



Retail Detail

Shame On You! OSHA Regulation by Shaming

Our Retail Industry clients know that OSHA has become increasingly aggressive in its enforcement efforts. Dr. David Michaels, Assistant Secretary of Labor for OSHA, has described one of OSHA's newest initiatives as "regulation by shaming." This initiative has also been called 'regulation by disclosure,' because OSHA has decided to issue news releases after some of its inspections specifically naming employers, and detailing the "serious hazards" which OSHA has uncovered at the employer location. In practice, OSHA often publishes these news releases before companies have had a chance to contest the citations and participate in a hearing before the Occupational Safety and Health Review Commission. Perhaps even more frustrating, however, is the fact that OSHA's news releases often set forth facts and/or allegations which later prove unfounded. These news releases are particularly problematic for retailers because they can affect branding, and create a negative public perception about a company, which can then lead to a loss of customers, vendors, or other business opportunities.

You should be on alert for OSHA inspections which could result in such negative news releases. One indication that OSHA may be seeking to "shame" your company in a negative news release is if OSHA sends multiple Compliance Safety and Health Officers ("CSHOs") to inspect your facility. This indicates that the agency has targeted you for a higher level of scrutiny and it is willing to commit more resources to your inspection and your facility.

Another signal that OSHA intends to issue a news release and make a splash following the inspection of your facility is if OSHA issues subpoenas for documents or depositions in connection with its inspection. Senior OSHA compliance representatives or OSHA's lawyers will take those employee depositions. Attention from these compliance officers should raise your antenna because it may indicate that OSHA is planning to use your company as an example.

In light of this new "shaming" initiative, you should have procedures in place, and knowledgeable counsel available, to ensure that your company cooperates with OSHA during the inspection while still preserving your rights. It is imperative to properly manage the inspection to minimize potential damage to your company's reputation and economic viability. Specifically, you should review OSHA's document requests carefully to make sure that they are within the scope of OSHA's inspection order and object of they go beyond that order to avoid additional citations. You should also advise your employees of their rights before they submit to any OSHA interviews.

Finally, if OSHA issues citations to your company after an investigation, take time to carefully review 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 citations. In addition, if OSHA issues a news release in an attempt to shame your company, consider responding to reporters' inquiries either directly or through counsel to clarify that the citations are only allegations and your company is working with OSHA to resolve the citations.

Please feel free to contact any of the individuals on our retail industry team listed below for further guidance.

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