



OSHA Enforcement in the Final Year of the Obama Administration

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Although the Obama Administration is well into its last year, it is signaling no let-up in its aggressive environmental and occupational safety and health enforcement agendas. Indeed, continuation of or even more stringent enforcement seems likely. In this light, employers should keep watch on two key OSHA enforcement issues that dovetail with environmental enforcement to understand and limit liability arising on both regulatory fronts:

1. Enhanced Use of the General Duty Clause: The General Duty Clause is often used as a gap-filler or fallback standard when OSHA lacks a specific standard to address a workplace hazard or needs to bolster its case. OSHA has relied heavily on policy and guidance documents rather than formal rulemaking for specific standards to justify citing employers under the General Duty Clause for alleged violations involving combustible dust and hazardous materials.

This practice may be strengthened based on an OSHA October 2014 request for information. OSHA is planning to update many or revoke some obsolete permissible exposure limits (PELs). PEL's are established acceptable concentration limits for certain chemicals in the workplace. OSHA said that it is looking for ways to justify new PEL's or use alternative methods to set exposure standards, but it seems to want to do this without having to do the traditional hard work of determining feasibility of implementation and underlying risk assessment. Given the claimed obsolescence of certain PEL's and the time and difficulty of pursuing formal regulatory action, OSHA can be expected to rely even more on the General Duty Clause in lieu of outdated standards.

2. Increased Penalties: Recent Congressional action requires OSHA to raise penalties for the first time in 25 years. The initial "catch-up" adjustment must be in place by August 2016 and is based on changes in the consumer price index between 1990 and 2015. Maximum penalties could jump substantially, almost doubling (i.e., Serious = \$12,471 or Willful = \$126,000). OSHA will be tempted to use these stiffer penalties to gain greater leverage in enforcement actions to achieve its policy and enforcement objectives. Where the same set of facts may indicate both safety and environmental violations, such as with hazardous waste

management problems, OSHA's penalties could now regularly rival what EPA or state environmental agencies may seek.

Flexing the General Duty Clause and increased penalty levels may offer enforcement flexibility and leverage for OSHA, but they create uncertainty and higher risk for industry. In light of these evolving issues and the likely push to the finish line by the Obama Administration, companies should revisit their internal policies and update training on potential exposures to prevent or mitigate liability arising from OSHA standard violations.

Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, title VII, §701(b), 129 Stat. 599 (11/02/2015); 79 Fed. Reg. 61383 (October 10, 2014).

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