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Plan, Prevent, Protect or Pay? What Employers Should Expect From OSHA Under Its New Enforcement Strategies and Semiannual Regulatory Agenda

Rolling out OSHA's semiannual regulatory agenda on April 26, 2010, Secretary of Labor Hilda Solis unveiled several action items being marketed as the "Plan, Prevent, and Protect" enforcement strategy. According to the Secretary, employers too often take shortcuts affecting worker safety and, therefore, must plan for workplace hazards, prevent them, and protect their employees. Shortly before announcing new initiatives for OSHA under this regulatory agenda, the agency announced the implementation of its Severe Violator Enforcement Program and a general overhaul to increase OSHA's proposed penalties in enforcement actions. OSHA is seemingly poised to arm its arsenal to make employers pay when they fail to plan, prevent and protect.

Highlights from OSHA's Semiannual Regulatory Agenda

While the DOL regulatory agenda spans across several administrative agencies, the "Plan, Prevent, and Protect" strategy is a centerpiece to OSHA enforcement.

New Rulemaking: Injury Illness Prevention Programs (or "I2P2"). According to OSHA, the goal of this potential new rule is to help employers reduce workplace injuries and illnesses through a systematic process that proactively addresses workplace safety and health hazards. OSHA contends, in a separately published fact sheet, that an I2P2 rule would require employers to identify and remediate risks to workers before they cause injuries or accidents. OSHA will carry out a series of stakeholder meetings to assess this new proposed rule. The 2010 meetings will be held June 3 in East Brunswick, New Jersey, June 10 in Dallas, Texas, and June 29 in Washington, D.C. Based on comments from these meetings, OSHA may formalize a proposed rule, which would be announced in the Federal Register as a Notice of Proposed Rulemaking ("NPRM"), subject to a public comment period, before a Final Rule would be implemented.

New Rulemaking: Modernizing OSHA's Reporting System. OSHA is preparing a proposal to modernize its recordkeeping and reporting requirements so that accurate and timely data is more readily available. Under the proposal, employers would need to uniformly track injury and illness data. Further, OSHA may then publish its collection of injury/illness data to employers. Stakeholder meetings are scheduled to be held by July 2010.

Proposed Rule on Global Harmonization of Classification and Labeling of Chemicals. In 2003, the United Nations adopted the Globally Harmonized System ("GHS") of classification and labeling of chemicals. In September 2009, OSHA published a NPRM to modify its 29 C.F.R. Section 1910.1200 Hazard Communication standard to make it consistent with the GHS. This would involve changing the criteria for classifying health and physical hazards, adopting standardized labeling requirements, and requiring a standardized order of information for safety data sheets. The NPRM comment period ended in December 2009 and public hearings on the proposed Rule have been scheduled for this summer. The post-hearing comment period will end in June 2010.

Proposed Rule on Occupational Exposure to Crystalline Silica. OSHA may significantly decrease the Permissible Exposure Limit ("PEL") from the current equivalent of 100 micrograms per cubic meter, to 50 or 75 micrograms. The Proposed Rule may also include additional requirements concerning monitoring, medical surveillance, worker training, and workplace controls for minimizing silica exposure. OSHA currently plans to issue the NPRM in February 2011.

Final Rule on Hexavalent Chromium. The Final Rule includes provisions that would decrease the PEL for the presence of hexavalent chromium in the workplace. Under a previous version of the Rule, an employer would notify employees of any exposure in excess of the PEL. Following a legal challenge to the proposed rule in the Third Circuit Court of Appeals, the current Rule significantly broadens the exposure notification requirements. Employers must notify affected employees of all exposure determinations, whether above or below the PEL. This may be of particular significance for welders who make up almost half of the employees covered by the chromium standard.

Final Rule on the Recording and Reporting of Work-Related Musculoskeletal Disorders (“WMSD”). OSHA published a Final Rule to add a definition of WMSD to 29 C.F.R. Part 1904 and a separate column on the 300 Log to track this class of injury/illness. The comment period ended in March 2010 and final action is planned for July 2010; therefore, a potential revision to the recordkeeping and reporting requirements could be forthcoming later this year.

Final Rule on Cranes and Derricks in Construction. OSHA plans for publication of a Final Rule in July 2010 to address the technological advances in equipment that make the current construction standard antiquated. The final rule is designed to prevent the leading causes of fatalities: electrocution; crushed-by/struck-by hazards during assembly/disassembly; and collapse and overturn.

OSHA’s Announcement of the SVEP and Plan to Increase Penalties

Contemporaneous with the announcement of its new regulatory agenda on April 22, 2010, OSHA also announced its new Severe Violator Enforcement Program (“SVEP”), which becomes effective forty-five days after it was announced. Under the SVEP program, OSHA will concentrate resources on inspecting employers who have demonstrated “indifference” to their OSHA obligations by committing willful, repeated, or failure to abate violations. Enforcement actions for severe violator cases will include mandatory follow-up inspections, increased company corporate awareness of OSHA enforcement, company-wide agreements, enhanced settlement provisions, and federal court enforcement under Section 11(b) of the OSHA Act.

Additionally, OSHA announced that several administrative changes are being made to its penalty calculation system. These administrative enhancements will become effective in the next several months. The penalty changes will increase the overall dollar amount of all penalties, while maintaining OSHA’s policy of reducing penalties for small employers and those acting in good faith.

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