



OSHA Issues Memorandum Announcing "Administrative Enhancements" to OSHA's Penalty Policies to Dramatically Increase Employers' Fines

Insights

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On September 29, 2010, the Occupational Safety and Health Administration (OSHA) took the next step in its 22-month effort to increase penalties and more vigorously enforce the OSH Act. OSHA head Dr. David Michaels sent to all of OSHA's Regional Administrators and the State Plan Administrators a memorandum outlining the deployment of the new Administrative Penalty. Effective October 1, 2010, all OSHA Area offices are directed to utilize the new penalty policy and the associated calculation system.

Inspections opened prior to October 1 that reveal violations will lead to citations and penalties under the old penalty policy. However, employers can expect to see an informal influence from the new policy as they have witnessed in many recent citations. This "interim penalty policy" will remain in effect until OSHA is able to incorporate these changes into its Field Operations Manual. This comes on the heels of the Department of Labor Inspector General's report critical of the way OSHA handles penalty reductions in settlement negotiations. On a practical level, employers can expect to find that Area Offices have less discretion with regard to issuing citations and penalties, and will be less able and more reluctant to make reductions at Informal Conferences.

Under the new policy, the time period for considering an employer's past history of OSHA violations for purposes of determining a "repeat" violation and for determining penalty increases and reductions is expanded from three to five years. An employer who has been inspected by OSHA within the last five years and has no serious, willful, repeat or failure-to-abate violations will receive a 10% reduction in its penalty. However, where an employer has been cited by OSHA for a high-gravity, serious, willful, repeat or failure-to-abate violation within the previous five years, OSHA will increase penalties by 10% up to the statutory maximum. Those employers who have not been inspected or who have received a citation for serious violations that were not high-gravity will not receive either a reduction or an increase based on past inspection history.

The new policy also notes that, at the discretion of the Area Director, high-gravity, serious violations relating to Standards that have been identified under OSHA's new Severe Violators Enforcement Program ("SVEP") will no longer need to be grouped or combined but can be cited as separate violations with their own individual penalties. The new penalty policy also requires the Area Director to consider the adequacy of the proposed penalty when dealing with individual violations for hazards

identified under the SVEP, and the Area Director is given the authority to limit adjustments for good-faith, history or size of the employer when the Area Director considers it necessary to achieve the "appropriate deterrent effect" by increasing the penalty.

Other procedural changes which may affect penalty amounts include the use of a gravity-based penalty determination where the penalties will be between \$3,000 and \$7,000. With respect to employer size, employers with 251 or more employees would not receive any penalty reduction for size. The memorandum also notes that the good-faith procedures in OSHA's Field Office Manual were being retained. However, employers must have a safety and health program in place in order to get any good-faith reduction, and no good-faith reduction would be allowed in cases involving high-gravity, serious, willful, repeat or failure-to-abate violations. The 15% "quick fix" reduction under the old policy allowing for an abatement incentive program to encourage employers to immediately abate hazards during inspection was retained. However, the 10% penalty reduction for employers with a strategic partnership agreement with OSHA has been eliminated.

Next to the increase in the period-for-repeat calculation, the provision which will have the greatest impact on employers is that section modifying the current penalty calculation policy. Under the old policy, all of the penalty reductions for history, good-faith, "quick fix," and size were added together and the total percentage was applied to the gravity-based penalty to arrive at the proposed penalty. Under the new penalty policy, the penalty adjustment factors will be applied "serially" in the order of history, good-faith, "quick fix," and size. The example included in the memorandum showed that using the "serial" versus the sum calculation will automatically result in a higher penalty against an employer.

What about the State-OSHA Plans?

The memorandum noted that OSHA had communicated with the State Plan states regarding its expectations and the legal requirement to be "as least as effective" as Federal OSHA in penalty calculation policies. The State Plan OSHAs, through their Association, have objected to being required to utilize OSHA's new penalty policy. The memorandum states that there will be further discussion with the state plans on this issue. However, a number of State Plans have also indicated that they will follow the policy. OSHA has also made it clear, by its September release of harsh evaluations of State Plan agencies and its recent opening of additional offices in State Plan states, that it intends that these agencies increasingly follow its lead.

The Assistant Secretary's memorandum concludes by noting that the changes in the new penalty policy increase the average penalty for a serious violation from approximately \$1,000 to an average of \$3,000 to \$4,000. The Memorandum does not belabor that the cumulative impact of these changes in calculation formulas, coupled with the longer Repeat period and a greater willingness to use Willful citations will exponentially increase many penalties.

What should employers do?

1. Carefully audit your safety and health management program and make improvements discussed in our other Alerts and presentations.
 2. Review your current procedure for handling OSHA and other government inspections to recognize new enforcement strategies.
 3. Prepare for more difficult negotiations after receipt of citations and be willing to contest and try citations when you have a reasonable case.
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