Effectively Handling An Enforcement-Driven OSHA While Achieving Operational Excellence and Profitability Through Safety

2014 Indiana Safety and Health Conference & Expo

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Edwin G. Foulke, Jr.
404.240.4273
efoulke@laborlawyers.com
ABOUT FISHER & PHILLIPS

FISHER & PHILLIPS LLP is one of the country's oldest and largest firms devoted exclusively to representing employers in labor, employment, civil rights, employee benefits and business immigration law. Our depth and breadth of experience in these niche areas are unsurpassed. Although it's Atlanta-based, Fisher & Phillips has more than 280 lawyers in 31 offices across the country and bar admissions in 41 states and Washington, DC.

The Firm's practice includes counseling and defending employers under all major federal and state labor, employment, and employee benefits laws and regulations including, among others: The Age Discrimination in Employment Act (ADEA); The Americans With Disabilities Act (ADA); The Civil Rights Acts of 1866, 1964 and 1991; The Consolidated Omnibus Reconciliation Act (COBRA); The Employee Polygraph Protection Act (EPPA); The Employee Retirement Income Security Act (ERISA); The Equal Pay Act (EPA); The Fair Credit Reporting Act (FCRA); The Fair Labor Standards Act (FLSA); The Family and Medical Leave Act (FMLA); The Immigration Reform and Control Act (IRCA); The National Labor Relations Act (NLRA); the Occupational Safety and Health Act (OSHA), and The Worker Adjustment and Retraining Notification Act (WARN), as these laws have been amended.

Our lawyers practice in federal and state courts throughout the United States. In addition to representing employers in litigation, we represent employers in federal, state and local administrative proceedings, mediation and arbitration, collective bargaining and administration of collective bargaining agreements, and in resolving threatened claims prior to the initiation of formal proceedings.

As a result of our representation of employers in litigation and formal claims proceedings, we have acquired considerable expertise in developing and implementing policies, practices, and procedures to help employers minimize or avoid the occurrence of employment-related claims, the risk of liability from such claims, or other forces that may interfere with employer rights.

ABOUT TODAY'S SPEAKER

Edwin G. Foulke, Jr is a partner with Fisher & Phillips LLP, a leading national labor and employment law firm. Mr. Foulke is co-chair of the firm's Workplace Safety and Catastrophe Management Practice Group in its Atlanta, Georgia office. Prior to joining Fisher & Phillips, he was the Assistant Secretary of Labor for Occupational Safety and Health. Named by President George W. Bush to head OSHA, he served from April, 2006 to November 2008. During his tenure at OSHA, workplace injuries, illnesses and fatalities rates dropped to their lowest level in recorded history.

His practice includes workplace safety compliance and strategic safety planning, whistleblower compliance and litigation involving the 22 whistleblower statutes handled by OSHA, defense of employers in responding to workplace health and safety cases including OSHA citations and providing advice and assistance to employers in responding to workplace fatalities and catastrophic accidents and in legislative and regulatory matters. Mr. Foulke has represented employers in thousands of OSHA inspections and OSHA citation contests.

For approximately thirty (30) years, Mr. Foulke has worked in the labor and employment area, specializing in occupational safety and health issues. In 2010, 2011 and again in 2012-13 he was named as one of the "50 Most Influential EHS Leaders" by EHS Today magazine, as well as being named one of the "50 Most Influential EHS Leaders" in the United States by Occupational Hazards magazine in 2008. Mr. Foulke is recognized as one of the nation's leading authorities on occupational safety and health issues and one of the top speakers and writers in this area.
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YOUR SAFETY PROGRAM NEEDS TO AVOID THIS...

BUT YOU DON'T WANT THIS APPROACH EITHER!

EVERYONE MAKES MISTAKES

"The greatest mistake is to imagine that we never err."
~ Thomas Carlyle

THANK YOU FOR YOUR COMMITMENT TO SAFETY

"Winning is not a sometime thing, it is an all-time thing."
~ Vince Lombardi
So is Safety!
SAFETY AND HEALTH IN THE 21ST CENTURY

Having great safety and health is vital ...  
1) it is morally the right thing. 
2) it allows your employees to go home each night safely to their family and loved ones. 
3) it keeps you from having to do the worst job any person would possibly have to do. 
4) it is the law. 
5) it is essential for a company to be profitable and competitive in today’s marketplace.

WHY YOU NEED AN EFFECTIVE SAFETY PROGRAM

WHY BE CONCERNED?

- Continued aggressive enforcement – including more inspectors, higher penalties and nasty press releases – and more employers placed in the Severe Violators Enforcement Program
- Increased emphasis on rulemaking
- More directives bypassing rulemaking
- More focus on whistleblowers with push to find more “causes” determinations
- Potential elimination of Voluntary Protection Program (VPP)
- More emphasis on workers rights, including worker summits
- Local, state and national governments look at safety records – bar on submitting bids
- Private sector companies also looking at contractors, vendors and system safety record – may lose clients

THE PROOF IS IN THE PENALTIES

1. BP Products North America, Inc. (TX) – $87 million
2. Whitesell Corp. (AL) – $3.07 million
3. BP – Husky Refinery (OH) – $3.04 million
4. E. N. Range, Inc. (FL) – $2.1 million
5. South Dakota Wheat Growers (SOD) – $1.6 million
6. Tempe Grain Elevators, LLC (CO) – $1.56 million
7. Republic Steel (OH) – $1.14 million
8. CES Environmental Services, Inc. (TX) – $1.1 million
9. AMD Industries, Inc. (IL) – $1.247 million
11. Piping Technology & Products, Inc. (TX) – $1.013 million
12. PJ Trailers Mfg., Inc & Decco Trailers (TX) – $949,800
13. Bastik, Inc. (MA) – $917,000

OSHA’S 10 LARGEST PROPOSED PENALTIES

1. BP Products, North America (10/23/09) – $81.34 million
2. BP Products, North America (9/21/05) – $21.38 million
3. O & G Industries, Keystone Construction and Maintenance and other companies (8/3/10) – $16.6 million
4. IMC Fertilizer/Angus Chemical (10/31/91) – $11.55 million
5. Imperial Sugar (7/25/98) – $9.75 million
6. Samsung Guan, Inc. (9/21/96) – $9.26 million
7. CITGO Petroleum (6/29/91) – $8.16 million
8. Dayton Tire (4/16/64) – $7.49 million
9. USX (U.S. Steel Corp.) (13/03/69 & 11/2/86) – $7.38 million
10. Phillips 66/Florida Engineering (4/19/00) – $6.4 million
OSHA's Top 10 Most Cited Violations Fiscal Year 2013

1. Fall protection, general requirements (1926.501)
2. Hazard communication (1910.1200)
3. Scaffolding (1926.451)
4. Respiratory protection (1910.134)
5. Electrical - wire method (1910.305)
6. Powered industrial trucks (1910.178)
7. Ladders (1926.1053)
8. Lockout/Tagout (1910.147)
9. Electrical - general requirements (1910.303)
10. Machine guarding (1910.212)

Achieving Operational Excellence and Profitability Through Safety

Element of an effective safety and health management system

1. Strong management commitment
2. All employee involvement/engagement
3. Worksite analysis - root cause analysis
4. Hazard prevention and control
5. Training for employees, supervisors and managers

Developing an Effective Safety Plan

- Experience is not just the best teacher – it is the only teacher.
- Accident prevention is a product of learning.

