Healthcare Update

2012, No. 1

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Top 10 OSHA Citations In The Healthcare Industry

By Tiffani Casey (Atlanta)

Each year the Occupational Safety and Health Administration (OSHA) issues hundreds of citations to employers in the healthcare industry. While medical centers, doctors' offices, and clinics must all comply with a significant number of standards, the citations issued to hospitals remain relatively constant from year to year.

Not surprisingly, maintaining compliance with the Blood Borne Pathogens (BBP) standard presents a continuing challenge. Citations under the BBP standard are the most frequently cited in this industry. The other standards most frequently cited usually fall under Hazard Communication requirements. This past year was no different.

Your Main Areas Of Concern

For hospitals and medical centers, the most frequently cited standards (after BBP compliance) during the last half of 2011 were:

1. failure to train under the BBP standard;
2. failure to implement and maintain an Exposure Control Plan under the BBP standard;
3. failure to engineer out hazards/ensure hand washing under BBP standard;
4. poor housekeeping under the BBP standard;
5. failure to use personal protective equipment under the BBP standard;
6. failure to keep BBP training records and a Sharps Injury Log;
7. failure to implement and maintain a written Hazard Communication Program;
8. failure to provide Material Safety Data Sheets (MSDS) under the Hazard Communication standard; and
9. failure to ensure proper labeling of chemicals under the Hazard Communication standard.

For doctors' offices and clinics, the most frequent citations were:

1. failure to implement and maintain an Exposure Control Plan under the BBP standard;
2. failure to train under the BBP standard;
3. failure to engineer out hazards/ensure hand washing under BBP standard;
4. poor housekeeping under the BBP standard;
5. failure to implement and maintain a written Hazard Communication Program;
6. failure to make the Hepatitis B vaccination available under the BBP standard;
7. failure to prepare Exposure Determinations under the BBP standard;
8. failure to use personal protective equipment under the BBP standard;
9. failure to provide post exposure Hepatitis B vaccination under the BBP standard; and
10. failure to train employees under the Hazard Communication standard.

Using This Data Wisely

Employee exposure to safety and health hazards and the issuance of related OSHA citations can be expensive, so it's worth taking the time to avoid these issues by getting compliant with the OSHA standards and by reducing employee exposure. While full compliance with the standards can be difficult, there are steps you can take to minimize these hazards and avoid citations.

First, regularly audit your safety and health compliance by performing facility-wide and recordkeeping inspections and reviews. The focus of the audits should be in those areas where noncompliance is most likely. This includes not only OSHA's top 10 areas, but also areas specific to your facility.

For example, if you have had previous citations from OSHA, those standards cited should be a focus of the audit to prevent repeat citations. Review your first reports of injury, OSHA 300 Logs and workers' compensation records, to look for patterns of injuries related to potential infractions. Finally, perform walkthrough inspections, looking for potential hazards and safety violations (and of course promptly correcting any problems).

Use information gathered from these audits for implementing new procedures and policies. For example, if you find that you are not properly updating MSDS sheets for new items, you may need to revise your product-intake procedures. Alternatively, you may discover that even though your procedure is adequate, responsible individuals are not performing their duties properly and require retraining, or even discipline.

Second, audit your training practices, especially in relationship to BBP and Hazard Communication. Failure-to-train citations are low-hanging fruit – just one missed employee can result in a citation. Additionally, no matter how much training is provided, employees often seem to develop amnesia when an OSHA compliance officer asks whether they have been trained in a specific area.

Avoid these issues by performing regular "refresher training"; informally asking employees about the training they've received; developing readily-available resources; and reviewing documentation to ensure the training records exist and are readily available if OSHA visits.

While not all hazards, and therefore not all potential for citations, can be eliminated, taking the above steps will go a long way in reducing the likelihood of their existence. More importantly, these steps are key elements in creating a safer working environment for healthcare employees.

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Who's Afraid Of A Little Snow?

By Richele Taylor and Karen Luchka (Columbia)

Lots of folks may dream of a white Christmas, but healthcare employers often struggle with handling weather-related disruptions, such as snow days in the workplace. Even in a hospital, some departments or free-standing satellite facilities must deal with such events. Healthcare employers should therefore implement policies addressing inclement weather, including how employees can find out how a facility's schedule may be changed and what they should do if the facility is open, but they are unable to make it to work due to the weather.

These issues are tricky, as healthcare entities must provide continuity of care, while ensuring that employees are not taking unnecessary risks in commuting to work. In addition to dealing with scheduling and commuting issues, facilities must also ensure that employees are paid properly.

The Legal Standards Involved

When reviewing your policy, your first concern should be to ensure that it makes sense for your organization. Second, make sure that the policy explains what occurs when employees wake up in a winter wonderland (or face flooding, storm damage, or some other natural disaster). In handling these scenarios, companies must comply with the Fair Labor Standards Act (FLSA).

