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OSHA's Severe Violator Enforcement Program: A Severe Injustice

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It has been five years since OSHA launched its Severe Violator Enforcement Program ("SVEP"), and two years since an agency White Paper trumpeted the program's "strong start" and progress on "key goals." A closer examination of OSHA's SVEP data, however, reveals that:



- SVEP disproportionately targets small employers;
- SVEP cases are contested more often than other OSHA citations;
- OSHA has trouble conducting follow-up inspections of small employers, especially those in the construction industry; and
- The program fails to reach the recalcitrant employers it was designed to target.

The fact is, SVEP (which succeeded OSHA's controversial Enhanced Enforcement Program) has shown troubling trends from the start. Not only do the criteria weigh against smaller employers, but the consequences for

employers thus labeled are dire, placing them in a precarious position, even before OSHA has proven that the employer violated the law at all, let alone in such an egregious manner as to warrant inclusion in SVEP.

Repeat Overkill

SVEP was instituted to target "enforcement efforts on recalcitrant employers who demonstrate indifference to the health and safety of their employees." To that end, OSHA created four categories that would land an employer in SVEP. However, over the life of the program, one qualifying category has been invoked predominantly: an employer who has two or more willful, repeat, or failure-to-abate citations related to High Emphasis Hazards (NF-2WRF).

Willful violations are those committed by an employer who knows the applicable standard but intentionally disregards it. Repeat violations have a much lower standard and require no aggravated intent. The employer does not have to know the law or be indifferent to safety.

Through the first several years of SVEP, this NF-2WRF category accounted for nearly 70% of all SVEP cases. On the surface, this suggests that the program is reaching those bad actors, who deliberately flout the law; i.e., employers that have committed multiple willful violations. However, the reality is that only one in four qualifying cases involves any willful violations. More than 75% of this category is based on repeat violations, which, again, do not require any specific or aggravated intent.

Moreover, OSHA reports that nearly 60% of SVEP employers have fewer than 25 total employees, and 75% have fewer than 100. Often, these employers are not "recalcitrant" and have not acted with indifference toward safety or the law. Rather, they generally do not know what OSHA's vast portfolio of regulations require and/or lack the resources to comply.

Bad Timing

An employer is entered into SVEP at the outset of an OSHA case, prior to an opportunity to defend itself and prove wrong OSHA's alleged violations. Notwithstanding this end run around Constitutional Due Process, once in the program, SVEP employers are immediately subject to:

- Public shaming by OSHA through both an inflammatory, embarrassing, and one-sided press release detailing the alleged violations and by posting the employer's name on a Severe Violator list on OSHA's public website;



- Mandatory follow-up inspections at that cited facility and up to ten sister facilities within the organization; and
- More expansive settlement terms than ever before, including corporate-wide requirements.

SVEP status also has serious indirect consequences:

- Harm to the company's reputation;
- Loss of customers and clients;
- Defection by current employees and obstruction of recruiting prospective employees;
- Denial of, or increased interest rates on, business loans and lines of credit;
- Higher insurance rates or loss of insurance coverage; and
- Use of the SVEP designation in talking points for organized labor and interests adverse to the employers.

And all of this happens *before* any adjudication process—in other words, before OSHA proves that a violation of the law even occurred.

Getting Out

More than half of SVEP citations have been contested, with 30% of those contests still in process. Some disputed citations have taken more than three years to resolve.

Our research shows that up to 20% of disputes result in the underlying SVEP-qualifying citations being either withdrawn or corrected in a way that falls outside the SVEP-qualifying criteria. A 20% error rate for a program that imposes such harsh penalties before any sort of judicial process is controversial, to say the least.

OSHA's proscribed SVEP exit criteria further punish employers who choose to exercise their due-process rights, and seem designed to keep employers in the program forever. Indeed, it was not until two years after the birth of SVEP that OSHA even announced a set of exit criteria (i.e., for the first two years there was literally no way out). The actual exit criteria introduced by OSHA, however, offer little more relief than that, as they are nearly impossible to achieve.

The criteria for employers whose SVEP-qualifying citations become a Final Order require waiting three years after "final disposition" of the qualifying SVEP case, and during that period, the employer must:

- Abate all qualifying violations (not controversial);
- Pay all penalties (not controversial);
- Complete any actions committed to in an applicable settlement agreement (not controversial); and
- Avoid additional "Serious" violations at that or related facilities (controversial).

Remember, it takes Willful and Repeat violations to qualify into SVEP, but any Serious violation will keep you in for at least another three years. Under OSHA's current enforcement scheme, almost everything is characterized by OSHA as at least Serious. Approximately, 75% of all OSHA inspections result in at least one violation, and 75% of all violations are characterized by OSHA as Serious (nearly 85% are characterized as Serious or worse).

OSHA Violation Statistics	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Total Violations	96,742	85,514	78,723	78,186	67,941
Total Serious Violations	74,885	62,115	57,112	58,316	49,616
Total Willful Violations	1519	594	423	319	439
Total Repeat Violations	2,758	3,229	3,034	3,139	2,966
Total Other-than-Serious	17,244	19,306	18,054	16,290	14,503

Considering this data, that SVEP requires follow-up inspections at up to 11 of the SVEP employer's facilities, and that OSHA goes into those inspections believing the SVEP employer is a bad actor, it is inconceivable that an SVEP employer could survive this gauntlet without at least one Serious violation to restart a new three-year SVEP clock. Even if the employer meets all of these conditions, removal from the program is at the discretion of the OSHA Regional Administrator.

To date, zero employers have exited SVEP through the exit criteria.

In keeping with the general unfairness of how SVEP is implemented, the key date for exiting SVEP is the date of "final disposition" of the SVEP citations. That means:

- A failure by the employer to contest the citations;
- A settlement agreement between OSHA and the employer;
- A decision by an ALJ within the Occupational Safety and Health Review Commission or by the Commission itself on appeal; or
- A decision by a U.S. Court of Appeals.

Challenging an SVEP decision can be expensive and time-consuming, potentially dragging on for more than a decade in some instances. Based on OSHA's final disposition rule, employers could be stuck in SVEP for years before OSHA's allegations are actually proven, and all the while, the employer's exit clock has not even started to tick. That is particularly unfair considering OSHA does not wait for final disposition to dump employers into SVEP.

Given the daunting exit criteria, employers should challenge SVEP-qualifying citations and bargain in settlement or prevail before an ALJ to eliminate the SVEP-qualifying citations. For now, that appears to be the only way out.

SVEP Strategies

Given the high stakes of SVEP, and the focus on repeat violations, employers should consider:

- Increasing communication among related facilities in the corporate family about OSHA activity at any facility;
- Proactively correcting any OSHA-cited condition at **all locations** after a citation at one location**;**
- Challenging citations that fall within OSHA's SVEP-qualifying "High Emphasis Hazards" to avoid being set up for Repeat violations in those categories; and
- Challenging SVEP-qualifying citations. Those citations may be withdrawn or re-characterized, and that may be the only way to ever get out of SVEP.

For more information about OSHA's Severe Violator Enforcement Program, join Conn Maciel Carey's national OSHA Practice for an upcoming webinar event on this topic ("**OSHA's Severe Violator Enforcement Program (SVEP): Who, What, When, Where, and How to Avoid It** ") on Tuesday, October 20, 2015 at 1 PM ET.
Click here for more information about the webinar and to register.