



**FOULSTON  
SIEFKIN LLP**

ATTORNEYS AT LAW

WWW.FOULSTON.COM

WICHITA • TOPEKA • OVERLAND PARK

EMPLOYMENT AND LABOR  
FOULSTON SIEFKIN ISSUE ALERT

# OSHA TARGETING NURSING AND RESIDENTIAL CARE FACILITIES

JUNE 26, 2012

*by Forrest Rhodes*

Various circumstances can lead a compliance officer from the Occupational Safety & Health Administration ("OSHA") to your employer's doorstep for an inspection. An inspection could be triggered by an employee's complaint or your number could be pulled for a random inspection. An OSHA inspection can also be initiated pursuant to a National Emphasis Program ("NEP"). These programs are generated at the OSHA headquarters level and can be used to target a particular industry where OSHA has determined a need exists for systemic inspections. This is often driven by a greater than normal rate of workplace accidents or injuries in the industry.

This year OSHA announced a new NEP aimed at nursing homes and residential care facilities. The establishments potentially subject to this NEP are those within the NAICS codes 623110, 623210, and 623211 (formerly SIC codes 8051, 8052, and 8059). Bureau of Labor Statistics information from 2010 reflects injury and illness rates within the nursing home and residential care industry that are two to three times higher than the national average.

Because of the large number of establishments potentially subject to inspection, OSHA is targeting the NEP at those with a DART rate at or greater than 10.0. The DART ("Days Away, Restricted, or Transferred") rate is a measure of the frequency of cases that lead to an employee missing work, being restricted in his/her work activities, or being transferred to another position. It is calculated as follows:

$$\text{DART Rate} = (N \div EH) \times 200,000$$

*N reflects the number of cases in a year where an employee missed work, had restricted work activities, or transferred jobs due to a workplace injury or illness.*

*EH reflects the total number of hours worked by all employees during the calendar year.*

*200,000 is a base number for 2,000 hours of work by 100 full-time equivalent employees.*

If your establishment had a DART rate greater than 10.0 from 2011 or has such a rate in any of the next two years, you will be eligible for inspection under the NEP. If your company operates multiple establishments, each one is viewed separately, so while one establishment may be outside the NEP's scope, others might be covered.

---

*This document has been prepared by Foulston Siefkin for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.*

Inspections under this NEP will address the following safety hazards, which labor statistics reflect occurring with great frequency in the nursing and residential care industry:

- Ergonomic stressors caused by patient lifting;
- Bloodborne pathogens;
- Tuberculosis;
- Workplace violence; and
- Slips, trips, and falls.

While the NEP inspection will focus on the above hazards, it is important to recognize that OSHA does not wear blinders during their inspections. If the compliance officer identifies hazards other than those listed above, OSHA may (and typically will) expand the scope of the inspection to address the additional hazards. This can lead to additional citations and additional penalties.

A proactive approach to OSHA compliance, and employee health and safety in general, is the best practice. Moreover, some of the standards applicable to the areas of focus for this NEP expressly require the employer to have implemented written policies or procedures. Once OSHA arrives to conduct an inspection, your ability to correct hazardous situations or implement the procedures required under these standards is significantly limited, if not impossible. Identifying and addressing these issues in advance helps to ensure that if OSHA arrives, they won't find anything on which to base a citation.

## FOR FURTHER INFORMATION

If you have questions or want more information regarding the NEP inspection or OSHA issues, you should contact your legal counsel. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Forrest Rhodes is available to assist you with OSHA-specific issues, or with any general employment or labor law issues you may have. You may contact him at [frhodes@foulston.com](mailto:frhodes@foulston.com) or by calling 316.291.9555. You may also contact Jay Rector, Foulston Siefkin's Employment and Labor Practice Group Leader, at 316.291.9722 or [jrector@foulston.com](mailto:jrector@foulston.com). For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

####

*Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Topeka, Overland Park, and Wichita, Foulston Siefkin provides a full range of legal services to clients in the areas of Administrative & Regulatory, Agribusiness, Antitrust & Trade Regulation, Appellate Law, Banking & Financial Services, Commercial & Complex Litigation, Construction, Creditors' Rights & Bankruptcy, E-Commerce, Education & Public Entity, Elder Law, Emerging Small Business, Employee Benefits & ERISA, Employment & Labor, Energy, Environmental, Estate Planning & Probate, Family Business Enterprise, Franchise, General Business, Government Investigations & White Collar Defense, Health Care, Immigration, Insurance Defense Litigation, Insurance Regulatory, Intellectual Property, Life Services & Biotech, Mediation/Dispute Resolution, Mergers & Acquisitions, OSHA, Public Policy and Government Relations, Product Liability, Professional Malpractice, Real Estate, Securities, Senior Housing & Care, Tax Exempt Organizations, Taxation, Water Rights, and Workers Compensation. This document has been prepared by Foulston Siefkin for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.*