"We can't solve problems by using the same kind of thinking we used when we created them." - Albert Einstein

Safety Character

- Character is doing things right when no one is looking.
- What type of safety character do you have?
  - Full-time
  - Part-time
  - When convenient

"Be more concerned with your character than your reputation because your character is what you really are while your reputation is merely what others think you are." - John Wooden

Safety Mission, Vision & Values

Mission: To ensure a safe worksite for all employees, vendors, suppliers and guests.
Vision: That all employees return home safe everyday to their families and loved ones.
Values: Safety is a core value of the company.

Make sure that other company values do not conflict with the safety values. Establish a shared vision among management and employees of safety and health goals and objectives being integrated with production.
DEMONSTRATED COMMITMENT TO SAFETY —
YOUR SAFETY MENTALITY

- Personal commitment demonstrated at all levels, starting at the top —
  commitment must be visible
- Safety mentality
  - How do you respond to situations?
  - Take responsibility
  - Make excuses
- Take actions to show commitment
  - Allocate personnel
  - Allocate resources
  - Provided training
- Ensure mission, vision and values are not just words
- Motivate employees toward safety goals
- Reward safe actions

SAFETY PERFORMANCE METRICS
FOR ALL MANAGEMENT

- All management must have clearly-articulated safety performance
  metrics which connects to the company’s safety goals and objectives
- Assess performance on regular basis
- Provide feedback in “real time”
- Do not ignore small problems that will grow into large problems — do it
  right the first time.

"If you don’t have time to do it right, when will you have time to do it over?"
— John Wooden

EMPOWERMENT AT ALL LEVELS

- Motivational programs to encourage employee recommendations/safety improvements
- Safety Committees and safety survey
- Engaging employees by personal involvement
- Management and employee “stop work” authority
- Management and employees involved in accident investigation
- Trust

DEFINED GOALS & OBJECTIVES

- Goal: zero injuries, illnesses and fatalities
- Objectives define path to achieving goal
- All management and employees have a role in the objectives
- Objectives help define the company’s expectations for all employees
- Safety cannot be the absence of failure (i.e., injury) — you may just be
  lucky
- Communicate expectations
- Safety discipline — drive to achieve safety goals — where do you place
  your emphasis?

EMPOWERMENT —
CHECK TO SEE:

- Are employees using safe work procedures?
- Do employees assist in developing safe work procedures?
- Do employees suggest changes to safe work procedures?
- Do employees report or correct hazards they find?
- Do employees feel safe at work?

WORK SITE MONITORING &
COMPLIANCE ENFORCEMENT

- Hazard identification and job analysis
- Leading v. lagging indicators
- Use of in-house v. third-party audits
- Compliance requirements communicated — time limits to report all
  injuries, significant incidents, first aid and/or near misses
- Discipline for safety violations — clear rules and disciplinary procedure
- Quantifiable measurements to verify safety results.
LEADING INDICATORS — CHECK TO SEE:

- How are hazards identified and remediated?
- Are near misses and first aid tracked?
- Root cause analysis for all injuries and near misses
- Do employees use job safety analyses properly?
- Are PMs performed when due?
- Are audits conducted? How often? How many recommendations closed out?
- Safety observations/interactions
- Who is involved in accident and near miss investigations?
- How often are policies and procedures audited against reality?
- Do you have a management of change process?
- What do you measure?
- What gets rewarded?

LEADING INDICATORS — CHECK TO SEE:

- Pre-job safety meetings
- Job specific safety requirement for vendors and contractors
- Track safety performance of contractors and vendors
- Duty pre-work safety meeting/toolbox talks
- Safety suggestions
- Good housekeeping
- Job and site specific training
- Safety committee review, reports, and corrective action

CONSISTENT POLICIES & PROCEDURES

- Make sure that company policies and procedures do not conflict with the company's safety mission, vision and values.
- Integrate safety into all aspects of the company's general management programs and processes
- Use common language for both the safety and management policies and procedures
- Standardize measurement processes

TRAINING FOR EMPLOYEES, SUPERVISORS AND MANAGERS

- Consistent and continuous education process
- Understandable training
- Must reflect policies and procedures
- Retraining and review
- Stop telling employees not to have an accident - instead, tell them how not to have an accident
- Watch out for complacency or just silly mistakes

CHECK YOUR TRAINING

- How often do you train?
- Who conducts training?
- Where, when and how do you train?
- What do you train your employees on?
- How do you follow up to ensure that training worked?
- Does your training discuss problems/injuries that occurred in the past?

REMEMBER: "There is nothing so easy to learn from as experience and nothing so hard to apply."
- Josh Billings
IDENTIFY THE “Fs”

How many “Fs” did you see?

KEEP YOUR PROGRAM FRESH

- Assign employees to review policies and procedures
- Ask for feedback regularly
- Take action when necessary
- Close the communications loop
- Keeping your workplace safe requires continuous improvement
- Cannot stop learning
- Must have strategic and operational safety plans to be successful

SO, WHAT’S NEXT?

- Your workforce is changing — are you prepared? Are your employees taking safety home with them? Are you enabling employee wellness? The current and coming changes to your workforce will dramatically impact your company’s profitability and competitiveness.
- WARNING: Individuals do not act until there is an urgency to do so!

THE AGING WORKFORCE

- Between 1977 and 2007 the employment of persons 65 and older increased 101% compared to only a 59% increase in the total workforce
- Men over 65 increased 75% - women over 65 increased 147%
- Employees age 75+ represented only 0.8% of the workforce in 2007, but this number increased 172% between 1977 and 2007

THE FUTURE WORKFORCE

- Obesity rates have tripled in the past 30 years.
- On average, 8-16 year olds devote 7.5 hours to using entertainment media (TV, computers, video games, cell phone & more) in a typical day
- Only 1/3 of high school students get recommended levels of physical activity
- 50-55% of U.S. teenagers are either obese or overweight

THE AGING WORKFORCE

- Number of older employees on full-time schedule nearly doubled between 1995 and 2007
- Employees ages 55 to 64 expected to increase by over 36% from 2006 to 2016
- Employees age 65+ predicted to rise by more than 80%

Source: Bureau of Labor Statistics
THE FUTURE WORKFORCE
- 35% of college students are overweight
- Over 50% of teenagers who are overweight will continue to be overweight as adults
- Over 65% of adult Americans are either overweight or obese
- A CDC study found that obesity causes approximately 300,000 excess deaths each year

THE OBESITY PROBLEM
- Number of Americans considered obese growing by approximately 7% per year
- The CDC identified obesity as having roughly the same association with chronic health conditions as 20 years of aging
- Surgeon General reports approximately 9% of natural healthcare expenditures are directly related to obesity and physical inactivity.

