So How Does OSHA Raise Penalties 82% and We Don't Notice?

Insights
11.03.15

A lot of us woke up on November 3 and exclaimed, *"What the heck!How did that happen?"*The Budget Agreement signed on November 2, which was worked out behind closed doors, includes provisions authorizing OSHA to increase penalties for the first time since Bush I, fifteen years ago, by as much as 50% to 82%.Yep.50% to 82%.

It's not clear whether OSHA will choose to increase penalties to the full extent allowed, but the Agreement authorizes OSHA to make a one-time *"catch up"* increase to compensate for more than two decades of no increases. The catch-up increase can't exceed the inflation rate from fiscal year 1990 through fiscal year 2015 as measured by the federal government's Consumer Price Index (CPI).

After the one-time "catch-up" increase is implemented, OSHA will then annually increase maximum penalties the amount of the inflation rate for the prior fiscal year.

Under the maximum catch-up increase allowed—about 82 percent according to the CPI—the maximum $70,000 fine for **Repeat** and **Willful** violations would grow to a maximum of **$125,438**, and the $7,000 maximum fine for serious violations to $12,744.

BNA extrapolated that had OSHA applied the 82 percent increase in fiscal year 2014 OSHA's $143.6 million, penalties would have been $261.4 million.

OSHA does not have to take the full increase, but based on the consistent comments from OSHA and the DOL's leadership, it's not likely that they will not implement most of the increase.As of Tuesday, OSHA refused to comment and one gets the impression that they didn't see this coming either.Various groups have sought to increase penalties for years and have gotten nowhere after much public debate.I don't know how this change occurred with no public debate, and regardless of your opinion of this change, that's a question worth asking.

The Bright Side

My experience is that almost all executives want to keep their workers safe and many accidents and violations are inadvertent.We should use these potential sledge hammer penalties as a way to get the attention of corporate decision makers.Business often treats safety as a cost center and does not develop a business plan to achieve the company's goals in this area.That's left to the safety professionals.Executives are going to have to roll up their sleeves and set a tone and keep their eyes on making safety a genuine value of the company and a part of how business is done.I don't know about you, but a little bit of fear motivates me.

What's Next

I'll leave the political questions to others.First, OMB must issue guidance by Jan. 31 on implementing the bill's provisions.Raising the maximum fines in line with the CPI for the catch-up boost requires OSHA to publish an interim final rule by July 1, 2016, allowing the adjustment to take effect by Aug. 1, 2016.

The effective date is August 16, 2016, so use those nine months well.Keep in mind that the body slam of the doubling of the salary test for overtime exemption will probably kick in around that date as well, so manage your resources well.You also must respond to the 250 or so NLRB decisions rendering your employee handbooks and policies unlawful, the *Black List Executive Order*, scrutiny of temps and franchisees, and a few other items.

Who Gets Hit the Worst

Compliance with OSHA standards and safety are not the same thing, although there are clear correlation.The fact that few employees are getting hurt does not mean that you're in compliance with OSHA's many standards.

And more importantly, the most hazardous businesses may not be the employers most at risk.Look at the hundreds of thousands in recent citations against Dollar Tree and other retailers for a handful of the same items: blocked exits, extinguishers and electric cabinets among others.Really?!The hazards of retail or at least the items cited really pose such a great risk to employees?Rhetoric aside; not hardly.I worry more about ergonomic issues in those industries.

The employers most at risk under increased penalties are employers with lots of locations which are in industries where safety is not as prominent as in construction and foundries, where supervision may be weak, and turnover is high.Maybe a more fair description is not that supervision is "weak," but that supervision is not very sophisticated about safety because it's fricking retail or other lower hazard industry.Ducks in a barrel.Every time a site receives citations, those citations will serve as Repeat items at others for five years, and the penalties add up swiftly.

A more reasonable target group is manufacturing and any other industry which requires a lot of guarding, Lock-out procedures, and related training.And remember, since January 1, 2015, you have been responsible to report all amputations, and such a report will trigger scrutiny.

Take seriously our concerns and use the next nine months to constantly improve.

Howard

Related People

Howard A. Mavity
Partner
404.240.4204
Email