OSHA Forecast: Developments To Watch in 2015 and Beyond

December 15, 2014
Presented by

Valerie Butera
Member, Labor and Employment Practice
Washington, D.C. Office
vbutera@ebglaw.com
202-861-5325
This presentation has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal, state, and/or local laws that may impose additional obligations on you and your company.

WebEx can be used to record webinars/briefings. By participating in this webinar/briefing, you agree that your communications may be monitored or recorded at any time during the webinar/briefing.

Attorney Advertising
Agenda

1. Enforcement Trends
2. Regulatory Activities
3. Hazard Communication
Enforcement Trends
OSHA Inspection Activity

- In the past year, OSHA conducted 39,228 total inspections.
- OSHA’s targets included:
  - Chemical facilities
  - Refineries
  - Health Care Facilities
  - Worksites employing large numbers of temporary employees
  - Worksites where violence is more likely to occur
2014 Top 10 Most Frequently Cited Standards

1. Fall Protection in construction
2. Hazard communication
3. Scaffolding in construction
4. Respiratory protection
5. Powered industrial trucks
6. Lockout/Tagout
7. Ladders in construction
8. Electrical: wiring
9. Machine guarding
10. Electrical: systems design
What Industries Will OSHA Target in 2015?

- Industries where employees are exposed to OSHA-regulated chemicals, such as funeral homes, chemical and product manufacturing plants, printing facilities, and outpatient care centers;
- Hospitals and residential care facilities;
- Refineries;
- Grain Handlers; and
- Retail
What Happened to OSHA’s Focus on Temporary Workers?

- On July 15, OSHA issued a policy memo to its field offices outlining when a compliance officer visiting a worksite should enlarge the inspection to include temporary agencies providing workers to the site.

- Generally, compliance officers were instructed that whenever a temporary worker was exposed to a violation, the compliance officer should determine whether the temporary agency was aware of the hazards or could have known about them.

- As a result, OSHA inspections involving temporary employee agencies increased 322% in fiscal 2014.

- Only 15% of the inspections resulted in citations being issued to temporary employee agencies.
How Will the New Reporting Requirements Effect Enforcement?

- Beginning January 1, 2015, **all** employers must report to OSHA all work-related fatalities within 8 hours.
- **All** employers will also be required to report to OSHA within 24 hours all work-related:
  - Inpatient hospitalizations
  - Amputations
  - Loss of an eye
What About Changes to the Recordkeeping Requirements?

- OSHA has added a number of industries to the list employers required to record work-related injuries and illnesses, including:
  - Retailers
  - Ambulatory health care services
  - Bakeries
  - Employers that rent out or lease equipment and machinery
- Employers with 10 or fewer employees are usually exempt from the recordkeeping requirement regardless of industry.
- **But ALL employers, even those that are not required to record injuries and illnesses, are required to immediately report to OSHA job related fatalities, inpatient hospitalizations, amputation, and loss of an eye.**
Whistleblower Claims on the Rise

- New claims have dramatically increased in the vast majority of the 22 different whistleblower statutes that OSHA handles. Complaints of employer retaliation under the OSHA statute alone have risen 70% since 2005.

- But whistleblower investigators rarely find merit to these claims. Of the total number of claims determinations from 2005 to present, only 2% have been resolved on the merits. By comparison, during the same time period, 60% have been dismissed (others have been withdrawn, kicked out, or resolved in some type of settlement).

- Complaints are expected to continuously rise, nonetheless, as employees have become much more familiar with their rights under the various statutes containing whistleblower provisions. Particularly savvy complainants are filing complaints under multiple statutes simultaneously.
OSHA’s Enforcement Strategy

OSHA’s plan for responding to emerging industries, new technologies, and changes in the American workforce consists of several strategic initiatives:

- Site Specific Targeting
- National and Local Emphasis Programs
- Severe Violator Enforcement Program
- Corporate Settlement Agreements
Site Specific Targeting

- OSHA’s site specific targeting program is its primary programmed inspection plan for establishments with 20 or more employees.

- Site specific targeting does not apply to the construction industry, which is addressed separately; nor does it apply to nursing and personal care facilities, which are addressed by an ongoing National Emphasis program.

- Targets are determined by a history of a higher than average number of injuries and illnesses in the workplace, as determined by written injury and illness reporting required by OSHA.

- In determining its targets for 2014, OSHA reviewed information gathered from 70 industries, as varied as department stores, farms, warehousing, and manufacturing.

