FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

Solutions at Work®

Thirteen Steps To Improve Safety, Increase Profitability & Reduce Legal Liability

Hospitality Law Conference

February 11, 2014

Edwin G. Foulke, Jr.
404.240.4273
efoulke@laborlawyers.com

ABOUT FISHER & PHILLIPS

FISHER & PHILLIPS LLP is one of the country's oldest and largest firms devoted exclusively to representing employers in labor, employment, civil rights, employee benefits and business immigration law. Our depth and breadth of experience in these niche areas are unsurpassed. Although it's Atlanta-based, Fisher & Phillips has more than 280 lawyers in 31 offices across the country and bar admissions in 41 states and Washington, DC.

The Firm's practice includes counseling and defending employers under all major federal and state labor, employment, and employee benefits laws and regulations including, among others: The Age Discrimination in Employment Act (ADEA); The Americans With Disabilities Act (ADA); The Civil Rights Acts of 1866, 1964 and 1991; The Consolidated Omnibus Reconciliation Act (COBRA); The Employee Polygraph Protection Act (EPPA); The Employee Retirement Income Security Act (ERISA); The Equal Pay Act (EPA); The Fair Credit Reporting Act (FCRA); The Fair Labor Standards Act (FLSA); The Family and Medical Leave Act (FMLA); The Immigration Reform and Control Act (IRCA); The National Labor Relations Act (NLRA); the Occupational Safety and Health Act (OSHA), and The Worker Adjustment and Retraining Notification Act (WARN), as these laws have been amended.

Our lawyers practice in federal and state courts throughout the United States. In addition to representing employers in litigation, we represent employers in federal, state and local administrative proceedings, mediation and arbitration, collective bargaining and administration of collective bargaining agreements, and in resolving threatened claims prior to the initiation of formal proceedings.

As a result of our representation of employers in litigation and formal claims proceedings, we have acquired considerable expertise in developing and implementing policies, practices, and procedures to help employers minimize or avoid the occurrence of employment-related claims, the risk of liability from such claims, or other forces that may interfere with employer rights.

ABOUT TODAY'S SPEAKER

Edwin G. Foulke, Jr is a partner with Fisher & Phillips LLP, a leading national labor and employment law firm. Mr. Foulke is co-chair of the firm's Workplace Safety and Catastrophe Management Practice Group in its Atlanta, Georgia office. Prior to joining Fisher & Phillips, he was the Assistant Secretary of Labor for Occupational Safety and Health. Named by President George W. Bush to head OSHA, he served from April, 2006 to November 2008. During his tenure at OSHA, workplace injuries, illnesses and fatalities rates dropped to their lowest level in recorded history.

His practice includes workplace safety compliance and strategic safety planning, whistleblower compliance and litigation involving the 22 whistleblower statutes handled by OSHA, defense of employers in responding to workplace health and safety cases including OSHA citations and providing advice and assistance to employers in responding to workplace fatalities and catastrophic accidents and in legislative and regulatory matters. Mr. Foulke has represented employers in thousands of OSHA inspections and OSHA citation contests.

For approximately thirty (30) years, Mr. Foulke has worked in the labor and employment area, specializing in occupational safety and health issues. In 2010, 2011 and again in 2012-13 he was named as one of the "50 Most Influential EHS Leaders" by *EHS Today* magazine, as well as being named one of the "50 Most Influential EHS Leaders" in the United States by *Occupational Hazards* magazine in 2008. Mr. Foulke is recognized as one of the nation's leading authorities on occupational safety and health issues and one of the top speakers and writers in this area.

HOSPITALITYLAWYER.COM PRESENTS:
HOSPITALITY LAW CONFERENCE
FEBRUARY 10th - 12th, 2014

THIRTEEN STEPS TO IMPROVE SAFETY, INCREASE PROFITABILITY & REDUCE LEGAL LIABILITY

February 11, 2014

Edwin G. Foulke, Jr.
Fisher & Phillips LLP
Direct: (404) 240-4273
efoulke@laborlawyers.com

HospitalityLawyer.com

THANK YOU
FOR YOUR COMMITMENT TO SAFETY

HospitalityLawyer.com

SAFETY TIP OF THE DAY

Never take a sleeping pill and a laxative at the same time.

HospitalityLawyer.com

YOUR SAFETY PROGRAM SHOULD AVOID THIS…

HospitalityLawyer.com

…AND THIS!

HospitalityLawyer.com

BUT YOU DON'T WANT THIS APPROACH EITHER!

HospitalityLawyer.com

POOR SAFETY AND HEALTH IS NO LAUGHING MATTER

"The greatest mistake is to imagine that we never err."

~ Thomas Carlyle

1. DETERMINE YOUR VULNERABILITY UNDER OSHA'S PRIORITIES

- Determine which OSHA safety and health standards are applicable to your operation
- Find your SIC classification and comply with the requirements of those national and local emphasis programs
- Ensure OSHA properly classifies your establishment and that other classification may benefit an establishment
- Ensure that your facility is prepared to handle an OSHA inspection and your managers know their legal rights
- Watch out for possible whistleblower complaints

2. AUDIT YOUR COMPANY'S OSHA RECORDKEEPING

- Recordkeeping - one of the cornerstones of your safety program and a driver of OSHA's new enforcement efforts
- Compliance Officers will carefully review the OSHA 300 logs when conducting inspections
- Audit and correct last five years of logs, looking at insurance and other records; look for "patterns" of injuries
- Correct "coordination" and "education" challenges

3. AUDIT YOUR WORKPLACE FOR ROUTINE VIOLATIONS

- OSHA is looking for the "low-hanging fruit" or more common safety and health violations such as:
  - Blocked exits, extinguishers and electric panels
  - Improper materials handling and racks
  - Personal protective equipment (PPE) violations
  - Recordkeeping errors
  - Housekeeping problems
  - Common Electrical problems
  - Even one untrained employee for Haz Com, PIT operation, LOTO, or fire extinguishers
  - Guarding, especially conveyors, annual LOTO evaluations

