee suffers the loss of a small portion of a fingertip, even without bone involvement. In addition, the new rule has shortened reporting times for certain injuries, and it redefines the universe of employers now classified as low-risk.

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The “new” OSHA is more aggressive and motivated than ever. The agency seems eager to increase enforcement visibility through policy-making and expanded interpretation of its compliance authority. Now is the time for employers to revisit critical facets of workplace safety and OSH Act compliance. For those who do not, it is likely that frustrating and potentially expensive encounters with OSHA will loom on the horizon.

Related People

Michael V. Abcarian
Senior Counsel
214.220.8300
Email

Service Focus

Workplace Safety and Catastrophe Management

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