



NC-OSHA Willful Citations Remind Employers to Know the Legal Aspects of Citations

Insights

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NC-OSHA is a solid state-OSHA plan. They believe that their approach best reflect the needs of their citizens and challenged the Obama era Fed-OSHA when they felt that Fed demands were punitive and counterproductive. The agency values cooperative efforts with employers and is not known for abusing the scope of OSHA inspections. This does not, however, mean that unicorns frolic and chocolate rivers and gum drop trees dot the Raleigh government complex.

As the Fiscal Year ended, NC-OSHA proudly acknowledged significantly more Willful citations this year. During 2019, NC-OSHA leadership reviewed the definition of a “Willful” violation and decided to cite employers when Compliance Officers could document a case.

Although we all need to be reminded of “the stick” as well as the “carrot,” we’ve found that many OSHA Willful violations around the Country don’t hold up.

NC-OSHA Teaching Compliance Officers to Build the Necessary Legal Case for Citations is a Good Wake-up to Employers.

NC-OSHA’s increased willingness to issue Willful violations reflects an Agency focus on training and requiring Compliance Officers to think a bit like lawyers and adequately document their cases. NC-OSHA has involved Compliance Officers in Informal Conferences and Appeals/Contests instead of handing cases off to supervisors. Compliance Officers see and learn what happens when a case is inadequately documented. Attorneys and employers will challenge OSHA if they cannot prove the elements of a violation. The burden is on OSHA and not the employer at this stage. Struggling with an inadequate budget and a huge workload, Fed-OSHA Area Directors are struggling to maintain the quality of inspections, so we applaud the NC-OSHA effort. Everybody benefits from OSHA issuing clean citations which don’t require litigation.

Likewise, when employers respond to an OSHA Inspection, they too need to gather facts about whether OSHA can carry its burden to prove the elements of a Citation:

- A Hazard;
- Employees were exposed or should have been in the normal course of business.
- An applicable OSHA Standard (or a 5(a)(1) General Duty basis for citing a recognized industry hazard not covered by an OSHA standard);

- The employer knew or should have known of the hazard with the exercise of due diligence.

Six months later when attacking a citation is too late to gather this information.

What does it take to get hit with a Willful Citation?

NC-OSHA's Field Operations Manual (FOM) defines a Willful violation as follows:

A willful violation exists under the Act where the evidence shows either an intentional violation of the Act or plain indifference to its requirements - not necessarily with knowledge of the standard itself.

The employer committed an intentional and knowing violation if:

An employer representative was aware of the requirements of the Act, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements.

An employer representative was not aware of the requirements of the Act or standards but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement.

The employer committed a violation with plain indifference to the law where:

Higher management officials were aware of an OSH requirement applicable to the company's business but made little or no effort to communicate the requirement to lower-level supervisors and employees.

Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

An employer representative was not aware of any legal requirement but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

Finally, in particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if it had it. The employer makes a "deliberate purpose not to discharge some duty necessary to the safety of the person or the property of another". (See Appendix IV-A - "Willful Violations Under OSHA: No Knowledge of the Act Required", H. Alan Pell, 1997.)

It is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished

from inadvertent, accidental or ordinarily negligent.

The frightening truth is that the CEO or plant manager need not be the malefactor. A rogue supervisor, foreman, or superintendent's conduct can be the basis for a Willful classification.

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