3. AUDIT YOUR WORKPLACE FOR ROUTINE VIOLATIONS (CONT'D)

- Written programs, such as Haz Com, LOTO, EAP, JSA's, and chemical handling almost always require revision and updating, or have "holes"
- OSHA's focus on routine items and use of its "egregious" policy is generating six- and seven-figure penalties
- Proposed penalty calculation is intended to raise average penalty 300%
- Routine violations are challenging to prevent and may result in multiple repeat citations for employers with many locations

4. REVIEW ABATEMENT OF ALL PAST OSHA CITATIONS

- OSHA considers past citations for last five (5) years in issuing "repeat" citations
- OSHA may cite for "failure to abate" if past abatements of items that are again out of compliance cannot be documented

5. UNDERSTAND IMPLICATIONS OF OSHA'S MULTI-EMPLOYER CITATION POLICY

- Recognize and respond to how contractors, customers, and vendors can expose you to OSHA violations or harm your employees, including employees working away from your site.
- Establish regular teleconferences among plant managers to share information, revise and expand checklists, confirm abatement on a district, region and system wide basis
- Depots and smaller locations with limited supervision present special problems

6. PREPARE FOR OSHA'S REVISED APPROACH TO ERGONOMICS ENFORCEMENT

- OSHA has proposed adding musculoskeletal disorders (MSDs) to 300 logs which may include 75% of workplace injuries
- OSHA current utilizes General Duty clause to issue ergonomic citations and intends to more widely use General Duty citations
- OSHA may use recordkeeping audits or comprehensive safety program demands to address MSDs.
- Look for patterns
- Recognize the exposure to union "harassment"

7. USE JOB SAFETY ANALYSIS TO FOCUS WORKPLACE SAFETY & HEALTH STRATEGY

- OSHA has proposed development of a Standard requiring a comprehensive safety management program
  - "Injury & Illness Prevention Program ("I2P2")—more demanding than the California Standard
  - Would require employers to determine all hazards and develop procedures and training
  - Would cite employer for failure to do so
- Use your job safety analysis (JSA) to focus increased training, supervisor involvement and safety oversight

8. MAKE SAFETY THE #1 GOAL FROM THE WORK FLOOR TO THE "C" SUITE

- Develop a comprehensive safety and health management system which includes management commitment and employee involvement
- An employer can genuinely change safety and health culture but the effort requires more than good intentions and a written plan
- Safety efforts tie in with maintaining company culture and harmonious labor relations.
- Under the PAW, executives will have a vested interest in safety.

8. MAKE SAFETY THE #1 GOAL FROM THE WORK FLOOR TO THE "C" SUITE

- Requires "manpower" and accountability
- Coordination between engineering, maintenance, purchasing, housekeeping, operations, and safety
- Involving plant managers
- More shift checklists and periodic self-inspections
- Review cooperation between bargaining unions at sites with more than one union
- Investigate better use of committees and employees
- Consistency among supervisors
- Make sure your training is current and understandable

IDENTIFY THE "FS"

How many "Fs" did you see?

9. UTILIZE SAFETY AS A PROFIT CENTER

- A well-planned safety & health management program can:
  - Reduce workers' comp claims
  - Become a "profit center" for the company
- Connect safety to quality
  - Combine with "green" and similar efforts as marketing tools
  - Increase employee involvement and satisfaction
  - Serve as a catalyst to address underperforming employees in many areas
  - Coordinate with food security, ABI, customer, and other requirements

10. DEVELOP EMERGENCY ACTION PLANS TO DEAL WITH THE INEVITABLE

- Maintain emergency action/response plans focusing on natural disasters, pandemics, and man-made disasters, with enhanced emphasis on:
  - Evacuation plans
  - Exit and egress compliance
  - Training (evacuation, extinguishers, Haz Com)
- OSHA is especially emphasizing exit and evacuation planning in citations
- Plans should also consider "non-safety" issues, such as business continuation, management of leaves/benefits, remote work and wage-hour compliance

11. BEGIN TO EFFECTIVELY USE WELLNESS PROGRAMS

- A wellness plan offering more than just smoking cessation benefits is essential for dealing with an increasingly older and heavier workforce
- Wellness plans can be effectively and lawfully managed, even with new employment regulations including GINA and the ADAAA, but know the changes
- Make wellness efforts AND insurance culturally focused
- Recognize that many workplace injuries may be due to health, fitness, and an aging workforce

12. AVOID MEMBERSHIP IN OSHA'S SEVERE VIOLATORS ENFORCEMENT PROGRAM

- Consider how to avoid "membership" in the new SVEP and other programs which may target all or some of a company's facilities for increased inspections and scrutiny.
- The SVEP is easy to get into and effective since June 18, 2013.

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4503

13. SOLVE OTHER PROBLEMS BY SOLVING SAFETY PROBLEMS

- Showing employees you care and involving them in safety management can prevent a multitude of legal problems.
- Surveys have shown that if safety is the primary issue in union organizing drives, the union success rate in those drives is approximately 68%, the highest for any issue.
- Review safety Committees in light of recent NLRB comments

13. SOLVE OTHER PROBLEMS BY SOLVING SAFETY PROBLEMS

- Use increased safety efforts to create a workplace in which employees do not experience issues often spawning lawsuits, union organizing or conflict in a unionized setting
- Use training and audits to correct wide range of legal and HR vulnerability, including wage-hour and other problems OSHA has budgeted money to train their compliance officers to determine if alleged independent contractors are, in fact, employees
- The DOL's "Plan/Protect/Prevent" strategy is based on this approach

"What lies behind us and what lies before us are tiny matters compared to what lies within us."

~ William Morrow

QUESTIONS?

"Judge a man by his questions, rather than his answers."

~ Voltaire

Fisher & Phillips LLP is dedicated exclusively to representing employers in the practice of employment, labor, benefits, OSHA, and immigration law and related litigation.

THESE MATERIALS AND THE INFORMATION PROVIDED DURING THE PROGRAM SHOULD NOT BE CONSTRUED AS LEGAL ADVICE OR AS CRITICAL OF THE CURRENT OR PAST ADMINISTRATIONS.

