



Will OSHA Pay Your Attorney's Fees for Fighting an Improper Citation Under the Equal Access to Justice Act?

Insights

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The Occupational Safety and Health Administration (OSHA) conducted an inspection of your facility. OSHA issues a serious citation to your company for a machine guarding violation, despite the fact the OSHA investigator did not actually observe a plausible infraction. Your company would like to contest the citation because it was not justified. However, your company is not sure if it can afford to pay an attorney to fight the citation. There may be relief. The Equal Access to Justice Act may provide your company with an avenue for having the government foot the bill for your company challenging the citation.

What is the Equal Access to Justice Act?

The Equal Access to Justice Act ("EAJA"), 5 U.S.C. 504, allows for the award of attorney's fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications"), including those before the Occupational Safety and Health Review Commission ("OSHRC"). An eligible party may receive an award when it prevails over the Secretary of Labor, who prosecutes OSHA citations, unless the Secretary's position in the proceeding was substantially justified or special circumstances make an award unjust. The OSHRC has promulgated rules for identifying the parties that are eligible for awards and the proceedings that are covered. The rules also explain the process for applying for attorney's fees and other expenses and the standard the OSHRC should apply in deciding such awards.

When does the EAJA apply to OSHRC Proceedings?

The EAJA applies to adversary adjudications before the OSHRC. The party seeking an award must be successful in the adjudication before the OSHRC. Successful essentially means that the OSHRC found that OSHA's position in the proceeding was not substantially justified. OSHA then has the burden to show that its position was, in fact, substantially justified. If OSHA is unable to meet the burden of persuasion, the OSHRC may award the prevailing party reasonable fees for an attorney and expert witness.

Who is Eligible to apply for an Award under the EAJA?

The OSHRC's rules specifically limit who is eligible for an award of attorney's fees and other expenses under the EAJA. 29 C.F.R. § 2204.105 establishes who is eligible. First, the applicant must be a party with somewhat limited resources. Subsection (b)(5) of section 2204.105 limits eligible corporate applicants to any "partnership, corporation, association, unit of local government, or public or private organization that has a **net worth of not more than \$7 million** and **employs not**

more than 500 employees.” The net worth and number of employees of an applicant are determined as of the date the notice of contest was filed.

Applying for an Award of Fees

An application for an award of fees may be filed whenever a party has prevailed in a proceeding and it must be filed no later than thirty days after the time for filing an appeal has expired. The application should show that the party seeking an award of fees prevailed and identify OSHA's position that the applicant alleges was not substantially justified. The applicant must state how many employees it has and provide a statement regarding the applicant's net worth. The hourly rate for attorney's fees under the EAJA for OSHRC matters is currently capped at \$125 per hour.

Summary

If OSHA issues your company a citation without substantial justification, consider the EAJA when deciding whether to contest the citation. If your company has a net worth less than \$7 million and employs fewer than 500 employees, the OSHRC may award your company attorney's fees and other costs if it is successful in contesting a citation. The government may be left footing the bill if they were not substantially justified in issuing a citation to your company.

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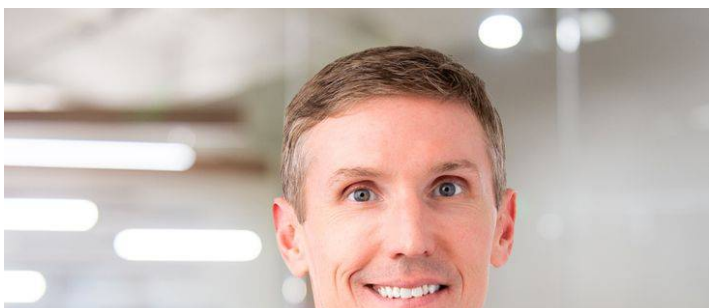


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