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OSHA Observer

A review and analysis of emerging developments in occupational safety and health law

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OSHA'S COOPERATIVE COMPLIANCE PROGRAM

For several years now, the Occupational Safety and Health Administration ("OSHA") has been experimenting with alternative enforcement methods. One such program is OSHA's High Injury/Illness Rate Targeting System and Cooperative Compliance Program ("CCP"), which OSHA claims offers selected employers "a choice between traditional inspections and working in partnership with OSHA to reduce injuries and illnesses in the workplace." In early December 1997, letters went out to selected employers in states under federal OSHA's jurisdiction, inviting them to sign up for CCP, and employers have until January 30, 1998 to make their decisions. However, as with most government programs, CCP presents advantages as well as significant risks for the employer. In deciding whether to join CCP, an employer must first be aware of the requirements the program imposes, evaluate how those requirements will work in its particular occupational environment and weigh the pros and cons of a program that some call the "crown jewel" of the "reinvented OSHA" and others believe is nothing short of "bureaucratic extortion."

CCP is designed for employers placed on OSHA's primary high hazard inspection list — a list which includes worksites with the highest 1996 lost workday injury and illness ("LWDII") rates. Following its November 25, 1997 Internal Directive, OSHA has informed most of the primary high hazard inspection list worksites that it will comprehensively inspect their premises by December 31, 1999. If a worksite agrees to comply with CCP, however, OSHA will remove it from the primary high hazard inspection list.

CCP REQUIREMENTS

CCP requires an employer to exceed the existing safety and health requirements contained in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("OSH Act"), or any of the standards and regulations promulgated pursuant to the OSH Act. To participate in CCP, an employer must commit in writing to do the following:

1. Identify and correct safety and health hazards in its workplace.
2. Actively involve workers in the identification and abatement of hazards in the workplace.
3. Improve an existing safety and health program or implement a comprehensive safety and health program based upon the principles set forth in the 1989 Voluntary Safety and Health Program Management Guidelines — Elements for an Effective Safety and Health Program.
4. Actively involve employees in the comprehensive safety and health program.
5. Work to significantly reduce its LWDII rate.
6. Fill out a CCP agreement and return it to the notifying Area Office by January 30, 1998.
7. Annually send OSHA information from the OSHA 200 annual summary form (the injury and illness log).

INSPECTIONS

Participating worksites remain subject to OSHA inspections. Although removed from the primary list, CCP worksites will be placed on a secondary inspection list. OSHA will inspect as many as 30% of these secondary list worksites, with one exception: OSHA will inspect no more than 10% of worksites with 100 or fewer employees that work with State Consultation Programs, thereby being placed on OSHA's tertiary inspection list. In either case, OSHA will not inspect any CCP worksites until May 4, 1998, in order to allow employers time to prepare for a possible inspection and to implement CCP requirements.

Employers must be aware that participating worksites

remain subject to inspections for fatality-catastrophe situations, complaints, and other nonprogrammed inspection reasons. Only programmed inspections are affected by joining CCP. Further, if OSHA receives reports that an employer is not adhering to the CCP requirements, it will investigate and may conduct an on-site inspection. Where appropriate, OSHA reserves the right to return a worksite to the primary list.

CITATIONS AND PENALTIES

To encourage employers to join CCP, OSHA has asserted that CCP "inspections should be shorter and result in lower penalties if the establishment has worked diligently." Given that CCP requires participating employers to identify worksite hazards, OSHA inspections may well be shorter and more targeted as the Agency will have the benefit of working from the employer's "roadmap" of site hazards. Unfortunately, these employer-generated audit or inspection reports may also be the predicate for a willful violation should OSHA find that an identified hazard has not been corrected.

While OSHA has said that CCP worksites will not be cited for most other-than-serious violations, provided the violations are promptly abated during inspection, CCP participating employers are not exempt from citations and penalties, as employers in OSHA prototype programs similar to CCP have discovered. For instance, one New Hampshire employer in OSHA's Focused Fifty Program was issued a citation for 50 serious violations and 12 other-than-serious violations with penalties totaling \$244,500. See BNA Occupational Safety and Health Daily (July 3, 1997). In another case, OSHA proposed a \$10,000 penalty against one Maine 200 (the precursor to the CCP) employer in response to a complaint-initiated investigation (BNA Occupational Safety and Health Daily (September 24, 1997)).