BE SAFE!

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®

November 12th 2013

LEGAL ALERT

OSHA Proposes Publishing Worker Injury Data

OSHA has announced a proposed rule which will require establishments with 20 or more employees in certain industries with high injury and illness rates, to electronically submit their summary of work-related injuries and illnesses to OSHA every year. The change may affect between 450,000 and 1,500,000 sites. The first proposed new requirement is for establishments with more than 250 employees (and who are already required to keep records) to electronically submit the records on a quarterly basis to OSHA.

Currently, OSHA requires approximately 80,000 employers per year to submit data as part of its OSHA Data Initiative. OSHA uses its data to target certain industries or establishments for inspections and other initiatives. The Bureau of Labor Statistics surveys another 250,000 sites.

One can see many ways in which OSHA could use this data for more effective targeting. The biggest concern seems to be how others would use this data, which OSHA would make accessible to the public. On first blush, one could argue that there is no downside to sharing individual employers' injury-and-illness summaries. If properly handled, no "identifiable" embarrassing individual employee information would be available. But when the full implications of this proposal are considered, there appears to be the possibility of abuse.

Regulation By Shame?

OSHA press releases emphasize that the data collection would allow OSHA to better target inspection efforts and would even highlight employers with especially strong commitments to safety. But since a November 2010 conference where Dr. David Michaels, Assistant Secretary, OSHA, stated that, *"we will continue to practice regulation by shaming,"* this Administration has championed such an approach. The Administration also gutted OSHA consultation efforts and has shown little interest in OSHA's showcase cooperative effort, the Voluntary Protection Program (VPP).

It seems unlikely that a significant reason for the initiative is to highlight good employer performance. At least, that's not how the Administration has worked so far. Dr. Michaels and his leaders would probably readily admit their interest in highlighting employers with higher numbers. But who determines which numbers suggest bad behavior? And what about factors beyond the safety culture? Of course, one workplace injury is one too many incidents, but how will these numbers be interpreted and used by others?

Potential For Misuse

Some also question the extent to which this expansion is driven at the request of unions and other third parties who want access to the data in order to attack specific employers. As an example, consider the 10-year campaign against Hyatt by the union, UNITE-HERE. UNITE-HERE created its "Hyatt Hurts" campaign arguably in order to compel Hyatt to recognize the union at nonunion facilities or to give in to collective-bargaining demands at other sites. The union focused on injuries associated with housekeepers, and was involved in studies which purported to show that the hospitality industry, and Hyatt in particular, required housekeepers to change too many beds per shift, which contributed to ergonomic injuries. The union was then involved in persuading OSHA to investigate dozens of alleged instances of ergonomic violations throughout the country. Dr. Michaels actually took the extraordinary step of writing a highly publicized Hazard Alert letter to Hyatt criticizing their practices. The campaign finally cooled, in part, after the union shifted its attention to opposing the nomination of Hyatt principal and former Obama fundraiser, Penny Pritzker for Secretary of Commerce.

OSHA Proposes Publishing Worker Injury Data

How did the union and the research groups obtain Hyatt-specific information which purported to show that Hyatt workers suffered disproportionately from ergonomic injuries? Much of the data was not available on a government site. Rather, the union probably used existing OSHA provisions allowing employees, former employees, and their "representatives" to obtain extensive injury and illness data. The parties then fed this data to groups for analysis.

It's not clear how much merit the claims possessed, but the tactics often employed by the union seemed designed to cause the maximum business disruption possible, and it's questionable whether the campaign benefitted Hyatt or its workers. Hyatt is just one example. Consider the increase of public attacks on large international retailers for a host of alleged safety hazards. The allegations may or may not have merit, but almost all of the attacks are against nonunion employers, which raises questions about their purpose.

A main concern is balancing the value of establishing a better database for OSHA to use in determining where to focus its limited enforcement resources, against the potential anti-competitive mischief presented by the easy access to previously private data. Will OSHA be further pulled from its core safety enforcement duties?

Some recent OSHA actions raise questions about the reasons for OSHA's priorities, such as the divisive February 2013 Interpretation in which OSHA changed 40 years of precedent to propose that community organizers, union personnel at companies where they were not the certified bargaining agents, and other third parties could participate in OSHA inspections. Adding third parties to OSHA onsite inspections seem likely to generate conflict between OSHA, employers and third parties, and generate an increase in employer demands for a warrant.

And in an apparent inconsistency, OSHA has led the charge attacking employer safety plans which measure their success based on this same injury data, claiming that reliance on this data may lead employers to discourage employees from reporting workplace injuries. Moreover, employers and OSHA agree that it is ineffectual to target one's safety efforts on "lagging indicators."

Instead of focusing on injuries, which are lagging indicators, employers should focus on the "leading indicators," which are the actions which will prevent injuries. A major problem is that many customers select suppliers and construction contractors based on various injury statistics, which further create the risk of chilling employee injury reports. Moreover, such statistics can be affected by other factors.

The public will have 90 days, through February 6, 2014, to submit written comments on the proposed rule. On January 9, 2014, OSHA will hold a public meeting on the proposed rule in Washington, D.C. A Federal Register notice announcing the public meeting will be published shortly.

Every employer supports efforts that improve worker safety. The question is whether this proposal would improve worker safety or be used to create distractions from real safety issues.

For more information visit our website at www.laborlawyers.com or contact any member of the Fisher & Phillips Workplace Safety and Catastrophe Management practice group.

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®

June 17, 2013

LEGAL ALERT

Getting Off OSHA's Severe Violator's Enforcement Program "Black List"

After several years of received employer's requests, OSHA's Directorate of Enforcement Programs (DEP) issued a memorandum detailing the removal criteria for those employers currently under OSHA's Severe Violator Enforcement Program (SVEP). This memorandum provides employers guidance on how to be removed from the SVEP, a process that has been unclear since the program was first implemented.

What is SVEP?

The SVEP is a program originally implemented by OSHA on June 18, 2010 that was designed to focus its enforcement resources on "employers who have demonstrated recalcitrance or indifference to their OSH Act obligations by committing willful, repeated or failure-to-abate violations" in certain defined circumstances.

