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E - NEWSLETTER

Reinhart OSHA E-News

Electronic Volume 2, Issue 1
1/28/2003

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KNOW YOUR OPTIONS AS AN EMPLOYER

The Big Picture of the OSHA Enforcement Process

Many employers do not fully understand their rights when it comes to matters of OSHA enforcement. Consequently, they may make mistakes in managing enforcement that will impact future OSHA enforcement matters.

The next two issues of this OSHA E-Newsletter will help employers to see the "big picture" regarding the OSHA enforcement process. This issue discusses an employer's legal options after it receives a Notice of Citation and Proposed Penalty from an OSHA Area Office. The following issue will discuss several important points that the employer should consider before settling with OSHA.

For purposes of this E-Newsletter, assume the OSHA inspection is completed. The Compliance Officer took photographs, interviewed employees, reviewed safety programming, collected samples for testing and conducted a closing conference at which the Compliance Officer orally informed the employer of any alleged violations and other matters of enforcement.

At some point after the closing conference, the employer will receive the Citation and Notice of Penalty that: 1) describes the alleged violations, 2) provides legal authority for the conclusion that there was a violation of the Act, 3) lists the classification of violation, 4) proposes a monetary penalty for each violation and 5) provides hazard abatement

information.

An employer is not required to agree with OSHA's conclusions or acquiesce to OSHA's demands. The law provides employers with two ways to respond to the Citation and Notice of Penalty: informal settlement conference and formal litigation.

Informal Settlement Conference

OSHA Area Directors are authorized to enter into settlement agreements with employers. From the employer's perspective, the conference is an opportunity to settle the proposed citations on more favorable terms than the terms in the proposed citation. However, the long term consequences of any proposed settlement agreement must be carefully considered. For example, accepting damaging language in the settlement agreement in return for a lower monetary penalty, may create problems in defending future OSHA citations. The bottom line is that employers should weigh the relevant costs and benefits before reaching any settlement with an Area Director.

An Area Director can only agree to an informal settlement before the employer files its Notice of Contest. An employer has fifteen working days from the date of the receipt of the Citation and Notification of Penalty in which to file a Notice of Contest with the Area Office of OSHA.

Formal Litigation

The Notice of Contest is a legal document that begins the second process for contesting the Citation and Notice of Penalty. From a practical standpoint, the Notice of Contest has the effect of removing the matter from the OSHA Area Office and transferring the matter to the Office of the Regional Solicitor of Labor.

By transferring the matter, the employer is also able to engage in formal settlement negotiations with an attorney in the Office of the Regional Solicitor of Labor. The OSHA attorney may better appreciate the legal weaknesses of the citations and the unpredictability inherent in any litigation.

Employers should understand that by filing the Notice of Contest, it has commenced formal litigation including

formal discovery pursuant to the rules of civil procedure. The matter will be docketed for trial before an Administrative Law Judge for the Occupational Safety and Health Review Commission. If necessary, the Administrative Law Judge will hear the case and issue a written order affirming, modifying or vacating each contested item and directing other appropriate relief.

The next issue of the OSHA E-Newsletter will discuss several factors that the employer should consider before reaching any settlement with an Area Director at an informal conference.

OSHA Practice Group E-Newsletter is an electronic publication of the law firm of Reinhart Boerner Van Deuren s.c., and is prepared by attorneys in its OSHA Practice Group. This publication is intended to afford timely notice to our clients and friends of current events in OSHA regulations and to provide general information about OSHA issues. It is not intended, nor should it be used, as a substitute for specific legal advice regarding particular factual situations.

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