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OSHA Observer

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

If you have questions regarding this bulletin, please contact Nina G. Stillman (312/609 -7560) or any other Vedder Price attorney with whom you have worked.

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PROPOSED OSHA POLICY REGARDING USE OF VOLUNTARY EMPLOYER SELF-AUDITS

Last month, the Occupational Safety and Health Administration (OSHA) published in the Federal Register a proposed policy statement regarding its use of voluntary employer safety and health audits. 64 Fed. Reg. 54358 (Oct. 5, 1999). The proposed policy provides that OSHA will not routinely request voluntary self-audit reports when initiating an inspection. Rather, OSHA intends to seek access to such reports only in limited situations in which the agency has an independent basis to believe that a specific safety and health hazard warrants investigation and has determined that such records may be relevant to identify or determine the circumstances of the hazardous condition.

OSHA recognizes that voluntary self-audits can play a vital role in workplace safety and health when employers use them to identify hazards and take corrective actions. Nevertheless, OSHA acknowledges that employers may be reluctant to perform such voluntary self-audits if OSHA routinely uses them as a road map to identify violations during an inspection or as a basis for imposing willful citations for uncorrected conditions.

Thus, while not conceding its legal right to obtain voluntary self-audits, OSHA seeks to encourage employers to perform them by discontinuing its practice of making routine requests for their production at the initiation of an inspection. In addition, OSHA proposes to create a "safe harbor" against willful citations for employers who identify hazards during a voluntary self-audit. Specifically, OSHA indicates that it will not use a prior self-audit as evidence of willfulness concerning a hazard found in a subsequent inspection if the employer is responding promptly to the identified hazard. To the contrary, OSHA will treat a voluntary self-audit that results in prompt corrective action as evidence of the employer's good faith which may entitle it to a substantial penalty reduction. However, we anticipate that there may be substantial disagreement between OSHA and an employer as to whether an action is sufficiently "prompt" or "corrective."

OSHA's draft policy applies to audits that: (1) are systematic, documented and objective reviews conducted by, or for, employers to review their operations and practices to ascertain compliance with the OSH Act; and (2) are not mandated by the Act, rules or orders issued pursuant to the Act, or settlement agreements, *i.e.*, voluntary audits.

OSHA's proposed policy is in the early stages of rulemaking, and public comments must be submitted in writing by December 6, 1999.

If you have questions regarding OSHA's proposed policy statement or other OSHA topics, please contact Nina G. Stillman at (312) 609-7560, James E. Bayles, Jr. at (312) 609-7785, or any other Vedder Price attorney with whom you have worked.

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DUE DILIGENCE: A CHECKLIST FOR EVALUATING HEALTH AND SAFETY COMPLIANCE HISTORY

Today's vibrant economy has fueled a significant increase in acquisition activity. However, in the often rushed process of pre-acquisition due diligence, employers frequently overlook an area of substantial potential liability – the target company's health and safety compliance history.

Although due diligence activities usually address a company's workers' compensation history and environmental issues, they rarely look at workplace safety and health compliance. OSHA, however, can impose substantial penalties on companies that fail to comply with its standards or the OSH Act's General Duty Clause. For example, the OSH Act authorizes OSHA to impose penalties of up to $70,000 for *each* violation on employers that willfully ignore safety and health standards or repeatedly violate the same standard. In addition, *criminal* liability is possible for workplace illness or injury under both federal and state law.

Thus, to evaluate fully the potential effect of a company's health and safety compliance history on its ultimate net worth, several categories of documents should be reviewed as part of any good due diligence program. We recommend, at a minimum, a review of the following:

- full OSHA citation history, including settlement agreements
- 3-5 years of OSHA 200 Logs and workers' compensation summaries
- outside consultant/loss prevention reports and self-audit reports
- 2-3 years of safety committee minutes
- training records and written programs required by OSHA standards (*e.g.*, Lockout/Tagout, Hazard Communication, Confined Space)

- special hazards programs (*e.g.*, Asbestos, Benzene, Bloodborne Pathogens, Formaldehyde)

The goal of the due diligence process in the area of OSHA compliance is to identify all potential hazards for which OSHA could issue a large citation in a subsequent post-acquisition inspection. The greatest risk is posed by hazards about which the target company is aware but, for whatever reason, has failed to abate. A careful review of the foregoing documents should identify most, if not all, of those lurking hazards.

If you have questions on how to perform due diligence activities with respect to workplace health and safety compliance or other OSHA topics, please contact Nina G. Stillman at (312) 609-7560, James E. Bayles, Jr. at (312) 609-7785, or any other Vedder Price attorney with whom you have worked.

