



## Contesting OSHA Penalties

by William Kenworthy

As most contractors have heard by now, in November 1990, Congress increased sevenfold the maximum civil penalties that the Occupational Safety and Health Administration (OSHA) may impose for violations of its job safety regulations. Maximum penalty amounts for serious and other-than-serious violations increased from \$1,000 to \$7,000, and the maximum for willful and repeat violations increased from \$10,000 to \$70,000.

This increased penalty authority is resulting in larger assessments by the agency. The penalties for equivalent offenses have recently run three to four times larger than those imposed before the law's amendment. Consequently, avoiding or minimizing such violations has become more important than ever.

### Responding to a Citation

Enforcement proceedings officially start when an employer receives a "Citation and Notification of Penalty." The citation may be served by certified mail, addressed to the employer at the principal place of business. Courts have invalidated notices sent to a job site, but it is not safe to ignore such notices no matter where they are sent. The employer must post the notice, minus the portion specifying penalties, in a place visible to all employees.

The Act requires that the citation describe in detail the alleged violation. The notice will also state the amount of the proposed penalty and, in most cases, order that the violation be corrected by a given date.

At this point you have three options. One is to accept the notice as filed, pay the penalty, and proceed to abate the alleged violation. Or, you can acknowledge the violation but seek to modify the corrective action, either in terms of its substance or its deadline. A third option is to contest the violation, seeking either to avoid it or to achieve a better result through negotiation and settlement.

### Is OSHA Being Reasonable?

In making this decision, you must question whether the penalty is reasonable in amount and whether the required corrective action is reasonable both in

substance and in the time allowed to make it. The law requires that an employer be given a reasonable amount of time for abatement. If a company admits to a violation and pays the penalty, it may be bound to admit and pay again if similar circumstances arise. Moreover, any future violations of the same nature are likely to be charged as repeat violations — with greatly increased penalties.

The employer may choose to contest only the method or time allowed for abatement. Difficulty in obtaining necessary equipment parts, for example, has been accepted by OSHA as a basis for extending the time allowed to take corrective action. Where these types of issues arise, employees or their unions are permitted to actively participate in the case.

### Challenge It in Writing

If you decide to contest either the penalty or abatement issue, or both, the first step is to file a notice of contest. A written notice of contest must be mailed to the OSHA Area Director within 15 days after receiving the notice of proposed penalty. Compliance with this deadline is *critical*. If a notice of contest is not mailed within 15 days, OSHA's notice automatically becomes a final order and is no longer subject to contest or appeal. For this reason, you should use certified, return-receipt-requested mail to send the notice. An oral notice or personal contact with an OSHA representative is inadequate.

Contesting an OSHA notice automatically extends the deadline for abating the alleged violation. A new deadline will not be established until a final order is issued or a settlement agreement is reached.

OSHA regulations do not stipulate a particular form for the notice of contest. A letter suffices. However, you should clearly state what you are contesting. If you want to contest both the claim of violation and the abatement issue, your letter should say so. If the citation involves more than one alleged violation, specify which ones you are challenging. A notice of contest that merely complains about the amount of the proposed penalty may be construed as admitting to the violation.

### Average Penalty per OSHA Violation in 1989

Type of violation	Proposed penalty	Actual penalty	Percentage of proposed paid
Serious	\$336.00	\$220.00	31%
Other-than-serious	2.65	1.61	33%
Willful	7,471.00	3,078.00	57%
Repeat	874.00	535.00	33%
All*	449.00	270.00	32%

\* This includes all types of violations except for other-than-serious violations that carried no proposed penalties.

### Negotiating a Settlement

On receiving a notice of contest, the OSHA Area Director forwards the matter to the Occupational Safety and Health Review Commission. A proceeding is put on docket and eventually leads to a hearing before an administrative law judge. At any stage in this process it is appropriate to enter into settlement negotiations with OSHA. Where abatement issues are concerned, employees or their representatives may participate in the settlement process.

The law requires OSHA to consider four factors when assessing a penalty amount:

- the size of the business
- the gravity of the violation
- the good faith of the employer
- any history of previous violations

In proposing penalties, OSHA relies primarily on the gravity of the violation. The other factors either add to or subtract from the basic amount. Proposed penalties are often reduced through contest and negotiation.

OSHA allows its field offices to negotiate reductions of proposed penalties by as much as 40%. Greater reductions must be approved by the OSHA Regional Administrator in consultation with the Regional Solicitor. You should bear in mind that since they are not required to abate the problem until all contested issues are settled, OSHA's representatives are under some pressure to settle these cases quickly. Thus it is often possible to negotiate favorable terms of settlement.

### Average Settlement Amounts

As a guideline, it helps to know the average amount of penalty settlement for OSHA violations. A

recent General Accounting Office report provided figures for 1989, which was prior to the amendment increasing maximum penalty amounts (see chart). Remember that penalties have increased roughly fourfold since then.

The average amounts for "other-than-serious" violations are so low because 98% of such violations carry no proposed penalty at all. Furthermore, the statistics included here do not take into account OSHA penalties in so-called "egregious" cases. In those cases, OSHA assesses penalties on a violation-by-violation basis. OSHA has levied some penalties running to millions of dollars against major companies.

The most important fact revealed in the chart, however, is that significant reductions are normally possible through contest and negotiation.

If settlement negotiations are unsuccessful, your case will eventually go to a hearing. It is possible for company representatives to handle an OSHA contest from beginning to end. But proceeding to a hearing without a knowledgeable attorney is not recommended. The OSHA Act and its regulations are complex. Those regulations are further subject to a significant gloss of judicial interpretation. Also, the Federal Rules of Evidence apply to all hearings before administrative law judges. You would be substantially handicapped at such a hearing if you're not represented by someone familiar with both the Act and the rules of evidence. ■

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