How do employers get put into the SVEP?

The OSHA SVEP Enforcement Directive sets forth what employer actions could put them into SVEP. According to this Directive, there are 4 types of accidents or violations that will bring a company under the SVEP, including:

1.) Fatalities or catastrophes involving an employee death or 3 more hospitalizations
2.) Non-fatalities or catastrophes involving high emphasis hazards
3.) Non-fatalities or catastrophes due to potential release of highly hazardous substances
4.) All "egregious" violations

Employers that are put into the SVEP must be prepared to adhere to increased invasive enforcement of the OSH Act. These enforcement acts include enhanced follow-up inspections, nationwide inspections of related workplaces, and increased publicity of OSHA enforcement both internally and externally. Additionally, OSHA may order the employer to hire a safety and health consultant to help develop a new safety program for the company or submit to the area director a log of work-related injuries and illnesses on a quarterly basis.

How do employers get off the SVEP?

According to the DEP memorandum, OSHA will consider removing an employer from the SVEP after 3 years from the date it was placed into SVEP (by either failure to contest, a settle agreement, or Review Commission decision). However, the removal is not automatic after 3 years, OSHA Regional Administrators will perform additional follow-up inspections and analysis of IMIS/OIS data and determine whether all SVEP related violations have been abated, all outstanding penalties paid, all settlement provisions have been complied with, and the employer has not received any additional serious citations related to the hazards identified in the SVEP inspection at the initial establishment or any related establishment. If so, the Regional Administrator will have discretion to remove the employer from SVEP. If the employer is found not to have carried out its abatement and settlement obligations, it'll be placed back into SVEP for another 3 years.

As a practical matter, the existence of the SVEP, the relatively easy requirements to be place on it, and the difficulty in being removed from the list make it even more important that employers carefully manage OSHA inspections to minimize citations or lay the groundwork for (1) future appeals; (2) "contest" citations; and (3) talk to legal counsel about defenses to any potential citations.

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®

June 1, 2013

LEGAL ALERT

OSHA Increases Focus on Safety for Temporary Employees

In a recent memorandum from the national office to its Regional Administrators, OSHA set forth new issues that Compliance Officers should examine when they inspect worksites where temporary employees are working. The information to be documented includes determining whether the employees are exposed to conditions in violation of OSHA rules or other safety and health hazards and whether the employees received safety and health training "in a language and vocabulary they understand" as well as the supervising structure under which the temporary employees are reporting (i.e. who is supervising the temporary employees at the worksites).

Who falls under "Temporary Worker"?

The memorandum identifies temporary employees as "those who are paid by a temporary help agency, whether or not their job is temporary." The memo instructs compliance officers that if there are temporary employees, the inspector should "document" the name and location of the employees' staffing agencies. In addition, inspectors should also record "the extent to which the temporary workers are being supervised on a day-to-day basis either by the host employer or the staffing agency."

In addition, it is important to note that employees are not defined by OSHA based on who pays them. Instead, OSHA looks at whether there is an employer-employee relationship between the parties. Criteria OSHA uses to determine that relationship include:

- The nature and degree of control the hiring party asserts over the manner in which the work is done.
- The degree of skill and independent judgment the temporary employee is expected to apply.
- The extent to which the services provided are an integral part of the employer's business.
- The right of the employer to assign new tasks to the employee.
- Control over when the work is performed and how long it takes.

The Reason Behind the Memorandum

According to OSHA, in recent months there have been a series of reports of temporary employees suffering serious injuries. In some cases, the host employer failed to provide safety training or, if some instruction was given, it inadequately addressed the hazard believing that the temporary employee agency was providing the appropriate safety and health training.

Because of the number of temporary employees being utilized in worksites throughout the country, and the recent increase in the number of severe incidents, OSHA stated they wanted to "... increase the unified effort using enforcement, outreach and training to assure that temporary workers are protected from workplace hazards."

OSHA's Plan for Temporary Employees

The memo calls on OSHA compliance officers to use a newly created code in the agency's information system to denote when temporary employees are exposed to safety and health violations and further directs investigators to review records and conduct interviews to assess whether temporary employees have received the required training in a language and vocabulary they can understand. In a statement announcing the new initiative, OSHA officials stated that the agency has also started working with the American Staffing Association and with employers that use staffing agencies to promote best practices to protect temporary employees from hazards on the job.

Conclusion

Any employer utilizing temporary employees must be aware that no matter what its contract states as to the temporary employee provider responsibility to conduct OSHA safety and health training, the host employer will still be responsible for ensuring that its temporary employees have been properly trained and aware of all safety and health hazards at the worksite. This is especially true if the host employer is supervising the temporary employees, Also, under the OSHA multi-employer citation policy, the host employer will not likely be considered the controlling employer and may be cited for safety and health violations created by the temporary employees. This is a complex issue and employees utilizing a temporary employee provider should look closely at the contract with the provider to ensure that it is indemnified for any safety or health violations created by the temporary employee provider.

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®

January 17th 2012

LEGAL ALERT

OSHA Announces New Focus Areas

The Occupational Safety and Health Administration has recently announced three new focus areas targeting hazards in certain specified work environments. These include: winter storm months, chemical facilities, and formaldehyde exposure in the hair product/salon industry.

Employee Protection During Winter Storms

OSHA has created a webpage to help protect employees from hazards they may face during winter storm response and recovery operations. The webpage provides guidance on how employers and employees involved in cleanup and recovery operations can recognize snowstorm-related hazards and the necessary steps that you must take to keep your employees safe while working in these conditions. The page includes guidance for employees clearing heavy snow in front of workplaces and from rooftops; employees encountering downed power lines or traveling on icy roads; and utility employees restoring power after winter storms.

The guidance outlines hazards associated with working in winter storms and lists effective means of addressing those hazards directly. For example, OSHA suggests using necessary personal-protection equipment to avoid being struck by falling objects such as icicles, tree limbs, and utility poles, as well as exposure to potential carbon monoxide poisoning. Similarly, a roof collapse under heavy weight of snow should be addressed by using caution around surfaces weighed down by large amounts of snow or ice.

