RULES AND RULEMAKING: I2P2 AND OSHA'S USE OF INTERPRETATIONS

JOHN J. COLEMAN, III
Burr & Forman, LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203

ABA Occupational Safety and Health Law Committee
March 13-15, 2012
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>A.</td>
<td>What is I2P2?</td>
<td>3</td>
</tr>
<tr>
<td>B.</td>
<td>OSHA's 1998 Proposal</td>
<td>4</td>
</tr>
<tr>
<td>C.</td>
<td>Current I2P2 Proposal</td>
<td>5</td>
</tr>
<tr>
<td>II.</td>
<td>I2P2 Issues to Consider</td>
<td>5</td>
</tr>
<tr>
<td>A.</td>
<td>First: How will an I2P2 program impact employer liability?</td>
<td>5</td>
</tr>
<tr>
<td>B.</td>
<td>Second: Can the self-critical analysis privilege apply to an I2P2 program?</td>
<td>6</td>
</tr>
<tr>
<td>C.</td>
<td>Third: Why are drug testing and workplace violence not addressed in the current proposal?</td>
<td>8</td>
</tr>
<tr>
<td>D.</td>
<td>Fourth: How will an I2P2 program operate in an organized workplace?</td>
<td>8</td>
</tr>
<tr>
<td>E.</td>
<td>Fifth: How will small businesses be affected?</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>CONCLUSION</td>
<td>10</td>
</tr>
</tbody>
</table>
I. Introduction

A. What is I2P2?

I2P2 refers to OSHA's rulemaking effort to require employers to put in place a system, with employee participation, to address and remedy hazards in their workplace. OSHA has discussed the concept of an I2P2 rule previously when it drafted a proposed rule in the late 1990's. Additionally, some states, including California, require employers to have an injury and illness prevention plan in place.\(^1\) Other states allow for workers compensation premium credits for employers who voluntarily adopt various forms of injury and illness prevention programs.\(^2\)

Generally, I2P2 programs require the following elements:

(1) management leadership and employee participation;
(2) hazard identification and assessment;
(3) hazard prevention and control;
(4) information and training;

---

\(^1\) The following states require injury and illness programs for either all employers or "hazardous employers": Arkansas, California, Hawaii, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New York, Oregon, Utah, and Washington. However, these programs vary in their requirements.

(5) evaluation of program effectiveness.

In January 2012, OSHA issued a White Paper, resurrecting its earlier proposed rules and arguing that a rule requiring employers to have an injury and illness prevention program is "an effective, flexible, commonsense tool . . . that can dramatically reduce the number and severity of workplace injuries and illnesses . . ." and that an injury and illness prevention program "helps employers find hazards and fix them before injuries, illnesses, or deaths occur."³

B. OSHA's 1998 Proposal

The idea of requiring employers to have an injury and illness prevention program is nothing new for OSHA. OSHA has considered the I2P2 rule concept for nearly two decades dating back to stakeholder meetings held in 1995. In 1998, OSHA prepared a draft proposed rule that would have required all employers not engaged in construction or agriculture to establish an injury and illness prevention program. The 1998 proposal contemplated five required elements: (1) management leadership and employee participation; (2) hazard identification and assessment; (3) hazard prevention and control; (4) information and training; and (5) evaluation of program effectiveness.⁴ The draft proposal was reviewed by a Small Business Regulatory Enforcement Fairness Act panel, but the

³ See OSHA's Injury and Illness Prevention Programs White Paper, January 2012.

rule was never published, and in 2002 OSHA removed the proposal from its regulatory agenda.

C. Current I2P2 Proposal

While not known for certain, it appears that OSHA's current I2P2 proposal closely mirrors its 1998 proposal. OSHA recites nearly verbatim the same fundamental elements of the 1998 proposal in its 2012 White Paper - "... management leadership, worker participation, hazard identification and assessment, hazard prevention and control, education and training, and program evaluation and improvement ...". As listed below, numerous unresolved issues remain regarding the impact on employers should the current I2P2 proposal become law.

II. I2P2 Issues to Consider

From the employer's perspective, I2P2 raises five important issues . . .

A. First: How will an I2P2 program impact employer liability?

Many states recognize that an injured employee has a cause of action against his/her co-worker under an exception to workers compensation immunity based on willful or intentional co-worker acts or omissions. The elements of an I2P2

---

5 See OSHA's Injury and Illness Prevention Programs White Paper, January 2012.

program could serve as evidence in these or premises liability actions by non-employee invitees and contractors.

Provisions requiring written hazard assessments and unprotected written investigation findings offer a fertile field for plaintiffs personnel injury lawyers to plunder, and a strong incentive to potential defendants to provide sanitized information other than is helpful to regulating workplace safety goals.

OSHA civil liability and criminal liability under OSHA and state law poses similar potential sources of concern respecting how such programs are implemented. Whether a citation is deemed "willful" or "criminal willful" could turn on how I2P2 documentation reads. Will requirements strike a reasonable balance between disclosure needed for regulatory purposes and fear of exposure?

How will I2P2 deal with these issues? Can or should written accident investigation reports be confined to reports to the employer's general counsel? What Fifth Amendment issues arise of the answer is no? How can information be sufficient to meet regulatory goals if the answer is yes? Should OSHA revisit the self-critical analysis privilege as a bridge?

