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Successfully Navigating Workplace Safety Issues in 2016

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Workplace Safety

Recent Occupational Safety and Health Administration (“OSHA”) developments are a growing cause of concern for many employers and manufacturers in the United States. Effective August 1, 2016, OSHA—the federal agency that enforces workplace safety—is expected to increase its fines for workplace safety violations more than 80-percent. At the same time, OSHA and the Department of Labor (“DOL”) are making it harder than ever for employers to police safety violations.

In February 2016, the DOL brought suit against U.S. Steel Corp., alleging that U.S. Steel’s policy that employees immediately report workplace incidents violates the Occupational Safety and Health Act, because it allegedly discourages employees from reporting workplace injuries. According to Richard Mendelson, OSHA’s Regional Administrator in Philadelphia, “U.S. Steel’s policy discourages employees from reporting injuries for fear of retaliation. Because workers don’t always recognize injuries at the time they occur, the policy provides an incentive for employees to not report injuries once they realize they should, since they are concerned that the timing of their report would violate the company’s policy and result in some kind of reprimand.”

For employers, any increase in OSHA fines could be a costly problem, underscoring the importance of a robust and effective workplace safety policy. However, OSHA’s recent enforcement positions only create confusion over how to implement an

effective safety policy, while at the same time avoiding a situation similar to U.S. Steel. In order to navigate these contradictory positions, companies must monitor changes in federal regulations, as well as understand what actions they should take to avoid issues with OSHA and minimize potential liability.

OSHA, Fines, and the Bipartisan Budget Deal

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing a safe and healthful workplace for their employees. According to OSHA, it ensures these conditions for American workers by setting and enforcing standards, and providing training, education, and assistance. That includes the ability to fine companies for health and safety violations, and to investigate retaliation against employees for reporting workplace incidents or unsafe conditions.

For the first time in more than 20 years, OSHA is significantly increasing those fines, based on a provision in the federal government's 2015 budget deal that flew under the radar when the budget was passed. The provision allows OSHA to implement a "catchup" adjustment. The adjustment is based on the difference in the Consumer Price Index ("CPI") since the last time OSHA raised penalties in 1990 through October 2015. After the initial increase in rates, moving forward OSHA will adjust penalties based on the CPI.

The provision could allow OSHA to raise rates more than 80-percent, if the maximum amounts are implemented. That means the maximum penalty for a willful violation would increase to about \$127,000 from the current \$70,000. The change is expected to go into effect by August 1, 2016.

While OSHA could seek less than the maximum increase allowed under the law, indications are that officials will ask for as much as possible. During Congressional testimony last October, David Michaels, Assistant Secretary at the Agency, claimed that, "The most serious obstacle to effective OSHA enforcement of the law is the very low level of civil penalties allowed under our law, as well as our weak criminal sanctions. The deterrent effects of these penalties are determined by both the magnitude and the likelihood of penalties. However, OSHA's current penalties are not strong enough to provide adequate incentives."

The DOL's Lawsuit Against U.S. Steel

Even while claiming that additional penalties are necessary to ensure that companies comply with workplace safety rules and regulations, OSHA and the DOL

appear to be making it harder to do just that. On February 17, 2016, the DOL filed suit in federal court against U.S. Steel, claiming that U.S. Steel's workplace injury policy requiring employees to immediately report any workplace incident violates the OSH Act.

The lawsuit stems from an OSHA investigation in 2014, after U.S. Steel suspended two employees who reported incidents several days after they occurred. According to the lawsuit, one employee bumped his head on a low-hanging beam, but did not report the incident to his supervisor. Four days later he allegedly began experiencing stiffness in his shoulder, and his union representative reported the head-bumping incident to U.S. Steel. The company suspended the employee for five days for failing to comply with its reporting requirements.

In addition, the complaint alleges that another U.S. Steel employee noticed a small splinter in his thumb while working. He removed the splinter and did not report the incident. Two days later, after experiencing swelling, he visited a doctor, received treatment, and reported the incident. U.S. Steel also suspended this employee for five days for failing to comply with its reporting requirements.

Both employees filed complaints with OSHA, alleging that they were suspended in retaliation for reporting workplace injuries. OSHA investigated both incidents and determined that U.S. Steel had retaliated against the employees for reporting the incidents, regardless of U.S. Steel's policy. After U.S. Steel refused to change its immediate reporting policy, the DOL brought suit, asking a federal court to force U.S. Steel to modify its policy.

Next Steps

With the probability of a major increase in OSHA fines on the horizon and increased enforcement activity from the agency, companies need to prepare themselves to avoid sanctions and to respond appropriately if they are the target of an investigation. Steps to take include:

Staying Updated on OSHA's Actions

Companies should work closely with their legal counsel, both in-house and at law firms, to understand the enforcement positions and penalties OSHA could seek, and how they are affected. Business organizations and trade groups can also be good sources for this kind of information.

Know Your Vulnerabilities

Some workplaces present more potentially hazardous situations than others. According to OSHA, in fiscal year 2015 the top 10 most frequently cited standards violations were: fall protection; hazard communication; scaffolding; respiratory protection; lockout/tagout; powered industrial trucks; ladders; electrical, wiring methods; machine guarding; and electrical, general requirements. By recognizing where common risks exist, employers can adopt policies that address the specifics of their workplaces and proactively minimize workplace safety risks.

Review Your Policies and Procedures

In light of the increased focus by OSHA and the potentially costly fines, now is a good time for employers to perform a thorough audit of their workplace safety policies and procedures. Many employers have immediate reporting requirements like U.S. Steel. These policies have many benefits, including allowing employers to identify injury risks much quicker and reduce workers' compensation fraud and abuse. Accordingly, some employers may not wish to adopt the position advocated by the DOL. There is no silver bullet solution here. Employers should review the specifics of their workplace, consult with supervisors, managers, and legal counsel, and determine the policy that fits best.

Train Employees

Everyone accepts that workers need to be trained on proper safety techniques. In case of workplace accidents and incidents, employees also need to know how to respond, including which forms to complete. Employers should regularly review training procedures and content to make sure they are effective and up to date.

Have a Plan if OSHA Shows Up

When OSHA conducts an inspection, it rarely offers advance notice. That means every site should know how to respond to an OSHA investigation, including who to contact and what rights the company has when inspectors show up.

When an OSHA inspector arrives, he or she should show credentials and ask to meet the appropriate employer representative. In the "opening conference," the OSHA compliance officer explains why the workplace was selected for an inspection and what the scope of the inspection will probably be. The inspector will also describe the purpose of the visit and the standards that apply. He/she will also ask the employer to select a representative to accompany him or her during the inspection.

In some cases, an employee representative may be part of the inspection as well. After the opening conference, the compliance officer and accompanying representatives conducts a walk-through to inspect work areas for safety and health hazards.

Notwithstanding the position a company takes regarding OSHA on-site inspections, the company should have a savvy legal team in place that understands the company, the industry, and the company's objectives, and that can respond quickly if necessary.

With penalties for OSHA violations set to increase, employers need to be more proactive than ever. Reviewing all safety policies, developing a response plan, and educating employees before issues arise can decrease the chance of penalties and minimize them when they do occur.

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