



OSHA Significantly Expands Severe Violator Enforcement Program: FAQs for Employers

Insights

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The nation's workplace safety and health watchdog agency recently announced that it will now cast a wider net to include even more workplaces in its enhanced inspection program known as the "Severe Violator Enforcement Program" or SVEP. Employers placed in this program by the Occupational Safety and Health Administration (OSHA) are included on a list of "severe violators" that is publicly available on the agency's website – which is a list you do not want to land on for a variety of reasons. Not only could you face the fallout of being publicly named, but employers on the list are also subject to additional follow-up inspections, including at worksites other than the one at issue. What do employers know about this new development announced on September 15? Here are a series of FAQs to help you understand what you'll be dealing with – as well as a list of action steps you can take to minimize your chances of landing on the SVEP list.

What Were the Old Criteria?

The old criteria for the SVEP program applied to cases of fatalities, three or more hospitalizations, egregious matters, the potential release of a highly hazardous chemical, or two or more willful or repeated violations of a discrete group of what OSHA deemed to be "high emphasis hazards."

How Have the Standards Changed?

Under the new standards, OSHA has substantially widened the net and will place employers in the SVEP for receiving at least two repeat, willful, or failure-to-abate violations for any "high-gravity" serious violations (the agency categorizes how grave the violation is as high, medium, or low). Violations issued under any standard can now qualify an employer for inclusion on the SVEP list.

Is There a Way to Get Removed from the List Early?

Under the new program, OSHA also seeks to compel employers to enter into agreements with OSHA to implement enhanced abatement measures and get off the list. Like under the old SVEP program, employers remain on the list for a minimum of three years. However, the newly revised program offers employers an opportunity to be removed from the SVEP list after two years in exchange for agreeing to enhanced abatement measures that include a safety and health management program that meets certain criteria set forth by OSHA.

What About Follow-Up Inspections?

Companies who are placed on the SVEP list will receive a follow-up inspection or referral inspection within one year, and not longer than two years, after the final order date of the underlying citations. In these inspections, OSHA will investigate whether the underlying violations were abated (even if the employer has already certified abatement) and also look for similar hazards and violations. The program only permits OSHA to forgo a follow-up inspection where the inspector or the Area Director documents in the file a compelling reason not to conduct the inspection.

We Have Multiple Worksites – What Do We Face?

For employers who have multiple worksites, OSHA now provides guidance on when it will expand its SVEP follow-up and referral inspections to the employer's other worksites. The program sets forth a series of example questions for inspectors to ask which focus on the extent of the compliance issues and the company's structure. If OSHA gathers sufficient evidence of compliance problems at related sites pursuant to these questions, it will seek to conduct follow-up inspections of an employer's other worksites, potentially throughout the country.

Work with your counsel if OSHA is seeking to obtain evidence to make this determination, either through voluntary questioning or a subpoena compelling documentation and/or sworn testimony. In some cases, it may make sense for you to cooperate with voluntary requests to ease suspicions and address concerns.

What Do We Face by Being Placed on the List?

Being placed on the SVEP list can be very costly to employers. Inclusion can cause harm to the company's reputation, for one thing. OSHA will often place a company on the list while the underlying citations are under contest and being litigated. Moreover, the follow-up and referral inspections can lead to additional costs in time and expense in dealing with the inspections. And not to mention that OSHA's follow-up and referral inspections could result in the issuance of additional citations and penalties.

What Should We Do to Minimize the Risk of Being Added to the List?

It is, therefore, more important than ever before for employers to have a robust safety and health compliance program. OSHA has signaled in recent months that it is taking a very aggressive enforcement stance. Its substantial expansion of the SVEP criteria grants it significantly greater power to re-inspect and penalize employers with follow-up inspections, including at an employer's other worksites.

It is also imperative that employers have a plan in place to respond to and manage OSHA inspections in order to avoid being placed on the SVEP list, as well as to respond to any follow-up or referral inspections under the SVEP program.

What if OSHA Launches an Inspection?

In the event OSHA shows at your door for an inspection after being placed on the SVEP list, or for a general accident/complaint inspection, here are a few quick and easy tips for handling an inspection:

- Understand the purpose of OSHA's visit. If the inspection is based on a complaint, obtain a copy of the complaint. If the inspection is based on the SVEP, ask how your facility was selected for inspection under this program.
- Know what to expect during the investigation. Each inspection includes an opening conference, walk-around inspection and closing conference.
- Know your rights! It's your facility — you have rights. Make sure the inspection is conducted in a reasonable manner and during a reasonable time.
- Maintain control. This includes determining before an inspection what standards are applicable to your facility, whether previous citations have been corrected and who the company's contact person will be for an OSHA inspection.

Conclusion

We will monitor the situation and provide updates as developments occur, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Workplace Safety Team.

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