



OSHA Gets It Right On Temporary Workers – Part II

Insights

6.11.13

I have been surprised to see so little commentary on the outgoing Deputy Assistant Secretary's April 29 [announcement of OSHA ramping up its focus on Temporary Workers](#). Ed talked a bit earlier this week about OSHA's new initiative and I'll provide additional practical observations.

There are few areas where employers are innocently more ignorant of safety failings than for their "temporary employees." Such employees often fall through both the employer and temporary provider's oversight.

Management side OSHA lawyers can regale you with countless stories about employers who were surprised to learn that their "temporary" and not-so-temporary employees had not received site-specific Haz Com instruction or received fit testing and the required medical evaluation before utilizing respirators. There is no malice in such violations. Somehow the safety department's concerns just fell through the cracks.

The memo states:

"Recent inspections have indicated problems where temporary workers have not been trained and were not protected from serious workplace hazards due to lack of personal protective equipment when working with hazardous chemicals and lack of lock out protections among others."

The memo tacitly acknowledges that these days, "temporary employees" may not be so temporary and may be working regularly at a site, on a long term open basis, or in a temp to perm basis. The reality is that, often, employers employ "temps" for months at a time, and this creates significant safety responsibilities.

Ed and my experience is that **"temporary" workers result in a disproportionate number of OSHA violations** because employers are not aware of the extent of the employer's responsibilities. OSHA's directive focuses on recent highly publicized deaths of temporary employees, who supposedly were undertrained or not properly integrated into the employer's safety processes. However, we find that experienced employees who become nonchalant about safety constitute the largest percentage of fatalities. So, while not to denigrate the importance of preventing fatalities, our focus on temps is more one of compliance in even the more routine safety areas.

How Does OSHA's "Initiative" Work and Where Am I Exposed?

OSHA broadly defines "temporary workers."

OSHA recognizes that it is increasingly common for employers to utilize agencies to provide workers for a 6-month **"temp to perm"** period where the employer can more freely evaluate the candidate and its own manpower needs. OSHA also realizes that, especially since 2008, "temps" may work on site regularly or continuously for months or even years. At this point, it is admittedly difficult to distinguish the employer's obligations between its full time and "temporary" workers.

The economy, increased regulation and statutory demands, and the evolution of manufacturing and other settings drives this continuing move to use of "temporary workers," and we find that indeed employers have often not even considered the unique compliance challenges posed by these workers. Basically the thought processes are *"huh, they're temps ... they don't require as much safety and other training,"* or *"I never thought about it,"* or *"that's the provider's responsibility ... isn't it?"* OSHA has determined that temporary workers innocently fall through the system, although it is unlikely that OSHA will attribute these failures to "innocence" ... it's possible that they will view the employer's actions as the "plain indifference" associated with "willful" conduct.

The Backstory

Let's be honest, part of this focus is driven by unions who want more dues paying members and may genuinely believe that employing temporary workers is unfair to the workers. This belief among unions seems near universal among unions. While in South Africa, I witnessed employers and economist's concerns when the trade-union heavy ANC proposed to all but eliminate *"labor brokers,"* potentially resulting in the loss of 1 million workers and the additional battering of the Rand. Don't get me wrong, I recognize the opportunity for abuses of the temporary process, but the reality is that those abuses are never the sole focus of such initiatives. Expect unions and third parties to employ safety concerns about temporary workers in attacks on unionized and non-union companies. Expect as well to hear claims of unfairness and of a discriminatory impact.

The Initiative reflects the increasing ability of OSHA to better target employers and to track multi-location employers many sites. As I have posted before, employers who have had limited experiences with OSHA, even after meaningful citations at one location, should not expect this lack of focus to indefinitely continue. Even with their budget constraints, OSHA is slowly making its SVEP more invasive and effective. And as I explained last December, OSHA has rolled out a more effective internal information system for tracking employers and making more inspection information available online to OSHA Area Offices.

In implementing this Initiative, **Compliance Officers are instructed to:**

- Determine within the scope of their inspections whether any employees are temporary workers and whether any of them are exposed to violative conditions;

- Document the name of the staffing agency, its location, the supervisory structure, including the extent to which the temporary workers are being directed on a day-by- day basis by either the employer or agency;
- Review records and conduct interviews to determine whether the employees have received required training in a language which they can understand; and
- Use a newly created “Code” in OSHA’s internal information system to document AND TRACK where an agency’s employees are exposed to a violation (AND on the employer’s record, so that a Compliance Officer going on site at another location will be aware of potential repeat opportunities).

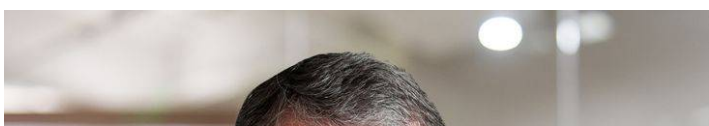
Actions Going Forward

Use this initiative to spur you to:

1. Expressly check to see how and in what ways you use temporary workers, and whether you ever documented and taken steps to determine that in each setting, these workers receive required **“site-specific”** training and safety instruction;
2. Review your agreements and actual practice with providers. If you supervise the workers, they are probably recordable on your 300, and the safety obligation ultimately falls on you. One cannot contract away responsibility. If the agency fails to do contractually required training or does not do site-specific training, you will probably be cited as well. Often, the safety manager never sees or knows detail about these contracts.
3. Even if you require a provider to conduct basic safety training, such as Hazard Communication, PPE use, and Bloodborne Pathogens, it may not be adequate or may still necessitate site-specific training.
4. Ensure that your supervisors know their role and responsibility toward temps, subs and contractor employees.
5. Review how you document training of temps, including documentation of “on-the-job-training,” and
6. Also consider temporary workers inclusion in Respiratory, Hearing protection, PPE and other programs, and the obligations created. Consider how you must treat the sporadic temporary employee, the long term temps and the temp-to-perm. All three categories pose difficult challenges in complying with certain programs.

Howard

Related People





Howard A. Mavity

Partner

404.240.4204

Email