

Employers Beware: Understanding OSHA's New Enforcement Guidance

By Joshua M. Henderson &

April 3, 2023

Meet the Authors



Joshua M. Henderson

Principal

Joshua.Henderson@jacksonlewis.com

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April 3, 2023

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Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We Get Work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, "How will my business be impacted?" The Occupational Safety and Health Administration's new guidance promises steeper penalties for employers to prevent workers from being exposed to life-threatening hazards. On this episode of We Get Work, we discuss the new field guidance on increased citations and penalties, which will likely result in the issuance of more serious citations and consequently, employers landing on OSHA's severe violator list.

Our host today are Melanie Paul and Josh Henderson, principals respectively in the Atlanta and San Francisco offices of Jackson Lewis. Melanie is the co-leader of the firm's Workplace Safety and Health Group. She's a former senior trial attorney with the Department of Labor and spent 10 years prosecuting OSHA cases, including working with the Department of Justice to have matters criminally prosecuted. Melanie [inaudible 00:01:26] clients against the type of cases prosecuted by her former self. Josh provides training and strategic advice

on compliance with workplace health and safety regulations under federal law and state plans. He defends employers in OSHA litigation in California and across the United States.

Melanie and Josh, the question on everyone's mind today is, "What do I need to know about OSHA's new enforcement guidance initiatives and how will that impact my business?"

Melanie Paul:

Hi, I'm Melanie Paul. I'm co-head of the Workplace Safety and Health Practice Group here at Jackson Lewis. And joining me today is my partner in San Francisco, Josh Henderson. Welcome to Jackson Lewis, Josh. And we are going to talk today about OSHA's new enforcement initiatives. Both of us actually had the pleasure of attending the American Bar Association Workplace and Occupational Safety and Health Committee Conference in San Diego, March 7th through 10th, where we got to learn directly from some OSHA officials what's on the agenda for 2023 in enforcement. So Josh, why don't you kick it off and let us know what we learned about on instance-by-instance enforcement?

Joshua Henderson:

Thank you, Melanie. It's great to be your partner. Last week we learned quite a bit of information on two new OSHA enforcement guidance changes. And one of those is, as you mentioned, the instance-by-instance enforcement guidance. To provide a little bit of backdrop for this, traditionally when OSHA issues citations, they'll issue one citation under a particular standard. In that citation, they may describe multiple instances of a violation, but they will issue only one citation, and for that citation will issue one penalty. With the instance-by-instance or IBI citation guidance, going forward, OSHA is prepared to issue a citation for every instance of a violation and thereby issue multiple citations, but the penalty amounts will rise as a result because there will be multiple citations. So the enforcement guidance by its terms is limited to certain high hazards like falls, trenching, machine guarding, respiratory protection, permit required confined spaces, lockout/tagout, but also to other than serious violations related to record keeping.

Now, the OSHA officials who spoke at the conference in San Diego indicated that the IBI policy, the instance-by-instance policy, was really intended to give discretion to OSHA to issue citations to bad actors, to those who had a history of willful and repeat violations. But it remains to be seen exactly how that discretion will be exercised.

So to give an example of how this may play out, and this was an example that was given during the conference. If for example an OSHA inspector is at a work site and sees multiple employees not wearing fall protection when they're required to wear fall protection, the instance-by-instance enforcement policy would permit the compliance officer to issue a citation for every employee who is not wearing fall protection as required. So if you've got five employees not wearing fall protection, you could have five fall protection citations, and those can be serious citations. And so you're going to see penalties at 15,625 per serious

citation. You multiply that by five, you're close to \$80,000 just on a fall protection citation. So in addition to an instance-by-instance citation per employee basis, you could also get an instance-by-instance citation for each day that the compliance officer shows up and there are violations of the kind that I've described, fall protection, respiratory protection, if you've got employees who are not wearing or not provided with the proper PPE or respirators.

