

Details About OSHA’s Severe Violator Enforcement Program Emerge

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Last year, as part of a department-wide initiative to sharpen the U.S. Department of Labor’s (DOL’s) focus on “indifferent” repeat-offense employers, Secretary of Labor Hilda Solis announced that the Occupational Safety and Health Administration (OSHA) would create a new program, the Severe Violator Enforcement Program (SVEP), to replace the existing Enhanced Enforcement Program (EEP). The SVEP would identify employers with repeated, serious citations, and, among other things, subject them to increased, multi-worksites inspections and higher penalties.

OSHA released relatively little detail about the SVEP—at least until this week, when OSHA sent a 27-page draft SVEP Directive (the Directive) to state plan officials for their review. While the draft itself is not final and is subject to review, it contains valuable insight on how OSHA intends the SVEP to be implemented—and gives employers a rare opportunity to adjust to what will probably be a new era of increased enforcement at OSHA.

Overview of the SVEP

According to the draft Directive, the SVEP will “focus increased enforcement attention on significant hazards and violations” by concentrating on employers that have demonstrated “indifference” to workplace safety obligations through willful, repeated, or failure-to-abate-violations in four areas: (1) fatality or catastrophe situations; (2) industries that expose employee to the most severe hazards, including those identified in the draft Directive as “High-Emphasis Hazards”; (3) industries that expose employees to the potential release of highly hazardous chemicals; and (4) egregious enforcement actions. Once an employer is selected for the SVEP, OSHA will undertake a number of enforcement steps including enhanced follow-up inspections as well as inspections at other worksites of that same employer, potentially on a nationwide basis.

The important point for employers about the SVEP is that it is another step in OSHA’s recent efforts to increase its enforcement against employers. In fact, the SVEP was developed to replace the EEP, which had been criticized by Congress and the DOL Inspector General as failing to protect workers from “recalcitrant” employers. This new program includes new features that will allow OSHA to conduct more aggressive multi-worksites inspections against those employers that fall within the program, as well as a nationwide referral program and closer coordination with states having OSHA state plans. As OSHA stated in the Directive, the “purpose of the SVEP is to focus increased enforcement attention on significant hazards and violations by concentrating on employers who have demonstrated indifference to their occupational safety and health obligations.”

Criteria for Program Selection

OSHA will consider any inspection that meets one or more of the following criteria as a candidate for the SVEP:

- **Fatality/Catastrophic Criteria.** A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated citations or failure-to-abate notices based on a serious violation related to the death of an employee or three or more employee hospitalizations. Violations under this section do not need to be classified as “High-Emphasis Hazards.”
- **Nonfatality/Noncatastrophic High-Emphasis Hazards.** An inspection that finds two or more willful or repeated violations or failure-to-abate notices based on high-gravity, serious violations due to a High-Emphasis Hazard.

A “High-Emphasis Hazard” is one based on a fall or a specific National Emphasis Program (NEP) identified in the draft, and thus includes (1) fall hazards under general industry, construction, shipyard, marine terminal, and longshoring standards; (2) amputation hazards; (3) combustible dust hazards; (4) crystalline silica hazards; (5) lead hazards (based on sampling); (6) excavation and trenching hazards; and (7) ship-breaking hazards.

- **Nonfatality/Noncatastrophic Hazards Due to the Potential Release of a Highly Hazardous Chemical—Process Safety Management (PSM).** An inspection that finds three or more willful or repeated violations or failure-to-abate notices based on high-gravity, serious violations related to petroleum refinery hazards, i.e., hazards covered by the petroleum refinery PSM NEP and hazards associated with the potential release of highly hazardous chemicals, as defined by the PSM Covered Chemical Facilities NEP.
- **Egregious Violations.** All “egregious” enforcement actions—cases where OSHA has alleged instance-by-instance violations of a particular standard—will be considered SVEP cases.

The SVEP will apply to all employers, regardless of size. Each inspection, even multiple inspections for a single employer, will trigger separate evaluations as to whether that investigation rises to the level of SVEP.

Consequences of SVEP Selection

Placement into the SVEP will trigger a number of serious consequences for employers. While actions taken against an employer will be judged on a case-by-case basis, SVEP employers may be targeted for:

- **Enhanced, Broad Follow-Up Inspections.** Follow-up inspections of the cited workplace will be conducted after the citation becomes a final order, even if abatement verification has been received. In other words, these follow-up inspections are not limited in scope to whether the identified hazard has been abated, but will also include an assessment of whether the employer is engaging in similar violations. For Construction Industry worksites that close before a follow-up investigation can be conducted, at least one of the employer’s other worksites will be inspected.
- **Nationwide Inspections.** Where the agency has reason to believe that a citation is part of a broader pattern of noncompliance, OSHA will conduct inspections at related worksites of that

employer. This means, for example, that a Pennsylvania facility that is cited for a particular violation can trigger an investigation of a Texas-based worksite for that same employer. According to the SVEP, the scope of the related inspection “will depend upon the evidence gathered in the original SVEP inspection.” Specifically, OSHA will be looking for evidence of broader noncompliance patterns in its initial investigations—and may issue document requests or subpoenas to gather evidence to determine whether related investigations are warranted. OSHA also will identify potential locations to state plan states, and will accept referrals from state plan states. When the regional administrator determines that related worksite inspections for the employer should be conducted, the following rules apply:

