

OSHA poised to follow through on stepped-up workplace safety checks

As most employers have heard by now, in 2009 U.S. Labor Secretary Hilda Solis famously pronounced that, under her watch, the U.S. Occupational Safety and Health Administration would be “back in the enforcement business.” Later, Deputy Labor Secretary Jordan Barab confirmed the new posture and warned a group of safety professionals that “there is a new sheriff in town.” OSHA Assistant Labor Secretary David Michaels also wryly noted that many employers only invest in worker safety “when they have adequate incentives to comply with OSHA’s requirements.” These comments were to foreshadow an increase of some \$50 million in OSHA’s budget for 2010; the addition of almost 200 federal OSHA inspectors; and an enhanced, aggressive enforcement policy.

The new program is intended to focus enforcement resources on repeat offenders.

Specifically, OSHA announced last spring its new Severe Violator Enforcement Program, which took effect Oct. 1. The SVEP replaces the Enhanced Enforcement Program and is intended to focus enforcement resources on employers who have shown indifference to meeting their obligations to create safe workplaces. The SVEP encourages OSHA compliance by providing for more aggressive enforcement and larger penalties for employers who are charged with certain repeated or willful violations or who fail to abate violations. It is a nationwide federal program that “applies to all employers regardless of size.”

OSHA previously delegated enforcement authority in this state to the N.C. Department of Labor. Accordingly, most local inspection and other enforcement activity is

handled by the department’s Occupational Safety and Health Division. The state is required to respond to OSHA’s new SVEP either by adopting the program or by establishing an equivalent one that is “at least as effective” as the federal program. State officials have indicated that they will opt to establish an equivalent program, and they believe they already have most of the components in place.

What conduct could cause an employer to be designated as a “severe violator”?

If one of the following criteria is met, then an enforcement case will be designated as a severe violator enforcement case:

- Certain fatality or catastrophe situations or failure-to-abate certain “serious” violations.
- Two or more willful or repeated violations or failure-to-abate notices, for certain “high-gravity, serious” violations (including falls, amputations, combustible dust or excavation/trenching).
- Three or more willful or repeated violations or failure-to-abate notices stemming from the potential release of highly hazardous chemicals.
- An “egregious” enforcement action (*i.e.*, one involving willful violations with an aggravating factor).

SVEP cases result in *mandatory* follow-up inspections – both to confirm abatement and determine if there are similar violations. One of the most significant requirements is the new “nationwide referral procedure,” under which OSHA or an authorized state agency will inspect other “related” worksites (in other words, under common ownership) of an SVEP employer. If the employer has three or fewer related worksites, all will be inspected as well.

In addition, OSHA intends to implement enhanced “regulation by shaming.” For selected cases, the appropriate OSHA Regional Office may issue a news release notifying the public; further, where the SVEP case is the result of a nationwide referral, the Regional Office must

issue a news release. OSHA may also notify the company's president and its employee representatives, and it may call for a meeting with company officials.

Finally, OSHA will consider additional settlement provisions in SVEP cases, such as requiring the employer to hire a consultant to develop an appropriate safety program; making settlements apply company-wide; requiring interim abatement procedures if final abatement will take more time; requiring construction employers to explain what protective measures will be taken at each jobsite (including future sites); requiring quarterly submission of OSHA 300 Logs and other notifications; and requiring a consent enforcement order in federal court.

Will my business be inspected?

In fiscal 2010, NCOSH conducted about 4,500 compliance inspections and assessed about \$5.8 million in penalties. Through the first week in March, the state had conducted about 36% of its programmed inspections in the construction industry. Another 18% of NCOSH's inspections were in the health-care industry, including doctor's offices and dental practices.

On the federal side, since the launch of SVEP, OSHA deployed more than 1,000 inspectors into places with deficient worker safety programs. An increased federal presence could be hitting close to home soon. OSHA has publicly stated that South Carolina's program needs "significant program modification." OSHA's latest audit of North Carolina's program highlighted a number of deficiencies here, as well.

As of this writing, certain legislative proposals could result in decreased OSHA funding for the remainder of 2011. North Carolina also is struggling to find funds for NCOSH to keep up with the SVEP mandate. Regardless, the SVEP itself and the new "nationwide referral procedures" clearly will result in additional scrutiny for employers.

What can my business do now to prepare?

One of the best ways to avoid OSHA penalties is to be ready for an inspection. Employers should take action now to improve their compliance with health and safety laws. Even if you believe your facility is a safe workplace, deficiencies in ordinary recordkeeping and training requirements often lead to citations and penalties. You should ensure that your facility has updated its safety plans and has

adequate training documentation and that safety committee meetings and minutes are up to date. Simply being in compliance with these requirements can create a favorable first impression. For some employers, a voluntary audit or self-inspection may be an appropriate method of identifying deficiencies before they result in citations.



STEVE PARASCANDOLA
CAROLINE N. BELK



Steve Parascandola is a partner at Smith Anderson and chairs the firm's Environmental, Health and Safety practice group. He received his bachelor's from Eckerd College and his law degree from Stetson University College of Law. He has more than 20 years of OSHA and environmental law experience and regularly counsels clients on enforcement defense and regulatory compliance. **Caroline Nasrallah Belk** also is a member of the firm's Environmental, Health and Safety practice group. She received her undergraduate and law degrees from Duke University and practices in the areas of compliance counseling and enforcement defense and has had significant experience representing private companies in connection with OSHA enforcement matters.

It is also important to have a plan in place for how to handle inspections. Every employer should designate a representative to meet with and accompany the inspector. A knowledgeable, cooperative representative can go a long way toward conveying a positive compliance attitude.

In addition, the employer's representative should know the location of all required records. He or she should also be knowledgeable about OSHA requirements for the site or know which other individuals are best suited to answering such questions. The employer's representative should also be informed on an employer's rights and responsibilities during an inspection. OSHA has published a booklet that is normally given to employer representatives at the end of an inspection. It can be viewed online at <http://www.osha.gov/Publications/osha3000.pdf>.