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Shame On You! **OSHA Regulation by Shaming**

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INTRODUCTION

It is no secret that under the current administration, OSHA has been increasingly aggressive in its enforcement efforts. OSHA has made apparent its preference for using a “stick” rather than a “carrot” to encourage compliance with the Agency’s standards through such initiatives as the Severe Violator’s Enforcement Program, the new Repeat classification policy, the revised penalty policy, state program oversight, and national emphasis programs. One of the more potentially serious initiatives, however, is what Dr. David Michaels, Assistant Secretary of Labor for OSHA, has described as “regulation by shaming.” If your company finds itself targeted by an aggressive OSHA enforcement action, your company may be at risk of suffering injury to both your company’s reputation and economic viability well before your company has been given the opportunity to exercise its right to contest the citations. This article discusses self-described OSHA’s policy of “regulation by shaming” as well as how important it is to

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manage the OSHA inspection, citations, and subsequent press releases to in avoid such potential harm to your reputation as well as substantial economic losses, including the opportunity to qualify for contract work in a bidding process, loss of preferred contractor status and other negative effects.

REGULATION BY SHAMING

In a November 2010 conference, Dr. Michaels stated that, “We will continue to practice ‘regulation by shaming,’ sometimes less provocatively called ‘regulation by disclosure,’ by issuing news releases that name employers, expose their failings, and detail the serious hazards uncovered in our inspections.” In practice, OSHA issues news releases in conjunction with the issuance of significant citations which occurs before companies have been afforded their right to have an informal conference with OSHA, contest the citations and proceed to a hearing before the Occupational Safety and Health Review Commission to litigate the citations which may be deficient factually, legally or both. Unfortunately, OSHA’s news releases may be misleading because they often assume that factual or legal allegations in the citations are proven facts which later are found to not be accurate through the administrative process. These public news releases by OSHA may often result in unwarranted, negative public perception about a company, which can then lead to a loss of bids, contracts, or other business opportunities which in turn can cripple a company’s financial viability, particularly for smaller employers.

WHEN TO BE CONCERNED

Not every OSHA inspection results in this kind of OSHA enforcement action, but certain conduct during an inspection may signal that OSHA intends to “shame” your company. One signal that OSHA is escalating the gravity of an inspection is if OSHA sends multiple Compliance Safety and Health Officers (“CSHOs”) to the inspection indicating the agency’s

commitment of resources and to a higher level of scrutiny. The presence of multiple CSHOs can also be more stressful to employees during the employee interviews, and unfortunately, multiple CSHOs interviewing one employee has the potential to create an intimidating atmosphere in which the employee may become confused and result in inaccurate or erroneous information forthcoming which can be used to support questionable citations.

OSHA's use of subpoenas for documents or depositions or both is another signal that OSHA may intend to "shame" your company. During most inspections, documents are informally requested and employee interviews are conducted informally and by agreement. However, during inspections that OSHA deems more significant, the CSHO will often use OSHA's subpoena authority to request specific documents (subpoena duces tecum) and/or to formally depose company employees under oath (subpoena ad testificandum). If OSHA has requested to take the depositions of company employees, the depositions are frequently taken by senior OSHA compliance representatives or one of OSHA's lawyers, which is a clear indication that OSHA may intend to issue citations which could potentially attempt to "shame" your company.

WHAT TO DO IF YOUR COMPANY IS TARGETED

Even if OSHA does not initiate an inspection with the intent to "shame" your company, employers should have procedures in place and knowledgeable counsel available to ensure that your company maintains a cooperative attitude with OSHA during the inspection while still preserving the rights of your company and creating a documented record of what occurred during the inspection. Regarding document requests and employee interviews, employers should ensure that OSHA's document requests pertain to the proper scope of OSHA's inspection since providing other documents can expand the inspection and increase the potential for additional

citations. Employers should also advise their employees of their rights before OSHA interviews employees, and employers should be familiar with their own rights regarding interviews of management employees. Employees and employers have significant rights during these interviews which will be waived if the employer is unaware and does not inform its employees of these rights so that they can be exercised. Making the information available to employees becomes even more critical when it appears that OSHA is targeting your company under its shaming policy.

If OSHA issues citations to your company, you should carefully evaluate the citations to ensure that they are both factually and legally accurate. If any of the citations contain factual or legal deficiencies, your company should strongly consider requesting an informal conference and/or filing a notice of contest to preserve the company's rights to challenge the factual and legal bases of any citations. If OSHA issues a news release in an attempt to shame your company, you should consider responding to reporters' inquiries either directly or through counsel to clarify that the citations are only allegations and that your company is working with OSHA to resolve the citations. You may also need to contact potential business associates to clarify the status of the OSHA citations and underlying facts in order to maintain contracts and bidding status with such entities.

Finally, if your company is a relatively small employer, you ultimately may be eligible to recover a portion of your attorneys' fees and expenses that you incur in responding to citations that are not substantially justified. While recovery of fees and expenses under the Equal Access to Justice Act is uncommon, it is nonetheless critically important to carefully evaluate the factual and legal accuracy of any citations as well as your eligibility to potentially recover fees under the Equal Access to Justice Act.

CONCLUSION

OSHA's policy of "regulation by shaming" has potentially troubling implications for companies because companies may lose business as the result of news releases and citations that have not become final orders and which the company is contesting. If you find your company being targeted by OSHA's "regulation by shaming" policy, it becomes even more imperative to properly manage the inspection and protect your company's rights to minimize potential damage to your company's reputation and economic viability.