OBESITY AND ADVERSE HEALTH EFFECTS
- Type-2 diabetes
- Hypertension
- Sleep apnea
- Heart failure
- High cholesterol
- Kidney failure
- Degenerative joint disease & arthritis
- Gallbladder & gall bladder disease
- Birth defects
- Miscarriages
- Stress incontinence
- Fatty liver disease
- Cancer in both men & women
- Premature death
- Lung & breathing problems (asthma)
- Acid reflux
- Deep vein thrombosis
- Erectile dysfunction
- Ovarian cysts
- Faster aging
- Live 13 years less on average

WHAT IS THE SOLUTION?
- Integrate safety with health into all aspects of management and operations
- Sincere and continuous commitment to safety and health
- Address problems head on
- Wellness programs

WELLNESS PROGRAM ELEMENTS
- Review of company's health insurance program
- Case management
- Disease management
- Incentives and pay for performance
- Communications
- Benchmarking and analytical review
- Legal compliance

Final Questions?
"Judge a man by his questions, rather than his answers."
- Voltaire
Fisher & Phillips LLP
is dedicated exclusively to representing employers in the practice of employment, labor, benefits, OSHA, and immigration law and related litigation.

Edwin G. Foulke, Jr.
1075 Peachtree Street NE, Suite 3500
Atlanta, GA 30309
Direct: 404-245-4273
efoulke@laborlawyers.com

BE SAFE!

REMEMBER: Bad decisions make good stories and usually the evening news.

1/24/2014
OSHA Proposes Publishing Worker Injury Data

OSHA has announced a proposed rule which will require establishments with 20 or more employees in certain industries with high injury and illness rates, to electronically submit their summary of work-related injuries and illnesses to OSHA every year. The change may affect between 450,000 and 1,500,000 sites. The first proposed new requirement is for establishments with more than 250 employees (and who are already required to keep records) to electronically submit the records on a quarterly basis to OSHA.

Currently, OSHA requires approximately 80,000 employers per year to submit data as part of its OSHA Data Initiative. OSHA uses its data to target certain industries or establishments for inspections and other initiatives. The Bureau of Labor Statistics surveys another 250,000 sites. One can see many ways in which OSHA could use this data for more effective targeting. The biggest concern seems to be how others would use this data, which OSHA would make accessible to the public. On first blush, one could argue that there is no downside to sharing individual employers' injury-and-illness summaries. If properly handled, no "identifiable" embarrassing individual employee information would be available. But when the full implications of this proposal are considered, there appears to be the possibility of abuse.

Regulation By Shame?

OSHA press releases emphasize that the data collection would allow OSHA to better target inspection efforts and would even highlight employers with especially strong commitments to safety. But since a November 2010 conference where Dr. David Michaels, Assistant Secretary, OSHA, stated that, "we will continue to practice regulation by shaming," this Administration has championed such an approach. The Administration also cut OSHA consultation efforts and has shown little interest in OSHA's showcase cooperative effort, the Voluntary Protection Program (VPP).

It seems unlikely that a significant reason for the initiative is to highlight good employer performance. At least, that's not how the Administration has worked so far. Dr. Michaels and his leaders would probably readily admit their interest in highlighting employers with higher numbers. But who determines which numbers suggest bad behavior? And what about factors beyond the safety culture? Of course, one workplace injury is one too many incidents, but how will these numbers be interpreted and used by others?
OSHA Proposes Publishing Worker Injury Data

How did the union and the research groups obtain Hyatt-specific information which purported to show that Hyatt workers suffered disproportionately from ergonomic injuries? Much of the data was not available on a government site. Rather, the union probably used existing OSHA provisions allowing employees, former employees, and their "representatives" to obtain extensive injury and illness data. The parties then fed this data to groups for analysis.

It's not clear how much merit the claims possessed, but the tactics often employed by the union seemed designed to cause the maximum business disruption possible, and it's questionable whether the campaign benefitted Hyatt or its workers. Hyatt is just one example. Consider the increase of public attacks on large international retailers for a host of alleged safety hazards. The allegations may or may not have merit, but almost all of the attacks are against nonunion employers, which raises questions about their purpose.

A main concern is balancing the value of establishing a better database for OSHA to use in determining where to focus its limited enforcement resources, against the potential anti-competitive mischief presented by the easy access to previously private data. Will OSHA be further pulled from its core safety enforcement duties?

Some recent OSHA actions raise questions about the reasons for OSHA's priorities, such as the divisive February 2013 Interpretation in which OSHA changed 40 years of precedent to propose that community organizers, union personnel at companies where they were not the certified bargaining agents, and other third parties could participate in OSHA inspections. Adding third parties to OSHA onsite inspections seem likely to generate conflict between OSHA, employers and third parties, and generate an increase in employer demands for a warrant.

And in an apparent inconsistency, OSHA has led the charge attacking employer safety plans which measure their success based on this same injury data, claiming that reliance on this data may lead employers to discourage employees from reporting workplace injuries. Moreover, employers and OSHA agree that it is ineffectual to target one's safety efforts on "lagging indicators."

Instead of focusing on injuries, which are lagging indicators, employers should focus on the "leading indicators," which are the actions which will prevent injuries. A major problem is that many customers select suppliers and construction contractors based on various injury statistics, which further create the risk of chilling employee injury reports. Moreover, such statistics can be affected by other factors.

The public will have 90 days, through February 6, 2014, to submit written comments on the proposed rule. On January 9, 2014, OSHA will hold a public meeting on the proposed rule in Washington, D.C. A Federal Register notice announcing the public meeting will be published shortly.

Every employer supports efforts that improve worker safety. The question is whether this proposal would improve worker safety or be used to create distractions from real safety issues.

For more information visit our website at www.laborlawyers.com or contact any member of the Fisher & Phillips Workplace Safety and Catastrophe Management practice group.

This Legal Alert provides an overview of a proposed new regulation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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LEGAL ALERT

Getting Off OSHA's Severe Violator's Enforcement Program "Black List"

After several years of received employer's requests, OSHA's Directorate of Enforcement Programs (DEP) issued a memorandum detailing the removal criteria for those employers currently under OSHA's Severe Violator Enforcement Program (SVEP). This memorandum provides employers guidance on how to be removed from the SVEP, a process that has been unclear since the program was first implemented.

What is SVEP?
The SVEP is a program originally implemented by OSHA on June 18, 2010 that was designed to focus its enforcement resources on "employers who have demonstrated recalcitrance or indifference to their OSH Act obligations by committing willful, repeated or failure-to-abate violations" in certain defined circumstances.

