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May 16, 2025

The Honorable Ryan Mackenzie
Chairman
U.S. House Subcommittee on Workforce Protections
Washington, D.C.

The Honorable Ilhan Omar
Ranking Member
U.S. House Subcommittee on Workforce Protections
Washington, D.C.

Dear Chairman Mackenzie and Ranking Member Omar:

On behalf of Fisher Phillips LLP, an international labor and employment law firm practicing in workplace safety law, we submit this letter for the record for the Workforce Protections Subcommittee hearing entitled, “Reclaiming OSHA’s Mission: Ensuring Safety Without Overreach.” We strongly support the committee’s scrutiny of OSHA’s Severe Violator Enforcement Program (“SVEP”), and other instances where the agency has wielded immense enforcement power that is not rooted in a notice-and-comment regulation or enabling statute.

OSHA’s SVEP is an enforcement directive the agency implemented without going through notice-and-comment rulemaking. *See Severe Violator Enforcement Program*, CPL 02-00-169 (effective September 15, 2022). Under the directive, employers may be considered for placement into SVEP if they meet any one of the following criteria:

1. OSHA conducts an inspection into a fatality and issues one “willful” or “repeat” violation;
2. OSHA issues a failure-to-abate for a serious citation directly related to an employee death or an event causing three or more employees to be hospitalized;
3. OSHA issues at least two willful or repeated violations, or failure-to-abate notices based on high-gravity serious violations;
or
4. all “egregious enforcement actions” must be considered SVEP cases. Egregious enforcement actions generally involve high-profile cases where OSHA has utilized its instance-by-instance citation directive to punish what the agency deems a recalcitrant employer.

OSHA’s SVEP is legally problematic for at least three reasons:

1. It is effectively an agency rule that never went through notice-and-comment rulemaking;
2. Employers are placed on SVEP based on the mere issuance of a citation, and not one that has been adjudicated on the merits. This violates procedural due process guaranteed by the Constitution; and
3. Once placed on SVEP, an employer is subject to OSHA opening inspections on the company enterprise-wide across the United States. By way of example, a citation arising from an accident at a company's Ohio location resulting in SVEP placement would open the company to potential OSHA inspections, for example, at its Wisconsin, Florida, Texas, and Arkansas facilities – even if the company never had an accident or employee complaint at those facilities.

1. SVEP Never Went Through Notice-and-Comment Rulemaking

Under the Administrative Procedure Act, 5 U.S.C. §553, before promulgating a rule OSHA must provide the public with notice of the rule and an opportunity to comment on a proposed version of the rule. Procedural rules can be exempt from this process, but the SVEP is a substantive rule. Courts have recognized that a directive that “has substantial impact upon private parties and puts a stamp of agency approval or disapproval on a given type of behavior” is a substantive rule. *Chamber of Commerce of the U.S. v. DOL*, 174 F.3d 206 (D.C. Cir. 1999). Likewise, courts have found that when OSHA uses the threat of its power to inspect to force an employer into compliance or to suffer the consequences, then the Directive is a rule. *Id.*

The SVEP Directive is a rule/standard within the meaning of 29 U.S.C. § 652(8) (the OSH Act) because it effectively obligates employers, under penalty of continued, enterprise-wide inspection to adopt abatement measures that are more demanding than those required by the OSH Act or by any pre-existing regulation implementing the Act. *Chamber of Commerce*, 174 F.3d 212; *accord Agric. Retailers Ass'n v. U.S. Dep't of Labor*, 837 F.3d 60, 64 (D.C. Cir. 2016) (citing *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1468 (D.C. Cir. 1995)). Additionally, the Directive has “a substantial impact” on employers, as it “places the burden of inspection” and prolonged placement on the list upon employers who contest citations alleging SVEP violations. Employers who choose to contest SVEP citations are penalized and kept on the list for more than three years if they do not “voluntarily” provide “acceptable abatement verification” while the contest pend. Providing abatement verification during the pendency of a contest to remain off a “severe violator” list is not a requirement otherwise imposed by the OSH Act. See 29 U.S.C. §§ 651-78. Indeed, typically abatement of a citation is stayed during the pendency of contest.¹

Finally, to be removed from SVEP, employers must also have one follow-up inspection within the three-year period, and have: (1) abated all SVEP-related hazards; (2) paid all penalties; (3) complete all applicable settlement provisions (if any); and (4) receive no additional serious citations related to the hazards identified in the original SVEP inspection or any related establishment. Requirement number four is typically the sticking point as large employers often will have at least one “serious” citation issued enterprise-wide within a three-year period.

¹ As long as the abatement is challenged, and it typically is.

Such onerous requirements are why there are presently 1039 employers on the Federal SVEP, with some of these employers having remained on the log for the past fourteen years (since 2011). *See* Public Federal SVEP Tracking Log 12/01/2024.² One of Fisher Phillips' clients in the food-manufacturing industry was placed on SVEP in 2015 and despite expending millions of dollars in compliance efforts, private consultants, and private audits, has not yet been removed from the list.

2. Placement on SVEP Based on Mere Allegations Violates Due Process

When issued, a citation is a mere allegation that an employer violated an OSHA standard at a particular location or establishment. The employer is entitled to due process through a hearing before an administrative law judge of the Occupational Safety and Health Review Commission ("OSHRC") before it is required to pay any penalty or abate any alleged violation.

However, an employer is placed on SVEP the moment the citations are *issued* and before those citations are adjudicated by OSHRC. This is problematic because the placement of the employer on SVEP immediately opens the employer to nationwide inspections at its other facilities – before it has had its day in court. Effectively, a mere allegation by OSHA – the unadjudicated citation – purports to allow the government warrantless entry into every establishment the employer owns and operates. This is a fundamental deprivation of employers' constitutional due process rights.

3. SVEP's Enterprise-Wide Inspections Are Contrary to the Fourth Amendment

As a corollary to the above issue, the Supreme Court has held that OSHA generally cannot conduct warrantless searches and inspections of an employer's premises. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). SVEP permits OSHA to conduct warrantless inspections at every location an employer operates – regardless of whether there has been a complaint or allegation of workplace hazards at that location. This is a violation of a company's Fourth Amendment rights, particularly when placement on SVEP occurs before the citations are ever adjudicated final.

Conclusion

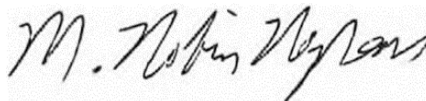
In summary, the SVEP is a rule that has far reaching and potentially catastrophic consequences for employers. This rule never went through required notice-and-comment rulemaking. If it had, it is likely employers from across all industries would have submitted a plethora of concerns and comments in response. SVEP also violates the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution.

Practically speaking, employers placed on SVEP remain on the list for years and often are unable to achieve removal from the list. While on the list, these employers are subjected to nationwide OSHA enforcement actions, which results in employers expending millions of dollars in compliance costs and legal fees.

² Accessible here: <https://www.osha.gov/enforcement/svep#v-nav-5>

We welcome the opportunity to work with the Subcommittee on Workforce Protections in achieving its goal of furthering worker safety without overreach and look forward to future discussions.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Robin Repass".

Robin Repass
Partner
FISHER & PHILLIPS LLP

A handwritten signature in black ink, appearing to read "Curtis G. Moore".

Curtis G. Moore
Partner
FISHER & PHILLIPS LLP