Employees are treated differently under the FLSA, depending on whether they are classified as non-exempt or exempt. Briefly, non-exempt employees are those who are entitled to overtime pay. Exempt employees are those who are paid on a salaried basis, *and* also meet specific legal requirements to be exempt from the overtime pay requirements.

Pay Non-Exempt Employees For *Time Spent Working*

Compliance with the FLSA for non-exempt employees is straightforward: non-exempt employees are only paid for hours worked. Absent some contractual obligation (such as an individual employment agreement or a union contract) a company does not have to pay non-exempt employees when they miss work due to snow or other inclement weather. Also, non-exempt employees can be required to use vacation time for an absence due to inclement weather (even for a half-day).

Of course, before implementing such a policy you should consider how disgruntled your employees may be if they're required to use vacation time when missing work. Employees are more likely to favor a policy that allows them to choose whether to use a vacation day to cover their absence due to inclement weather or to simply not be paid if they are saving vacation for special plans.

Exempt Employees Must Be Paid *When Operations Are Suspended*

Exempt employees must be paid their full salary for any week in which they perform work. Accordingly, if you are shut down for business for three out of five days during the workweek, the exempt employees must be paid their normal salary for the entire week. To do otherwise signifies that an employee is not exempt.

The FLSA does not require employers to provide paid vacation or time off for any employees, exempt or non-exempt. But when an employer does have a vacation or PTO policy that covers exempt employees, it may substitute or reduce the accrued leave for the time an employee is absent from work. Even if the substitution is for less than a full day, it will not affect the classification of the employee as exempt. Either way, if the exempt employees work for a small portion of the workweek, they must be paid for the entire week, even if the employer's operations are closed for a portion of the week.

What If You Are Open, But Exempt Employees Are Snowbound?

The above discussion assumes that the company shut down due to inclement weather. What should a healthcare employer do when it stays open and the employee is unable to come to work? The U.S. Labor Department finds that if the employer is open for business and an exempt employee chooses not to report to work (or is unable to report), the employer may count this as time-off for personal reasons.

Continued on page 3

Another Way Of Looking At The Obesity Problem

By Ted Boehm (Atlanta)

One well-known trend in American demographics may be responsible for the emergence of a new concern in the healthcare employment setting – a trend that is spurring the Department of Labor's Occupational Safety and Health Administration (OSHA) to action.

It's well known that the obesity rate in America has risen dramatically over the last several decades. Currently, approximately 34% of adult Americans are considered obese, which is more than double the percentage of adult Americans who were considered obese in 1980. Obesity, of course, is linked to numerous other health problems, which, unsurprisingly, often results in such individuals seeking treatment in healthcare facilities. As an increasing number of overweight Americans enter healthcare and long-term care facilities, employers need to address the growing number of workplace injuries related to the care of such patients.

Increased Injury Rate to Healthcare Workers

Data recently released by the Bureau of Labor Statistics showed an increase in injuries to workers in healthcare facilities. According to the data, the number of injuries increased 6% last year for healthcare support workers in general, a rate that is nearly 2.5 times the rate for all private and public workers. The injury rate for nursing aides, orderlies and attendants rose 7%. Perhaps most notably, the rate of musculoskeletal type injuries increased 10% for nursing aides, orderlies and attendants.

In response to this trend, Assistant Labor Secretary David Michaels announced last November that OSHA intended to develop a national emphasis program (NEP) that will focus on worker safety at nursing homes and other healthcare facilities. OSHA has not released a start date yet, but the proposed NEP would have an initial term of up to three years and would involve increased inspections of healthcare facilities and nursing homes. While OSHA did not specifically link obesity to the increased rate of worker injuries in its announcement, it seems likely that the risk posed by overweight patients was at least one motivating factor. As Assistant Labor

Continued on page 4

No Bargaining Required Over Hospital's Flu-Prevention Policy

By Gregory D. Ballew (Kansas City)

Recently, an administrative law judge (ALJ) found that Virginia Mason Hospital, which has a collective bargaining agreement with the Washington State Nurses Association, did *not* violate the National Labor Relations Act (NLRA) when – without bargaining with the union – it implemented a flu-prevention policy. The unilaterally-implemented flu-prevention policy required non-immunized nurses to take antiviral medication or to wear facemasks when in contact with patients, visitors and the public.

The ALJ found that because the parties' agreement contained a broadly-worded management rights clause, the union had waived the right to bargain over the issue. If affirmed by the National Labor Relations Board, the ALJ's decision will give hospitals with appropriately-worded management rights clauses in their union contracts leeway to unilaterally implement similar flu-prevention policies.

