
Responding to an OSHA Enforcement Action

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Under the Obama administration, we are seeing a more assertive Occupational Health & Safety Administration (OSHA). In April 2010, OSHA announced implementation of its new “Severe Violator Enforcement Program” (SVEP) and that it was “increasing civil penalty amounts.” See OSHA Directive CPL 02-00-149. OSHA’s new administrative penalty calculation system became effective on October 1, 2010. This represents the first increase in OSHA penalties in over forty years. OSHA’s new SVEP, as well as its increased civil penalty amounts, represent an increased focus on OSHA enforcement. We can expect an increase in OSHA inspections, including mandatory OSHA follow-up inspections, and inspections of other worksites of the same employer where similar hazards and deficiencies may be present.

Accordingly, this article provides a nuts and bolts overview of responding to an OSHA enforcement action. While this article discusses settlement or early resolution of OSHA enforcement actions, by no means does the author intend to suggest that settlement or early resolution is appropriate in all OSHA enforcement actions. In fact, real concerns exist with respect to settlement of OSHA citations, which will be discussed more fully below. Regardless of whether a party wishes to entertain settlement of an OSHA enforcement action or not, this article provides helpful hints to achieving a result most favorable to your client. While this article is limited to discussion of OSHA enforcement actions, parties should be aware of the possibility for concurrent state enforcement actions that may arise in relationship to receipt of an OSHA citation. Examples of common OSHA enforcement actions that the environmental practitioner may face include actions related to asbestos abatement activities, management of hazardous wastes, or chemical exposure.

The OSHA enforcement process typically begins with an inspection. Where violations are discovered, this inspection typically is followed by receipt of one or more citations. However, citations are not received during or immediately following on-site inspections. Rather, citations and a proposal of penalty are generally received later by certified mail. Once received, it is important to follow certain steps in order to reach a favorable settlement of the citation(s).

First, pursuant to section 9(b) of OSHA, the employer must “prominently” post the citation and the notice of proposed penalty” at or near each place a violation referred to in the citation occurred.” See 29 U.S.C. § 658(b). Preferably, the employer should take a picture, with a date stamp, of each posted citation and notice of proposed penalty at or near each place of violation, as this information will be useful in defending or negotiating resolution of the enforcement action. It is important to note that the citation and notice of proposed penalty must be posted until the violation is abated or for three working days, which-

ever is longer. The failure to post may result in a fine of \$7,000 for each violation. See 29 U.S.C. § 666(i).

Upon receipt, the employer or designated employee should review the citation(s) for accuracy. For instance, are the citations factually accurate? If they are not factually accurate, make a record of any factual inaccuracies, including pictures or even affidavits that may be useful to demonstrate such factual inaccuracies.

Most important, take any necessary corrective action to abate the workplace hazard. For instance, if the citations relate to the failure to perform asbestos abatement work, be sure to perform any necessary asbestos abatement work. However, prior to doing so, be sure to contact a qualified contractor that will follow all applicable federal, state, and local laws, including acquiring any necessary preliminary permits. Request that this contractor prepare a report summarizing any corrective action or abatement activities undertaken.

Equally important to taking corrective action to abate the workplace hazard is to demonstrate good faith to ensure continued compliance. For instance, the employer may wish to participate in certain training courses to become educated, and educate employees, on the particular workplace hazard. By way of example, the employer may mandate staff participation in an Asbestos Awareness Initial Course that provides training on EPA and OSHA asbestos regulations. This may be particularly relevant with respect to penalty assessment, which is discussed in more detail below. Make sure that each employee signs a course sign-in sheet and receives a certificate of course completion. Be sure to retain a copy of these materials for your file.

Next, request an informal settlement conference with the Area Office. It is important to note that the informal conference must take place within fifteen working days of receipt of the notice of citation and proposal of penalty. Expiration of the fifteen working-day period, without filing of a notice of contest, will result in the citation(s) and proposed penalties becoming final orders. The burden of requesting the informal settlement conference is on the employer. The request for an informal settlement conference is simply made by calling the Area Office and requesting an appointment.

Prior to the informal settlement conference, it is important to compile all of the materials mentioned above. It is vitally important to adequately prepare for the informal settlement conference. The primary objective of the informal settlement conference is to reach settlement or early resolution of those citations, which the employer deems accurate and to negotiate a reduction in the proposed penalty assessment. Typically, OSHA representatives present at the informal conference will either be the Area Director or an Assistant Area Director. The Area Director or Assistant Area Director will usually have the inspector participate in the informal settlement meeting, as well.

