

HRW Client Alert: OSHA Penalties Set to Increase in August 2016

Jeffrey Hirsch // Peter Moser
(617) 348-4315 // (617) 348-4323
jhirsch@hrwlawyers.com // pmoser@hrwlawyers.com

OSHA Penalties for Citations Will Increase by Up to 80%

For 25 years, the OSHA penalty framework has remained unchanged. As of August 1, 2016, however, the maximum penalties for civil citations could rise by up to 80%. The increase is mandated by Congress, part of the Bipartisan Budget Act of 2015, which required the U.S. Department of Labor to raise civil penalties to adjust for inflation.¹ Assuming a full 80% increase, the new penalties per citation would be:

- Other-than-serious violations: \$12,600.
- Serious violations: \$12,600.
- Willful violations: \$126,000.
- Repeat violations: \$126,000.

OSHA has the authority to implement an increase lower than the maximum 80%, if imposing the maximum penalties would have a “negative economic impact” or adverse “social cost.” Most likely, however, OSHA will implement the maximum 80% increase.

The higher amounts will apply to all penalties proposed or assessed after August 1, 2016. Accordingly, if your workplace is involved in an OSHA inspection that could extend past August 1, 2016, proposed penalties will be set according to the higher thresholds.

Frequently Asked Questions

In announcing the increases, OSHA included answers to frequently asked questions about the new penalties, including adjustments that OSHA can make in setting fines for small businesses. The answers include the following:

- The increase was imposed by Congress in the Bipartisan Budget Act of 2015, which required the U.S. Department of Labor to raise civil penalties to adjust for inflation. OSHA has not raised the penalties since 1990. The penalties were to be adjusted according to the difference in percentage between the Consumer Price Index from October, 2015 and October, 1990.

¹ www.osha.gov/penalties.html ; www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf



- The new penalties will take effect no later than August 1, 2016, after the Interim Final Rule setting the levels is published in the *Federal Register* on or before July 1, 2016. Instead of a proposed rule subject to a period of public notice and comment, OSHA's rule to implement the increases will be an Interim Final Rule, effective immediately when published.
- The U.S. Department of Labor will adjust the levels annually, based on the federal Consumer Price Index, starting in January, 2017.
- Employers inspected before the effective date of the higher penalties, but who receive OSHA civil citations after the date of the increases, *will be cited according to higher penalties*. The Bipartisan Budget Act requires OSHA to apply the higher rate of penalties in such cases. It is important to remember, however, that *OSHA retains the flexibility to assess penalties below the maximum level*. Minimum fines, however, must reflect the increases in the penalty structure.
- For **small businesses** that could face a disproportionate impact from the higher fines, the penalty rules will continue to allow OSHA to apply a reduction factor based on the size of the employer. OSHA explained that while small businesses have the same obligation to protect workers as smaller businesses, the agency will still have the authority to adjust fines according to potential adverse impact on small businesses, on a case-by-case basis.

The new penalty levels are to be applied prospectively, to new and pending OSHA inspections, but not to previously assessed or enforced citations that OSHA is in the process of collecting or has already collected.²

In addition, increases in maximum penalties made based on annual cost-of-living increases, according to the Consumer Price Index, will be made by January 15th of each year.

Employers should also note that states with OSHA-approved State Plans must also have penalties "at least as effective" as OSHA's federal penalties.

Before the increases were enacted, OSHA was one of three federal agencies exempted from the requirement that federal agencies raise fines to keep up with inflation. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 eliminated OSHA's exemption. Details of the mandated increases in penalties are available in the federal Office of Management

² www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf *Completing the catch-up adjustment, sec. f*; www.osha.gov/penalties.html

and Budget's memorandum, *Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*.³

If you have questions about a pending OSHA investigation or the new level of fines, or have any other questions related to OSHA's inspection procedures and citation structure, please contact HRW.

³ www.osha.gov/penalties.html; www.congress.gov/bill/114th-congress/house-bill/1314/text.
www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf.