



There's More Enforcement Overlap Between Federal OSHA and State Plans Than You Think

Insights

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One of the fascinating things about an OSHA citation defense practice is the distinctions you see in prosecution by Federal OSHA versus state plans. It is very unusual in the legal world to have the same laws enforced by different governing bodies. OSHA litigation is just that.

Our workplace safety group's time is split evenly between defending clients against citations in one of the 24 or so approved state plans and the Federal OSHA states. I really don't have a favorite between the two. Both are enjoyable.

OSHA offers a consistent enforcement procedure. Each state plan is unique and has different policies and attitudes regarding enforcement.

State plans, however, are not completely independent from Federal OSHA.

Employers commonly believe that if they have locations in both state-plan states and Federal OSHA states, there is no interaction between the two. Indeed, many employers think they are insulated from prosecution for citations, such as a failure to abate or willful, in a state-plan state if the underlying citation occurred in a Federal OSHA state, and vice-versa.

This is not always the case. As noted below, there is much more overlap between Federal OSHA and state programs than commonly believed.

Federal OSHA Will Look to State Plan Citations to Establish Employer Knowledge and a Willful Offense

Federal OSHA will not use a *state plan citation* against an employer as the factual predicate for a repeat citation. Federal OSHA will use, however, a citation occurring in a different Federal OSHA state as the basis of a repeat. Likewise, state plans will use citations occurring within their state, but not outside their state, to form the basis of a repeat citation.

Its position on repeat citations notwithstanding, Federal OSHA has specifically stated that it can use a state plan citation as the basis of a willful citation in a Federal state. Its Field Operations Manual (at p. 3-1) provides:

If an establishment has an inspection history that includes citations received while performing work in a **State Plan State**, CSHOs should be aware of this information. This **inspection history may be used to document an employer's heightened awareness of a hazard and/or standard in order to support the development of a willful citation** and may be considered in determining eligibility for the history penalty reduction. However, the State Plan citation may not be used to support a repeat violation.

OSHA's Movement Towards Enterprise-Wide Agreements & Its Effect on State Plan Enforcement

One of OSHA's preferred methods of resolving large citations in recent years is the so-called enterprise-wide settlement agreement. Only 25 of these agreements have been publicly recorded since OSHA was enacted in 1970. However, 23 enterprise-wide agreements have been reached since January 1, 2010.

These agreements, copies of which can be found on OSHA's website, are generally used to require employers to perform company-wide abatement of hazardous conditions and/or implement new safety policies and procedures. Instead of correcting the alleged hazard only at the location where the inspection at issue took place, the employer must rectify this issue at multiple locations, including at times facilities located in state-plan states.

How can Federal OSHA require abatement of alleged hazards at employers' facilities in state-plan states? The agreement is solely between Federal OSHA and the employer, right?

In other words, Federal OSHA is attempting to require employers to abate issues at locations in state-plan states, where it technically has no jurisdiction. So what gives?

In order to address this issue, Federal OSHA has included language such as the following seen in the 2013 Wal-Mart enterprise-wide agreement:

The Parties recognize that some of respondent's retail stores and Sam's Clubs are located in states that have assumed authority of the enforcement of OSHA standards pursuant to Section 18 of the Act ("State Plan Worksite"). These state plans are encouraged to honor or agree to the terms of this Agreement.

This particular agreement also included separate appendixes for Federal OSHA locations and state plan locations.

But would a state plan actually enforce such an agreement?

Technically, a state plan OSHA administrator would have no duty to comply with the enterprise-wide agreement reached by Federal OSHA. It would largely be a political decision as to whether or not it would. Some states have. I recently spoke with a state plan administrator who confirmed that Federal enterprise-wide agreements would be enforced in the state plan at issue.

So what do we learn from this?

1. **Carefully consider the ramifications of entering into an agreement to resolve a state plan citation.** Don't assume those citations will never resurface just because your other facilities are located in a Federal OSHA state. The Feds clearly will use a state plan citation to show knowledge of a hazard on behalf of an employer. This can quickly turn a serious citation into a willful offense.
2. **Enterprise-wide settlement agreements are broader than you think.** Prior to entering such an agreement, carefully review its language, preferably with counsel, in order to understand how it may be enforced by both Federal OSHA and state plans.
3. **Communicate safety concerns amongst all company locations.** Make sure your Federal OSHA and state-plan locations talk to each other in order to ensure that abatement measures required by a settlement agreement are adopted at all locations. A copy of all citations and settlement agreements should be shared with management and safety personnel at all locations. State and Federal OSHA plans can, in certain circumstances, collaborate on enforcement.

Collaboration between Federal OSHA and state plans is not a bad thing. It promotes employee safety. But employers can no longer assume that state plans and Federal OSHA are completely independent from an enforcement standpoint.

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