



Will State OSHA Plans Follow the Feds' Lead and Increase their Penalties Too?

Insights

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This August Federal OSHA will increase its penalties for the first time since 1990.

We originally thought maximum fines would increase to \$12,500 for serious citations and \$125,000 for willful and repeat citations. Based on recent conversations with Fed-OSHA, however, we learned the increases may even be higher, with repeat/willful citations topping out at \$128,000. Additional increases reflecting inflation likely will follow on January 15 of each subsequent year beginning in 2017.

Although the exact amount is uncertain, employers operating in Fed-OSHA states know penalty increases are coming late this summer. But what about the State OSHA Plans? Will State OSHA Plans follow the Feds' lead and increase their penalties too?

History of State Plan Enforcement

The Federal government enforces the OSH Act in the private sector in approximately 26 states, with the balance of the states operating approved "State Plans" where a state agency enforces the Act. The OSH Act requires State Plans to be "as least as effective" as Fed-OSHA.

Whether a State Plan's maximum penalty amounts must be as high as Fed-OSHA in order to be "as least as effective" is a question often tossed around among attorneys in our workplace safety practice group. Many of us think it's not necessary.

State Plans historically have levied lower penalty amounts than their Federal counterparts. Recent research by the Institute for Work and Health, which Fed-OSHA often relies upon and cites, found that illness and injury rates decrease at an establishment following an OSHA inspection resulting in penalties. However, the same study found that State-Plan inspections, which have historically resulted in lower penalties, usually lead to lower injury rates than Fed-OSHA citations.

The Feds Contend the State Plans Must Increase Penalties

Despite this research, Fed-OSHA still believes State Plans must have higher penalties to be effective. Fed-OSHA's website provides information about the upcoming penalty increase. The site states:

Will states with OSHA-approved programs also increase their penalties?

Yes. OSHA-approved State Plans must have penalty levels that are at least as effective as federal OSHA's (see Section 18 (c)(2) of the OSH Act).

What will State Plans Do?

Based on conversations with several state officials, the State Plans originally resisted any change to their current maximum penalty levels, some more vehemently than others. We discussed this issue with officials from the Virginia, North Carolina, and South Carolina state plans. Both Carolinas initially insisted that no change to penalty amounts would be made. Virginia, however, conceded that increased penalties would occur in the Commonwealth.

More recent discussions with these State Plans, however, revealed that the Feds are pushing hard and heavy for all State Plans to increase their maximum penalties. The Feds are turning up the heat, claiming that an increase is required for effective enforcement by State Plans. The administration likely will not quit pushing for this change until the State Plans agree to a substantial penalty increase.

What Can Employers Expect?

The State Plans likely will follow the Feds' lead and increase their maximum penalty amounts. When this change will occur is uncertain. In the four State Plan states where I'm licensed and do most of my state plan work (Tennessee, Virginia, North Carolina, and South Carolina), maximum OSHA penalty amounts are established by state statute, not regulation.

The codification of penalty amounts will inevitably cause delays. The State Plans cannot unilaterally alter state statutes. They must seek such change from the state legislature or general assembly. This requires 1) the drafting of a bill; 2) a sponsor for the bill; 3) approval in both houses of the bicameral state legislature; and 4) governor endorsement.

States like North Carolina and South Carolina may have a difficult time passing legislation establishing higher penalty amounts. Whether right or wrong, legislators in these states may view increased penalties as a burden on private sector job growth. Expect resistance from politicians in these states, as well as many across the country.

Employers in State OSHA Plan states should expect to eventually see increased penalties. For many states, however, that change won't occur in 2016 (or even 2017).

**Special thanks to Fisher Phillips associate Sidney Minter for conducting research and collecting vital information needed to prepare this article.*

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