

Writer's direct phone
(312) 460-5877

Writer's e-mail
mlies@seyfarth.com

Writer's direct fax
(312) 460-7877



131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

OSHA Ups the Enforcement Ante on Employers

By Mark A. Lies II*
& Elizabeth Leifel Ash**

I. Introduction

Under the Obama Administration, employers have already seen OSHA's enforcement budget increase. The Democratically-controlled Congress has publicly announced its intention to amend the OSHA law to increase civil and criminal penalties. OSHA representatives have also identified new aggressive inspection strategies directed toward certain hazards or groups of employers. Already in 2010, employers have seen a dramatic increase in the number of OSHA inspections. Then, the early-April tragedy at the Upper Big Branch Mine in West Virginia, in which 29 miners perished, redoubled the nation's focus on workplace safety issues. The loss of 11 employees in the off-shore oil rig accident in the Gulf of Mexico has also heightened this awareness.

Within the last few weeks, OSHA has announced several changes to its enforcement policies. These changes mean that OSHA has now taken affirmative steps to implement what

* Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment law and civil litigation.

** Elizabeth Leifel Ash is an associate with Seyfarth Shaw, (312) 460-5845, eash@seyfarth.com. Her practice focuses on regulatory compliance and litigation, including occupational safety and health and environmental matters.

many have predicted: an enforcement climate that is much more rigorous for employers. This article addresses several recent developments and recommends actions employers can take to protect themselves against the expected increase in citations and penalties.

I. Changes to OSHA's Penalty Policy

On April 22, 2010, OSHA head Dr. David Michaels issued a memorandum on enhancements to OSHA's penalty policy. The memorandum was the result of a working group study, which generally concluded that OSHA's current penalties were too low to have any deterrent effect against violations of safety and health regulations. Thus, the revisions to the penalty policy (which will be captured in OSHA's Field Operations Manual) will have the primary effect of increasing penalties for citations classified as "Serious."

While the statutory maximum penalty for Serious citations is \$7,000, OSHA's penalty policy directs inspectors to determine what specific dollar amount, at or below \$7,000, is appropriate considering the seriousness of the violation, the size of the employer, and the employer's good faith and history of compliance. In addition, the Area Directors, who meet with employers to discuss citations during an informal conference, had fairly wide latitude in reducing penalty amounts in an effort to resolve employer contests outside of litigation.

The April 22, 2010 memorandum made several key changes to these policies. First, OSHA can now increase a base penalty by 10% if an employer has received any high-gravity serious, willful, repeat, or failure-to-abate violations over the last five years. Second, Area Directors now have the authority to reduce penalties in an informal conference only by 30%. Reductions greater than 30% will require approval from the OSHA Regional Administrator.

Perhaps the most striking change in the April 22, 2010 memorandum relates to Repeat violations. Because the Act authorizes a penalty of up to \$70,000 for a Repeat violation,

employers with multiple locations around the country are always concerned about avoiding Repeat violations. Under OSHA's previous policy, it can issue a Repeat citation to an employer who has a substantially similar violative condition to a condition cited within the previous three years from the previous citation becoming final. Now, OSHA can look back *five years* to issue Repeat citations. For employers who thought they had seen the three years as a light at the end of the tunnel for purposes of avoiding a Repeat citation, the look-back timeframe has now almost doubled.

OSHA projects that these changes to its penalty policy will result in an overall increase in penalties for Serious violations from an average of \$1,000 to a new average of \$3,000 to \$4,000.

II. OSHA's Severe Violator Enforcement Program

In addition, on April 22, 2010, OSHA announced that its new Severe Violators Enforcement Program (SVEP) is expected to take effect within the next 45 days. The SVEP is another step in OSHA's plan to bolster the deterrent effect of citations and penalties. The SVEP concentrates OSHA's resources on inspecting employers who have "demonstrated indifference" to their obligations under the Act and regulations by committing willful, repeated, or failure-to-abate violations in one or more of the following circumstances: 1) a fatality or catastrophe situation; 2) in industrial operations or processes that expose employees to severe occupational hazards, such as those identified as "high-emphasis hazards;"[†] 3) exposing employees to hazards related to the potential release of a highly hazardous chemical (*i.e.* process safety management); or 4) all prior egregious enforcement actions. Any inspection that finds one or more of these four criteria at the time that the citations are issued will be considered a SVEP case.

