



OSHA NAMES VIOLATORS' INSURERS

OSHA is publishing the names of workers comp insurers in news releases that publicly shame employers cited for safety violations.

NCOIL Probing Workers Comp Opt-Out

The National Conference of Insurance Legislators voted during November's annual meeting to look into opt-out programs for workers compensation insurance—a system that has been adopted in Texas and Oklahoma and is under consideration in other states. NCOIL has not declared a position on the matter but says it "would be remiss" if it didn't investigate the issue. A group of Democrats in the U.S. House of Representatives has asked the Department of Labor to bolster federal oversight of state workers comp programs.

COMPLIANCE » SCOTT SINDER AND MATTHEW HERRINGTON

Program or Policy?

It will make a big difference to the Justice Department.

Each of your firms undoubtedly has many compliance policies in place to deal with a seemingly limitless number of legal obligations and exposures. A compliance policy on its own no longer cuts it—enforcement authorities expect to see a compliance program tailored to the risks the company faces and effectively implemented and operated.

In a not-so-subtle steady drum-beat over the past year, the Justice Department made it clear a "fire and forget" compliance policy no longer passes muster.

Recently, a company was held responsible for corrupt activities in its China subsidiary. There was no evidence of headquarters' involvement or knowledge. Rather, it was the lack of activity that created the basis for liability. The

Justice Department said the company failed to take any steps to ensure a nifty set of policies had been promulgated at the subsidiary and to ensure they had actually been implemented. In other words, they had a policy but no program.

The recent appointment of the department's first internal compliance expert, and Assistant Attorney General Leslie Caldwell's speech lauding that appointment, marks another nail in the "fire and forget" coffin. Caldwell referred to such compliance programs as "paper programs." Her speech highlighted factors the department will look to in assessing compliance programs offered as a corporate defense to employee malfeasance.

The following questions in italics are Caldwell's; the commentary is ours:

Tone at the Top: *Does the institution ensure that its directors and senior managers provide strong, explicit and visible support for its corporate compliance policies?*

Nothing new here.

Organizational Authority and Visibility: *Do the people who are responsible for compliance have stature within the company? Do compliance teams get adequate funding and access to actual resources? Of course we don't expect that a small company has the same compliance resources as a Fortune 50 company.*

The second question is a twist. Call it the Benghazi factor—an email record filled with the complaints of a resource-constrained compliance program is a ticking time bomb, especially when the disgruntled former compliance employee finds his or her whistle. Does this mean compliance gets a blank check? No. But it does mean the resources allocated to compliance should be tied to risk and changes in risk, separate and apart from the company's overall economics.

REGULATORY NEWS TICKER

only the procedural filing requirement, doesn't change substantive notice requirements under §27-603 or Code of Maryland Regulations 31.08.17.01 through 31.08.17.03. www.mdinsurance.state.md.us/

MICHIGAN Department of Insurance and Financial Services places health exchange insurer Consumers Mutual Insurance of Michigan in rehabilitation. www.michigan.gov/lara

MINNESOTA State insurance exchange appoints interim head Allison O'Toole to permanent leadership. She did not apply for the job, nor was a new bid for applicants issued. www.commerce.state.mn.us

MISSOURI John Talley replaces Maria Sheffield as captive program manager in Department of Insurance. Talley was most recently chief of captives in New Jersey. www.insurance.mo.gov

NEW JERSEY Does not change overall workers comp rates for term beginning Jan. 1, though individual classification rates may change based on latest data. » Raises surcharge on policies administered by New Jersey Workers Compensation Insurance Plan from minimum 17% to minimum 20%. » Enacts law requiring Department of Banking and Insurance to provide insurance producer licensing exam and registration materials in Spanish and English, effective in May. Also effective in May, instructional

materials for use in exam prep course must be available in Spanish and English. www.state.nj.us/dobi/insmnu.shtml

NEW YORK Sees its largest nonprofit insurance cooperative under the ACA fail. Health Republic Insurance of New York leaves millions of dollars unpaid to medical providers, 200,000 people without insurance. Health Republic received \$241 million in federal loans, under investigation for fraudulent financial filings. www.dfs.ny.gov

If the firm's overall economics require a reduction in resources, so be it, but make that change a smart change through a risk-based methodology.