Melanie Paul:

Well, Josh, this really sort of begs the question on how this discretion is going to be exercised. I mean, as it stands now, for those of us that practice in the OSHA arena nationwide, we can all tell you that there is no consistency from area office to area office, or region to region even, even within Federal OSHA in terms of how they cite, how they issue penalties, and when it comes to flexibility and settlement. So this is a real concern, I think, that employers need to be aware of that now all of a sudden area offices have this discretion to really ratchet up the penalty amounts and the number of citations.

For the construction industry, for example, that can have really negative effects on their business and the ability to bid for future work. So this is a very real and very concerning initiative that OSHA is putting out there without much direction on how this alleged discretion is going to be exercised. In addition to that, internally, OSHA counts widgets. Like many employers, they have metrics for different things and there are metrics for numbers of citations and penalties issued within the agency. So that alone begs the question of will this discretion get misused in order to ratchet up their numbers internally? What do you think about that, Josh?

Joshua Henderson:

No, it is very concerning. And yeah, I think it remains to be seen how they will exercise their discretion. If it's truly limited to the "bad actors," then that's one thing. But you can imagine, given the internal pressures that you've just alluded to, that the discretion very well may be exercised more broadly than that, but that's not the only enforcement change on the horizon. Do you want to speak to the grouping or anti-grouping enforcement guidance change?

Melanie Paul:

Well, I think on the panel that I moderated at the conference I did refer to it as the anti grouping memo to the dismay of some in the agency, but actually it is an anti grouping memo. So with that IBI enforcement initiative memo also came along this anti grouping memo, which also purports to give discretion to the area offices to not group citations in certain situations. Traditionally, under OSHA's field operations manual, the area offices had discretion to group citations that were similar enough to require the same abatement.

So if you corrected one hazard, doing that same corrective action would also correct another hazard that was cited. And in those types of situations, OSHA would often group those citations, which can often make settlement more palatable for employers because it may seem like there are fewer citations.

Although to be fair, that's not the case. Really what's happening when you group is that you are reducing the penalty amount because you could have multiple citation items under a singular penalty. But really the number of citation items or violations remains intact. But what this memo now gives discretion to the area offices to do is to not group in these circumstances. And again, their overarching theme is, "If we have a bad actor, then we're going to issue more citations, more penalties." Overall, this is across all industries, so it is a concern. And as you mentioned before, with the particular types of high hazards that are really going to be affected by this new enforcement guidance, those high hazards are the most commonly cited standards in general industry and construction, fall hazards, lockout/tagout, machine guarding.

I can't tell you how many cases I'm litigating at any given time involving those standards. Pretty much all the time. So it's a very real concern, particularly I would say lockout/tagout. Lockout/tagout can be very complicated. It crosses all industries. You can have multiple people affected or multiple energy sources on equipment that in theory OSHA could cite each for a separate instance of a lockout/tagout violation. And you can easily see these numbers climb dramatically.

The other thing I would add too is that how does the agency define who is a bad actor. And I can tell you that when I was with the solicitor's office and prosecuting OSHA cases, there were times when I felt based on a company's OSHA history in the past or conduct in a certain case, that I may have drawn the conclusion that they were a bad actor. But there is no criteria for that really within the agency. It's kind of like a gut feeling that people have about the company based on the facts of a particular case.

Having been on the defense side now for four years, I can also say that OSHA doesn't often get the facts right during their investigations. And so those conclusions that can be drawn about employers being bad actors may be based on assumptions made by the compliance officer about the facts and may not really be reflected in the objective evidence. But what does all that mean? It means that companies that may not deserve it are going to get caught in OSHA's crosshairs. I think ultimately, it may get to a point, and we'll have to see how this year plays out, but it may get to a point where it makes financial sense for a company to actually contest the citations rather than settle them through the informal conference process. And I think that we're going to see a major increase in the contest rate. That will be interesting to see because that's really going to impact the agency's mission, which is to provide a safe and healthful working environment for workers in this country.

The fact is that when you contest a citation with Federal OSHA, it automatically hits pause on the abatement deadline. And so then it seems counterintuitive to the agency's mission. What do you think about that, Josh?