How do employers get put into the SVEP?
The OSHA SVEP Enforcement Directive sets forth what employer actions could put them into SVEP. According to this Directive, there are 4 types of accidents or violations that will bring a company under the SVEP, including:
1.) Fatalities or catastrophes involving an employee death or 3 more hospitalizations
2.) Non-fatalities or catastrophes involving high emphasis hazards
3.) Non-fatalities or catastrophes due to potential release of highly hazardous substances
4.) All "egregious" violations

Employers that are put into the SVEP must be prepared to adhere to increased invasive enforcement of the OSH Act. These enforcement acts include enhanced follow-up inspections, nationwide inspections of related workplaces, and increased publicity of OSHA enforcement both internally and externally. Additionally, OSHA may order the employer to hire a safety and health consultant to help develop a new safety program for the company or submit to the area director a log of work-related injuries and illnesses on a quarterly basis.

How do employers get off the SVEP?
According to the DEP memorandum, OSHA will consider removing an employer from the SVEP after 3 years from the date it was placed into SVEP (by either failure to contest, a settle agreement, or Review Commission decision). However, the removal is not automatic after 3 years, OSHA Regional Administrators will perform additional follow-up inspections and analysis of IMIS/OIS data and determine whether all SVEP related violations have been abated, all outstanding penalties paid, all settlement provisions have been complied with, and the employer has not received any additional serious citations related to the hazards identified in the SVEP inspection at the initial establishment or any related establishment. If so, the Regional Administrator will have discretion to remove the employer from SVEP. If the employer is found not to have carried out its abatement and settlement obligations, it'll be placed back into SVEP for another 3 years.

As a practical matter, the existence of the SVEP, the relatively easy requirements to be place on it, and the difficulty in being removed from the list make it even more important that employers carefully manage OSHA inspections to minimize citations or lay the groundwork for (1) future appeals; (2) "contest" citations; and (3) talk to legal counsel about defenses to any potential citations.

This Legal Alert provides highlights of certain specific federal regulations. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.
OSHA Increases Focus on Safety for Temporary Employees

In a recent memorandum from the national office to its Regional Administrators, OSHA set forth new issues that Compliance Officers should examine when they inspect worksites where temporary employees are working. The information to be documented includes determining whether the employees are exposed to conditions in violation of OSHA rules or other safety and health hazards and whether the employees received safety and health training "in a language and vocabulary they understand" as well as the supervising structure under which the temporary employees are reporting (i.e. who is supervising the temporary employees at the worksites).

Who falls under "Temporary Worker"?

The memorandum identifies temporary employees as "those who are paid by a temporary help agency, whether or not their job is temporary." The memo instructs compliance officers that if there are temporary employees, the inspector should "document" the name and location of the employees' staffing agencies. In addition, inspectors should also record "the extent to which the temporary workers are being supervised on a day-to-day basis either by the host employer or the staffing agency."

In addition, it is important to note that employees are not defined by OSHA based on who pays them. Instead, OSHA looks at whether there is an employer-employee relationship between the parties. Criteria OSHA uses to determine that relationship include:

- The nature and degree of control the hiring party asserts over the manner in which the work is done.
- The degree of skill and independent judgment the temporary employee is expected to apply.
- The extent to which the services provided are an integral part of the employer's business.
- The right of the employer to assign new tasks to the employee.
- Control over when the work is performed and how long it takes.

The Reason Behind the Memorandum

According to OSHA, in recent months there have been a series of reports of temporary employees suffering serious injuries. In some cases, the host employer failed to provide safety training or, if some instruction was given, it inadequately addressed the hazard believing that the temporary employee agency was providing the appropriate safety and health training.

Because of the number of temporary employees being utilized in worksites throughout the country, and the recent increase in the number of severe incidents, OSHA stated they wanted to "...increase the unified effort using enforcement, outreach and training to assure that temporary workers are protected from workplace hazards."

OSHA's Plan for Temporary Employees

The memo calls on OSHA compliance officers to use a newly created code in the agency's information system to denote when temporary employees are exposed to safety and health violations and further directs investigators to review records and conduct interviews to assess whether temporary employees have received the required training in a language and vocabulary they can understand. In a statement announcing the new initiative, OSHA officials stated that the agency has also started working with the American Staffing Association and with employers that use staffing agencies to promote best practices to protect temporary employees from hazards on the job.

Conclusion

Any employer utilizing temporary employees must be aware that no matter what its contract states as to the temporary employee provider responsibility to conduct OSHA safety and health training, the host employer will still be responsible for ensuring that its temporary employees have been properly trained and aware of all safety and health hazards at the worksite. This is especially true if the host employer is supervising the temporary employees. Also, under the OSHA multi-employer citation policy, the host employer will not likely be considered the controlling employer and may be cited for safety and health violations created by the temporary employees. This is a complex issue and employees utilizing a temporary employee provider should look closely at the contract with the provider to ensure that it is indemnified for any safety or health violations created by the temporary employee provider.

This Legal Alert provides highlights of certain specific federal regulations. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.
OSHA Opens Worksites to Allow Union Representatives to Participate in Walk-around Inspections of Non-Union Companies

In a new letter of interpretation publicly released on April 5, 2013 (originally dated February 5, 2013), the Occupational Safety and Health Administration (OSHA) announced for the first time that during an OSHA inspection of non-union worksites, employees can be represented by anyone selected by the employees including outside union agents.

Background

Until now, OSHA's policy has been to allow union representatives to be the "employee representative" but only when the inspection involves a "union" workplace. Section 8(e) of the Occupational Safety and Health Act of 1970 ("The Act") specifically stated the following regarding worksite inspections and third-party representatives:

"Subject to regulations issued by the ... [OSHA], a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the ... [OSHA] representative during the physical inspection of the workplace ... for the purpose of aiding the inspection. Where there is no authorized employee representative, the... [OSHA] representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace." (Emphasis Added)

In other words, historically under the Act, the union had to be a "recognized" or "certified" representative for purposes of collective bargaining under the National Labor Relations Act to act as the employee representative in an OSHA inspection.

OSHA's New Union Supported Policy

According to OSHA's new interpretation, non-union employees can select a person who is affiliated with a union or a community organization to act as their "personal representative" in filing complaints on the employees' behalf, requesting workplace inspections, participating in informal conferences to discuss citations, and challenging the abatement period in citations being contested by an employer. The interpretation letter goes on to state that "a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative."

In its February 5th letter, utilizes a novel analysis of Section 1903.8(c), in justifying its new determination that the Act and OSHA inspection regulations explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such representation is "reasonably necessary to the conduct of an effective and thorough physical inspection."

Under this expansive interpretation (which fails to specifically define who is "a person" affiliated with a union or community representative), not only can union organizers be designated as the "employee representative" but also individuals such as community activists or perhaps even plaintiff lawyers could participate in an OSHA inspection on behalf of some of the employees. Obviously, there is concern that OSHA's new policy may encourage unions to get involved in OSHA inspections and complaints in non-organized facilities as a means to gain access to the facility, which they normally would not have access. This change in policy could be a big boost to union organizing and has been widely applauded by most, if not all, labor union organizations.

