

More Employers to Land on OSHA's Severe Violator List

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The Occupational Safety and Health Administration (OSHA) has announced that it has expanded employer eligibility for placement on its Severe Violator Enforcement Program (SVEP).

This means that it is more important than ever that employers understand the long-term consequences of settling citations, as doing so could put them on the path to being labeled a "severe violator." Employers should consider the serious non-immediate, non-monetary consequences of settling citations, including, but not limited to:

- Disqualification from bidding on certain jobs
- Damage to public reputation
- Being targeted by OSHA for greater enforcement activity

OSHA believes that broadening the scope of its SVEP will focus its enforcement and limited resources on employers it considers bad actors, *i.e.*, those that have demonstrated a recalcitrance or indifference to their Occupational Safety and Health Act obligations by committing willful, repeated, or failure-to-abate violations of OSHA requirements. The agency has given OSHA State Plans 60 days to notify OSHA that their own enforcement policies and procedures are at least as effective as the revised SVEP.

SVEP Expansion

Employers on OSHA's public list of "severe violators" may be stuck on that list for at least two years.

A company may be added to the SVEP list if it meets any of the following criteria:

- Fatality/Catastrophe inspection* where OSHA finds at least one willful or repeated violation or issues a failure-to-abate notice based on a serious violation directly related either to an employee death or to an incident causing three or more employee hospitalizations.
- Non-Fatality/Catastrophe inspection* where OSHA finds at least two willful or repeated violations or issues failure-to-abate notices (or any combination of these violations/notices) based on the presence of high gravity serious violations. (Low and moderate gravity serious violations do not fulfill this criterion.); or
- Egregious enforcement actions* where OSHA cites an employer for instance-by-instance violations.

Employers should be most concerned about the expanded second category, which can easily rope in more employers than ever before. For example, a manufacturing company that settles serious lockout tagout (LOTO) citations (almost always characterized as "high-greater" violations) and has another inspection within five years where OSHA cites the company with LOTO violations now classified as repeated could end up on SVEP. Likewise, a roofing company that settled fall protection citations (almost always characterized as "high-greater") and is cited again by OSHA for a serious fall protection violation within five

years now classified as repeated could also become a severe violator.

When an employer ends up on the SVEP list, OSHA must conduct a follow-up inspection within one year of the citation becoming a final order, even if the agency has received abatement verification of the cited violations. The purpose of the follow-up or referral inspection is to assess not only whether the cited violation(s) were abated, but also whether the employer is failing to address similar or related hazards.

Removal from SVEP List

To be removed from OSHA's SVEP Public Log after at least three years from OSHA receiving acceptable abatement certification of the violations that landed the company there, the company must have:

1. Abated all SVEP-related hazards;
2. Paid all final penalties;
3. Where applicable, followed and completed all applicable settlement provisions;
4. Received no additional serious citations related to the hazards identified in the original SVEP inspection or any related establishments; and
5. Have received one follow-up or referral OSHA inspection.

A company can be removed after just two years if it has agreed to an Enhanced Settlement Agreement requiring it to develop and implement a safety and health management system (SHMS). The SHMS must include policies, procedures, and practices that are effective to recognize and abate occupational safety and health hazards and protect employees from those hazards. The company and OSHA should be able to review and evaluate the SHMS and an independent third-party will have to verify its implementation.

Regulation, Enforcement Prioritized

The current administration has been prioritizing more regulation and enforcement, including stricter oversight of state OSHA plans. President Joe Biden's request for a \$664.6 million budget allocation (a funding increase of 12 percent) to OSHA in fiscal year 2022 included a plan to hire 155 new OSHA inspectors. While it was declined by Congress, it shows the administration's commitment to strengthen OSHA enforcement.

In response to the immediate effects of the new SVEP criteria, employers should re-evaluate their safety procedures and OSHA compliance protocols to determine whether they are affected and the steps they should take to insulate themselves from being labeled a severe violator.

If you have questions or need legal assistance please reach out to the Jackson Lewis attorney with whom you often work, the authors, or any member of our [Workplace Safety and Health Group](#).

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