Joshua Henderson:

Yeah. And in your panel that you moderated, this led to a really illuminating exchange, I thought, because you raised this issue and I thought you did it very deftly. You raised the question of the fact that the contest rate is going to go up.

More employers are going to contest these citations and that will stay their abatement obligations. I remember and I wrote it down, the response of the OSHA official was that they're not afraid of a higher contest rate. Well, I mean, he said that, I think we'll see how that plays out. I think you are right that it ultimately could have the effect of undermining OSHA's overarching obligation, which is to provide a safe and healthful work environment.

Melanie Paul:

Another piece of that is that these directives come out from the national office. I often have to wonder, having been in the trenches myself at the Department of Labor, in the field, in the solicitor's offices which are the ones who are trying the cases and litigating the cases and taking them to trial, what collaboration has there been or input from the regional offices with the national office in putting out these initiatives? Because it will directly impact those regional offices and the attorneys in those offices and their resources and their ability to handle the increased caseload. So I really have to wonder if the agency has consulted with the regions in that regard, and I suspect not.

Joshua Henderson:

No, I think you're probably right. One other thing that I wanted to mention, and this was asked of the OSHA officials during one of the panels, was whether the instance-by-instance citation policy and the grouping policy would be required to be followed under state plans. So 25 plus, I think it's close to 29. There are different 29 state plans in states where I practice like California, Washington, and Oregon, they have their own state plans. So the question is, do those state plans have to adopt these new enforcement guidance changes to be as safe and effective as Federal OSHA, which is of course, the overall requirement? And the answer was they are encouraged to adopt these enforcement guidance changes, but they're not technically required to do so. So a bit of, I guess, reassuring news if you're employers are in some of these state plans. But I can tell you from experience in California, I suspect we'll see the state wanting to follow the enforcement guidance of Federal OSHA, but we'll see how that actually pans out.

Melanie Paul:

Yeah, absolutely. And of course, as of late, OSHA has also been trying to hold states accountable to that, at least as effective standard. So it does beg the question of, do states really have discretion in adopting these enforcement initiatives, or is OSHA going to come down on them at some later point for not issuing as many penalties for not issuing as many citations if that's the measure of at least as effective as?

Joshua Henderson:

Melanie, one of the things that we haven't discussed is what do you think is behind this latest enforcement push from OSHA.

Melanie Paul:

I mean, I think that this administration from Trump has been a lot more

aggressive in its enforcement initiatives. I think they just got derailed a little bit because of COVID, the first half of the administration. But I mean, that's kind of the direction they were always headed in. We're just really seeing that now. As COVID kind of tapers off and the priorities around COVID taper off, this is what we're seeing.

Joshua Henderson:

Yeah, I guess we shouldn't be surprised by it. And I would add that OSHA has long come under fire for what many have seen as inadequate penalties. But as you know, that's built into the regulations themselves. So it's always struck me as a bit unfair to OSHA to say that they're not penalizing employers enough. There are maximum penalties right now, as I mentioned, the serious citation, the maximum is 15,625. But this seems to me to be an effort by the agency to flex its regulatory muscle and to be more relevant.

Melanie Paul:

Yeah, fair point. And with Democratic administrations, you usually see more enforcement. And with Republican administrations, you tend to see more outreach and enforcement. And so I think finding a good balance between those two is really in industry's best interest. But for now, we are in this administration and the big push is enforcement. So this is where we are. And really, employers should take note and reach out to us or any of our team members if they have any questions or any concerns or have any OSHA issues.

Joshua Henderson:

Yeah, I would just say in some, OSHA's prepared to issue more citations and more penalties than it has in the past. Full stop. This should be very concerning to the employer community. And to your point, Melanie, this is a good reminder for employers to review their health and safety training policies and oversight, both of course to create a safe and healthful workplace, but also to ensure you're well-prepared to defend against these new OSHA citations and penalties.

Thank you everyone for listening. Thank you, Melanie. It's been great to have a discussion about this, and we'll talk again soon as we learn more.

Alitia Faccone:

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