OSHA'S NEW EMPHASIS ON THE RETAIL INDUSTRY

To Our Clients and Friends:

The Occupational Safety and Health Administration ("OSHA") has recently stepped up its enforcement activities in the retail industry. Those in the industry should be mindful of OSHA's new emphasis and its potentially costly consequences.

Region III of OSHA--which covers Pennsylvania, Delaware, Maryland, D.C., Virginia, and West Virginia--formalized this focus in late 2012 with a Local Enforcement Program centered on department stores.[1] Because "OSHA . . . determined that employees face significant risk of injury resulting from improper storage of materials and obstruction of egress from places of employment," Region III ramped up inspection of department stores, with particular emphasis on those two areas of concern.[2]

Region III's Local Enforcement Program is symptomatic of a much broader trend within OSHA. Since early 2013, clothing stores, big box stores, home improvement stores, drug stores, and a supermarket have all faced OSHA citations. Several of these citations included proposed penalties well into the six-figures.

Retail establishments can be easy targets for certain OSHA citations. The vast majority of retail industry citations in the past year included at least one citation item for obstructing access to the exits. OSHA regulations specify that exit accesses must be at least 28 inches wide "at all points," and OSHA often interprets this to mean that the exit accesses may never be obstructed, even temporarily.[3] Therefore, even if retail stores only temporarily limit aisleways to less than 28 inches in order to stock shelves, in OSHA's view, they may still be subject to citation. Similarly, many of the retail industry citations in 2013 included items related to poor "housekeeping and cleanliness," hazards caused by stacked boxes, and "trip and fall hazards." All of these conditions are common in the retail industry.

Moreover, national retailers--with many establishments in a number of states--are especially susceptible to "repeat citations." Repeat citations are citations for regulatory violations for which the company has already accepted citations at another establishment anywhere in the country. A regulatory violation in Peoria, IL, could form the basis of a "repeat" citation even if the company's prior citation for that regulatory violation occurred in Manhattan. In 2010, OSHA also expanded the "look-back" time period for repeat citations from three years to five years, so a company can receive a "repeat" citation even if the cited issue has not arisen at any of the company's stores for almost five years.[4]
As OSHA enforcement in the retail industry escalates, multiple repeat citations will put retail stores at a greater risk of being named a "severe violator" in OSHA's "Severe Violators Enforcement Program" ("SVEP"). A company can be named a "severe violator" if: 1) it is the subject of a "fatality or catastrophe inspection with one or more willful or repeated violations or failure-to-abate notices"; 2) has "two or more willful or repeated violations or failure-to-abate notices that are high-gravity violations related to high-emphasis hazards," 3) has "three or more willful or repeated violations or failure-to-abate notices that are high gravity violations related to the potential release of a highly hazardous chemical"; or 4) is "an egregious . . . case."[5] Once a company is part of SVEP, it may face follow-up inspections at all its stores, potential involvement of the CEO in OSHA issues, higher penalties, and a more onerous set of conditions--including agreeing to civil contempt in the event of non-compliance--before any citations can be settled. Finally, once an employer is categorized as a "bad actor" under SVEP, it is very difficult to get this scarlet letter removed.

As OSHA increases its focus on the retail industry, retail companies will need to focus on company-wide workplace safety policies and a more vigorous and coordinated defense against arbitrary enforcement action.


Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have about these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following lawyers:

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