Background

Virginia Mason Hospital operates an acute-care hospital in Seattle, Washington, where it employs approximately 600 nurses who are represented by a union. The hospital announced that it was amending its "Fitness for Duty" policy to require its entire work force to be immunized against the flu. The union filed a grievance and an arbitrator issued an award in favor of the union. As a result, the hospital did not require the nurses to be immunized.

Thereafter, the hospital informed the union that it was considering a policy requiring non-immunized nurses to wear a protective facemask or to take antiviral medication. The hospital made clear that these measures were intended to protect patients, employees and visitors from contracting influenza. But no bargaining was conducted with the union over the proposal before the hospital implemented the policy. Once implemented, the union filed an unfair labor practice charge contending that the hospital was required to bargain regarding the policy.

The ALJ's Decision

The ALJ stated that it was undisputed that the hospital implemented its flu-prevention policy without the give and take of bargaining and, therefore, unless the hospital could demonstrate a legitimate defense, its failure to bargain was an unfair labor practice.

First, the ALJ rejected the hospital's defense that the flu-prevention policy was required by state or federal law, stating that the hospital could not point to a single such law or regulation. Second, the ALJ found that the policy was amenable to resolution through the bargaining process.

Finally, the ALJ addressed the hospital's contention that the union waived bargaining over the policy when it agreed to a management rights clause in the CBA. While the management rights clause in the parties' CBA did not specifically mention the wearing of facemasks, it did allow the hospital to unilaterally "direct the nurses" and "to determine the materials and equipment to be used; [and] to implement improved operational methods and procedures."

The ALJ found that a facemask is "equipment" and that requiring nurses who have not been immunized and who refused to take antiviral medication to wear a facemask was simply an extension of infection control guidelines already in effect at the hospital and was permitted under the management rights clause of the CBA. Thus, the ALJ concluded that the union waived the right to bargain over the wearing of facemasks when it agreed to the management rights clause in the CBA.

What It Means

The decision, if affirmed, facilitates the efforts of the hospital to deliver quality health care to its patients and prevent the spread of illness. The decision highlights the importance of an employer including a strong and appropriately-worded management rights clause in its collective bargaining agreement. Absent such a management rights clause, the hospital's action in this case would have been found unlawful.

Even with a management rights clause, you should nonetheless provide notice of any proposed changes to the union (placing the burden of requesting bargaining on the union) and consult with counsel before implementing any such changes, as Board law continues to evolve.

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Who's Afraid Of A Little Snow?

Continued from page 2

Under the FLSA, you can take deductions from an exempt employee's salary or leave time for absences due to personal reasons, so long as time is not deducted for sick leave. The sole caveat is that a company may deduct from an exempt employee in this scenario in full-day increments only, not for half-days missed. Thus, if your exempt employee shows up for work at noon and works until 6 pm, you will not be able to deduct from his or her pay.

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Another Way Of Looking At The Obesity Problem

Continued from page 2

Secretary Michaels noted in the announcement, one area of focus will be on "back injuries from resident handling or lifting patients."

It's possible that Assistant Labor Secretary Michaels' announcement may foreshadow another OSHA announcement in the coming year. In January 2010, OSHA proposed a rule that that would have required employers to check a box in a separate column on the OSHA Injury and Illness (Form 300) Log for work-related musculoskeletal injuries to employees. In the face of criticism from the business community, OSHA temporarily withdrew its proposal in January 2011. But in light of the 10% increase in musculoskeletal injuries to healthcare workers and OSHA's recent announcement that it intends to focus on back injuries to workers in the industry, employers should prepare for the possibility that OSHA will revisit this proposed rule.

What This Means To Nursing Home And Long-Term Care Employers

Employers in the long-term care profession should take particular note of this increasing injury rate and the OSHA announcement. Baby boomers are now hitting retirement age and will likely have an enormous impact on long-term care in the coming years. Recent data indicates that this segment of the population – some 77 million strong – may not be entering long-term care facilities in ideal shape. A poll released by the Associated Press in July found that baby boomers are more obese than any other generation.

As a result, long-term care workers may soon be assisting heavier patients than at any time before. Because long-term care workers regularly provide physical assistance to patients, the incidence of injuries (particularly musculoskeletal injuries) seems likely to rise unless employers have adequate procedures in place to prevent such injuries.

Nursing homes and other healthcare facilities need to prepare plans for responding to the increased rate of worker injuries and the likelihood that OSHA will increase its inspection of facilities as part of the proposed NEP. Now is the time to take necessary measures to minimize or mitigate such workplace injuries by conducting an audit of existing safety training programs, or creating new programs if none exist.

A modest investment of time and resources now will pay dividends if an OSHA inspector comes calling in the future. Moreover, use this as opportunity to ensure that *all* OSHA records are in order. For assistance with these or other labor and employment matters, contact your Fisher and Phillips attorney.

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