[†] OSHA has identified several "high-emphasis hazards," such as fall protection, amputations, combustible dust, crystalline silica, excavation/trenching, lead, and shipbreaking.

Once a case meets the SVEP criteria, the employer will be subject to heightened scrutiny from OSHA. First, any workplace that is the subject of a SVEP inspection *will be inspected again* after the citations become final orders even if the employer has submitted abatement verification of the cited violations. Second, when an OSHA inspector identifies a SVEP case, the inspector is to evaluate whether compliance problems noted during the inspection are likely to exist at related facilities (i.e. those facilities that are within the same 3-digit NAICS or 2-digit SIC codes) around the country. The OSHA Regional Administrator will then determine whether those related facilities should also be selected for an inspection. Third, OSHA will mail copies of any SVEP citations to the employer's national headquarters in an effort to increase company-wide awareness of the citations. OSHA may also issue a news release for any SVEP case upon issuance of the citations. Fourth, for any SVEP case that is resolved through settlement, OSHA and the employer must consider several potential provisos to ensure future compliance both at the cited facility and company-wide. Those provisos include hiring a safety consultant, making the settlement agreement company-wide, requiring interim abatement controls if final abatement requires an extensive amount of time, and requiring accountability measures such as the submission of injury/illness logs and/or reporting of serious illnesses or injuries to OSHA. Finally, SVEP cases are "strongly considered" for the entry of a federal court enforcement order under Section 11(b) of the Act in order to assure compliance with the settlement agreement, which allows federal courts to utilize their considerable authority, including contempt and sanctions to enforce compliance, *including plant closure*.

III. OSHA's Native Language Training Policy

Numerous OSHA standards, from Lockout/Tagout to forklift operation, and bloodborne pathogens to hazard communication, require employers to train or instruct employees in some

way. OSHA generally treats its training requirements as “performance-based,” meaning that OSHA defers to each individual employers to fashion the most effective manner by which to accomplish the goal of the standard. For that reason, none of OSHA’s training standards require employers to use particular documents, teaching methods, or language to train employees. Instead, OSHA requires employees to present information in a manner that employees are capable of understanding.

On April 28, 2010, Dr. Michaels issued a memorandum reiterating its policy regarding the training of employees. Specifically, the memorandum affirms that if an employee does not speak, read or understand English, training must be provided in a language the employee understands. OSHA has tasked each of its inspectors with the duty to determine whether the training provided by an employer satisfies the intent of the Standard, *i.e.* whether employees receiving the training have actually understood that training. One way OSHA inspectors will evaluate the employer’s compliance with safety training standards is by determining how the employer communicates other workplace rules and policies to employees, particularly job instructions, *i.e.* other non-safety policies or procedures. If these other job instructions are given in Spanish, for example, OSHA will likely view English-only safety training as insufficient.

IV. Conclusion and Recommendations

OSHA’s recent activity confirms its announced intent toward more aggressive enforcement and less leniency toward employers. This increased enforcement exposure reinforces the need for employers to develop systematic and thorough strategies for addressing OSHA citations and correcting health and safety violations promptly to avoid a similar fate.

- Develop company-wide written safety policies to ensure that all facilities are at the same level of compliance. Remember that even company-wide safety

policies must often be tailored to address the hazards of each particular workplace.

- Develop a company-wide system of tracking citations that have become final within five years to avoid Repeat liabilities.
- Develop written policies for ensuring that required training is conducted for every employee subject to the requirement. This should include a method for ensuring, for example, that employees who are absent from work on the date of their scheduled training are not overlooked or forgotten.
- Maintain documentation demonstrating the receipt of training for every employee required to receive the training.
- Hold individual employees, including managers and supervisors, accountable through appropriate disciplinary measures where a safety rule or practice is violated. Maintain documentation of any such disciplinary action.
- Consider engaging bilingual trainers to conduct training and document employees' understanding of that training.
- Consider translating safety programs into Spanish or other languages where the employer has a large non-English speaking workforce.
- In the event a citation is issued, contact your legal counsel immediately to assess the potential risk of Repeat exposure and to avoid waiving your right to contest that citation.