OSHA's new interpretation also goes directly against its own inspection regulation. Section 1903.8 of the OSHA inspection regulations states in part that:

(a) "Compliance Safety and Health Officers shall be in charge of inspections and questioning of persons. A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection."

(b) "...If there is no authorized representative of employees, or if the Compliance Safety and Health Officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace."

(c) "The representative(s) authorized by employees shall be an employee(s) of the employer...is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such
third party may accompany the Compliance Safety and Health Officer during the inspection."

In addition, OSHA's current Field Operations Manual (FOM) also does not support its new interpretation. With respect to walkaround rights, the FOM states:

VII. Walkaround Inspection.

A. Walkaround Representatives.

Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employee.

1. Employees Represented by a Certified or Recognized Bargaining Agent.

During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in a walkaround.

2. No Certified or Recognized Bargaining Agent.

Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for OSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on a walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.


Employee members of an established plant safety committee or employees at large may designate an employee representative for OSHA inspection purposes."

The new interpretation letter also raises many questions that have not yet been addressed and may lead to legal issues including:

- Who is an appropriate employee representative?
- Who makes the determination that the selected individual(s) is an appropriate employee representative?
- Do the employees get to vote for the employee representative and does the selected individual have to receive a majority of the employee votes at the facility?
- If one or more employees object to the selected representative, does it void the selection?
- Do different groups of employees get to select their own representative? How many employee representatives can be present during an investigation?
- What rights do the non-employee representatives have during the inspection? (i.e. Being present during managers and supervisor's interviews).

Employers Proactive Approach to OSHA's New Interpretation

It is important to note that worksites that have formal safety committees in place may be less susceptible to the application of this new interpretation in its OSHA walkaround inspection process. Under the form, the safety committees can designate the employee representatives for the facility, which would make it more difficult for the OSHA inspector to choose an outside union organization. If a company does not have a safety committee already in place, employers may want to consider establishing one as that committee arguably would hold the "representative" role in walkaround inspections. Employers setting up safety committees should be aware of the National Labor Relations Act and unfair labor practice (ULP) pitfalls if the safety committee is not properly implemented. Employers should also consider what trade secret, confidentiality and safety and health measures should be in place before allowing any third party to have access to the workplace. If the OSHA inspector does attempt to bring in a third-party as a part of the inspection, the employer should attempt to ascertain the reasons for that third-party selection and "why is the person's presence "reasonably necessary" in conducting the OSHA inspection?"

What many employers do not know, is that they have the right to refuse a walkaround inspection on any basis and require OSHA to get a warrant. One option for employers is to advise the OSHA compliance officer that it will permit OSHA to conduct its inspection but it is refusing entry of any third party. OSHA may treat this as a "refusal of entry" and seek a warrant. Since OSHA's request directly contradicts the Act and OSHA regulations, the federal district court judge reviewing the request for the warrant may not issue it. Employers should know that they will not be allowed to participate in or argue on their behalf in the "ex parte" warrant application proceedings. If the warrant is issued, however, the employer would have to decide whether to move to quash the warrant or otherwise oppose the warrant if OSHA attempts to enforce the warrant in federal court. While requiring a warrant might not be the most favorable approach for some employers, it may prevent the excess use of walkaround inspections for organizing non-union workforces if the warrant is ultimately quashed.

The major reaction by the business community to this new interpretation letter is that it is a payback by OSHA for the union support in past elections. The facts are clear that the new interpretation letter directly contradicts the express language of the Act and OSHA's regulation, as well as adds little, if anything, to improve safety and health in the workplace. What it does is to open the door for potentially allowing an OSHA inspection to be improperly utilized as a union organizing tactic. This is one more reason why all employers must know all of their legal rights during an OSHA worksite inspection.

Fisher & Phillips has developed a detailed strategy and protocol for its clients to respond to either OSHA or an employee's request for participation of non-employee representations during an OSHA inspection. For more information, visit the Fisher & Phillips LLP web site at www.laborlawyers.com. For help with ensuring that your business or company are in compliance or for advice concerning any of OSHA's safety and health standards, contact your regular Fisher & Phillips attorney or any of the lawyers in our Workplace Safety and Catastrophe Management Group.

This Legal Alert provides highlights of certain specific federal regulations. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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Thirteen Strategies Every Employer Should Implement
To Improve Safety, Reduce OSHA Penalty Exposure, And
Improve Company Profits While Protecting Its Reputation/Brand

1. **Determine Your Vulnerability Under OSHA’s New Priorities**: First determine which OSHA safety and health standards are applicable to your operation. Then, find your SIC classification, which may determine which of OSHA’s 140+ emphasis efforts affect you, and comply with the requirements of those national and local emphasis programs. Finally, ensure that your facility is prepared to handle an OSHA inspection and that your managers know their legal rights during and after an inspection.

2. **Audit Your Company’s OSHA Recordkeeping, Especially Form 300 Injury & Illness Logs**: Recordkeeping is one of the cornerstones of your safety program and a driver of OSHA’s new enforcement efforts. In addition to its National Emphasis Program (NEP) on Recordkeeping Audits, OSHA has instructed its compliance officers to more fully review every Company’s OSHA 300 Logs when conducting any inspection. An employer can expect a full-blown OSHA safety or recordkeeping audit if there are deficiencies in the logs. Audit and correct your last five years of logs, looking at insurance, first aid and other records, as OSHA might do, and look for “patterns” of injuries — which OSHA will also do!

3. **Audit Your Workplace For Routine Violations**: OSHA is looking for the “low-hanging fruit” or more-common safety and health violations, such as: blocked exits and electric panels; improper materials handling and racks; personal protective equipment violations; recordkeeping errors; housekeeping problems; etc. These routine violations are challenging to prevent. In the case of an employer with many locations, past violations will result in repeat citations. OSHA’s focus on such routine items, as well as use of its “egregious” policy, is generating six- and seven-figure penalties. OSHA’s proposed penalty calculation guidance is intended to raise the average penalty approximately 300%, and does not count the effects of the Protecting American Workers Act, if passed. Multi-location employers are especially at risk, and only improved and consistently enforced safety rules, self-audits, and supervisor accountability will reduce exposure.

4. **Review Abatement Of All Past OSHA Citations**: Prepare for OSHA’s proposed change to consider past citations for the last five (5) years, not the current three (3) years, in issuing “repeat” citations. Also, OSHA may cite for “failure-to-abate” if you cannot document past abatements of items again out of compliance.

5. **Prepare For OSHA’s Revised Approach To Ergonomics Enforcement**: OSHA will require an additional column to 300 Logs specifically for musculoskeletal disorders (MSD’s), which as broadly defined may include 75% of your workplace injuries. OSHA is currently utilizing the General Duty clause to issue ergonomic citations and has announced its intention to more widely use these General Duty citations. The addition of a new column for musculoskeletal disorders may be used by OSHA to develop data to move forward with a possible ergonomics standard as well as additional ergonomic enforcement efforts and to highlight your facility’s ergonomic problem areas.

