Getting Off OSHA's Severe Violator's Enforcement Program "Black List"

Insights
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After several years of received employer's requests, OSHA's Directorate of Enforcement Programs (DEP) issued a memorandum detailing the removal criteria for those employers currently under OSHA's Severe Violator Enforcement Program (SVEP). This memorandum provides employers guidance on how to be removed from the SVEP, a process that has been unclear since the program was first implemented.

What is SVEP?
The SVEP is a program originally implemented by OSHA on June 18, 2010 that was designed to focus its enforcement 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.

How do employers get put into the SVEP?
The OSHA SVEP Enforcement Directive sets forth what employer actions could put them into SVEP. According to this Directive, there are 4 types of accidents or violations that will bring a company under the SVEP, including:

1. Fatalities or catastrophes involving an employee death or 3 more hospitalizations
2. Non-fatalities or catastrophes involving high emphasis hazards
3. Non-fatalities or catastrophes due to potential release of highly hazardous substances
4. All "egregious" violations

Employers that are put into the SVEP must be prepared to adhere to increased invasive enforcement of the OSH Act. These enforcement acts include enhanced follow-up inspections, nationwide inspections of related workplaces, and increased publicity of OSHA enforcement both internally and externally. Additionally, OSHA may order the employer to hire a safety and health consultant to help develop a new safety program for the company or submit to the area director a log of work-related injuries and illnesses on a quarterly basis.

How do employers get off the SVEP?
According to the DEP memorandum, OSHA will consider removing an employer from the SVEP after

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3 years from the date it was placed into SVEP (by either failure to contest, a settle agreement, or Review Commission decision). However, the removal is not automatic after 3 years, OSHA Regional Administrators will perform additional follow-up inspections and analysis of IMIS/OIS data and determine whether all SVEP related violations have been abated, all outstanding penalties paid, all settlement provisions have been complied with, and the employer has not received any additional serious citations related to the hazards identified in the SVEP inspection at the initial establishment or any related establishment. If so, the Regional Administrator will have discretion to remove the employer from SVEP. If the employer is found not to have carried out its abatement and settlement obligations, it'll be placed back into SVEP for another 3 years.

As a practical matter, the existence of the SVEP, the relatively easy requirements to be place on it, and the difficulty in being removed from the list make it even more important that employers carefully manage OSHA inspections to minimize citations or lay the groundwork for (1) future appeals; (2) "contest" citations; and (3) talk to legal counsel about defenses to any potential citations.

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