

THE NOVEMBER SURPRISE: OSHA RAISES PENALTIES 82% AND NO ONE NOTICES

Insights

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Employers woke up to a surprise on November 3. That's when we learned that the Federal Budget Agreement, which was quickly worked out behind closed doors and signed the day before, includes surprise provisions authorizing the Occupational Safety and Health Administration (OSHA) to increase penalties for the first time since 1990. To the surprise of almost all observers, the amount of the increase could be as much as 82%.

Feds Tell OSHA To Play Catch-Up

The Agreement requires 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 1990 through 2015 as measured by the Consumer Price Index (CPI), which is expected to be around 82%.

Assuming OSHA applies the maximum catch-up increase allowed, the current 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 and Failure-to-Abate violations would increase to \$12,744.

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.

Significant Increases Likely

OSHA has not yet commented on this development, and it is not clear whether it will choose to increase penalties to the full extent allowed. However, based on the consistent comments from OSHA leadership about the benefits of

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stiffer regulatory punishments, it's highly likely that it will implement most, if not all, of the increases.

The initial penalty increases must become effective by August 1, 2016, but we can expect to learn well before then the extent to which OSHA will increase these amounts. The Federal Office of Management and Budget will issue guidance on implementing the bill's provisions by January 31, 2016. 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 August 31.

Who Is Most At Risk?

Many employers fail to recognize that the most hazardous businesses may not be the employers most at risk of incurring OSHA penalties. You need to remember that compliance with OSHA standards and having an accident-free workplace are not necessarily the same thing. Although there are clear correlations between the two, the fact that few of your employees are getting hurt does not always mean that you are in compliance with OSHA's many standards.

For example, there have been hundreds of thousands of dollars in recent citations against retailers for a handful of the same items: blocked exits, fire extinguishers, and electric cabinets among others. The sooner you realize that your business is at risk of OSHA violations, the better.

The employers most at risk under the increased-penalty scheme are those with many locations, those in industries where safety is not as prominent as in construction and foundries, those where supervision may be unsophisticated about safety issues, and those where turnover is high. Another common target group for OSHA is any company in the manufacturing industry, or any other business that requires a lot of guarding, lockout/tagout procedures, and related training.

What Should You Do Now?

You have over nine months to adjust to this new reality, so we recommend you use that time well. These potential sledgehammer penalties can be used as a way to get the attention of corporate decision-makers. Rather than just treating safety as a cost center, you should work with your company safety professionals to develop a business plan to achieve your company's goals in this area.

Executives should to roll up their sleeves and set the right tone on this subject, keeping your eyes on making safety a genuine core value of the company and a regular part of how business is conducted.

If you have any questions about this development, or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Workplace Safety and Catastrophe Management Practice Group.

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