Driving accidents, slips or falls due to slippery roadways and walkways, and falls from snow removal on roofs or while working in aerial lifts or on ladders can be minimized by ensuring that employees use fall protection, and by providing and maintaining ladders. In addition, clearing walkways of snow and ice and using salt where appropriate, as well as urging employees to stay in the vehicle unless visible help is within 100 yards, will address these hazards.

Winter storm hazards such as electrocution from downed power lines and downed objects in contact with power lines, burns from fires caused by energized line contact or equipment failure, as well as lacerations or amputations from improperly operated chain saws and power tools can be addressed by making certain all powered equipment is properly guarded and disconnected from power sources before performing maintenance. Of course employees (and everyone else) should always assume that all power lines are energized and stay away from any downed or damaged power lines. OSHA suggests establishing and clearly marking work zones for further protection.

Health hazards, such as dehydration, hypothermia, frostbite, exhaustion from strenuous activity, and back injury or heart attack while removing snow, require the use of personal-protective equipment and safe work practices to reduce the length and severity of exposure to the cold.

The new Winter Storms Web page http://s.dol.gov/L1 includes links to guidance from OSHA, the Federal Emergency Management Agency, the American Red Cross,, the National Weather Service, the National Oceanic and Atmospheric Administration, The Centers for Disease Control and Prevention, the National Safety Council and other agencies and organizations.

National Emphasis Program For Chemical Facilities

At the end of 2011, OSHA issued a new National Emphasis Program (NEP) for chemical facilities to protect employees from catastrophic releases of highly hazardous chemicals. This new NEP replaces OSHA's pilot Chemical Facility National Emphasis Program which covered several OSHA regions around the country.

The program establishes policies and procedures for inspecting workplaces that are covered by OSHA's process safety Management (PSM) standard. The inspection process includes detailed questions designed to gather facts related to PSM requirements and verification that employers' written and implemented PSM programs are consistent. The intent of the NEP is to conduct focused inspections at the facilities randomly selected from a list of worksites likely to have highly hazardous chemicals in quantities covered by the standard.

According to the Assistant Secretary of Labor for OSHA, Dr. David Michaels, "This program will enable OSHA inspectors to cover chemical facilities nationwide to ensure that all required measures are taken to protect workers."

OSHA Announces New Focus Areas

OSHA implemented a multi-year pilot NEP for PSM-covered facilities in July of 2009 in an effort to reduce releases of highly hazardous chemicals. During the pilot, however, OSHA found many of the same safety-related problems that were uncovered during the NEP for the refinery industry, which is covered by the PSM standard. As a result, OSHA is expanding the enforcement program to a national level.

Prevention Of Formaldehyde Exposure

OSHA is continuing its efforts to protect employees from the dangers of formaldehyde exposure in the hair care industry. In 2011 citations were issued to 23 salon owners and beauty schools in Connecticut, Massachusetts, Pennsylvania, Florida, Illinois, New York, New Jersey, and Ohio, with fines ranging up to $17,500 for failing to protect employees from overexposure and potential exposure to formaldehyde.

Formaldehyde can irritate the eyes and nose; it can also cause allergic reactions of the skin, eyes, and lungs, and is a cancer hazard. Salon owners who decide to use products that may contain or release formaldehyde must follow the requirements of OSHA's formaldehyde and hazard communication standards. Of concern to OSHA is the fact that some of these hair products expose employees to formaldehyde even when the label states they are "formaldehyde free."

The violations of OSHA's formaldehyde and hazard communication standards include failing to list formaldehyde as a hazardous ingredient on the material safety data sheet (MSDS); failure to include proper hazard warnings on the product labels; and failure to list the health effects of formaldehyde exposure on the MSDS. Labels must include ingredient and health hazard warning information, and the MSDS must provide users with information on the chemicals in the product, the hazards to employees and how to use the product safely.

The best way to control exposure to formaldehyde is to use products that do not contain formaldehyde. Salon owners should check the label or product information to make sure the hair product does not contain or list formaldehyde, formalin, methylene glycol or any of the other names for formaldehyde.

For more information, visit the Fisher & Phillips web site at www.laborlawyers.com. For help with ensuring that your business or company are in compliance or for advice concerning any of OSHA's safety and health standard, contact your regular Fisher & Phillips attorney or any of the lawyers in our Workplace Safety and Catastrophe Management Group.

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®

Edwin G. Foulke, Jr.
efoulke@laborlawyers.com
(404) 240-4273

OSHA Injury & Illness Recordability Worksheet*

Name of Employee: _____ Date of Injury/Illness Onset: _____

Description of Injury or Illness:_____

(a) Where in the facility did the injury or illness occur? For example, break room, South Receiving dock, etc. Do not just list "office" or "warehouse" – be specific. _____
_____

(b) What piece of equipment, item, product, etc. caused the injury or illness?
_____

(c) What was the injury or illness the employee experienced? _____
_____

Right or left side, hand, eye, etc. _____
If a finger or toe injury, which digit? _____

*****All of your responses to (a)-(c) above should be captured in your explanation of the injury/illness in Column F of the OSHA 300 Log, once you've determined whether the injury/illness should be recorded.*****

I. Did the Injury/illness occur in the work environment?

Yes, please explain:	No, please explain:
↓	↓
If the injury/illness occurred in the work environment move to Section II.	If you do not believe the injury/illness occurred in the work environment, or if you are unsure, contact counsel to confirm the event is not recordable. Once confirmed, move to Section IX.

II. Is the Injury or Illness a New Case?

Yes, please explain:	No, please explain:
If the injury/illness is a new case move To Section III.	If the injury/illness is not a new case or you are not sure if the case is new or not contact counsel to make a determination. If you determine it is not a new case. The incident is NOT recordable as a new entry, however, you must update the previously recorded entry (assuming it occurred in the last 5 years). Move to Section IX.

