

Week of **November 11, 2013**

OSHA Focuses on Temporary Worker Safety

OSHA is getting tough on staffing agencies that provide employers with temporary workers if they do not provide those workers with legally required safety and health training. But, the buck doesn't stop there: employers that use the temporary workers are feeling the heat, too.

After investigating the death of two temporary employees from excessive heat this summer in Texas and Virginia, OSHA took action that could increase the risk of civil liability claims against the involved companies. OSHA issued citations and fines both to the temp agencies and to the employers that used the workers.

While the \$13,000 to \$20,000 fines issued to the companies were moderate in comparison to other OSHA penalties, the government's actions could provide evidence that plaintiffs' lawyers can use to help sue the employers and make an end-run around workers' compensation shields.

In an Op-Ed piece in the *Houston Chronicle* last month, OSHA chief Dr. David Michaels said his agency has seen too many instances over the past year of fatalities involving workers during their first few days on the job.

"Most of these have been temporary workers," he wrote. "We have known for a century that new workers are at increased risk for occupational injury and fatality, and that higher risk is due to a lack of safety training and experience at that work site."

OSHA defines temporary workers as those supplied to a host employer and paid by a staffing agency. It has used its authority under the general duty clause of the Occupational Safety and Health Act to enforce its rules against staffing agencies. Some OSHA officials believe that temporary workers often lack benefits, have no access to

paid sick leave, and are often afraid to raise concerns for fear of reprisal.

Since April, OSHA has undertaken a national initiative to protect temporary workers in order to halt what Michaels described as a "rising toll of fatal injuries." Agency inspectors must determine, in every inspection, if every temporary worker on the site has received the safety training and protections required by law for the job. "If they haven't, we will hold their employers accountable," Michaels warned.

In August, Michaels announced OSHA was partnering with the Department of Labor's Wage and Hour Division to create new strategies to protect temporary workers. The agency is also trying to clarify the obligations staffing agencies have for their workers when they are on-site at host employers.

In the *Chronicle* article, Michaels said OSHA is also reaching out to labor staffing agencies, explaining how they must insist their employees are not put at risk of injury or death while working. And OSHA is making every worker, including temporary workers, aware that they have the right to contact OSHA if they face workplace hazards.

At least one state has also taken steps to protect temps. In Massachusetts, a new law effective in January requires temporary agencies to provide certain workers with written job orders that have information about the job, necessary training and which party is responsible for payment of personal protective equipment.

Jackson Lewis's Safety and Health Group can assist your company minimize OSHA and liability risks. Contact Henry Chajet (703-483-8381, Henry.Chajet@jacksonlewis.com) or Mark Savit (303-876-2203, Mark.Savit@jacksonlewis.com).

HazCom deadline reminder! Dec. 1st is the deadline for employers to have completed training their employees on the new label elements and safety data sheet format under OSHA's revised Hazard Communication Standard (HCS). The label elements are pictograms, hazard statements, precautionary statements and signal words. The safety data sheet consists of a specified 16-section format. Full compliance with the rule begins in 2015. OSHA revised its 30-year-old HCS to harmonize U.S. hazard communication regulations with international standards. Contact Jackson Lewis' Safety and Health Group for more information on the new hazard communication requirements and training for your employees.

OSHA Says SVEP is a Success

OSHA says a preliminary review of the first 18 months of its Severe Violator Enforcement Program (SVEP) indicates the program has met several key goals.

SVEP was launched in June 2010 to replace OSHA's Enhanced Enforcement Program. In a white paper about SVEP OSHA issued early this year, the agency said the program has been successful for its intended purpose of targeting employers OSHA believes have demonstrated indifference to their legal obligations for safety by committing willful, repeated or failure-to-abate violations.

As of August 2012, OSHA had designated 288 inspections as involving SVEP—on average, about 12 per month. OSHA uses several criteria to target employers for the program. These are a fatality or catastrophe, non-fatal/catastrophe related to high emphasis hazards or those involving a potential release of a highly hazardous chemical, or employers considered egregious violators.

High emphasis hazards are considered falls, amputations, combustible dust, lead, crystalline silica, excavation/trenching, shipbuilding and high hazard chemicals at firms that fall under OSHA's process safety standard.

Not uncommonly, settlements with SVEP violators involve agreement by the company to go beyond compliance with OSHA standards. Of 180 inspections

that were SVEP cases in February 2012, 67 settlements included enhanced settlement provisions. Most often, these require employers to provide safety training, inform OSHA of current and future worksites, use OSHA's consultation services and regularly conduct safety and health audits.

Once deemed a SVEP violator, employers have found it difficult to be delisted. In response to that concern, OSHA issued a memo in August 2012 explaining that an employer may be removed after three years from the date of final disposition of all SVEP inspection citations.

Except where national corporate-wide settlements are involved, an employer's removal from the SVEP is up to the OSHA Regional Administrator and comes following an additional inspection and review of information in OSHA's database. Any employer which fails to abate all hazards, pay all penalties or comply with settlement terms during the three-year period stays on SVEP for three more years and then is re-evaluated. OSHA's enforcement directorate makes the removal determination in cases where national corporate-wide settlements exist.

Sites in danger of acquiring SVEP status or those already there should obtain legal advice because the consequences of being singled out can be devastating. For information, contact Henry Chajet (703-483-8381, Henry.Chajet@jacksonlewis.com) or Mark Savit (303-876-2203, Mark.Savit@jacksonlewis.com).

