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## OSHA Penalties to Increase in August 2016

The OSHA penalty structure, which hasn't changed since 1990, is about to get a boost to catch up with current prices. The long-standing maximum penalty amounts of \$7,000 for a serious violation and \$70,000 for a willful violation may jump to as much as \$12,400 and \$124,000 respectively. On the other end of the spectrum, in an extreme example of an enforcement action, OSHA, in conjunction with the U.S. Attorney's Office, recently prosecuted an employer for violations under the OSH Act (and other federal laws), for making false statements to OSHA investigators which carries a maximum sentence of 25 years imprisonment.

The OSH Act of 1970 specified that the maximum penalty for a serious violation was \$1,000, and the maximum penalty for a willful violation was \$10,000. In 1990, the Omnibus Budget Reconciliation Act increased serious violations to \$7,000 and willful violations to \$70,000 and no less than \$5,000. The Federal Civil Penalties Inflation Adjustment Act of 1990 directed some agencies to raise their penalties, but exempted OSHA. For the past 25 years the OSHA penalty amounts have remained static. In November 2015, President Obama signed the budget bill, which included the Federal Civil Penalties Inflation Adjustment Act Improvements of 2015.

The 2015 Act directed the Department of Labor to make a "catch up adjustment" that must go into effect by Aug. 1, 2016, and to make subsequent adjustments thereafter. The "catch up adjustment" is based upon the increase in the Consumer Price Index from October 1990 to October 2015, which was 78 percent. Starting in August 2016, employers should expect to see OSHA penalties of approximately \$12,400 for serious, and \$124,000 for willful, violations.

### Potential Effects of the Increase

The amount of the increase—almost 80 percent—is significant. While the reduction factors used by OSHA will remain the same, even with the various reductions OSHA penalties will have the potential to get much more "serious" from the employer's perspective. Under the existing penalty structure, a typical citation may include three items with an average penalty of \$5,000, for a total of \$15,000. Under the new penalty structure, a typical penalty may be \$27,000. In determining whether to contest a citation, the employer must balance the increased current penalty with the cost of contesting the citation. The employer must also consider the increased downstream impacts in determining whether to

contest a citation. If the employer receives another citation in the future, a repeat serious penalty, before reductions, could be three times the serious amount, or up to \$37,000. And although willful citations are somewhat rare, they carry the possibility of a \$124,000 penalty. Faced with great future liability, more employers will be choosing to contest citations, which is exactly what happened the last time OSHA increased its penalty amounts in 1990.

### **An Extreme Example of Enforcement**

Section 17(e) of the OSH Act provides that any employer who willfully violates any standard which causes the death of an employee may be fined up to \$10,000 and sentenced to six months in prison. It is a provision that is rarely used. However, an owner of a roofing company recently learned the hard way that it is used, and that lying during an OSHA investigation can implicate other federal laws.

James J. McCullagh was indicted by a Pennsylvania grand jury for four counts of providing a false statement, one count of obstruction of justice and one count of willfully violating an OSHA regulation, resulting in the death of an employee. In 2015, an employee fell to his death from roof bracket scaffold. Mr. McCullagh lied to OSHA about whether he provided fall protection equipment to his employees, and whether, on the day of the accident, they were using it. He also directed employees to falsely state to OSHA that they had been wearing fall protection harnesses on the day of the accident. Mr. McCullagh pleaded guilty and awaits sentencing, where he faces a maximum statutory sentence of 25 years in prison.

### **Tips for Dealing with OSHA Investigations and Penalties**

(1) DO NOT LIE TO OSHA; and (2) in considering whether to contest a citation, evaluate the amount of the current citation, whether you have good defenses to the current citation, and balance that against the possibility of future citation that may include a repeat multiplier, or possibly a willful classification, with increased fines.

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