You also need to make certain your firm is not out of sync with your peers. If your similarly sized competitors devote more funding and resources to their compliance programs than you do to yours, it will reflect badly.

Accessibility: *Are the institution's compliance policies clear and in writing? Are they easily understood by employees? Are the policies translated into languages spoken by the company's employees?*

There have been cases in which compliance policies were not translated into the language of the host country where a company operated.

Training, Beyond Check the Box: *Does the institution ensure its compliance policies are effectively communicated to all employees? Are its written policies easy for employees to find? Do employees have repeated training, which includes direction regarding what to do or who to consult when issues arise?*

It used to be a great answer to say everyone does an online training. A one-size-fits-all training for worldwide employees is a good start but nowhere near the end of a program capable of creating alignment between employee attitudes and corporate policy.

Living Policies and Continuous Improvement: *Does the institution review its policies and practices to keep them up to date with evolving risks and circumstances? This is especially important if an entity based in the United States acquires or merges with another business, especially a foreign one.*

If your policies have not been updated in five years, they are out of date. And when policies are updated, those changes both illustrate the company's commitment to a real program and provide a great vector reinforcing training in the basics of the program.

Consequences: *Are there mechanisms to enforce compliance policies? Those include incentivizing good*

A compliance policy on its own no longer cuts it.

compliance and disciplining violations. Is discipline even-handed? The department does not look favorably on situations in which low-level employees who may have engaged in misconduct are terminated but the more senior people who either directed or deliberately turned a blind eye to the conduct suffer no consequences. Such action sends the wrong message—to other employees, to the market and to the government—about the institution's commitment to compliance.

A program should be integrated into the company's existing business systems and procedures. For example, compliance should be integrated into personnel assessment systems, including but not limited to compensation systems. It is difficult to argue with Justice officials who say: "We know what company X values, and so do its employees, because those values are directly reflected in the metrics on which compensation is based."

Beyond the Walls: *Does the institution sensitize third parties like vendors, agents or consultants to the company's expectation that its partners are also serious about compliance? This means more than including boilerplate language in a contract. It means taking action, including termination of a business relationship, if a partner demonstrates a lack of respect for laws and policies.*

Contract language and certifications are necessary but not sufficient. Audit clauses that actually are used and consequences for noncompliance get you to sufficiency.

So, do you merely have a compliance policy, or do you have a complete program? When the enforcement authorities come calling, only the latter will suffice.

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OKLAHOMA State audit shows Workers' Compensation Commission has not kept track of who pays mandatory assessments to the state fund. A sample test of claims paid from two state-operated guaranty funds showed about half didn't have documentation to support the calculation of assessments. Other accounting problems were also uncovered and reportedly fixed. www.oid.ok.gov

RHODE ISLAND Has lost its Superintendent of Banking and Insurance Joseph Torti III to

Fairfax Financial, where he'll be VP of regulatory affairs. No successor named as of press time. Torti oversaw Rhode Island insurance for 13 years and had more than 25 years with the Insurance Division. He will leave as chair of NAIC Financial Condition E Committee and its Audit Committee of the Interstate Insurance Product Regulation Compact. He was also co-chair of the Principle-Based Reserving Implementation EX Task Force. www.dbr.state.ri.us/divisions/insurance/

SOUTH CAROLINA State Supreme Court adopts widely applied "continuous representation rule" for statute of limitations in legal malpractice cases. Decision reverses a 10-year-old ruling that set a three-year limit from the time of an original trial decision. Court adopts a statement from Ranier v. Stuart & Frieda in Oklahoma, saying: "We overrule Epstein and now hold that the statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has

not become aware of the injury prior to the decision on appeal." www.doi.sc.gov

TENNESSEE Department of Commerce and Insurance Commissioner Julie McPeak elected secretary-treasurer of NAIC at fall national meeting. McPeak was Kentucky's insurance commissioner but was appointed as lead in Tennessee in 2011. » Deputy Commissioner Chlora Lindley-Myers received Robert Dineen Award for Outstanding Service and Contribution to the