- Where an employer has more than one worksite, OSHA is likely to target multiple sites for inspection.
National and Local Emphasis Programs

- OSHA also relies upon a number of National and Local Emphasis Programs, which focus enforcement on certain industries.
- Currently there are 13 National Emphasis Programs (NEPs) focusing on amputations, lead, crystalline silica, primary metals, shipbreaking, trenching/excavations, process safety management covered chemical facilities, hexavalent chromium, federal agencies, combustible dust, isocyanates, refineries and residential care facilities.
- In addition, there are currently approximately 140 Regional/Local Emphasis Programs. A few programs are in place in a number of regions, such as programs focusing on fall hazards in construction, grain handling facilities, and oil refineries.
Severe Violator Enforcement Program

The Severe Violator Enforcement Program (SVEP) was established in 2010 and directs enforcement resources at employers who “demonstrate indifference to OSH Act obligations” by committing certain aggravated violations.
Severe Violator Enforcement Program

The program subjects employers to enhanced enforcement measures and penalties for willful, repeat, and failure to abate violations in the following situations:

- When egregious citations are issued
- When a fatality or other catastrophe has occurred
- When employees are exposed to a potential release of a highly hazardous chemical
- When employees are exposed to the most dangerous occupational hazards and those identified as High Emphasis Hazards such as falls, amputations, combustible dust incidents, and lead exposure
- When at least three willful, repeat or failure to abate citations are issued during an inspection based on potential releases of a highly hazardous chemical or any High Emphasis Hazard
What Happens When an Employer is Deemed a Severe Violator?

- If the employer has multiple worksites, OSHA will likely inspect most, if not all, of them.
- The employer should expect frequent follow-up inspections.
What Happens When an Employer is Deemed a Severe Violator?

- OSHA will engage in a public shaming campaign – issuing damning press releases and using social media to paint the employer as a bad actor and placing the employer on a publicly accessible list which is extremely difficult to be removed from. Worse yet, employers are placed on this list before they have had the opportunity to demonstrate whether the citation(s) that got them there are valid.
Corporate Settlement Agreements

- OSHA intends to pursue more corporate settlement agreements (CSAs). CSAs give OSHA the option of requiring employers to take actions at the worksite where they received citations, plus all of their other worksites.

- CSAs are intended to give OSHA the flexibility to correct a pattern of non-compliance with various OSHA standards across multiple worksites. These agreements can be either national or regional in their scope.

- Although OSHA states that CSAs should be directed at areas of health and safety that have the been the subject of a citation, the agency will also consider going beyond the subject of the citations issued and include additional safety and health program enhancements.
Types of Cases Targeted for CSAs

- So called “High Profile Enforcement Cases” such as:
  - SVEP cases
  - Process Safety Management cases
  - Fatality/Catastrophe cases
- Significant recordkeeping deficiency cases
Types of Cases Targeted for CSAs

- Cases where high gravity serious citations were issued – that is, cases where there was a high probability of death or serious harm to employees and at least one of the following circumstances is present:
  - A pattern of violations associated with a particular OSHA standard or subpart
  - A significant history of OSHA violations
  - Accident or fatality trends stemming from the same or similar conditions
Regulatory Activities
OSHA’s Ambitious Regulatory Agenda for 2015

- On November 21, 2014, the Department of Labor released its Agency Rule List, which provides the status of all rulemaking efforts at each of its agencies. OSHA dominated the list of regulatory activity in the Department, listing 26 regulations in the prerule, proposed rule, and final rule stages.
OSHA’s Ambitious Regulatory Agenda for 2015

Of these 26 items, OSHA announced that its top regulatory priorities include:

- Efforts to control exposure to silica
- Enhancements to current infectious disease protocols in healthcare and other high risk environments
- Issuance of a final rule modernizing its reporting system for occupational injuries and illnesses, requiring electronic submission of injury and illness survey data, which, notably, would be made publicly available
- Issuance of final rules regarding procedures for handling whistleblower complaints under 9 of the 22 federal statutes which include whistleblower protection provisions that OSHA has been tasked with investigating and enforcing
Other Noteworthy Regulatory Actions

- On October 10, 2014, OSHA issued a request for information regarding its outdated permissible exposure limits (PELs) to certain chemicals found in the workplace. The vast majority of OSHA’s PELs are more than 40 years old and science has since proven many of them to be insufficient to protect employees.

- OSHA aspires to issue a Notice of Proposed Rulemaking by the end of 2014 seeking to amend its recordkeeping regulations to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation.

- In response to an Executive Order released on August 2, 2013, titled Improving Chemical Facility Safety and Security, OSHA issued a comprehensive request for information on December 9, 2013. The comment period ended March 31, 2014.
Noteworthy Regulatory INACTION

Two longstanding controversial topics were relegated to OSHA’s long term action list (meaning the regulated community cannot know when, if ever, these issues will be dealt with):

- **Combustible dust:** Both the proposed stand-alone combustible dust standard and updates to the recently amended Hazard Communication Standard (which includes the undefined term “combustible dust” within the definition of “hazardous chemical” regulated under the standard) have been added to the list, indicating that regulated industries must continue waiting for a clear and intelligible definition of the term.

- **I2P2:** The proposed requirement that employers adopt Injury and Illness Prevention Programs (“I2P2”) has also been shelved for an indeterminate period of time.
The Hazard Communication Standard
The New HAZCOM

- In 2012, OSHA dramatically changed the Hazard Communication (HAZCOM) standard (which had not been changed since 1994) in order to align it with the Globally Harmonized System of Classification and Labeling of Chemicals (GHS) – a project being carried out by the United Nations.

- The goal of the change is to provide a common and coherent approach to classifying chemicals and communicating hazard information on labels and safety data sheets, which currently vary greatly among different countries and even among agencies within the same country.

