



OSHA Enforcement – What Employers Need to Know

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The Occupational Safety and Health Administration (OSHA) and Congress recently have taken steps that could significantly impact employers. These changes, the Severe Violators Enforcement Program (SVEP), and the Protecting American Workers Act (PAWA) could dramatically increase the financial and other consequences associated with OSHA citations.

SVEP became effective on June 18, 2010, and replaces OSHA's Enhanced Enforcement Program. The initiative purportedly "focuses enforcement efforts on employers who willfully and repeatedly endanger workers by exposing them to serious hazards." The four circumstances that will trigger SVEP enforcement are:

- 1. Fatality/Catastrophe:** Involves a fatality or where three or more employees are hospitalized. Also may apply where one or more willful, repeat or failure to abate citations are issued.

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1. **High-Emphasis Hazards:** Circumstances involving one or more specified and high-emphasis hazards where two or more willful, repeat violations or failure to abate citations are issued. Examples of high-emphasis hazards include: certain fall, amputation, combustible dust, airborne contaminant hazards, and lead, excavation/trenching, and shipbreaking hazards.
2. **Potential Release of a Highly-Hazardous Chemical (Process Safety Management):** Circumstances where three or more willful, repeat or failure to abate citations are issued for the potential release of highly-hazardous chemicals.
3. **Egregious Cases:** All cases where OSHA issues citations under its “Egregious Case” policy, which applies to particularly serious safety hazards for which OSHA opts to cite employers separately for every employee exposed.

Enhanced enforcement actions under the SVEP include mandatory follow-up inspections, increased company/corporate awareness of OSHA enforcement, corporate-wide agreements where appropriate, enhanced settlement provisions, and federal court enforcement.

In conjunction with the unveiling of SVEP, OSHA also issued a memorandum to regional administrators that enhances OSHA’s penalties. OSHA states in the memorandum that currently “the Agency’s penalties are too low to have an adequate deterrent effect.” The memorandum revises OSHA’s penalty classification system, as currently outlined in its *Field Operations Manual*. OSHA made the following significant changes:

1. The time frame for considering an employer's history of violations will expand from three years to five. An employer who has been inspected by OSHA within the previous five years and has not been issued any serious, willful, repeat or failure-to-abate citations will receive a 10% reduction for history. Of course, this change also means that the time period for considering the classification of repeated violations will be increased from three to five years. In addition, an employer that has been cited by OSHA for any high gravity serious, willful, repeat or failure-to-abate violation within the previous five years will receive a 10% increase in their penalty, up to the statutory maximum.
2. At the discretion of the area director, high gravity serious violations related to standards and hazards identified in the SVEP will not be grouped or combined, and may be cited as separate violations with individual proposed penalties.
3. OSHA is increasing its gravity-based penalty structure for serious citations, which will now range from \$3,000 to \$7,000. The gravity of a violation is the primary consideration in calculating penalties and is established by assessing the severity of the injury/illness that could result from a hazard and the probability that an injury or illness could occur. This gravity assessment is made by the compliance officer at the time of the inspection and is often subjective.
4. The minimum proposed penalty for a serious violation will increase from \$100 to \$500. The proposed minimum penalty for a posting violation will increase from \$100 to \$250 if the company was previously provided a poster by OSHA.
5. Final penalties will be calculated serially, unlike the current practice where all penalty reductions are added and the total percentage of reductions is then multiplied by the gravity-based penalty to arrive at the proposed penalty. According to the examples provided by OSHA, this new method of calculation could increase penalties by as much as 50%.

Earlier this year, Congress introduced the Protecting America's Workers Act (PAWA). PAWA expands whistleblower protections, requires OSHA to investigate all cases of death and serious injuries, prohibits any practice that discourages employees from reporting work-related injuries and extends coverage to public sector employees. Most importantly, PAWA gives OSHA greater authority to impose penalties. It would subject corporate officers as well as other responsible individuals to possible felony charges for willful violations of OSHA rules that result in an employee death. Previously, only a misdemeanor charge was possible in such circumstances. The maximum prison sentence for a willful violation resulting in the death of an employee would increase to 10 years from the current six months for the first offense, and to 20 years from one year for repeat convictions. Willful violations that result in serious bodily injury also could be prosecuted as felonies, with imprisonment of up to five years for a first offense and up to 10 years for subsequent convictions. The maximum prison term for knowingly making a false statement, representation or certification to OSHA would be increased from six months to two years. Civil penalties also would increase under PAWA, with serious violation maximum fines rising to \$12,000 from \$7,000 and willful violation fines going to a maximum of \$120,000 from \$70,000.

These initiatives are a preview of the renewed emphasis that OSHA and Congress plan to place on enforcement in the coming years. Because these initiatives can result in significant financial and legal implications, employers should familiarize themselves with these provisions and seek the advice of legal counsel if they have any questions.



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