

PUBLICATION

OSHA Update: Aggressive OSHA Enforcement and "OSHA Jail"

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OSHA has proposed its budget for fiscal year 2015 and there are already many contentious positions being taken regarding what had been hailed as overly aggressive enforcement positions by OSHA. Examples of overzealous enforcement have ranged from a proposed rule on silica to an enforcement memo issued in 2013 related to union representatives being permitted to participate in OSHA inspections at non-unionized workplaces. Secretary of Labor Thomas Perez answered questions related to both of these specific concerns while presenting the 2015 budget to the house appropriations committee with oversight over the Labor Department's budget.

The 2013 enforcement memorandum permitting union representatives to accompany OSHA inspectors at non-union workplaces is one of the more polarizing topics. Non-union employers have feared that this enforcement memorandum simply served as an aid to union organizing by allowing union organizers access to places of employment that they would otherwise not have. Currently, there is a lot of speculation that an appropriations rider could be added to OSHA's budget that would not permit OSHA to follow this memorandum. What that means for employers is that close attention should be paid to OSHA's budget for 2015. If such a rider were affixed to OSHA's budget, then any employer faced with this type of issue during an OSHA inspection could challenge the scope of the inspection with high confidence of prevailing in Court.

As another example of aggressive OSHA enforcement, consider the issue of "OSHA Jail." No, there isn't really a place called OSHA Jail, but there is an opportunity for criminal enforcement under the Occupational Safety and Health Act. The Act allows for up to six months in jail for any person found guilty of violating a safety standard that results in the death of an employee, as well as additional criminal fines. 29 U.S.C. §666(e). This is in addition to typical civil OSHA penalties. Just this past month, a United States Attorney in Montana filed such an action against the owner of a company. The owner and his company were charged with a criminal violation of the Act for permitting an employee to walk on an unguarded platform that allowed the employee to be subjected to falling thirteen feet to the ground. In September 2012, an employee fell to his death while walking on this platform. The company was quite small, with only 13 employees and operations that were seasonal from about April to November each year. The company had not been inspected previously by OSHA. Yet, the company was charged with a willful violation of the standard requiring guardrails for locations with elevations greater than four feet. A willful violation requires that a company demonstrate either plain indifference or reckless disregard for compliance with OSHA regulations. The company resolved the willful OSHA citation fairly quickly by accepting a reduced fine from \$54,000 to \$36,500. In resolving the OSHA citation, the company likely had no idea that this settlement could result in criminal prosecution. Now, the company faces up to a \$500,000 criminal fine and the owner, possibly six months in jail.

April's tip: Be careful of OSHA settlements. Quickly resolving an OSHA citation may seem like the best resolution, especially with the quick and easy "expedited informal settlement agreement" that OSHA offers with most OSHA citations, but it may not be the best course of action for your company. While a criminal action is not the prospect that most employers will ever face, building a history with OSHA can create problems. Carefully consider every OSHA citation before accepting it and remember – even a citation other than "serious" can be the basis for a repeat citation with even greater penalties.