6. **Use Job Safety Analysis (JSA) And Related Efforts To Focus Your Overall Workplace Safety And Health Strategy**: OSHA has proposed development of a standard requiring a comprehensive safety management program. This standard would require employers to determine all hazards, and (even if there

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is not an applicable OSHA standard) to develop procedures and training — and OSHA would cite employers for failure to do so. Use JSA development to increase focus on your training, supervisor involvement, and safety oversight.

7. **Turning Good Intentions Into A Workable Plan To Make Safety The #1 Goal From The Work Floor To The “C” Suite:** By developing a comprehensive safety and health management system which includes management commitment and all employee involvement, a company can genuinely change its safety and health culture; however, this effort requires more than a written plan.

8. **In Lean Times Utilize Safety As A Profit Center For Your Company:** Beyond reducing workers' comp claims, a comprehensive safety and health management programs can become a "profit center" for a company, allowing it to be more competitive in the local, national or global marketplace. Connect safety to productivity and quality; use it along with "green" and similar efforts as a marketing tool, and as a way to increase employee involvement and satisfaction.

9. **Develop Your Company's Emergency Action And Related Plans To Deal With The Inevitable:** Companies must maintain emergency action or emergency response plans which focus on natural disasters, including pandemics and Katrina-like events, as well as man-made disasters. These plans should tie in with an enhanced emphasis on evacuation plans, exit and egress compliance, training, and EAP/ERP and related plans. 2009's pandemic planning showed many gaps in employers' planning. OSHA is especially inspecting exit and evacuation planning for citations. Your plans should consider "non-safety" issues, such as business continuation, management of leaves and benefits, remote work and wage-hour compliance, etc.

10. **Improve Your Company's Wellness Plan And Protect It From Potential Liability:** A Wellness Plan offering more than just smoking cessation benefits is essential for dealing with an increasingly older and heavier workforce. Although new employment regulations including GINA and the ADAAA have increased the pitfalls associated with wellness programs, they can be effectively and lawfully managed.

11. **Understand The Implications Of OSHA's Multi-Employer Citation Policy:** Recognize and respond to how contractors, customers, and vendors can expose you to OSHA violations or harm your employees, including employees working away from your site.

12. **Avoid Membership In OSHA's Severe Violators Enforcement Program (SVEP) And Similar Efforts:** Consider how to avoid "membership" in the current EEP, the new SVEP, and other enforcement programs which may target all or some of a company's facilities for increased inspections and scrutiny.

13. **Solve Other Problems By Solving Safety Problems:** Showing employees you care, and involving them in safety management, can prevent a multitude of legal problems. As an example, surveys have shown that, if safety is the primary issue in union organizing drives, the union success rate in those drives is approximately 67%, the highest for any issue. Not surprisingly, safety may be a very public and embarrassing issue during labor disputes. Use increased safety efforts to create a workplace where employees do not experience the issues which often spawn lawsuits, union organizing, or conflict in an already unionized setting. Use training and audits to correct a wide range of legal and HR vulnerability, including wage-hour and other problems. As an example, money has been budgeted to train OSHA compliance officers to determine if alleged independent contractors are, in fact, employees.

Fisher & Phillips is ready to assist you in implementing each of these action plan items to improve your safety program, to increase your productivity and quality while at the same time protecting your Company's brand/reputation as well as assisting you to effective deal with an enforcement-focused OSHA.

Edwin G. Foulke, Jr.
efoulke@laborlawyers.com
Direct: 404.240.4723

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OSHA Inspection Checklist

Prepared by:

Edwin G. Foulke, Jr.
Direct: (404) 240-4273
efoulke@labornlawyers.com

1075 Peachtree Street NE, Suite 3500
Atlanta, GA 30309
OSHA Inspection Checklist

A. Prior to Inspection

- Display the official OSHA poster where notices to employees are customarily posted.

- Obtain upper management commitment to workplace safety and display commitment statement.

- Conduct internal or external safety audit and hazard assessment of the facility to spot and correct apparent safety and health hazards. It is important that hazards identified are addressed or corrected in a timely manner.

- Ensure that a management official has been assigned responsibility for safety and health compliance and for dealing with employees, OSHA, and other individuals on the subject of workplace safety and health.

- Determine which OSHA standards and regulations apply to the facility and ensure that all required written programs, plans, training and recordkeeping are complete and updated on an annual basis. Insure that the facility’s personal protective equipment hazard assessment has been completed.

- Train designated management personnel on how to properly handle and respond to an OSHA inspection, as well as approaches by law enforcement officials, building or fire inspectors, and inspectors from other safety regulators.

- Determine the company policy on requiring OSHA to have a warrant prior to allowing an inspection to be conducted.

- Foster employee participation in safety and health management and instill commitment in employees to safe work practices.

- Establish a crisis management team to deal with catastrophic occurrences, fatalities, and OSHA-related publicity.
• Ensure that injuries and illnesses are properly recorded and supporting documentation is available.

• Ensure that Hazard Communication Plan, MSDS's, and related materials are available.

• Notify OSHA within eight (8) hours if a fatality occurs or more than three (3) employees are hospitalized for the same incident. Where fatality or hospitalization occurs, consult with the company's OSHA counsel to determine what investigation should be conducted and what accident reports need to be prepared.

• Provide appropriate equipment, i.e. camera, video, monitoring, etc., for conducting OSHA inspections.

• Review previous OSHA citations and ensure abatement has been completed and hazards cited have not reoccurred.

• Ensure coordination between all employers on a multi-employer site.

B. Conducting the Inspection

1. Initial Contact and Opening Conference

• Refer the OSHA compliance officer arriving on the premises to the company's designated safety officer.

• No employees, other than the facility manager and/or the designated management safety officer, should communicate with the OSHA compliance officer prior to the opening conference.

• The safety officer should review the compliance officer's credentials as well as obtain his or her business card with an address and phone number to ensure that the compliance officer is on an official inspection.

• Determine from the compliance officer the purpose, scope, and the circumstances of the visit to the facility. If the inspection is based on a complaint, obtain a copy of the complaint.

• Determine if the compliance officer has a warrant to conduct the inspection. If yes, find out the scope of the warrant.

• Notify the company's OSHA counsel. This should be done prior to the opening conference in order to receive any instructions or to raise some defense or objection.

• Notify the designated employees' representative (if applicable) of OSHA's presence.
• Have an opening conference with the OSHA compliance officer to establish:
  – the focus areas of the inspection;
  – the scope and route of the walk-around inspection;
  – the designated trade-secret areas or processes;
  – the procedure for conducting employee interviews and producing documents;
  – the schedule of interviews;
  – the documents for review by OSHA;
  – the procedure for requesting copies of any employee complaints; and
  – the facility’s rules and procedures OSHA will be expected to follow.

