

HEALTH & SAFETY

OSHA issuing more 'egregious' violations, but they may not hold up

By Jim Stanley, President of FDRsafety

The Occupational Safety and Health Administration (OSHA) has recently begun issuing many more "egregious" citations, in which the agency proposes a separate penalty for each instance of noncompliance with OSHA recordkeeping regulations, safety and health standards, and with the general duty clause.

This results in much larger proposed penalties than "non-egregious" cases, in which OSHA issues one violation for all instances of the same hazard. Egregious violations are defined as those in which the employer has demonstrated one or more of the following characteristics:

- persistently high rates of illness/injury or fatalities;
- extensive history of prior violations;
- intentional disregard of health and safety responsibilities; or
- bad faith (a plain indifference to standards or requirements).

OSHA's strategy

OSHA believes the issuance of egregious violations improves the efficiency and effectiveness of the agency and conserves its limited resources by making an example of the employers who are cited. The revival of the strategy includes two recent instances that resulted in large proposed fines in Connecticut and Wisconsin. The question is whether those violations will hold up if the employers choose to litigate them.

According to OSHA, the violation-by-violation citations are not primarily punitive or exclusively directed at the individual work sites or workplaces involved. OSHA believes that these citations serve a public policy purpose, namely to increase the impact of OSHA's limited enforcement resources.

In Middletown, Connecticut, OSHA cited three construction companies and 14 site contractors for 371 alleged workplace safety violations and proposed \$16.6 million in penalties in connection with an explosion at a power plant construction site that killed six workers and injured 50 others. The accident occurred when natural gas was pumped under high pressure through new fuel gas lines to remove debris.

In the other accident, OSHA said a worker at a grain storage bin was engulfed in soybeans up to his chest and

almost died. The agency issued egregious violations and proposed fines of \$721,000 against a Burlington farmer cooperative.

In my experience, when OSHA has to litigate egregious citations, it is required to prove in each instance of violation that:

- if an accident occurred, it was substantially probable to cause death or serious physical harm;
- there was employee exposure to the hazard; and
- the cited employer knew of the hazard or could have known through the use of reasonable diligence.

In large egregious citation cases that are aggressively litigated by the employers, it is very difficult for OSHA to sustain its burden of proof for each and every instance of violation.

Approach part of a larger strategy

The push on egregious violations is part of a larger strategy by OSHA to increase penalties. Earlier this year, OSHA issued new administrative guidelines designed to increase the average penalty in non-egregious cases from \$1,000 to \$3,000 or \$4,000.

In addition, revisions to the OSH Act have been brought to the floor of the U.S. House of Representatives that would substantially increase civil penalties. The bill would:

- increase the maximum penalty for "willful or repeat" violations from \$70,000 to \$120,000 and raise the minimum for willful violations from \$5,000 to \$8,000;
- set the minimum and maximum penalties for willful or repeat violations resulting in death at \$50,000 and \$250,000, respectively;
- require OSHA to consider violations under state-run OSHA plans for the purpose of determining whether the violations are repeats (states have the option to set up their own occupational safety and health agencies, so long as their standards are at least as tough as the federal ones. OSHA does not operate in states that have their own plans);
- increase the maximum penalty for "serious" violations from \$7,000 to \$12,000 and increase the penalty to \$50,000 for violations (except for general duty clause violations) that "caused or contributed" to the death of an employee;
- increase the maximum penalty for failure to abate alleged violations and failure to follow posting requirements violations from \$7,000 to \$12,000; and
- require the Secretary of Labor to adjust civil penalties at least once during each four-year period beginning January 1, 2015, to account for inflation.

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