III. *Does the injury/illness meet any of the following exceptions for recordability despite having occurred in the workplace?*

Employee was on the premises as a member of the general public. _____

Symptoms were the result of **voluntary** participation in a wellness or recreational event. _____

Symptoms were related to a common cold or flu or similar non-work related disease. (note: Pandemic flu may recordable in certain circumstances) _____

Symptoms were the result of personal self medication, grooming, or intentionally self-inflected. _____

Symptoms were the result of a mental illness that has not been confirmed by a LHCP to be work related. _____

Symptoms surfaced at work **but** were the **sole** result of a non-work related event or exposure that occurred outside the work environment. _____

Symptoms were the sole result of the **personal preparation** or consumption of food or drink. _____

Symptoms were the result of a personal task performed **outside** of normal work hours. _____

Incident involved a motor vehicle accident while the employee was in the **act of commuting**. _____

Did not result in a significant aggravation of a pre-existing condition. _____

Yes, the injury/illness meets the exception checked above because: Attach any supporting documentation for your decision to this document.	No, the injury/illness does not meet any of the above exceptions.
If you believe that the event may meet one of the exceptions for recordability, contact counsel to confirm that the event is not record-able. Once confirmed, move to Section IX.	If the injury/illness does not meet any of the exceptions move to Section IV.

IV. *Did the incident result in any of the following?* Circle all that apply.

Death Days Away From Work Restricted Work Job Transfer

Loss of Consciousness Significant Injury/Illness Diagnosed by a LHCP

Yes. Provide details:	No.
The incident is recordable*. Move to Section IX.	If none of the above apply, move to Section V.

*If you circled more than one outcome above, only record the most serious outcome circled above on the 300 log in one of the Columns (g) through (j). However, you must still count the less serious outcome's days in Column(s) (k) and/or (l).

V. Did the employee visit a licensed health care professional?

Yes. Provide details:	No.
Move to Section VI.	Move to Section VII.

VI. Was the visit with the LHCP's limited to the following? In other words, no medical treatment (as defined in the regulations – see definition section below) was provided and nothing other than those items circled below occurred at the visit. Circle all that apply.

Observation Counseling

X-Ray's Blood Test Other Diagnostic Testing

Administration of Medication ONLY for purposes of performing diagnostic Testing

Yes. The employee's visit to the LHCP did not include any "medical treatment" and was limited to the items circled above. Specifically, other diagnostic tests performed were as follows:	No. Employee received medical treatment during employee's visit to the LHCP including the following:
Move to Section VII.	If medical treatment was provided, or you are not sure if medical treatment was provided contact counsel to make a determination. If you determine medical treatment was provided, move to Section VIII.

VII. ***Did the employee provide any treatment to himself?***

Yes. Provide details:	No.
Move to Section VIII.	The injury is not recordable. Move to Section IX.

VIII. ***Did the treatment fall within any of the following categories of "First Aid?"***

_____ Use of nonprescription medication at nonprescription strength.

_____ Tetanus immunization.

_____ Cleaning, flushing or soaking of surface wounds.

_____ Use of wound coverings such as bandages, gauze pads, butterfly enclosures or Steri-Strips.

_____ Use of hot or cold therapy.

_____ Use of non-rigid means of support; i.e., elastic bandages, wraps, non-rigid back belts, etc.

_____ Use of temporary immobilization devices while transporting an accident victim.

_____ Drilling of a fingernail or toenail to relieve pressure or draining of fluid from a blister.

_____ Removal of foreign bodies from the eye using **only** irrigation or cotton swabs.

_____ Removal of splinters or foreign materials from areas other than the eye using irrigation, tweezers, cotton swabs or other simple means.

_____ Use of finger guards.

_____ Use of simple massages. Note: physical therapy or chiropractic treatment is considered to be medical treatment.

_____ Drinking fluids for relief of heat stress.

_____ Use of eye patches.

Yes, the injury/illness was treated ONLY as marked above: Attach any supporting documentation for your decision to this document.	No, the injury/illness was not treated ONLY by the above first aid "exceptions," but the employee received other treatment as follows: Attach any supporting documentation for your decision to this document.
↓	↓
The injury/illness is **not** recordable. Move to Section IX.	The injury/illness is recordable. Move to Section IX.

IX. *Summary of Findings*

Based on the above analysis:

____ The injury or illness is recordable. **Proceed to complete the OSHA 300 log.**

____ The injury or illness is NOT recordable because:
- ____ It did not occur in the work environment
- ____ It occurred in the work environment but met one of the exceptions in Section III.
- ____ It did not meet any of the criteria for recordability – death, lost workdays, loss of consciousness, transfer to another job, or medical treatment beyond first aid.
- ____ Other reasoning: _____

_____ The injury or illness is NOT recordable as a new entry, but the previous entry must be updated with the new information (assuming the previous injury/entry was within the last 5 years). **Proceed to update the appropriate prior OSHA 300 log.**

Name of Evaluator: _____
Signature: _____
Date of Evaluation: _____

List the supporting documents attached:

Other Comments or Notes:

**This worksheet is intended only as a guide to assist the employer in analyzing the issues relevant to making a determination as to recordability of a workplace injury or illness. Each injury or illness will requireda specific evaluation of the facts in determining recordability. Not all scenarios can be accounted for and this worksheet should not be construed to provide legal advice regarding the recordabiliy or non-recordability of a particular injury or illness. Contact Edwin G. Foulke, Jr. at (404) 240-4273 or efoulke@laborlawyers.com, co-chair of the firm's Workplace Safety and Catastrophe Management Practice Group or your Fisher & Phillips attorney to provide more detailed advice on the recordability of an injury or illness.*

Definitions & Explanations

Section 1904.5 Determination of work-relatedness

(a) Basic requirement.

You must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies.

(b) Implementation.

(1) What is the "work environment"?

OSHA defines the work environment as "the establishment and other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work."

Section 1904.6 Determination of new cases

(a) Basic requirement.
You must consider an injury or illness to be a "new case" if:

(1) The employee has not previously experienced a recorded injury or illness of the same type that affects the same part of the body, or

(2) The employee previously experienced a recorded injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and symptoms had disappeared) from the previous injury or illness and an event or exposure in the work environment caused the signs or symptoms to reappear.

