

Labor and Employment Attorneys 10-22-10

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THE OSHA SHERIFF IS BACK AND HE HAS A PLAN

In our [September 2010 e-alert](#) we told you about the plan of the Occupational Safety and Health Administration (OSHA) to step up enforcement and implement aggressive initiatives, including the "after-the-fact" Site Specific Targeting Inspection Plans for 2010 and the "forward looking" rulemaking to require employers to establish on the job injury and illness prevention programs.

According to the new Assistant Secretary of Labor for OSHA, Dr. David Michaels, the agency believes that it must fundamentally transform the way it addresses workplace hazards and relates with employers and workers. To that end, OSHA intends to change the way businesses view employee safety by building a workplace culture that promotes safety and recognizes the importance of preventing employee injuries and illnesses.

To encourage businesses to provide safe workplaces to their employees, OSHA is identifying deterrence as a primary objective of its enforcement. The agency believes that stronger enforcement will provide employers the incentives to "do the right thing" and ultimately will result in a "level" playing field. OSHA does not want employers who invest in their workers' safety to be undercut by those that place their employees at risk for monetary gain.

Consequently, OSHA intends to: encourage employers to increase self-auditing activities and make safety investments before inspectors arrive at the door; target enforcement efforts at employers who most need attention; and increase the likelihood of stiff penalties for violators. Alterations to the OSHA penalty process include increasing the dollar amounts for employer penalties, implementing a violator "shaming" program, and commencing a new severe violator enforcement program.

OSHA intends to overhaul its penalty policy, which has not changed significantly in the 40 years of OSHA's existence. OSHA assesses an average penalty of \$1,000 for a serious violation. OSHA believes that this low penalty amount results in employers ignoring OSHA compliance, as evidenced by the 5,000 American workers killed on the job every year and the thousands more who are injured or exposed to potential hazards. Consequently, OSHA intends to levy higher penalties against violators to send the message that OSHA has returned to its original function of enforcing the Occupational Safety and Health Act and intends to pursue violators to the "full extent of the law."

Under OSHA's new penalty policy, the average penalty for a serious violation would be \$3,000 or \$4,000. OSHA's ability to increase the assessment further is constrained by a \$7,000 statutory current maximum (for a serious violation). Currently pending legislation would increase these penalties up to \$250,000, with adjustments for future inflation. Moreover, changes would be made to the penalty reduction and final penalty calculation process, including:

- The Regional Administrator must approve all penalty reductions exceeding 30%.
- OSHA will no longer allow penalty adjustment at an informal conference if the employer owes OSHA an outstanding penalty balance.

- Penalty reductions will be curtailed: employers with 1 to 25 employees will be eligible for a 40% penalty reduction rather than the previous 60% reduction; employers with 26 to 100 employees will be eligible for a 30% reduction rather than the previous 40% reduction; and employers with 100 to 250 employees will be eligible for a 10% reduction rather than the previous 20% reduction.
- Final penalties will be calculated serially, unlike the present practice of adding all penalty reductions and multiplying the total percentage by the gravity-based penalty to arrive at the proposed penalty.
- An employer who has been inspected by OSHA in the previous five years and has no serious willful, repeat or failure to abate violations will receive a 10% reduction for history. Previously this was based on a three-year period. The time period for most repeat violations will be increased from three to five years.
- Employers that were cited by OSHA in the previous five years for any high gravity serious, willful, repeat or failure to abate violation will receive a 10% increase in their penalty up to the statutory maximum.
- A gravity based penalty determination will be adopted, providing for penalties between \$3,000 and \$7,000.

OSHA believes that these changes will capture employers' attention and cause them to abandon the "catch me if you can" mentality that, according to OSHA, puts profit before prevention and gambles with workers' lives. Additional planned OSHA initiatives include:

- Ensuring that workers know their legal rights and that they can exercise these rights without fear of retaliation;
- Strengthening agency compliance assistance programs by encouraging the development and dissemination of tools, information, and best practices to help workers understand workplace hazards and to help employers maintain safe work environments;
- Promulgating rules that require employers to implement risk-based injury and illness prevention programs (rather than simply attempting to meet OSHA standards);
- Developing new approaches to reduce exposure to workplace hazards that do not rely on what OSHA views as the currently "unworkable" regulatory process;
- Promoting accurate recordkeeping, encouraging injury reporting, and learning from injury investigations;
- Grounding activities in science;
- Assisting state plans' growth and effectiveness; and
- Engaging in transparent action and open processes.

Clearly, the Sheriff is back, and he believes that it is OSHA's job to make sure that employers meet their responsibilities for ensuring that workplaces are safe and free of recognized hazards. The Sheriff's plan for OSHA to fulfill its responsibility to enforce the Occupational Safety and Health Act could drastically impact the way that OSHA regulates employers in the workplace safety and health arena.

We will continue to keep you apprised of major developments in this area. In the meantime, please call a member of our Labor and Employment team if you have any questions about OSHA's initiatives.

This *Headlines in Labor and Employment Law E-Alert* provides general information and should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.