OSHA classifies its citations as *de minimis*; *other-than-serious* (one that has a direct relationship to job safety and health but probably would not cause death or serious physical harm); *serious* (substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known); *repeat* (exists when an employer previously has been

cited for the same or a similar violation of a standard, regulation, rule or order at any other facility in federal enforcement states within the last five years); *willful* (those committed with intentional, knowing, or voluntary disregard for legal requirements or plain indifference to employee safety and health); and *failure to abate* (exists when the employer has not corrected a violation for which a citation has been issued and the abatement date has passed).

One key element to reaching a favorable settlement of OSHA citations is to negotiate a reclassification of the citations. The classification of the violation is tied to the penalty. Thus, by negotiating a lower classification of the violation, a party necessarily may negotiate a reduction in the proposed penalty assessment. For example, if OSHA classified the citations as serious, an employer could argue that the citations are more appropriately classified as other-than-serious, which generally do not carry penalties.

Next, go through OSHA's administrative penalty adjustments and demonstrate why they may (or may not) be applicable to further reduce the proposed penalty assessment. These factors include: (1) history reduction (10 percent reduction for any employer inspected by OSHA within previous five years not issued any serious, willful, repeat, or failure-to-abate citations); (2) history increase (10 percent increase, up to statutory maximum, to employer cited by OSHA within previous five years for high-gravity serious, willful, repeat or failure-to-abate citation); (3) repeat violations; (4) severe violator enforcement program; (5) gravity-based penalty (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); (6) size reduction (penalty reduction between 10 and 40 percent for those with less than 250 employees. No size reduction will be applied for employers with 251 or more employees); (7) good faith (A penalty reduction is permitted in recognition of an employer's effort to implement an effective workplace safety and health program. This is not allowed in high-gravity, serious, willful, repeat, or failure-to-abate citations. A 15 percent quick-fix reduction is allowed as an abatement incentive program to encourage employers to immediately abate hazards identified during inspections); (8) minimum penalties; and (9) additional administrative modifications to the penalty calculation policy.

Parties subject to an OSHA enforcement action should also be cognizant of OSHA's 1986 Egregious Penalty Policy. Under this policy, OSHA will allege a separate violation and propose a separate penalty for each instance of noncompliance. Such practice results in one large aggregate penalty. This is called violation-by-violation treatment. Typically, such treatment is limited to instances of noncompliance, which OSHA deems to constitute a flagrant violation of OSHA. Citations under con-

sideration for such treatment must be classified as willful, as well as (1) resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses; (2) resulted in persistently high rates of worker injuries or illnesses; (3) where the employer has an extensive history of prior violations of the Act; (4) where the employer has intentionally disregarded its safety and health responsibilities; (5) where the employer's conduct taken as a whole amounts to clear bad faith in the performance of his or her duties; or (6) the employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place. Since its adoption in 1986, employers have frequently challenged OSHA's Egregious Penalty Policy. In 2008, then Senator Barak Obama, in a hearing before the Senate Committee on Health, Education, Labor, and Pensions, proposed codification of the Egregious Penalty Policy in an effort to end these employer challenges through enactment of S. 1244 titled, "Protecting America's Workers Act." While this bill was never actually enacted, OSHA continues to apply the Egregious Penalty Policy.

Parties contemplating settlement should also request inclusion of exculpatory language within any settlement agreement. This exculpatory language may shield them from the citation being used in any potential civil litigation that may arise with respect to the OSHA enforcement action. Parties subject to OSHA enforcement actions should be cognizant of the fact that upon entering into a settlement agreement with OSHA, they will now have a record of violation, which will make future compliance all the more important. This is particularly true, as discussed above, because OSHA evaluates an employer's history of compliance when assessing penalties. If the parties do reach a settlement, the employer must generally post the settlement agreement for the period of time specified in the settlement agreement.

Finally, in the event that the parties are not able to reach a settlement at the informal settlement conference, it is imperative that the employer submit, in writing, to the Area Director a Notice of Intent to Contest so that the citation(s) and penalty/penalties do not become final orders. In fact, it is prudent for the employer, or their counsel, to prepare the Notice of Intent to Contest and take it with them to the informal settlement conference to leave with the Area Director, in the event settlement efforts are not successful.

Regardless of whether the parties settle at the informal settlement conference or resolve the matter subsequent to filing a Notice of Intent to Contest, the response actions and negotiation strategies discussed above will aid in garnering a more favorable outcome to the OSHA enforcement action.

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