Section 1904.7. Medical Treatment/First Aid

"Medical treatment" means the management and care of a patient to combat disease or disorder. For the purposes of Part 1904, medical treatment does not include:

A. Visits to a physician or other licensed health care professional solely for observation or counseling;

B. The conduct of diagnostic procedures, such as x-rays and blood tests, including the administration of prescription medications used solely for diagnostic purposes (e.g., eye drops to dilate pupils); or

C. "First aid" as defined in paragraph (b)(5)(ii) of this section.

paragraph (b)(5)(ii), defines first aid as follows:

A. Using a nonprescription medication at nonprescription strength (for medications available in both prescription and non-prescription form, a recommendation by a physician or other licensed health care professional to use a non-prescription medication at prescription strength is considered medical treatment for recordkeeping purposes).

B. Administering tetanus immunizations (other immunizations, such as hepatitis B vaccine or rabies vaccine, are considered medical treatment).

C. Cleaning, flushing or soaking wounds on the surface of the skin;

D. Using wound coverings, such as bandages, Band-Aids®, gauze pads, etc.; or using butterfly bandages or Steri-Strips® (other wound closing devices, such as sutures, staples, etc. are considered medical treatment);

E. Using hot or cold therapy;

F. Using any non-rigid means of support, such as elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes);

G. Using temporary immobilization devices while transporting an accident victim (*e.g.*, splints, slings, neck collars, back boards, etc.)

H. Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;

I. Using eye patches;

J. Removing foreign bodies from the eye using only irrigation or a cotton swab;

K. Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs, or other simple means;

L. Using finger guards;

M. Using massages (physical therapy or chiropractic treatment are considered medical treatment for recordkeeping purposes);

N. Drinking fluids for relief of heat stress.

This list of first aid treatments is comprehensive, *i.e.*, any treatment not included on this list is not considered first aid for OSHA recordkeeping purposes. OSHA considers the listed treatments to be first aid regardless of the professional qualifications of the person providing the treatment; even when these treatments are provided by a physician, nurse, or other health care professional, they are considered first aid for recordkeeping purposes.

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

Solutions at Work®

OSHA Inspection Checklist

Prepared by:

Edwin G. Foulke, Jr.
Direct: (404) 240-4273
efoulke@laborlawyers.com

1075 Peachtree Street NE, Suite 3500
Atlanta, GA 30309

OSHA Inspection Checklist

A. Prior to Inspection

- Display the official OSHA poster where notices to employees are customarily posted.
- Obtain upper management commitment to workplace safety and display commitment statement.
- Conduct internal or external safety audit and hazard assessment of the facility to spot and correct apparent safety and health hazards. It is important that hazards identified are addressed or corrected in a timely manner.
- Ensure that a management official has been assigned responsibility for safety and health compliance and for dealing with employees, OSHA, and other individuals on the subject of workplace safety and health.
- Determine which OSHA standards and regulations apply to the facility and ensure that all required written programs, plans, training and recordkeeping are complete and updated on an annual basis. Insure that the facility's personal protective equipment hazard assessment has been completed.
- Train designated management personnel on how to properly handle and respond to an OSHA inspection, as well as approaches by law enforcement officials, building or fire inspectors, and inspectors from other safety regulators.
- Determine the company policy on requiring OSHA to have a warrant prior to allowing an inspection to be conducted.
- Foster employee participation in safety and health management and instill commitment in employees to safe work practices.
- Establish a crisis management team to deal with catastrophic occurrences, fatalities, and OSHA-related publicity.

- Ensure that injuries and illnesses are properly recorded and supporting documentation is available.
- Ensure that Hazard Communication Plan, MSDS's, and related materials are available.
- Notify OSHA within eight (8) hours if a fatality occurs or more than three (3) employees are hospitalized for the same incident. Where fatality or hospitalization occurs, consult with the company's OSHA counsel to determine what investigation should be conducted and what accident reports need to be prepared.
- Provide appropriate equipment, i.e. camera, video, monitoring, etc., for conducting OSHA inspections.
- Review previous OSHA citations and ensure abatement has been completed and hazards cited have not reoccurred.
- Ensure coordination between all employers on a multi-employer site.

B. Conducting the Inspection

1. Initial Contact and Opening Conference

- Refer the OSHA compliance officer arriving on the premises to the company's designated safety officer.
- No employees, other than the facility manager and /or the designated management safety officer, should communicate with the OSHA compliance officer prior to the opening conference.
- The safety officer should review the compliance officer's credentials as well as obtain his or her business card with an address and phone number to ensure that the compliance officer is on an official inspection.
- Determine from the compliance officer the purpose, scope, and the circumstances of the visit to the facility. If the inspection is based on a complaint, obtain a copy of the complaint.
- Determine if the compliance officer has a warrant to conduct the inspection. If yes, find out the scope of the warrant.
- Notify the company's OSHA counsel. This should be done prior to the opening conference in order to receive any instructions or to raise some defense or objection.
- Notify the designated employees' representative (if applicable) of OSHA's presence.

- Have an opening conference with the OSHA compliance officer to establish:
  - the focus areas of the inspection;
  - the scope and route of the walk-around inspection;
  - the designated trade-secret areas or processes;
  - the procedure for conducting employee interviews and producing documents;
  - the schedule of interviews;
  - the documents for review by OSHA;
  - the procedure for requesting copies of any employee complaints; and
  - the facility's rules and procedures OSHA will be expected to follow.

- Conduct all necessary safety and health advising/training of OSHA compliance officers prior to access to restricted areas. Ensure that the OSHA compliance officer wears all necessary personal protective equipment and follow all company safety and health policies.

2. Walk-Around Inspection

- A designated safety officer or manager should stay with each OSHA compliance officer at all times during the inspection except during hourly employee interviews.

- The designated safety officer should take detailed notes, including date(s) of inspection, areas inspected, items discussed and employees interviewed.

- If compliance officer deviates from area(s) covered by complaint then company safety officer should inquire as for the reason for the deviation.

