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KNOW YOUR OPTIONS AS AN EMPLOYER

The Big Picture of the OSHA Enforcement Process

Part II - Negotiating an Informal Settlement Agreement with OSHA

A previous issue of the OSHA E-Newsletter discussed an employer's legal options after receiving a Notice of Citation and Proposed Penalty from an OSHA Area Office. This issue concludes the two-part series by discussing several factors that an employer should consider before reaching a settlement agreement at an informal conference with an OSHA Area Director.

Area Directors are authorized to change hazard abatement dates, reclassify violations and modify or withdraw OSHA citation items or penalties if an employer presents compelling evidence during the informal settlement conference. Some employers fail to appropriately value the importance of the informal conference for achieving a satisfactory settlement with OSHA.

Employers that inadequately prepare for the conference or fail to present a compelling case at the conference may not succeed in obtaining penalty reductions, deletion or reclassification of citation items or more favorable hazard abatement terms. Similarly, employer arguments based on "fairness," unfavorable business conditions or ignorance of

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OSHA regulations may also prove unproductive. Therefore, it is often a good idea to be assisted by a professional who understands and is experienced in the OSHA legal process.

The objective of the informal conference is to negotiate a just and reasonable settlement agreement with OSHA if possible. To do so, an employer must strike the proper balance between four primary considerations: (1) the amount of monetary penalty, (2) the classification of the citation item(s), (3) the required hazard abatement and (4) the specific language of the settlement agreement.

Monetary penalties are a relatively straightforward portion of an OSHA citation to understand and negotiate. OSHA believes that large proposed penalties are necessary to enforcement of the Occupational Safety and Health Act because they deter other employers from being "guilty of the same infractions of the standards or regulations." OSHA monetary penalties can range from $0 to $70,000 per violation.

The classification of the items of a citation is a critically important term in the settlement agreement. In issuing a citation, OSHA can classify an alleged violation using one of five categories: (1) Willful, (2) Repeated, (3) Serious, (4) Other-than-serious and (5) De minimis. The classification of a violation has both short-term and long-term implications. Specifically, the classification will establish a range for monetary penalties to be paid in the short-term. The monetary penalty for a Willful violation and Repeated violation can range between $7,000 and $70,000. Serious violations can cost between $1 and $7,000. Other-than-serious violations can run between $0 and $7,000.

Importantly, the classification of a citation item also has long-term implications. For example, utilizing gravity-based penalty factors, OSHA will increase a proposed penalty by five times for a first Repeated citation and ten times for a second Repeated citation. In other words, an employer that unwittingly accepts a Repeated classification will be subject to a gravity-based penalty factor equaling ten times the original penalty if OSHA cites the employer for the same violation in the future.

Hazard abatement is another important consideration. Abating a hazard oftentimes requires an employer to spend

money on personal protective equipment and safety programming. Sometimes hazard abatement means major capital expenditures on engineering controls to minimize the likelihood of workplace injury or illness. The OSHA Area Director has the authority to negotiate both the amount of hazard abatement and implementation deadlines for corrective action.

The legal language of the settlement agreement is also very important. For example, exculpatory language is permissible if the language is not clearly adverse to the purposes of the Act. However, incomplete or poorly worded language may not be sufficiently exculpatory. An employer that "trades away" something of value for poorly-worded exculpatory language may gain little or nothing.

As in any negotiation, the OSHA Area Director may or may not be willing to make meaningful concessions in each of the above areas of consideration. The task for the employer is to decide which of the consideration(s) is most important in both the short-term and the long-term and to negotiate the agreement accordingly. For example, while no one wants to pay any amount in penalty, many employers focus their efforts during the conference to reducing the monetary penalties. Such an approach, while understandable, may be short-sighted if the employer accepts a Repeated classification in return for a lower penalty. If the employer is likely to be inspected by OSHA in the future, the gravity-based penalty factor for a second Repeated classification could more than outweigh the gains in the first settlement agreement.

If you have any questions about negotiating an informal settlement agreement with OSHA, please contact Jeffrey P. Clark or Daryll J. Neuser.

OSHA Practice Group E-Newsletter is an electronic publication of the law firm of Reinhart Boerner Van Deuren s.c., and is prepared by attorneys in its OSHA Practice Group. This publication is intended to afford timely notice to our clients and friends of current events in OSHA regulations and to provide general information about OSHA issues. It is not intended, nor should it be used, as a substitute for specific legal advice regarding particular factual situations.

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