

OSHA Expands Enforcement Measures to Deter Violations

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On January 26, 2023, the Occupational Safety and Health Administration (OSHA) issued two enforcement guidance memoranda to “deter” potential violations. In the Department of Labor’s [press release](#) the same day, Doug Parker, Assistant Secretary for OSHA, explained that the measures detailed in the memoranda represent a “targeted [enforcement] strategy for those employers who repeatedly choose to put profits before their employees’ safety, health and wellbeing” and “[employers] who callously view injured or sickened workers simply as a cost of doing business will face more serious consequences.”

Instance-by-Instance Citations

Under the [first enforcement guidance memorandum](#), OSHA Regional Administrators and Area Office Directors will have more expansive authority to cite certain violations as “instance by instance” (IBI) citations for high gravity serious violations of OSHA standards specific to certain conditions. These conditions include lockout/tagout, machine guarding, permit-required confined space, respiratory protection, falls, trenching, and cases with other-than-serious violations specific to recordkeeping. While current IBI policy applies only to willful citations, OSHA believes that increased citations will discourage non-compliance and, in turn, incentivize employers to proactively prevent workplace injuries.

A decision to issue an IBI citation will include considerations of one or more of the following factors:

- The employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current;
- The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39;
- The proposed citations are related to a fatality/catastrophe; and
- The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.

Further, IBI citations may be issued when an OSHA standard allows – such as per machine, location, entry, or employee, and when the violations cannot be fixed by a single method. As separate penalties may now be assessed for each separate violation, Regional Administrators and Area Directors have the discretion to apply IBI penalty adjustments in appropriate cases, resulting in increased fines. This new policy will become effective on March 27, 2023.

Grouping Violations

In a [second enforcement guidance memorandum](#), OSHA reiterates its existing policy not to group violations where there is evidence that violations are separate or distinct, or where different conduct gave rise to the violations. Specifically, OSHA states that violations should not be grouped if the

evidence allows for separate citations and grouping does not elevate the gravity or classification and resulting penalty. Grouping violations should be considered when:

- two or more serious or other-than-serious violations constitute a single hazardous condition that is overall classified by the most serious item;
- grouping two or more other-than-serious violations considered together creates a substantial probability of death or serious physical harm; or
- grouping two or more other-than-serious violations results in a high gravity other-than serious violation.

Overall, according to OSHA, not grouping violations will more effectively “encourage” compliance.

Takeaways

As to the new “instance-by-instance” guidance, employers should assess whether they fall within the targeted group and also revisit their workplace safety policies and procedures to ensure compliance with OSHA standards, especially in lockout/tagout, machine guarding, permit-required confined space, respiratory protection, falls, trenching, and recordkeeping areas that are specifically highlighted in the guidance. When facing scenarios related to grouping of violations, employers must carefully assess the pros and cons of grouping prior to advocating for either circumstance.