- When appropriate, photographs should be taken of areas inspected by the OSHA compliance officer as well as all items photographed by the compliance officer. Video also should be utilized, if used by the compliance officer.

- The designated safety officer should immediately have corrected any alleged violations identified by the compliance officer to the extent possible, but should not acknowledge that a citation is appropriate.

- No management or supervisory employee should give information or make statements to the compliance officer without approval from the designated safety officer or the company's OSHA counsel.

- All work rules and safety procedures should be enforced and applicable to the compliance officer and walk-around team during the inspection.

- The compliance officer should be asked to put all requests for company information and/or documents in writing.

- The company's OSHA counsel should review all requests for documents and information as well as all information and documents provided.

- Document all samples or monitoring test taken by the OSHA compliance officer and request copies of all sampling and monitoring results as well as all photographs and videos taken. The company should request the OSHA compliance officer to schedule sampling and monitoring at a time when the company can conduct its own sampling and monitoring.

- Request copies of all OSHA sample and monitoring reports from the compliance officer.

3. Closing Conference

- Primarily listen to the Compliance Officer's proposal, and do not argue or debate the initial proposed findings.

- Remind the compliance officer of the scope of the inspection as stated in the opening conference.

- If directed by OSHA counsel, provide additional information and documentation relevant and supportive of the company's position as well as any information which shows abatement of any alleged violation.

- Obtain from the OSHA compliance officer an acknowledgment of receipt of the documents provided.

- Take detailed notes on the alleged hazards identified and the problem areas indicated by the compliance officer along with the applicable standards and suggested abatement procedures.

- Provide the OSHA compliance officer with the name, title, full address, and phone and fax numbers of the person to whom all OSHA correspondence should be directed.

C. After the Inspection

- Try to obtain all sample and monitoring reports from OSHA.
- Review all areas noted by the compliance officer and make appropriate abatement.
- Provide the company's OSHA counsel with copies of all of the documents provided to OSHA and all of the notes, photographs, videos, etc., taken during the inspection.
- The company's OSHA counsel should make a written request to OSHA to ensure that all trade secrets and proprietary information disclosed during the inspection are kept confidential.
- If facility is issued citations by OSHA, the following should be done:
  - Post the citation (with penalty amounts deleted -Note: in state plan states need to check rule on posting requirements) in the area where employee notices normally are posted.
  - Immediately notify the company's OSHA counsel about the citation and send a copy of the citation to them.
  - With the advice of counsel, schedule an informal conference with OSHA.
  - Post Notice to Employees of informal hearing.
  - Where an agreement cannot be obtained quickly, employer must file a Notice of Contest within fifteen (15) workings days of the employer's receipt of citations. Some state plan states maintain different procedures. An employer who misses a contest deadlines cannot typically get an extension or overcome the default.

NOTES

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

Solutions at Work®

Atlanta
1075 Peachtree Street, Suite 3500
Atlanta, GA 30309
(404) 231-1400

Baltimore
79 East Main Street, Suite 207
Westminster, MD 21157
(410) 857-1399

Boston
200 State Street, 13th Floor
Boston, MA 02109
(617) 722-0044

Charlotte
227 West Trade Street, Suite 2020
Charlotte, NC 28202
(704) 334-4565

Chicago
10 South Wacker Drive, Suite 3450
Chicago, IL 60603
(312) 346-8061

Cleveland
9150 South Hills Boulevard, Suite 300
Cleveland, OH 44147
(440) 838-8800

Columbia
1320 Main Street, Suite 750
Columbia, SC 29201
(803) 255-0000

Columbus
4449 Easton Way, 2nd Floor
Columbus, OH 43219
(614) 221-1425

Dallas
500 North Akard St., Suite 3550
Dallas, TX 75201
(214) 220-9100

Denver
1999 Broadway, Suite 3300
Denver, CO 80202
(303) 218-3650

Fort Lauderdale
450 East Las Olas Boulevard
Suite 800
Fort Lauderdale, FL 33301
(954) 525-4800

Gulfport
2505 14th Street, Suite 202
Gulfport, MS 39501
(228) 822-1440

Houston
333 Clay Street, Suite 4000
Houston, TX 77002
(713) 292-0150

Irvine
2050 Main Street, Suite 1000
Irvine, CA 92614
(949) 851-2424

Kansas City
4900 Main Street, Suite 650
Kansas City, MO 64112
(816) 842-8770

Las Vegas
3800 Howard Hughes Pkwy., Suite 950
Las Vegas, NV 89169
(702) 252-3131

Los Angeles
444 South Flower Street, Suite 1590
Los Angeles, CA 90071
(213) 330-4500

Louisville
220 West Main Street, Suite 2000
Louisville, KY 40202
(502) 561-3990

Memphis
1715 Aaron Brenner Drive, Suite 312
Memphis, TN 38120
(901) 526-0431

New England
One Monument Square, Suite 600
Portland, ME 04101
(207) 774-6001

New Jersey
430 Mountain Avenue, Suite 303
Murray Hill, NJ 07974
(908) 516-1050

New Orleans
201 St. Charles Avenue, Suite 3710
New Orleans, LA 70170
(504) 522-3303

Orlando
200 South Orange Avenue, Suite 1100
Orlando, FL 32801
(407) 541-0888

Philadelphia
201 King of Prussia Road, Suite 650
Radnor, PA 19087
(610) 230-2150

Phoenix
201 East Washington Street, Suite 1450
Phoenix, AZ 85004
(602) 281-3401

Portland
111 SW Fifth Avenue, Suite 4040
Portland, OR 97204
(503) 242-4262

San Antonio
300 Convent Street, Suite 1420
San Antonio, TX 78205
(210) 227-5434

San Diego
4747 Executive Drive, Suite 1000
San Diego, CA 92121
(858) 597-9600

San Francisco
One Embarcadero Center, Suite 2050
San Francisco, CA 94111
(415) 490-9000

Tampa
401 E. Jackson Street, Suite 2300
Tampa, FL 33602
(813) 769-7500

Washington D.C.
1875 I Street, NW, Suite 500
Washington, D.C. 20006
(202) 429-3707