

FISHER PHILLIPS' WIN OVER STATE OSHA QUOTA PLAN COULD HELP EMPLOYERS ACROSS THE COUNTRY

Insights
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When Fisher Phillips attorneys recently secured a key victory over a state OSHA plan that was improperly trying to create a quota system to encourage investigators to issue citations and assess penalties, it opened the door for businesses across the country to challenge their state OSHA plans over any number of other issues. If you are a business owner or a safety professional, this victory should lead you to explore how it might be able to help your organization, too. The May 16 victory at the Fourth Circuit Court of Appeals knocked back the North Carolina state OSHA agency and creates a pathway for employers in North Carolina – and across the country – to challenge their state OSHA plans where the local authorities have overstepped their bounds beyond federal limits. You should immediately contact your Fisher Phillips attorney to discuss any existing workplace safety citations you are disputing. It may be that the same arguments can be deployed as part of your defense. Read on to learn more about this significant employer victory.

Creative Legal Strategy Leads to Landmark Employer Victory

As background, the case started when the North Carolina Occupational Safety and Health Hazard Division (NC OSHA) issued several itemized citations to an employer following allegations of unsafe working conditions after a tragic incident. With the help of Fisher Phillips lawyers, the company took legal action to defeat the citations by unveiling a creative strategy.

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The central claim was that the issued citations were unlawful because the state's occupational health and safety plan ran afoul of the federal Occupational Safety and Health Act (OSH Act). Specifically, federal law forbids NC OSHA (and all the similar state plans across the country) from evaluating its employees' enforcement activities based on the number of penalties they have assessed and citations they have issued. Nevertheless, North Carolina evaluates its safety and health inspectors on how many citations those inspectors issue – essentially installing a quota system. Not only is this unfair to employers in North Carolina, it's also unfair to the professional safety and health inspectors.

The employer argued that state officials violated its constitutional rights and won at the trial level – because Fisher Phillips took the unique approach of filing the lawsuit against North Carolina state officials acting in their official capacity. The Fourth Circuit Court of Appeals just affirmed that victory for Fisher Phillips on May 16.

The Court of Appeals agreed that the state of North Carolina (and other states in similar positions) can be sued through its officials in these kinds of circumstances. The Court of Appeals first noted that Congress amended the law in 1998 to forbid “using the results of enforcement activities, such as the number of citations issued or penalties assessed, to evaluate employees directly involved in enforcement activities under this chapter or to impose quotas or goals with regard to the results of such activities” – in other words, establishing a quota system.

The Court of Appeals then reasoned that the employer's lawsuit can proceed because NC OSHA allegedly violated the law by basing its compliance officers' performance, in part, on the number of citations they issue. Therefore, the Court of Appeals gave the green light for the employer's underlying suit to proceed against the North Carolina officials.

What Employers Should Do

First, having a plan in place is the best countermeasure to OSHA's aggressive enforcement activities. With maximum limits for penalties increasing every year – currently over \$15,000 for serious/other than serious citations and more than \$150,000 for a repeat and willful – it pays to be prepared. Keep these two tips top of mind if OSHA shows up after you read this:



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Workplace Safety

- [Don't allow supervisor interviews on inspection day](#); and
- [Watch what documents you provide during OSHA's first visit](#).

Employers have Fourth Amendment rights during an OSHA inspection, and as demonstrated by this win in North Carolina, it pays to make OSHA respect those rights.

Second, with that goal in mind, review [these comprehensive OSHA Inspection FAQs](#), then put together a detailed plan for when OSHA arrives at your worksite. Here are six other tips you can put into effect right away:

1. **Assess Your Company's Vulnerability:** An ounce of cure is worth a pound of prevention.
2. **Review Your Company's OSHA Recordkeeping:** One of the most cited safety issues is poor record keeping. Making sure this process is in order can save you a lot of headaches.
3. **Perform "Routine" Audits:** Taking the time to give your company a check-up can help identify issues before any workers get hurt or OSHA shows up. But be prepared to correct any issues identified during the audits.
4. **Focus on Training:** OSHA has various regulations that require annual training. Failure to provide consistent training exposes not only the individual, but the entire workplace to danger. Regular employee safety training is essential to maintaining a safe workplace.
5. **Review Your Records for Correcting Past Violations:** One of OSHA's favorite ways to ding employers with heavy citations is by issuing repeat citations. Once you have been cited, it's a best practice to abate the condition or situation and continue to monitor the issue to ensure it remains abated.
6. **Proper Documentation:** Keep proper documentation of all training, violations/abatement, and safety-related disciplinary action. When trying to defend yourself against a citation, a good rule of thumb is that if it's not documented, then it didn't happen.

Finally, make your team aware of this court victory, and have them report any notable issues that come up in an

inspection – as you never know what your Fisher Phillips attorney can do with that nugget.

What Next?

The most critical thing you can do: contact your Fisher Phillips or the authors of this Insight (including the attorneys involved in this litigation) to learn more about whether you can capitalize on this decision with respect to any existing citations or developing workplace safety disputes you may have with your state OSHA plans. The holding from the Fourth Circuit could be broad enough to support challenges well beyond issues related to improper quota systems and could also give you the necessary authority to fight against a whole raft of agency actions.

If you have any questions, contact the authors of this Insight, your Fisher Phillips attorney, or any member of our [Workplace Safety Practice Group](#). Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information on workplace safety issues.