



Are Mandatory OSHA Settlement Conferences Still Mandatory?

Insights

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Administrative Law Judges are increasingly exercising their discretion to waive mandatory settlement conferences for Occupational Safety and Health Administration (OSHA) citation contests with large penalties. The increased penalties that OSHA can now levy may be the reason.

By rule, the Occupational Safety and Health Review Commission requires parties to participate in a mandatory settlement conference where the employer has contested proposed penalties totaling \$100,000 or more. 29 C.F.R. § 2200.120(b)(1). ALJs, however, have discretion to waive this rule—and other Commission procedural rules—where good causes exists and “special circumstances not contemplated by the provisions of” the Commission’s rules exist. 29 C.F.R. § 2200.107.

Beginning in 1990 and continuing for the next 26 years, penalties for serious OSHA citations could be no greater than \$7,000 per violation, and penalties for repeat or willful citations could be no greater than \$70,000 per violation. In 2015, however, the Federal Civil Penalties Inflation Adjustment Act of 2015 became law, and, accordingly, in 2016, OSHA increased its permissible penalty for serious citations to \$12,471 for each violation and repeat or willful citations to \$124,709 for each violation. The penalties have increased further in 2017 and 2018 due to mandatory adjustments for inflation required by the 2015 law.

This penalty increase likely has had the effect of increasing the number of cases before ALJs where a settlement conference is mandatory. Whereas it used to take multiple repeat or willful violations—or many, many serious citations—to meet the \$100,000 threshold for a settlement conference to be mandatory, now that threshold can be reached based upon a single repeat or willful citation.

Faced with this increase in cases requiring mandatory settlement conferences, ALJs have begun to take action by waiving the judicial settlement conference under Commission Rule 107 in some cases. Therefore, if an employer is tagged with citations totaling more than \$100,000, it may not be required to attend a mandatory settlement conference. This could impact whether a matter is resolved short of trial.

Depending on how many cases now qualify for mandatory settlement conferences, it is possible that the Commission may seek to amend Rule 120 to increase the conference threshold rather than allowing its ALJs to continue to proceed on an *ad hoc* basis. We will keep you updated with any further developments.

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