B. Second: Can the self-critical analysis privilege apply to an I2P2 program?

Will an employer be able to assert self-critical privilege in connection with the steps it takes to comply with its injury and illness prevention program? In Sec. of Labor v. Hammermill Paper Division of International Paper Co., 796 F.Supp.
1474 (S.D. Ala. 1992), the Secretary instituted an enforcement action against International Paper when it refused to produce "all safety compliance audits for the years 1989, 1990, and 1991" in response to an administrative subpoena duces tecum issued pursuant to 8(b) of the OSH Act. International Paper argued that the subpoenaed material was beyond the Secretary's authority to obtain, and that seeking such material contradicted OSHA policy for the Secretary to seek disclosure of an employer's voluntary self-audits in an OSHA enforcement investigation. See id. at 1474.

International Paper offered to produce these voluntary self-audits if "the Secretary would agree not to use such records for punitive purposes." Id. The Secretary argued that she is authorized, in her discretion, to require production of these records via subpoena. International Paper moved to quash contending it should not be required to have self-critical documents it created to further workplace safety used against it. Denying the motion, the Court was unsupportive:

Notwithstanding the court's opinion that the Secretary of Labor should not undertake this action, this court does not have authority to control the exercise of discretion by the Secretary of Labor. The court is of the opinion, and finds that the Secretary of Labor has statutory authority to compel the present disclosure. Accordingly, the subpoena must be enforced.

Id. at 1475.

Based on International Paper, it seem unlikely that an employer could successfully assert the self-critical analysis privilege under the current I2P2
proposal given the Secretary's extensive and broad subpoena power. Will employers likewise be penalized for engaging in self-critical analyses as part of their new injury and illness prevention plan, or will I2P2 provide regulatory relief?

C. Third: Why are drug testing and workplace violence not addressed in the current proposal?

According to OSHA, in 2005, of the approximately 17.2 million illicit drug users over 18 years of age, 12.9 million (74.8%) were employed either full or part time, and between 10 and 20 percent of the nation's workers who died on the job tested positive for drugs or alcohol. The current I2P2 proposal does not include employee drug testing or workplace violence policies as elements of an employer's injury and illness prevention program. Are there reasons for these omissions?

D. Fourth: How will an I2P2 program operate in an organized workplace?

Safety and health regulation and practices are subject to mandatory bargaining. The bargaining rights of organized employees may therefore conflict with rights provided under the OSH Act. What happens if the requirements of an employer's injury and illness prevention program conflicts with the bargained for

7 See OSHA Safety and Health Topics, Workplace Substance Abuse at www.osha.gov (July 2, 2007).

8 See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964)(specifically mentioning "safety practices" as a condition of employment in defining an employer's bargaining duty); NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967) enforcing 156 NLRB 622 (1966)(holding that it was "inescapable" that "workers, through their chosen representative, should have the right to bargain with the Company in reference to safe work practices.").
safety and health provisions of a collective bargaining agreement? Can an employer seek a variance regarding its injury and illness prevention program? How much flexibility will OSHA allow?

The Seventh Circuit has held that "the OSHA legislation was intended to create a separate and general right of broad social importance existing beyond the parameters of an individual labor agreement and susceptible of full vindication only in a judicial forum." However, the Seventh Circuit's holding may not represent a definitive rule on the power of other forums to consider and resolve safety claims. In *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974), a case where a union went on strike because of the employer's decision to reinstate supervisors who were facing criminal charges for falsifying safety records, the Supreme Court ruled that the safety issue was arbitrable under the labor agreement.

Safety is a mandatory subject of bargaining. Safety information clearly must be provided to the certified bargaining representative in connection with the processing of a grievance. What role will the bargaining relationship play in the development of safety programs and the satisfaction of anticipated I2P2 elements? What about bargaining over multi-employer units and/or master agreements with local variations? Will I2P2 allow parties the flexibility to respond to varying conditions?

---

9 *See Marshall v. N.L. Indus.*, 618 F.2d 1220, 1222 (7th Cir. 1980).
E. Fifth: How will small businesses be affected?

Regarding the formulation of injury and illness prevention programs, OSHA states in its 2012 White Paper that "every business is different, and one size certainly does not fit all. Employers who implement injury and illness prevention programs scale and adapt these elements to meet the needs of their organizations, depending on size, industry sector, or complexity of operations." OSHA's White Paper addresses the issue of whether injury and illness prevention programs are too expensive and complicated for small businesses, arguing that the "core elements can be implemented at a basic level suitable for the smallest businesses . . ." The key question is how flexible will OSHA be in its regulation with respect to small businesses? Will small businesses be required to seek a variance from OSHA?

CONCLUSION

OSHA's latest I2P2 proposal, while seeking to further the laudable goal of promoting workplace safety, faces daunting challenges that any one-size-fits all solution creates when applied across-the-board to increasingly unique worksites in our diverse economy. The subject calls for further dialogue with these diverse stakeholders so that the result (whether a uniform standard or some more flexible solution) achieves the desired goal while ensuring in a fragile economy that affected employers continue to remain competitive.