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OSHA Continues to Make Changes to Its Enforcement Procedures for Reporting Requirements

Hey employer, remember that workplace injury that you reported to OSHA a few months ago? You remember, right? The one where after you gave OSHA information about the workplace injury, like the root cause of the incident, and a few days later OSHA informed you that it considered the matter “closed.” Well guess what? OSHA is now at the door of your facility seeking to do a “monitoring inspection” related to the workplace injury that you thought was “closed.” Can OSHA actually do this you ask? Yes, and they will!

Summary

On March 4, 2016, the Occupational Safety and Health Agency (OSHA or the Agency) issued revised enforcement procedures related to employers’ reporting requirements under 29 C.F.R. § 1904.39 (Revised Enforcement Procedures) due to the “influx of workplace incident reports to OSHA and the field’s experiences with the new reporting requirements.” See a previous [GT Alert, OSHA Changes Requirements for Recording and Reporting Workplace Injuries and Illnesses – Effective Jan. 1, 2015](#).

The Revised Enforcement Procedures set forth two significant changes from OSHA’s December 2015 “Interim Enforcement Procedures for New Reporting Requirements under 29 CFR 1904.39” (Interim Enforcement Procedures). First, the Revised Enforcement Procedures provide for increased penalties for employers who fail to report a reportable event to OSHA. Second, the Revised Enforcement Procedures put employers on notice that OSHA may conduct an on-site inspection **even after** OSHA notifies employers that it is closing its Rapid Response Investigation (RRI) of a reportable workplace injury. Although OSHA may conduct a follow-up inspection, OSHA will not use an employer’s internal investigation and response to the RRI as a basis for a citation, as long as the employees are not exposed to a serious hazard and the employer is taking steps to correct the condition.

Background

In 2014, OSHA issued a final rule revising its occupational injury and illness recordkeeping and reporting requirements in 29 C.F.R. § 1904. The new requirements became effective Jan. 1, 2015. The final rule requires employers to report all work-related inpatient hospitalizations, amputations and losses of an eye to OSHA within 24 hours of the event.

On Dec. 24, 2014, OSHA issued Interim Enforcement Procedures. The Interim Enforcement Procedures provided procedures for the implementation process, including intake of reports, input of reports, temporary database, and guidance for determining whether a report resulted in an inspection of a RRI.

Under the Interim Enforcement Procedures, after OSHA receives an employer report, OSHA will determine whether to conduct an inspection or an RRI. That determination will be based on which of three “Categories” the employer report falls into:

Category 1 – All reports classified as “Category 1” will be inspected. These involve:

- > Fatalities and at least two inpatient hospitalizations
- > Injury of a worker under age 18
- > Employers with a known history of multiple injuries (same or similar events in previous 12 months)
- > Employers who are repeat offenders (with a history of egregious violations, willful violations, failure-to-abate, or repeated citations)
- > Employers in the Severe Violator Enforcement Program (SVEP)
- > A national emphasis or local emphasis program

Category 2 – OSHA will **either conduct an on-site inspection or an RRI** based on a variety of factors related to the alleged hazard that resulted in the injury or illness and the employer.

- > Are employees still being exposed to the factors underlying the hazards that resulted in the injury or illness?
- > Was the incident the result of a safety program failure, such as permit-required confined space (PRCS), lockout/tagout (LOTO), or process safety management (PSM)?
- > Was the employee exposed to a serious hazard (i.e., explosive materials, combustible dust, falls, or heat)?
- > Were temporary workers or other vulnerable populations injured or made ill?
- > Has another government agency (federal, state, or local) made a referral?
- > Does the employer have a prior OSHA inspection history?
- > Is there a whistleblower complaint or inspection pending?
- > Is the employer a Cooperative Program Participant, e.g., a participant in voluntary protection programs (VPP), a strategic partnership, a safety and health achievement recognition program (SHARP), or an active alliance member?
- > Did the incident involve health issues, such as chemical exposures or heat stress?

If OSHA receives a “yes” to multiple questions, OSHA will conduct an inspection.

Category 3 – Employer reports classified as Category 3 will receive an OSHA RRI. The RRI is similar to OSHA’s phone/fax procedures. OSHA will send the employer an RRI letter requesting information about the employer’s investigation into the work-related incident. The letter asks the employer to complete the following:

- > Conduct an incident investigation
- > Document findings and corrective actions
- > Post a copy of the letter where employees can readily review it
- > Fax or email a copy of the signed Certificate of Posting

Responses to OSHA RRIs are due to OSHA within five working days to “confirm abatement/steps that have been taken for abatement.” Notably, extensions are expressly permitted. In other words, OSHA requires a written response and supporting documentation to establish that the employer has conducted an investigation and abated the hazard that caused the workplace injury or illness.

When OSHA concludes that the employer has satisfactorily completed the RRI, the “Area Office will summarize the findings/response from an employer and enter that information into the OSHA Information System.”

While responding to OSHA’s RRI is not legally required, failing to do so will likely result in an on-site inspection.

Changes in the Revised Enforcement Procedures

The Revised Enforcement Procedures include two significant changes from the Interim Enforcement Procedures regarding:

- > OSHA is increasing the maximum fine for failing to report a reportable incident within 24 hours of learning of the incident. Previously the maximum fine was \$1,000. Now, the maximum fine is \$5,000. With that said, if the OSHA “Area Director determines that it is appropriate to achieve the necessary deterrent effect, the unadjusted penalty may be \$7,000, unless superseded by a future policy revision.”
- > OSHA may conduct a monitoring inspection of closed RRIs “based on a randomized selection of closed investigations.” Thus, even though OSHA informs an employer that it is closing the RRI, OSHA may still conduct an on-site monitoring inspection to confirm the abatement of the alleged hazard that resulted in the reportable injury or illness. The monitoring inspection will allegedly be limited to an inspection of the previously reported condition. OSHA claims that it will not use the “employer’s internal investigation to cite a condition(s) discovered by the employer during its internal investigation as long as employees are not exposed to a serious hazard and the employer is taking diligent steps to correct the condition.” In other words, OSHA is promising a “safe harbor” for employers who conduct internal investigations in response to an RRI.

Key Takeaways

OSHA’s Revised Enforcement Procedures show that the Agency will continue to monitor and seek information (like the root cause of the incident) from employers related to reportable workplace injuries or illnesses. Further, OSHA’s Revised Enforcement Procedures put employers that recently experienced a reportable workplace injury or illness on notice that an OSHA monitoring inspection of a closed RRI is possible. Employers can take some solace in the fact that OSHA will not use the employer’s internal investigation of the reportable workplace injury or illness that it provides to OSHA as a basis of a citation from the monitoring inspection. However, employers should be aware that OSHA can still cite employers for hazards in plain view and that OSHA believes are “serious” during monitoring inspections.

Employers should immediately consult with counsel when employers become aware of reportable workplace injuries to ensure compliance with OSHA’s reporting requirements and its subsequent requests for information related to the reportable workplace injury.

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