



## OSHA Enforcement Update For 2019: Penalties To Increase

Brooke F. Dickerson

Despite the Trump Administration's pronounced goal of reducing administrative burdens on businesses, the Occupational Safety and Health Administration (OSHA) increased inspections and enforcement actions during 2017 and 2018. The average penalty amount assessed also increased. For example, the average penalty for serious violations increased from \$3,645 in 2017 to \$5,016 in 2018. The trend toward more OSHA enforcement and higher penalties is likely to continue in 2019.

OSHA penalties are calculated based on the category in which OSHA classifies the violation. According to a new Department of Labor final rule<sup>1</sup>, which became effective on January 23, 2019, the maximum penalty in 2019 for "Serious," "Other-Than-Serious," "Posting," and "Failure to Abate" violations will increase to \$13,260 per violation from \$12,934 in 2018. The maximum penalty for "Willful or Repeated" violations will increase to \$132,598 in 2019 per violation from \$129,336 in 2018. OSHA calculates penalties based on the specific circumstances of each case, looking particularly at (1) the gravity of the violation, (2) the size of the employer's business (including all facilities regardless of location), (3) good faith, and (4) employer's history of cited violations (including all facilities regardless of location).

While a company would prefer to avoid having an alleged violation classified as "Willful or Repeated" (so as to avoid a higher penalty), a recent court decision from the Second Circuit Court of Appeals, *Triumph Construction Corp. v. Secretary of Labor*,<sup>2</sup> may make such avoidance more difficult. Prior to that decision, OSHA instituted a three-year look-back period for determining whether a violation was "repeated." In *Triumph Construction*, however, the Second Circuit held that OSHA could consider violations occurring during the prior five years to classify a current violation as repeated and bump it up into the highest penalty category.<sup>3</sup>

In fact, the court stated that, according to the OSHA Manual, "there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation," meaning OSHA could potentially look back indefinitely at similar violations by an employer to increase the amount of penalty assessed.<sup>4</sup>

Although employers are often tempted to settle OSHA allegations when the penalty imposed is relatively small in comparison to the legal fees to fight the alleged violation, employers should also consider the effect of admitting to a violation on possible future enforcement actions and potentially much higher fines.

<sup>1</sup> 84 Fed. Reg. 213.

<sup>2</sup> 885 F.3d 95 (2d Cir. 2018).

<sup>3</sup> *Id.* at 99.

<sup>4</sup> *Id.*

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