- A transition period was built into the move from the 1994 version of the standard to the 2012 version. During the transition, employers can comply with the 1994 version of the standard, the 2012 version, or both.
## The Deadlines

<table>
<thead>
<tr>
<th>Effective Completion Date</th>
<th>Requirement(s)</th>
<th>Who</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 1, 2013</td>
<td>Train employees on the label elements and safety data sheet format</td>
<td>Employers</td>
</tr>
<tr>
<td>June 1, 2015</td>
<td>Compliance with all modified provisions of the 2012 final rule, except:</td>
<td>Chemical manufacturers, distributors and employers</td>
</tr>
<tr>
<td>December 1, 2015</td>
<td>The Distributor shall not ship containers labeled by the chemical manufacturer or importer unless it is a GHS label</td>
<td></td>
</tr>
<tr>
<td>June 1, 2016</td>
<td>Update alternative workplace labeling and hazard communication program as necessary, and provide additional employee training for newly identified physical or health injuries</td>
<td>Employers</td>
</tr>
</tbody>
</table>
Combustible Dust in the New HAZCOM

- There were a number of preenforcement challenges to the 2012 changes to the HAZCOM rule. Among them was a case brought by a coalition of grain handlers who objected to the inclusion of the undefined term “combustible dust” with the definition of “hazardous chemical.” Any substance falling into the category of “hazardous chemical” is subject to all of the requirements of the rule.

- The D.C. Circuit Court of Appeals rejected the challenge to the rule, even though “combustible dust” is not defined, making it incredibly difficult for potentially regulated industries to determine whether the new version of the rule applies to them.

- There are countless definitions of “combustible dust” provided by OSHA and a variety of standards setting organizations. No two are alike.
Enforcement?

- Once June 1st hits, employers must be in compliance with substantially all of the 2012 HAZCOM standard.

- There appears to be no clarification in sight regarding combustible dust, as OSHA has stalled all of its regulatory efforts on that issue.

- It is critical that employers take action now, if they have not done so already, to move towards full compliance with the new version of the rule.

- Employers should anticipate compliance officers carefully studying training records, safety data sheets, labeling, etc. And they should anticipate citations, particularly as OSHA compliance officers have not necessarily received clear guidance on every element of the new rule.
OIG Warns Pharmaceutical Manufacturers of Improper Part D Beneficiary Coupon Use

Whistleblowers Rewarded Again by SEC and the Judiciary

September 10, 2014

By Stuart M. Gerson; Frank C. Morris, Jr.; and Meghan F. Chapman

On August 29, 2014, two whistleblower developments of particular interest to health care and life science entities emerged from the Securities and Exchange Commission respectively. The SEC, through its 10 to a compliance professional who that led to an enforcement action to the first time that the agency has a compliance professional.

Massachusetts Now Requires Employers to Provide Domestic Violence Leave

September 18, 2014

By Barry A. Guryan and Kate B. Rhodes

Massachusetts has enacted a law requiring employers with 50 or more employees to grant employees “domestic violence leave.” The law, entitled “An Act [R]elative to [D]omestic [V]iolence,” was approved by Governor Deval Patrick on August 8, 2014, and took effect immediately.

Under this new law, employers with 50 or more employees must provide employees with up to 15 days of paid or unpaid leave in any 12-month period if:

- the employee, or a family member of the employee, is a victim of “abusive behavior”;
- the employee is not the perpetrator of the abusive behavior against the employee’s abused family member; and
- the employee is using the leave from work to do any of the following:
  - seek or obtain medical attention, counseling, victim services, or legal assistance;
  - attend court proceedings;
  - seek legal advice; or
  - seek similar protections provided under state or federal law.

Sixth Circuit Expands the Liability of Health Care Employers for Sponsorship Costs

USCIS Expands H-1B Eligibility for Nurses

Obama Administration Warns ACA Sign-Ups to Provide Proof of Legal Status

California Supreme Court Expands Rights of Immigrants Working in that State

DOD Issues Technical Assistance Regarding Employer’s Receipt of Excess Documentation During the Form I-8 Process

DOD Seeks Immigration-Related Discrimination Claims Against Staffing Agency

Colorado Employers Must Use New Affirmation Form Starting October 1, 2014

Silicon Valley Man Receives 18-Month Sentence for H-1B Fraud

DHS Issues October 2014 Visa Bulletin

Sixth Circuit Expands the Liability of Health Care Employers for Sponsorship Costs

On August 20, 2014, the U.S. Court of Appeals for the Sixth Circuit issued its decision in Kuty v. U.S. Department of Labor, No. 11-6110 (3rd Cir. 2014). "Kuty" is a key case that establishes the extent to which hospitals and other health care facilities may be held liable for non-conformities with the Health Care Employment and Labor (HEAL) Act.
Visit EBG’s OSHA Law Update Blog

www.oshalawupdate.com
Questions?
Presented by

Valerie Butera
Member, Labor and Employment Practice
Washington, D.C. Office
vbutera@ebglaw.com
202-861-5325