- For General Industry worksites with three or fewer similar, related worksites nationwide—all worksites will be investigated.
 - For General Industry worksites with four or more similar, related worksites nationwide—the Director of the Directorate of Enforcement Programs (DEP) shall issue an SVEP nationwide inspection list with respect to the employer. Normally, where there are 10 or fewer similar related worksites, all will be inspected. When there are more than 10 such establishments, random numbers will be assigned to the worksites on the list and the first 10 will be inspected. The Director of DEP has discretion to select particular establishments for inspection and to conduct further investigations as deemed necessary.
 - For nationwide inspections that involve PSM hazards, inspections will be limited to the willful or repeated citations or failure-to-abate notices that were issued and will not include worksites that were inspected in the previous two years.
 - For Construction Industry worksites that operate in different regions, where deemed necessary, the Director of DEP will issue an SVEP nationwide referral. The procedures outlined above with respect to General Industry worksites will apply.
- **Increased Awareness of OSHA Enforcement.** The agency will pursue higher-profile enforcement, ensuring, for example, that company headquarters are notified of site-specific issues. OSHA will also issue press releases upon the issuance of citations.
 - **Enhanced Settlement Provisions.** OSHA will press SVEP participants to accept the following in settlement negotiations: (1) the hiring of an independent safety consultant to work through compliance issues; (2) applying settlement agreements companywide in accordance with OSHA’s 1991 Guidelines for Administration of Corporate-Wide Settlement Agreements; (3) imposing interim abatement controls where full abatement may take time; (4) imposing weekly or other enhanced reporting measures to report current or future jobsites for a certain time period; (5) requiring employers to report work-related injuries and illnesses on a quarterly basis and consent to inspections based on that data; and (6) requiring employers to report for a specified time period any serious injury or illness requiring medical attention, and to consent to inspections based on that data.
 - **Enforcement Under Section 11(b).** OSHA will strongly consider SVEP cases for federal court enforcement orders under Section 11(b) of the OSH Act.

Relationship to Other Programs

SVEP-related inspections will not be affected by inspections pursuant to other programs. Thus, if either an unprogrammed inspection or programmed inspection (i.e., an inspection pursuant to one of OSHA's other initiatives, such as Site-Specific Targeting, or SST) arises with respect to a worksite that is to be inspected pursuant to the SVEP, the two inspections may be conducted either separately or concurrently.

Unanswered Questions and Implications of This Program

There are a number of unanswered questions raised by the Directive as well as potentially significant implications for employers across the country. One of the more important issues is that while the Directive sets forth in detail how an employer can be placed in this program, it is not clear as to how an employer will be removed from the program. Will an employer be released from the SVEP if OSHA conducts a follow-up inspection of the originally cited worksite and does not find any similar level of violations? Or is there something more an employer would need to do, such as comply with some or all of the enhanced settlement provisions described above?

Another issue is whether OSHA will face challenges from employers for probable cause if the agency attempts to conduct inspections of other worksites based upon a citation satisfying one of the criteria set forth in the Directive, even though the citation is not yet a final order of the OSHRC. In other words, how can OSHA proceed forward with another inspection based upon a citation that has not yet been fully adjudicated? Under well-developed caselaw, OSHA is required to target its enforcement based upon neutral criteria, and the SVEP's targeting system, currently based upon unadjudicated citations, potentially creates a number of constitutional and legal issues for the agency.

Another implication of this program is the potential impact on the contest rate of OSHA citations—if the agency closes the door to potential settlements of willful violations and other citations using the Section 17 “unclassified” approach. If employers are fully aware of the further impact of those willful violations or other citations under the SVEP, then employers may be more likely to litigate these citations rather than, for example, accepting willful violations.

Conclusion

Selection into the SVEP will have significant impact on employers moving forward. Accordingly, while OSHA has not announced an implementation date for the SVEP, employers should take the time now, before its implementation, to audit their safety programs to ensure that they are not identified as repeat offenders under the program.

Employers should consider taking the following steps, among others, with counsel:

- Audit recent citations to ensure (1) that steps to abate those violations have been completed, and (2) that similar problems do not exist in facilities that were not inspected. Employers that adopt a multi-facility curative process for violations, rather than instituting a site-specific, temporary “fix,” may be less likely to receive further citations under the SVEP.
- Identify worksites with High-Emphasis Hazards and/or PSM hazards, and audit safety practices against OSHA's NEPs in these areas. These areas of emphasis—from falls to combustible dust hazards—encompass a wide-ranging target group for OSHA enforcement moving forward. These are particularly vulnerable areas for employers, because the hazards themselves are often difficult to identify and abate from a safety perspective.

- Employers with fatality and/or catastrophe citations should pay particular attention to the consequences of SVEP placement and plan, as best as possible and through consultation with counsel, for future agency action, including, for example, voluntary implementation of one of OSHA’s preferred settlement terms (i.e., hiring an independent safety consultant).

Morgan Lewis is well prepared to help in this regard. If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following members of Morgan Lewis’s OSHA team:

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