

DOL Announces Expansion of OSHA's Authority to Issue Increased Instance-by-Instance Citations and Penalties

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The Department of Labor (DOL) recently [announced](#) that the Occupational Safety and Health Administration (OSHA) has issued new enforcement guidance expanding its authority to issue instance-by-instance (IBI) citations for certain violations. The new guidance allows OSHA to increase fines for employers with a history of failure to comply with certain workplace safety and health requirements.

In a [memorandum](#) to its regional administrators, OSHA said that it is expanding its policy to issue IBI citations “to achieve a deterrent effect” in appropriate cases. The previous policy, which has been in effect since 1990, applied only to “egregious willful violations.”

Under the new policy, OSHA personnel will have authority to issue IBI citations in cases where the agency identifies “high-gravity” serious violations of OSHA standards specific to certain conditions, including lockout/tagout, machine guarding, permit-required confined space, respiratory protection, falls, trenching, and cases with other-than-serious violations specific to recordkeeping. The new guidance covers enforcement activity in general industry, agriculture, maritime, and construction industries, and becomes effective 60 days from 26 January 2023.

The decision to use IBI citations will be based on consideration of one or more of the following factors: (1) the employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current (i.e., the violation classification did not change upon settlement or other disposition of the citation); (2) the employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye as required by 29 C.F.R. § 1904.39 (2022); (3) the proposed citations are related to a fatality/catastrophe; or (4) the proposed recordkeeping citations are related to an injury or illness that occurred as a result of a serious hazard.

The new guidance will allow OSHA to issue IBI citations where the text of the relevant standard allows (e.g., per machine, location, entry, or employee), and when instances of violation cannot be abated by a single method of abatement. This method of citation will result in escalated proposed

finer where OSHA can treat each incident as a single distinct violation and propose a fine for each violation.

Decisions to use an IBI citation must be reviewed by an OSHA regional administrator and the Office of the Solicitor before a citation is issued. To further add to the deterrent effect of this new policy, OSHA announced that it will issue a press release following issuance of any IBI citations.

OSHA also issued a [second memorandum](#) to its regional administrators and area directors reminding them that they have the authority not to group violations and can instead issue citations separately. This memorandum emphasizes that this enforcement discretion “is an important tool in OSHA’s arsenal that helps deter employers from flagrantly disregarding their responsibilities to protect workers and comply with OSHA standards and regulations.” In particular, OSHA encouraged its personnel to separate violations where there is evidence that worksite conditions giving rise to violations are separate and distinct, or where different conduct gives rise to the violations. OSHA takes the position in the memorandum that OSHA enforcement activity may lose its deterrent effect in certain cases when citations are grouped.

In its [press release](#), the DOL emphasized that OSHA’s new enforcement guidance is aimed at making penalties more effective “in stopping employers from repeatedly exposing workers to life-threatening hazards or failing to comply with certain workplace safety and health requirements.”

As a final note, the DOL also recently announced changes to OSHA civil penalty amounts based on cost-of-living adjustments for 2023. Effective 17 January 2023, the maximum penalty for serious and other-than-serious violations will be increased to US\$15,625 per violation (up from US\$14,502), and the maximum penalty for willful or repeated violations will be increased to US\$156,259 (up from US\$145,027).

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