

News & Types: Client Advisories

New OSHA Enforcement Guidance Imposes More Stringent Penalties Against Employers

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Executive Summary

On January 26, 2023, The U.S. Department of Labor (“DOL”) announced new enforcement guidance changes that will expand the Occupational Safety and Health Administration’s (“OSHA”) authority to issue instance-by-instance (“IBI”) citations for certain egregious violations of OSHA standards. The new guidance is intended to make OSHA’s penalties more stringent against employers who fail to comply with certain workplace safety and health mandates and will target employers who place a greater emphasis on profit over safety. Such guidance will cover enforcement activity within general industry, agriculture, maritime and construction industries. The enforcement guidance will become effective March 27, 2023.

INSTANCE-BY-INSTANCE VS. GROUP CITATIONS

In the past, OSHA’s typical practice was to issue a citation containing multiple “instances” of an alleged violation, in which OSHA often grouped several incidents into one violation and issued a single penalty. For example, a citation alleging violation of a machine guarding standard would have previously grouped all instances of machines not properly guarded. Also, IBI citations previously applied only to willful violations.

Starting March 27, 2023, OSHA regional administrators and area office directors will have greater discretion to cite specific types of OSHA violations as IBI citations, naturally multiplying the associated penalties. Under the new guidance, these IBI citations may be applied where the language of the corresponding rule supports a citation for **each instance** of non-compliance, and where a violation cannot be abated by a single method of abatement. In its news release, the DOL explained that these instances include, “lockout/tagout, machine guarding, permit-required confined space, respiratory protection, falls, trenching and for cases with other-than-serious violations specific to recordkeeping.”

In its concurrently released memorandum, the DOL reiterated its intention of avoiding the grouping of OSHA violations, when grouping “does not elevate the gravity or classification and resulting penalty.” In situations where an existing directive encourages grouping, OSHA states that agency personnel may use discretion to cite violations separately. OSHA provides examples of circumstances where such discretion may be used,

including situations in which “violations have differing abatement methods, each violative condition may result in death or serious physical harm, and each violative condition exposes workers to a related but different hazard.” However, this does not mean that OSHA will completely refrain from grouping violations under the new guidance. OSHA noted that grouping violations should still be considered when:

- Two or more serious or other-than-serious violations constitute a single hazardous condition that is overall classified by the most serious item;
- Grouping two or more other-than-serious violations considered together create a substantial probability of death or serious physical harm; or
- Grouping two or more other-than-serious violations results in a high gravity other-than-serious violation.

In its second concurrently released memorandum, the DOL explained that, under the new guidance, the decision to use IBI citations “should normally be” based on consideration of one or more of the following factors:

- Whether the employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current;
- Whether the employer has failed to comply with reporting requirements pursuant to 29 C.F.R. § 1904.39 for any fatality, inpatient hospitalization, amputation, or loss of an eye;
- Whether the proposed citations are related to a fatality or catastrophe; and
- If the citations are in regard to recordkeeping, whether they are related to an injury or illness that occurred as a result of serious hazard.

The above factors are not exhaustive as the new guidance also provides that IBI citations may be issued in the absence of the above factors if “exigent factors” indicate IBI citations would have a deterrent effect.

INCREASED OSHA PENALTIES FOR 2023

The new enforcement guidance will be subject to the increased maximum civil penalties recently published by the DOL, which became effective January 17, 2023. These civil penalties are updated annually for inflation, and of course, to maintain their deterrent effect on employers. To summarize, the maximum penalty for serious violations, other-than-serious violations, and posting requirement violations has increased in 2023 from \$14,502 per violation to \$15,625 per violation. The maximum penalty for willful or repeated violations has increased from \$145,027 per violation to \$156,259 per violation.

WHAT THIS MEANS FOR EMPLOYERS

This new enforcement guidance is anticipated to create more serious financial ramifications for employers who violate OSHA. In an effort to avoid being subject to the more stringent penalties described, employers should immediately begin reviewing their workplace safety policies as well as recordkeeping and reporting practices to ensure they are compliant with OSHA’s new guidance by the effective date.