

July 3, 2007

Significant Developments at OSHA as it Steps Up Compliance Efforts

Seemingly responding to Congressional criticism concerning the Agency, the Occupational Safety and Health Administration (“OSHA”) is emphasizing a national program to eliminate hazards in petroleum refineries, implementing its 2007 Site-Specific Targeting plan, and obtaining mixed results from the Occupational Safety and Health Review Commission (“OSHRC”) and Fifth Circuit Court of Appeals in its efforts. Given that almost every private sector employer may be subject to an OSHA inspection, the following recent developments are noteworthy:

OSHA Announces Inspection of 4,150 Worksites Under 2007 SST Plan.

OSHA recently publicized that it will focus on approximately 4,150 high-hazard worksites in its Primary List for unannounced comprehensive inspections for the coming year. OSHA’s Site-Specific Targeting (“SST”) program is OSHA’s planned inspection tool for non-construction workplaces that have 40 or more employees. The SST plan is based on the data received from the prior year’s OSHA Data Initiative (“ODI”) survey based on DART and DAFWII figures, which employers track through their OSHA 300 logs. The DART rate involves injury/illness cases with days away from work, restricted work activity, and transfers to another job. The DAFWII rate is the number of cases that involve days away from work per 100 full-time employees. The SST-07 plan targets workplaces with a DART rate at or above 11.0 or a DAFWII case rate at or above 9.0 to create the Primary List of unannounced inspections. In addition to these 4,150 sites, OSHA will randomly select certain low DART rate employers in high risk industries for inspection. Further, companies cannot avoid inspection by failing to comply the data. A random sample of establishments that did not provide rate information in accordance with the 2006 ODI survey will be included in the Primary Inspection List. If an Area Office completes its inspections of all establishments on its Primary List before the expiration of the 2007 SST program, it may then obtain additional establishments from a Secondary List. This List will contain establishments reporting DART rates of 7.0 or greater but less than 11.0 or a DAFWII case rate of 4.0 or greater but less than 9.0. Aside from the SST Plan and targeted industries under national emphasis programs, OSHA will also inspect workplaces based on employee complaints of safety risks and reports of fatalities and multiple hospitalizations of employees. Therefore, every business should use this opportunity to review its strategy for responding to OSHA inspections.

The Agency’s National Emphasis Program for Petroleum Refineries and Hazardous Chemicals.

On June 12, 2007, OSHA published a directive implementing a National Emphasis Program to supposedly help eliminate workplace hazards associated with the release of highly hazardous chemicals at petroleum refineries. Under this program, OSHA will conduct 81 inspections over the next two years. According to OSHA, the program is just one of “multiple significant enforcement projects” in the oil, gas and refining industries on which OSHA is preparing for implementation.

OSHA Obtains Significant Assistance for Multiple Fine Citations.

In a move that should assist with OSHA's targeted efforts discussed above, the Fifth Circuit Court of Appeals, in the Spring of 2007, upheld the issuance of penalties for each of 141 instance-by-instance willful recordkeeping citations. In *Chao, Secretary of Labor v. Saw Pipes, USA, Inc.*, the Court considered citations against two related companies for knowingly and intentionally failing to record certain work-related injuries or illnesses. Specifically, in its discretion, OSHA may cite on an instance-by-instance basis, reasoning that each employer decision not to include a recordable injury or illness constitutes a separate violation. OSHA had proposed penalties against the two companies totaling \$1.21 million dollars. The companies contested OSHA's findings and penalties before OSHRC (the Review Commission). A Commission administrative law judge upheld the findings of willfulness, but granted the companies relief on the penalties by grouping them and assessing \$70,000 for each employer—the maximum allowed by the statute for a single willful violation. On appeal, the Fifth Circuit concluded that the ALJ had no authority to group the willful penalties proposed by OSHA. According to the Court, the decision whether to group alleged violations and penalties or to cite them separately was a matter Congress committed to OSHA's prosecutorial discretion alone. Accordingly, employers subject to OSHA recordkeeping requirements are advised to review their procedures to make sure all recordable injuries and illnesses are being entered properly on their OSHA 300 logs. Generally, companies should audit safety practices to ensure there are no potential willful violations as OSHA may apply instance-by-instance citations in matters beyond recordkeeping and reporting obligations.

General Contractors Receive Good News Under OSHA's Multi-Employer Liability Policy.

In the construction industry, OSHA has long cited general contractors for violations attributable to subcontractors under the multi-employer worksite policy. This policy provides that although employers may not have employees of their own exposed to a safety hazard, they still may be cited for a safety or health violation if such employers create the hazard, if they control the work site, or if they have the authority to correct the hazard to which another's employee is exposed. The multi-employer policy has been called into serious question by the decision of a divided Review Commission in the April 2007 case of *Secretary of Labor v. Summit Contractors Inc.* In vacating the citation issued to general contractor Summit, OSHRC Chairman W. Scott Railton and Commissioner Horace A. Thompson III agreed in separate opinions that OSHA's Multi-Employer Citation Policy is invalid in the construction context when applied against a "controlling employer" who neither creates nor has employees exposed to the cited safety hazard. The decision does not apply to general industry (non-construction worksites) and OSHA will likely appeal the ruling. Employers should consult with their counsel about the effect of this ruling while the appeal is pending.

Companies May Comment on Proposed PPE Rule Revisions Through July 16, 2007.

In May 2007, OSHA Issued a Notice of Proposed Rule Making Regarding Personal Protective Equipment (PPE). The PPE regulations generally provide the requirements for eye and face protection, respiratory protection, foot protection, and head protection. These proposed revisions are a continuation of OSHA's efforts to update references to specific consensus and industry standards located throughout the agency's standards. The proposed revisions replace the existing references to specific, out-of-date consensus standards with performance language that requires PPE to be constructed in accordance with "good design standards." The proposed revisions include appendices that may be used to identify good design standards. OSHA is accepting comments to the proposed rules through July 16, 2007, which can be reviewed on OSHA's website, www.OSHA.gov.

If you would like to explore any of these issues further, please contact:

Matthew Deffebach
1 Houston Center
1221 McKinney, Suite 2100
Houston, TX 77010
Telephone: 713.547.2064
Fax: 713.236.5631
matthew.deffebach@haynesboone.com

Terry Boone
201 Main St., Suite 2200
Fort Worth, TX 76102
Telephone: 817.347.6612
Fax: 817.348.2305
terry.boone@haynesboone.com