

OSHA MOVES CLOSER TO PROPOSING RULE REQUIRING ALL COVERED EMPLOYERS TO CREATE, IMPLEMENT AND ENFORCE INJURY & ILLNESS PREVENTION PROGRAMS

By Scott J. Wenner

Since publishing its regulatory agenda in April 2010, OSHA has declared its intent to mandate through rulemaking that all covered employers create, implement and enforce a workplace injury and illness prevention program. The agency has insisted that the standard it plans to promulgate “will simply require employers to develop a program to help them find and fix hazards in their workplaces.” See, e.g., *Injury and Illness Prevention Programs – Frequently Asked Questions*, <http://www.osha.gov/dsg/topics/safetyhealth/I2P2QAs.html>. While this characterization of the Injury and Illness Prevention Program — which OSHA calls “I2P2” — clearly understates the expected magnitude of the obligation to be imposed, the agency has yet to disclose any specifics that are under consideration. That will change soon.

“SBAR” Review Process Commenced

In January, OSHA took its first public action since holding five “stakeholder meetings” on the I2P2 concept 18 months ago. First, and most significantly, OSHA formally notified the Small Business Administration (“SBA”) Office of Advocacy as well as the Office of Management and Budget on January 6 of its intent to convene a small business advocacy review within 60 days. The so-called Small Business Advocacy Review (“SBAR”) is a statutory prerequisite to rulemaking by OSHA and the EPA that is required by the Small Business Regulatory Enforcement Fairness Act when a proposed rule is expected to have a significant impact on small businesses. The purpose of the SBAR review is to give representatives of small business an opportunity to present advice and recommendations on alternatives to contemplated regulations to minimize the regulatory burden on small entities. This review generally is one of the early steps in any large rulemaking by OSHA or EPA, and was expected to go forward in 2011.

Among the materials that OSHA must provide to the SBAR panel and the small business representatives in the review process, initially in confidence, is the draft rule being proposed. The panel must review the draft rule and other supporting materials prepared by OSHA and is required to consider the comments of the small business representatives about the effects of the draft rule on small business and any proposed alternatives. The panel then must prepare a written report to OSHA within 60 days, and the agency makes any appropriate revisions to the rule and publishes its proposed rule along with the SBAR panel’s report in the *Federal Register*. That publication commences the comment period which must precede publication of a final rule.

OSHA Publishes White Paper

Shortly before initiating the SBAR review process, OSHA posted a white paper on its website entitled *Injury and Illness Prevention Programs*.¹ This document, which contains citations to an impressive looking array of publications, apparently is OSHA’s opening volley in support of adoption of an I2P2 rule. However, this paper is entirely lacking in details or specifics — consistent with the agency’s failure after nearly two years to disclose anything but generalities about the I2P2 rule that it will propose. Indeed, OSHA’s new white paper marshals considerable support for the unremarkable propositions that, (i) despite improvement, workplaces still suffer too many injuries, illnesses and fatalities, and (ii) safety programs have yielded positive results for employers that implement them fully. That is a far cry, however, from establishing that a regula-

1. The white paper is available at <http://www.osha.gov/dsg/InjuryIllnessPreventionProgramsWhitePaper.html>.

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tion that specifies the elements that every safety program at each place of employment across the board must contain is appropriate.

The white paper attempts to bridge the gap by culling out what it deems to be common elements shared by most successful injury and illness prevention programs: management leadership; worker participation; hazard identification and assessment; hazard prevention and control; education and training; and program evaluation and improvement.² However, these are extremely broad concepts that defy uniform implementation or objective measurement. A workable safety program will vary from workplace to workplace, even within the same industry, depending on variables such as size, culture, unionization, location, age of facility and workforce, and a myriad of others. There is a real question of whether OSHA inspectors will be capable of fairly enforcing a regulation that requires such subjective and nuanced judgments in both implementation and enforcement without building in requirements so rigid as to defeat the effectiveness of a standard.

OSHA's white paper, though plainly an advocacy piece in support of a rule, does contain several nuggets that employers will find somewhat reassuring. The agency declares:

1. The I2P2 rule will not impose a "one size fits all" requirement, but will permit employers to tailor their plans to fit their own workplaces.
 2. Because the rule will build in flexibility, small businesses can create inexpensive plans that implement only the most basic elements.
 3. Many states already require at least some employers to have illness and injury prevention programs³, so an
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2. No empirical support is cited for any but the first two as being common to most successful programs.
 3. OSHA claims that the following states fall into this category: Arkansas, California, Hawaii, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New York, Oregon, Utah and Washington. However, five of the 14 states identified require programs only of "hazardous employers" – generally defined as employers having above average injury rates or workers compensation claim experience. Further, programs vary in their requirements — *e.g.*, on whether safety committees are required. Thus, OSHA's implicit suggestion that 14 states already have "injury and illness prevention plan" mandates that resemble the requirements that OSHA is considering is at best an overstatement.

OSHA rule will bring more uniformity for multistate employers and they will have a head start.

It remains to be seen what the rule that emerges after the SBAR review will require, both formally and from a practical perspective.

What Can Employers Do Right Now?

There is no proposed rule as yet, but OSHA has confirmed that there will be one soon. Until a rule is proposed it would make little sense to invest in creating any new programs or procedures that are not already required by existing state laws or other OSHA standards. Furthermore, the prospects for a final rule mandating injury and illness prevention plans emerging in 2012 are uncertain at best. It is expected that the notice and comment period that will commence when a proposed rule is published in the *Federal Register* will be contentious, and that any thorough analysis of the issues that will be raised will be time consuming. With an election in nine months and the possibility that there will be a change in administration as a result, it will take a concerted effort for OSHA to publish a final rule should it have to do so before January 20, 2013.

Nonetheless, even at this uncertain stage, employers can make a few sound investments in proactive steps.

1. Begin preparing those with budget responsibility up the line for the likelihood that OSHA will promulgate a final rule either this year or next that will require your company to prepare, implement and enforce an illness and injury prevention plan, complete with employee involvement and training.
2. Inventory any formal or informal safety programs or procedures that presently exist at your company – even if only in certain departments or locations – so you are familiar with what already is in place.
3. Determine whether your company, or individual departments or locations, has in place any procedures for
 - i. uncovering hazardous conditions that exist;
 - ii. reporting hazardous conditions that are found; and/or
 - iii. remediating hazardous conditions that are reported or found.
4. Make sure your company's safety training procedures and records are in order.

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5. Once OSHA publishes a proposed rule, consider participating in the process by
 - i. presenting comments on the website that will be established for submittal of comments on how the proposed rule would impact your company;
 - ii. notifying your trade association or other industry group of your concerns about the proposed rule and ensuring that it plans on participating in the comment and hearing process to oppose or seek modification of the proposed rule; and/or
 - iii. having your attorney prepare formal comments for submittal to OSHA and participate in any hearing convened by the agency on its proposed rule. ♦

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For more information about Schnader’s Labor and Employment Practices Group or to speak with a member of the Firm at a particular Schnader office location, please contact:

*Scott J. Wenner
212-973-8115; 415-364-6705
swenner@schnader.com*

*Michael J. Wietrzychowski
856-482-5723; 215-751-2823
mwietrzychowski@schnader.com*

www.schnader.com

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