

NOVEMBER 4, 2015

OSHA Penalties – After 25 Years There Will be an Increase

BY THOMAS BENJAMIN HUGGETT

The new two-year bipartisan budget, signed by President Obama on November 2, 2015, allows (in fact requires) OSHA to raise its citation penalties for the first time in 25 years. Since 1990, OSHA has been one of only three federal agencies that were specifically exempted from a law that required federal agencies to raise their fines to keep pace with inflation. A section of the budget bill—titled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015—eliminates this exemption for OSHA.

The law now requires an initial penalty “catch-up adjustment,” which must be in place by August 1, 2016. The catch-up adjustment is tied to the percentage difference between the October 2015 Consumer Price Index (CPI) and the October 1990 CPI. Because the October 2015 CPI will not be available until November 17, 2015, the actual percentage increase is unknown at this time. However, based on recent CPI, the increase will likely be in the range of 75% to 80% over current penalty amounts.

The budget allows OSHA the option of implementing a smaller penalty increase if (1) the agency determines increasing penalties by the maximum amount would have a “negative economic impact” or the “social costs” of the increase outweigh the benefits, and (2) the Office of Management and Budget agrees with the agency’s determination. Because the Assistant Secretary of Labor for OSHA, Dr. David Michaels, has been a vocal proponent of increased OSHA penalties (including congressional testimony just a month ago), it is unlikely he would authorize anything less than the maximum increase.

Although OSHA must go through the rulemaking process to effect the penalty increases, the budget directs that the increase be issued as an interim final rule. This means that OSHA does not have to issue a *proposed* rule, which would be subject to a public notice and comment period before finalized. Rather, the rule will become effective immediately upon publication. Further reducing the likelihood that a less-than-maximum penalty increase will occur, the new law specifies that a lesser penalty must go through full notice and comment rulemaking. This step—which would delay the agency from increasing fines—serves as a disincentive to institute a lesser penalty.

Assuming OSHA will impose an 80% catch-up adjustment, which will take effect upon the interim rule's publication no later than August 2016 (but likely much earlier in the year), the new maximum penalties would be as follows:

- Other than Serious violations: \$12,600
- Serious violations: \$12,600
- Willful violations: \$126,000
- Repeat violations: \$126,000

After the initial adjustment, OSHA will be required to implement annual cost-of-living increases, with the adjustment tied to the increase in the CPI. Adjustments must be made by January 15 each subsequent year.

Littler will continue to monitor this development.