CCP: PROS AND CONS

Employers considering participating in CCP must carefully weigh the program's costs and benefits, factoring into their analysis the particular and peculiar circumstances of the selected worksite and the nature of the employee relations at that location. If the employer declines CCP participation, it will remain on the primary inspection list and will be inspected by December 31,

1999. If, on the other hand, the employer elects CCP participation, it may avoid a programmed inspection entirely. OSHA speculates that another benefit of CCP participation will be fewer injuries, illnesses, and fatalities. (At least initially, however, injury and illness reports may increase due to increased worker awareness from the education components of the CCP program.) Moreover, since an employer may independently implement any element of the CCP on its own, the main benefits of participation appear to be reducing the chance of a programmed inspection, buying time to prepare for that possibility, and incurring possibly lower penalties.

The greatest cost of CCP participation is that an employer must comply with more rigorous safety and health obligations than the law currently requires, and failure to satisfy these more onerous requirements could result in inspections and possible penalties. Consequently, before electing to participate in CCP, an employer must be sure that it can and will devote the energy and resources necessary to implement and carry through with the program requirements. To this end, it must have corporate as well as site management's commitment to the program. Site management must also have the kind of working relationship with its hourly employees and union, if one is present, to ensure that all personnel in the plant will work together to make this cooperatively premised program work.

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The Vedder Price OSHA Group

Vedder, Price, Kaufman & Kammholz has one of the preeminent occupational safety and health law practices in the country. The practice is national in scope, with firm attorneys representing employers all over the United States and its territories with respect to federal and state plan matters under the Occupational Safety and Health Act ("OSH Act") and its state law equivalents as well as with respect to other wide-ranging workplace health and safety issues.

The firm's practice covers the broad spectrum of occupational safety and health law issues:

⚡ OSHA standard-setting activities;

Before joining CCP, employers should also determine whether there are any circumstances unique to the selected location or the employer generally that impact on the decision to participate. For example, does the employer have a number of facilities similar to the selected worksite? Even if those other facilities were not selected for the CCP "invitation," it would not be surprising for OSHA in the future to look to the CCP participating worksite as the model for the employer's other locations, thereby expecting the employer to bring all of its facilities up to the level of the CCP worksite. If the employer is contemplating major operational changes to the selected worksite, such as new production procedures, modernization of the equipment, workforce reductions, or a partial plant closure, these, too, must be factored into the determination of the feasibility of fully implementing and carrying through with the CCP obligations.

Finally, since placement on the "invitation" list was based

on 1996 data, an employer that knows that its 1997 LWDII data shows significant improvement may wish to join up for CCP as it already has a head start in satisfying one of the primary outcome measures OSHA uses to judge the success of the employer's program.

CONCLUSION

Regardless of whether a worksite participates in CCP, the employer should prepare for a comprehensive OSHA inspection because nonparticipating employers on OSHA's primary inspection list have a 100% probability of a programmed inspection and CCP employers have a 30% (or 10% for certain smaller employers) probability of such an inspection. Moreover, nonprogrammed inspections remain a possibility for all employers.

If a worksite elects to participate, not only does it remain subject to inspection, it also has the added burden of having to comply with the CCP's more rigorous health and safety program requirements.

Employers who participated in some of OSHA's prototype programs in states such as Maine, Alabama, Georgia, Mississippi, North and South Dakota, Idaho, and Wisconsin found that a good way to determine the status of their compliance in anticipation of the comprehensive inspections was to conduct a privileged programs review. Because these paperwork audits of OSHA-required programs, training records and recordkeeping are performed by counsel, with deficiencies identified in an attorney-client privileged opinion letter, they are generally not subject to production to OSHA or through discovery. They can, therefore, be a useful guide in identifying problem areas before OSHA arrives, while at the same time avoiding becoming a "smoking gun" to be used by OSHA as the basis for a possible willful citation.

If you have questions about CCP, the privileged programs review, or related matters, call [Nina G. Stillman](#) (312/609-7560) or any other Vedder Price attorney with whom you have worked.

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