



OSHA Penalties Keep Changing, But the OSH Act Remains the Same: Were OSHA's Recent Penalty Increases Valid?

Insights
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Federal OSHA increased its maximum penalties last summer for the first time since 1990. The increase occurred pursuant to a new law requiring federal agencies to adjust penalties to account for inflation. However, the OSH Act, which specifically provides the maximum penalties Fed-OSHA can administer, was not amended. It still prevents Fed-OSHA from issuing penalties higher than the levels set in 1990.

In other words, Fed-OSHA has enacted regulations that permit penalties higher than those allowed by the OSH Act. In light of the conflict between the new Fed-OSHA regulations and the OSH Act, can employers legally challenge this increase?

New Penalty Amounts

Effective August 1, 2016, Fed-OSHA increased the top penalty for serious citations to \$12,471 and \$124,709 for willful and repeat citations. This change became effective immediately for citations issued by the federal agency, while most state plans have been reluctant to increase their fines. Just prior to inauguration day, the agency again increased the penalties (to \$12,675 for serious and \$126,749 for repeat/willful citations) on January 13, 2017 due to inflation.

The Federal Penalties Inflation Adjustment Act

Fed-OSHA's penalty increase occurred pursuant to the Federal Penalties Inflation Adjustment Act Improvements Act of 2015, (the "Inflation Law") which directs agencies to adjust their penalties for inflation to "catch up" for the lack of previous increases, and every year thereafter:

(1) Catch up adjustment.-For the first adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 [Nov. 2, 2015]-

(A) the head of an agency shall adjust civil monetary penalties through an interim final rulemaking; and

(B) the adjustment shall take effect not later than August 1, 2016.

(2) Subsequent adjustments.-For the second adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and

each adjustment thereafter, the head of an agency shall adjust civil monetary penalties and shall make the adjustment notwithstanding section 553 of title 5, United States Code.

The OSH Act Was Never Amended

Pursuant to the Inflation Law, Fed-OSHA changed its regulations effective August 1, 2016 to include the increased penalty amounts set forth above. The new regulations specifically refer to the penalty provisions of the OSH Act, at 29 U.S.C. § 666(a). However, the OSH Act was never amended to reflect the increase found in the regulations, unlike in 1990, when Congress altered the OSH Act to provide for higher penalties. A bill to amend the OSH Act to reflect the higher penalties was introduced in the House of Representatives on February 7, 2017, but has not yet passed.

Despite the terms of the Inflation Law, the OSH Act still mandates that Fed-OSHA issue penalties no higher than the levels set in 1990 (\$7,000 for serious citations; \$70,000 for repeat/willful citations). A side-by-side comparison of Fed-OSHA's revised penalty regulations and the unchanged, current version of the OSH Act, demonstrates this discrepancy:

29 CFR § 1903.15(d)(3)

(d) *Adjusted civil monetary penalties.*

The adjusted civil penalties for penalties proposed after January 13, 2017 are as follows:

(1) *Willful violation.*

The penalty per willful violation under section 17(a) of the Act, 29 U.S.C. 666(a), shall not be less than \$9,054 and shall not exceed **\$126,749**.

(2) *Repeated violation.*

The penalty per repeated violation under section 17(a) of the Act, 29 U.S.C. 666(a), shall not exceed **\$126,749**.

(3) *Serious violation.*

The penalty for a serious violation under section 17(b) of the Act, 29 U.S.C. 666(b), shall not exceed **\$12,675**.

OSH Act, at 29 U.S.C. 666(a)

(a) *Willful or repeated violation*

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than **\$70,000** for each violation, but not less than \$5,000 for each willful violation.

(b) *Citation for serious violation*

Any employer who has received a citation for a serious violation of the requirements of section 654 of

this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to **\$7,000** for each such violation.

It's hard to imagine that Fed-OSHA has the administrative authority to adopt regulations permitting it to issue penalties in the case of a willful or repeat citation of up to \$126,748 *pursuant to a statute that **specifically caps its penalties at \$70,000***. Or, for serious citations, promulgating a regulation permitting penalties of up to \$12,675 *pursuant to a statute that **specifically caps fines at \$7,000***.

Fed-OSHA's administrative interpretation of the OSH Act to permit it to increase its penalties to an amount higher than those specifically enumerated in the OSH Act is likely untenable. Look for the Trump administration to attempt to undo Fed-OSHA's penalty increases, both pursuant to the rulemaking process, and by appointing judges who are strict statutory interpreters, like Supreme Court nominee Neil Gorsuch.

State OSHA Plans' Complaints About New Regulations

The rules adopted by Fed-OSHA pursuant to the Inflation Law have already been challenged, including by the State OSHA Plans. In an August 15, 2016, letter from Occupational Safety and Health State Plan Association to Fed-OSHA, the leaders of the more than 20 state OSHA plans questioned if Fed-OSHA's new rules were proper given that the OSH Act was never amended:

The Occupational Safety and Health Administration (OSHA) of the United States Department of Labor published an interim final rule that adjusts the amounts of civil penalties assessed or enforced in its regulations as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. While we understand the need for the regulation in that context, we are concerned that the language of the rule could be misunderstood to mandate that states more closely mirror federal penalty practices, ***which is not required by the OSH Act and has not been the past practice of federal OSHA.***

As some of our members have noted, ***the OSH Act does not explicitly say*** that State Plans must have the same maximum penalty authority as Federal OSHA. Without commenting on this issue, we acknowledge that federal OSHA has historically taken that position. In this instance, ***Congress did not amend the OSH Act***, so Federal OSHA satisfied the congressional directive to increase its own penalties through rulemaking. However, the rule unfortunately seems to address a broader range of penalty issues. . . .

Several State OSHA Plans have indicated that they will not increase their penalties until the OSH Act is amended. Look for these challenges to continue.

Employers likely will join the fight to challenge Fed-OSHA's increased penalties and there seems to be merit to that argument. We will keep you updated as this matter unfolds.

Related People



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