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THE CONTINUING EVOLUTION OF THE MULTI-EMPLOYER WORKSITE DOCTRINE

In the last two years, federal appellate courts have continued to grapple with the nebulous contours of what OSHA has termed the "multi-employer worksite doctrine." Stated simply, the doctrine provides that any employer responsible for a hazard can be cited for a violation of the OSH Act or an OSHA standard even if that employer's own employees are not exposed to the danger. The doctrine originated in the construction industry, where numerous contractors or subcontractors mingle throughout a worksite. In that context, hazards created by one employer often affected the employees of another employer.

Recently, however, OSHA has sought to extend the reach of the doctrine by applying it in non-construction settings and expanding the universe of employers who potentially could be held liable for a hazard. In *IBP, Inc. v. Herman*, the Court of Appeals for the D.C. Circuit considered

OSHA's attempt to invoke the doctrine at a meat processing facility to hold the owner of the facility, IBP, liable for a violation of the lockout/tagout standard after the employee of an independent contractor responsible for cleaning machines was killed while removing debris.

The D.C. Circuit initially expressed doubt about OSHA's authority to invoke the doctrine in the first place, noting that the Fifth Circuit Court of Appeals (Texas, Louisiana & Mississippi) rejected it outright as inconsistent with the language of the OSH Act. Ultimately, it assumed the doctrine's applicability but nevertheless vacated the citations against IBP, concluding that OSHA failed to prove that IBP had sufficient control over the hazard at issue to be held responsible for the death of the subcontractor's employee.

In *United States v. Pitt-Des Moines, Inc.* ("PDM"), however, the Seventh Circuit Court of Appeals (Wisconsin, Illinois and Indiana) proved much more receptive to the doctrine. Although the citations in PDM involved hazards found on a construction site, the Seventh Circuit looked to the OSH Act's legislative history to defend OSHA's use of the multi-employer worksite doctrine, emphasizing the Act's primary focus on making "places of employment, rather than specific employees, safe from work related hazards." The Seventh Circuit ultimately concluded that "once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works in its workplace." Because the Seventh Circuit relied primarily on the legislative history of the OSH Act rather than on an examination of language in the construction standards, its analysis would appear to support OSHA's extension of the doctrine to non-construction workplaces.

However, despite its general acceptance of the multi-employer worksite doctrine, the Seventh Circuit has resisted OSHA's efforts to extend liability to all employers having contact with a particular worksite. In the recent *CH2M Hill v. Herman*, the Secretary issued citations under OSHA's construction standards to CH2M Hill, a consulting enginering firm, under the multi-employer worksite doctrine. In so doing, it ignored detailed contractual provisions between CH2M Hill and the general contractor which made clear that CH2M Hill had no control over worksite safety or the actual construction process.

The Seventh Circuit vacated the citations, noting that prior to this case, the universe of employers subject to OSHA's construction standards extended only to those employers that had "actual and direct responsibility for the specific working conditions at the jobsite" – *i.e.*, "substantial supervision." In its opinion, CH2M Hill lacked the requisite supervisory control under the unique facts of that case.

In dicta, it also expressed doubts about a "new" test proposed by the Occupational Safety and Health Review Commission that would extend liability to any employer to the extent it (1) possesses broad responsibilities in relation to construction activities, and (2) is directly and substantially engaged in activities that are integrally connected with safety issues, *notwithstanding contract language expressly disclaiming safety responsibility.* The Court reasoned, "[w]hile perfunctory language that does not represent the true responsibilities of a particular employer should not absolve it from complying with the regulations, language exempting an employer from particular responsibilities that the facts confirm the employer does not actually retain cannot be casually thrown aside. Contracts represent an agreed upon bargain in which the parties allocate responsibilities based on a variety of factors. To ignore the manner in which the parties distributed the burdens and benefits is contrary to our notion of contract law."

Thus, recent federal appellate decisions make clear that the multi-employer worksite doctrine remains in flux. It is not uniformly applied. In jurisdictions where it does apply, it remains unclear whether it extends beyond the construction industry. Finally, the extent to which employers may contract away responsibility for workplace safety remains unclear.

Ultimately, liability under the doctrine will depend on the unique facts and circumstances presented at the time a hazard is identified. Contract language that explicitly allocates safety responsibility among employers, to the extent it reflects actual safety practices on the worksite, may help insulate an employer. Exculpatory language, alone, however, will probably be ineffective. Accordingly, even those employers with contracts that would appear to relieve them of all responsibility for safety issues would be well advised to consult legal counsel as early as possible when confronting hazards that may affect the

state plan enforcement activities;

- representation in contest litigation;
- safety and health consulting and litigation avoidance;
- safety and health auditing;
- defense of workplace safety and health criminal liability matters; and
- safety and health training and lecturing.

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employees of more than one employer.

If you have questions on the multi-employer worksite doctrine or other OSHA topics, please contact Nina G. Stillman at (312) 609-7560, James E. Bayles, Jr. at (312) 609-7785, or any other Vedder Price attorney with whom you have worked.

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