• Conduct all necessary safety and health advising/training of OSHA compliance officers prior to access to restricted areas. Ensure that the OSHA compliance officer wears all necessary personal protective equipment and follow all company safety and health policies.

2. Walk-Around Inspection

• A designated safety officer or manager should stay with each OSHA compliance officer at all times during the inspection except during hourly employee interviews.

• The designated safety officer should take detailed notes, including date(s) of inspection, areas inspected, items discussed and employees interviewed.

• If compliance officer deviates from area(s) covered by complaint then company safety officer should inquire as for the reason for the deviation.

• When appropriate, photographs should be taken of areas inspected by the OSHA compliance officer as well as all items photographed by the compliance officer. Video also should be utilized, if used by the compliance officer.

• The designated safety officer should immediately have corrected any alleged violations identified by the compliance officer to the extent possible, but should not acknowledge that a citation is appropriate.
• No management or supervisory employee should give information or make statements to the compliance officer without approval from the designated safety officer or the company’s OSHA counsel.

• All work rules and safety procedures should be enforced and applicable to the compliance officer and walk-around team during the inspection.

• The compliance officer should be asked to put all requests for company information and/or documents in writing.

• The company’s OSHA counsel should review all requests for documents and information as well as all information and documents provided.

• Document all samples or monitoring test taken by the OSHA compliance officer and request copies of all sampling and monitoring results as well as all photographs and videos taken. The company should request the OSHA compliance officer to schedule sampling and monitoring at a time when the company can conduct its own sampling and monitoring.

• Request copies of all OSHA sample and monitoring reports from the compliance officer.

3. Closing Conference

• Primarily listen to the Compliance Officer’s proposal, and do not argue or debate the initial proposed findings.

• Remind the compliance officer of the scope of the inspection as stated in the opening conference.

• If directed by OSHA counsel, provide additional information and documentation relevant and supportive of the company’s position as well as any information which shows abatement of any alleged violation.

• Obtain from the OSHA compliance officer an acknowledgment of receipt of the documents provided.

• Take detailed notes on the alleged hazards identified and the problem areas indicated by the compliance officer along with the applicable standards and suggested abatement procedures.

• Provide the OSHA compliance officer with the name, title, full address, and phone and fax numbers of the person to whom all OSHA correspondence should be directed.
C. After the Inspection

- Try to obtain all sample and monitoring reports from OSHA.
- Review all areas noted by the compliance officer and make appropriate abatement.
- Provide the company's OSHA counsel with copies of all of the documents provided to OSHA and all of the notes, photographs, videos, etc., taken during the inspection.
- The company's OSHA counsel should make a written request to OSHA to ensure that all trade secrets and proprietary information disclosed during the inspection are kept confidential.
- If facility is issued citations by OSHA, the following should be done:
  - Post the citation (with penalty amounts deleted -Note: in state plan states need to check rule on posting requirements) in the area where employee notices normally are posted.
  - Immediately notify the company's OSHA counsel about the citation and send a copy of the citation to them.
  - With the advice of counsel, schedule an informal conference with OSHA.
  - Post Notice to Employees of informal hearing.
  - Where an agreement cannot be obtained quickly, employer must file a Notice of Contest within fifteen (15) workings days of the employer's receipt of citations. Some state plan states maintain different procedures. An employer who misses a contest deadlines cannot typically get an extension or overcome the default.
OSHA Injury & Illness Recordability Worksheet*

Name of Employee: ____________________________ Date of Injury/Illness Onset: ____________

Description of Injury or Illness: ____________________________

(a) Where in the facility did the injury or illness occur? For example, break room, South Receiving dock, etc. Do not just list “office” or “warehouse” — be specific. ____________________________

(b) What piece of equipment, item, product, etc. caused the injury or illness? ____________________________

(c) What was the injury or illness the employee experienced? ____________________________

Right or left side, hand, eye, etc. ____________________________

If a finger or toe injury, which digit? ____________________________

**All of your responses to (a)-(c) above should be captured in your explanation of the injury/illness in Column F of the OSHA 300 Log, once you’ve determined whether the injury/illness should be recorded.**

I. Did the Injury/illness occur in the work environment?

Yes, please explain:

No, please explain:

If the injury/illness occurred in the work environment move to Section II.

If you do not believe the injury/illness occurred in the work environment, or if you are unsure, contact counsel to confirm the event is not recordable. Once confirmed, move to Section IX.
II. Is the Injury or Illness a New Case?

Yes, please explain:

No, please explain:

If the injury/illness is a new case move To Section III.

If the injury/illness is not a new case or you are not sure if the case is new or not contact counsel to make a determination. If you determine it is not a new case. The incident is NOT recordable as a new entry, however, you must update the previously recorded entry (assuming it occurred in the last 5 years). Move to Section IX.

III. Does the injury/illness meet any of the following exceptions for recordability despite having occurred in the workplace?

Employee was on the premises as a member of the general public.  

Symptoms were the result of voluntary participation in a wellness or recreational event.  

Symptoms were related to a common cold or flu or similar non-work related disease. (note: Pandemic flu may recordable in certain circumstances)  

Symptoms were the result of personal self medication, grooming, or intentionally self-inflicted.  

Symptoms were the result of a mental illness that has not been confirmed by a LHCP to be work related.  

Symptoms surfaced at work but were the sole result of a non-work related event or exposure that occurred outside the work environment.  

Symptoms were the sole result of the personal preparation or consumption of food or drink.  

Symptoms were the result of a personal task performed outside of normal work hours.  

Incident involved a motor vehicle accident while the employee was in the act of commuting.  

Did not result in a significant aggravation of a pre-existing condition.
Yes, the injury/illness meets the exception checked above because:

Attach any supporting documentation for your decision to this document.

If you believe that the event may meet one of the exceptions for recordability, contact counsel to confirm that the event is not recordable. Once confirmed, move to Section IX.

No, the injury/illness does not meet any of the above exceptions.

If the injury/illness does not meet any of the exceptions move to Section IV.

IV. Did the incident result in any of the following? Circle all that apply.

Death          Days Away From Work          Restricted Work          Job Transfer
Loss of Consciousness          Significant Injury/Illness Diagnosed by a LHCP

Yes. Provide details:

The incident is recordable*.
Move to Section IX.

No.

If none of the above apply, move to Section V.

*If you circled more than one outcome above, only record the most serious outcome circled above on the 300 log in one of the Columns (g) through (j). However, you must still count the less serious outcome’s days in Column(s) (k) and/or (l).

V. Did the employee visit a licensed health care professional?

Yes. Provide details:

Move to Section VI.

No.

Move to Section VII.

VI. Was the visit with the LHCP’s limited to the following? In other words, no medical treatment (as defined in the regulations – see definition section below) was provided and nothing other than those items circled below occurred at the visit. Circle all that apply.

