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FEDERAL OSHA PLAYS “BIG BROTHER” TO STATE OSHA PLANS

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INTRODUCTION

Under Section 18 of the Occupational Safety and Health Act of 1970, individual states have the option of developing and enforcing their own occupational safety and health programs as long as the program is approved by federal OSHA. These so-called “state plan states” must have programs that are *at least as effective* as federal OSHA in protecting workers within the state’s jurisdiction. Twenty-one states and Puerto Rico have complete programs covering both the private sector and state and local governments. In order to be approved to administer its own plan, a state must enact an equivalent of the federal OSH Act and must adopt its own standards, regulations and operating procedures, all of which must be updated within six months of any change in the federal program, including all newly issued federal regulations.

Because the state plan states’ jurisdiction is limited to employers and facilities within the state’s boundaries, the enforcement agencies within the state plan states tend to have a closer,

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more familiar relationship with employers than federal OSHA. However, federal OSHA recently issued a report that reviewed each state plan state and made critical recommendations for strengthening perceived gaps and weaknesses in those state programs. Through this review process, federal OSHA has effectively imposed its heightened enforcement agenda (including inspections, citations and enhanced penalties) on the state plan states, prompting more aggressive enforcement on employers within those states.

OSHA'S 2009 REPORT ON NEVADA

Most employers are unaware that any individual who finds inadequacies or other problems in the administration of a state's OSHA program may file a Complaint About State Program Administration (CASPA) with the appropriate OSHA Regional Administrator. In 2009, OSHA received two CASPAs about the manner in which the Nevada's enforcement agency had handled inspections at two casino hotels in Las Vegas. These complaints prompted an investigation into Nevada's occupational safety and health program, a report on which was issued in October 2009. As part of its review, OSHA examined at the manner in which Nevada had handled 23 fatality inspections and five high penalty inspections.

Based on its review of these cases, OSHA concluded that Nevada had not been aggressive enough in identifying workplace hazards and issuing citations to employers. Specifically, OSHA issued the following findings:

- Willful violations were discouraged because of the lack of management and legal counsel support.
- Clearly supportable repeat violations were not cited.
- In 17 percent of the fatality cases reviewed, hazards that were identified during inspections were not addressed in citations, a notice of violation or a letter to the employer.

In addition, OSHA found that Nevada had not afforded employee representatives and unions ample opportunity to participate in the inspection process:

- Union representatives were not notified of inspections and provided an opportunity to participate in opening conferences, closing conferences and informal conferences.
- In almost half of the fatality cases reviewed, the state failed to notify the families of deceased workers that it was investigating the death of their loved one. Thus, these family members were never given an opportunity to talk with investigators about the circumstances of the fatality.
- In the Luxor Hotel Case (the subject of the second CASPA), the Nevada OSHA investigator did not speak with employees to determine exposure to the alleged hazard. Therefore, the inspector was unable to determine that employees were exposed to a hazard. Additionally, worker representatives (unions) were not present and were not interviewed during this inspection. Their statements may have revealed recent worker exposures and thus confirmed the violation.

Based on these findings, OSHA recommended that Nevada increase the pursuit of willful violations and ensure that any hazards identified during the course of an inspection are addressed through a citation to the employer, notice of violation, or other method.

OSHA'S NATIONWIDE EVALUATION

Describing the results of the Nevada review as “serious operational deficiencies,” OSHA proceeded to review the state programs in Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, U.S. Virgin Islands, Virginia, Washington and Wyoming. The report for each state is available at <http://www.osha.gov/dcsp/osp/efame/index.html>.

Summarizing the effort, OSHA Assistant Secretary of Labor Dr. David Michaels stated that “[w]hile we found many positives in the state programs, we also found deficiencies including concerns about identification of hazards, proper classification of violations, proposed

penalty levels, and failure to follow up on violations to ensure that workplace safety and health problems are corrected." Each state is now required to develop a corrective action plan to address the findings and recommendations in OSHA's report. In certain instances, such as in Hawaii, OSHA recognized that deficiencies in the state's program resulted from severe budget cuts, and OSHA has offered assistance to those states in developing appropriate corrective action.

WHAT'S GOOD FOR THE GOOSE.....

In some cases, the federal OSHA investigation revealed that certain state plan programs had standards or procedures that *exceeded* the federal standards. OSHA highlighted these aspects of state plan programs, suggesting that OSHA may try to enact or adopt similar standards or procedures at the federal level in the near future. For example, in Oregon, an employer's contest of a citation does not stay the employer's obligation to abate the cited condition. In contrast, at the federal level, the filing of a good faith notice contesting the citation, abatement date, and method of abatement will relieve the employer of the obligation to abate the cited condition until the contested proceeding is resolved, either through settlement or by an administrative law judge. Staying the employer's obligation to abate a hazard is important because abatement (frequently involving the purchase of equipment, changing of production processes, modifying work assignments) is often complex and expensive, particularly for nationwide employers, who would need to implement the "fix" across numerous locations. If the citation is ultimately withdrawn or vacated by a judge, however, the employer may have incurred significant unnecessary expense to abate a condition that was ultimately determined not to be hazardous or requiring the abatement which OSHA specified. It should be noted that there is a proposed amendment to the federal OSHA statute that would eliminate the automatic stay of the

abatement obligation during a contested proceeding which is currently being considered by Congress and supported by OSHA in the Protecting America's Workers Act of 2009. OSHA's nationwide review of state plan programs may identify other more stringent state-level standards and procedures that OSHA may decide to implement in its own program.

CONCLUSIONS AND RECOMMENDATIONS

Accordingly, it is recommended that all employers, including those located wholly within state plan states, consider the following measures to protect against the threat of increased enforcement attention:

- Carefully monitor federal OSHA's website, www.osha.gov, to keep fully informed of OSHA's written policies that have been issued and directed to the state plan states.
- Continuously monitor the state plan OSHA websites to keep informed on current and proposed state plan enforcement agendas and policies.
- Carefully evaluate existing safety and health programs to identify potential hazards and compliance gaps with current and proposed enforcement agendas;
- Implement an effective system for identifying and correcting any safety and health violations observed at the workplace. This should include documenting the completion of any corrective action recommended.
- In the event a citation is issued, the employer must thoroughly investigate the facts underlying the citation with legal counsel. This includes interviewing witnesses to any incident or alleged violation and reviewing any relevant documentation, such as training and disciplinary records, and incident and injury logs.
- Develop a strategy to evaluate any citations received to avoid accepting citations that are factually and legally deficient which can lead to higher gravity citations (Repeat, Willful) in future regulatory inspections.