More Negative Developments in State OSHA Plans.

Insights
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While non-Californians understandably view the California legal system as more complicated and punitive, until recently, upper leadership and a lack of money made Cal-OSHA more reasonable than its written rules suggested. However, Fed-OSHA has continued to push State OSHA Plans to conform with its more punitive approach, and that "push," combined with a different governor, has resulted in more punitive Cal-OSHA approaches.

One obvious example is Cal-OSHA's misuse of Citation Notice letters, known by their form number as 1BY letters. Most management side attorneys have advised California employers to be quite careful how they respond, if they respond at all. Increasingly, it may be best not respond at all.

2010 Assembly Bill 2774 changed many aspects of how Cal/OSHA works. Most of the changes were aimed a making it easier for Cal/OSHA to successfully defend their citations at the Appeals Board. However, the 1BY letter was not initially conceived as an enforcement tool.

Previously, then-Cal/OSHA Chief Len Welsh, a straightforward and committed civil servant came up with the 1BY letter as a means to foster early and more open dialogue between employers and Cal/OSHA before citations classified as serious were issued. Everyone profited. Cal-OSHA could achieve employer compliance with the use of less of its limited resources, and employers could achieve an acceptable outcome without costly legal expenses. Moreover, the intent was that employers come to recognize that Cal-OSHA could be more of a partner in protecting workers, and not solely a "police officer. Welsh explained that once a citation was issued, it was posted on Fed/OSHA's Establishment Search page for all to see. Not an insignificant occurrence in this era of competitive bidding and the ever-increasing efforts required to protect an employer's "brand."

If the employer has a good reason why a citation should not be issued, or issued with a classification less than Serious, why not get that done before an appeal has to be filed? The concept of the 1BY was received positively by most on the employer's side, who saw it as a form of early settlement negotiation.

Cal-OSHA's first version of the 1BY letter was straight-forward: The letter identified the specific standard thought to have been violated, and included the Alleged Violation Description (AVD). The form also had a box to check to alert the employer that Cal-OSHA was considering issuing the citation as Willful Serious.

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Shortly after the 1BY process was born, Welsh left Cal-OSHA and the agency's attitude changed from innovator and conciliator, to viewing the 1BY process as another tool for enforcement.

General Counsel Amy Martin announced on a video cast sponsored by the Cal-OSHA Reporter that the employer's statements on the 1BY could be used as evidence at hearing, if it seemed to contain admissions against interest. Certainly, she declared, any changes in the employer's position between the reply and the trial would be pointed to as evidence of untrustworthiness. She also once mentioned fairly harshly that no one pays attention to it.

here also seemed to be no uniform approach to the use of the 1BY in Cal-OSHA's district offices. Admittedly, inconsistency is a problem with both Fed-OSHA and State Plans in many areas, including the application of the "willful" classification. However, the application of the 1BY process has been even more varied. Some treated the employer's replies seriously. But other District Managers and compliance officers have encouraged employers not to bother, because they may not even consider the responses. At least one employer reported that their response has even been used to justify increasing classification from Serious to Willful Serious.

Which leads to the latest version of the 1BY, which includes only the AVD language. Gone is any explanation as to which regulation will be cited. Gone also is the head's up that the citation might be a Willful. The reason? Apparently Cal-OSHA discovered that the Labor Code doesn't require them to provide either provision.

So, the concept of dialogue and intelligent pre-citation resolution was thrown out the window and the 1BY is more than ever a trap for the unwary. There will be few, if any occasions to use the 1BY process.

The concept really was innovative as Len conceived it. The closest Fed-OSHA equivalent would have been to use the Closing Conference as a negotiating opportunity, but by the time of the Closing Conference, OSHA's mind is made up, and at best, any additional information supplied will likely be used to buttress OSHA's file. While I have occasionally achieved pre-citation Fed-OSHA settlements, usually where bad press could be tolerated, it is difficult to do so.

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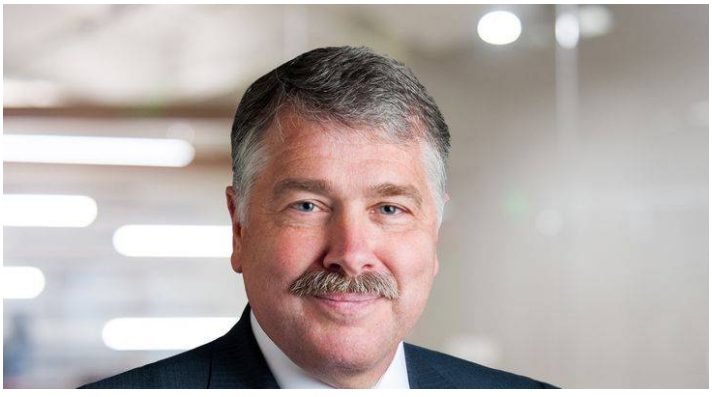

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