Observation          Counseling
X-Ray’s          Blood Test          Other Diagnostic Testing

Administration of Medication ONLY for purposes of performing diagnostic Testing
Yes. The employee’s visit to the LHCP did not include any "medical treatment" and was limited to the items circled above. Specifically, other diagnostic tests performed were as follows:

Move to Section VII.

No. Employee received medical treatment during employee’s visit to the LHCP including the following:

If medical treatment was provided, or you are not sure if medical treatment was provided contact counsel to make a determination. If you determine medical treatment was provided, move to Section VIII.

VII. Did the employee provide any treatment to himself?

Yes. Provide details:

No.

Move to Section VIII. The injury is not recordable. Move to Section IX.

VIII. Did the treatment fall within any of the following categories of “First Aid?”

_____ Use of nonprescription medication at nonprescription strength.

_____ Tetanus immunization.

_____ Cleaning, flushing or soaking of surface wounds.

_____ Use of wound coverings such as bandages, gauze pads, butterfly enclosures or Steri-Strips.

_____ Use of hot or cold therapy.

_____ Use of non-rigid means of support; i.e., elastic bandages, wraps, non-rigid back belts, etc.

_____ Use of temporary immobilization devices while transporting an accident victim.

_____ Drilling of a fingernail or toenail to relieve pressure or draining of fluid from a blister.

_____ Removal of foreign bodies from the eye using only irrigation or cotton swabs.

_____ Removal of splinters or foreign materials from areas other than the eye using irrigation, tweezers, cotton swabs or other simple means.

_____ Use of finger guards.
Use of simple massages. Note: physical therapy or chiropractic treatment is considered to be medical treatment.

Drinking fluids for relief of heat stress.

Use of eye patches.

Yes, the injury/illness was treated ONLY as marked above:

Attach any supporting documentation for your decision to this document.

No, the injury/illness was not treated ONLY by the above first aid "exceptions," but the employee received other treatment as follows:

Attach any supporting documentation for your decision to this document.

The injury/illness is not recordable. Move to Section IX.

The injury/illness is recordable. Move to Section IX.

IX. Summary of Findings

Based on the above analysis:

The injury or illness is recordable. Proceed to complete the OSHA 300 log.

The injury or illness is NOT recordable because:

- It did not occur in the work environment.
- It occurred in the work environment but met one of the exceptions in Section III.
- It did not meet any of the criteria for recordability – death, lost workdays, loss of consciousness, transfer to another job, or medical treatment beyond first aid.
- Other reasoning:

The injury or illness is NOT recordable as a new entry, but the previous entry must be updated with the new information (assuming the previous injury/entry was within the last 5 years). Proceed to update the appropriate prior OSHA 300 log.

Name of Evaluator: ___________________________
Signature: _________________________________
Date of Evaluation: _______________________

List the supporting documents attached:

Other Comments or Notes:
This worksheet is intended only as a guide to assist the employer in analyzing the issues relevant to making a determination as to recordability of a workplace injury or illness. Each injury or illness will require a specific evaluation of the facts in determining recordability. Not all scenarios can be accounted for and this worksheet should not be construed to provide legal advice regarding the recordability or non-recordability of a particular injury or illness. Contact Edwin G. Foulke, Jr. at (404) 240-4273 or efoulke@laborlawyers.com, co-chair of the firm’s Workplace Safety and Catastrophe Management Practice Group or your Fisher & Phillips attorney to provide more detailed advice on the recordability of an injury or illness.
Definitions & Explanations

Section 1904.5 Determination of work-relatedness

(a) Basic requirement.

You must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies.

(b) Implementation.

(1) What is the "work environment"?

OSHA defines the work environment as "the establishment and other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work."

Section 1904.6 Determination of new cases

(a) Basic requirement.

You must consider an injury or illness to be a "new case" if:

(1) The employee has not previously experienced a recorded injury or illness of the same type that affects the same part of the body, or

(2) The employee previously experienced a recorded injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and symptoms had disappeared) from the previous injury or illness and an event or exposure in the work environment caused the signs or symptoms to reappear.

Section 1904.7 Medical Treatment/First Aid

"Medical treatment" means the management and care of a patient to combat disease or disorder. For the purposes of Part 1904, medical treatment does not include:

A. Visits to a physician or other licensed health care professional solely for observation or counseling;

B. The conduct of diagnostic procedures, such as x-rays and blood tests, including the administration of prescription medications used solely for diagnostic purposes (e.g., eye drops to dilate pupils); or

C. "First aid" as defined in paragraph (b)(5)(ii) of this section.
paragraph (b)(5)(ii), defines first aid as follows:

A. Using a nonprescription medication at nonprescription strength (for medications available in both prescription and non-prescription form, a recommendation by a physician or other licensed health care professional to use a non-prescription medication at prescription strength is considered medical treatment for recordkeeping purposes).

B. Administering tetanus immunizations (other immunizations, such as hepatitis B vaccine or rabies vaccine, are considered medical treatment).

C. Cleaning, flushing or soaking wounds on the surface of the skin;

D. Using wound coverings, such as bandages, Band-Aids®, gauze pads, etc.; or using butterfly bandages or Steri-Strips® (other wound closing devices, such as sutures, staples, etc. are considered medical treatment);

E. Using hot or cold therapy;

F. Using any non-rigid means of support, such as elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes);

G. Using temporary immobilization devices while transporting an accident victim (e.g., splints, slings, neck collars, back boards, etc.)

H. Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;

I. Using eye patches;

J. Removing foreign bodies from the eye using only irrigation or a cotton swab;

K. Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs, or other simple means;

L. Using finger guards;

M. Using massages (physical therapy or chiropractic treatment are considered medical treatment for recordkeeping purposes);

N. Drinking fluids for relief of heat stress.

This list of first aid treatments is comprehensive, i.e., any treatment not included on this list is not considered first aid for OSHA recordkeeping purposes. OSHA considers the listed treatments to be first aid regardless of the professional qualifications of the person providing the treatment; even when these treatments are provided by a physician, nurse, or other health care professional, they are considered first aid for recordkeeping purposes.
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<th>Address 2</th>
<th>Zip Code</th>
<th>Phone</th>
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<tbody>
<tr>
<td>Atlanta</td>
<td>1075 Peachtree Street, Suite 3500</td>
<td></td>
<td>30309</td>
<td>(404) 231-1400</td>
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<td>21157</td>
<td>(410) 857-1369</td>
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<td>02109</td>
<td>(617) 722-0044</td>
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<td>60603</td>
<td>(312) 346-6081</td>
</tr>
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<td></td>
<td>44147</td>
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<td>1320 Main Street, Suite 750</td>
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<tr>
<td>Columbus</td>
<td>4449 Easton Way, 2nd Floor</td>
<td></td>
<td>43219</td>
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<td>Denver</td>
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<tr>
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<td>1875 I Street, NW, Suite 500</td>
<td></td>
<td>20006</td>
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