**OSHA Memo to Affect Way Agency Issues Certain Penalties, With Potential for Significant Increases**

OSHA’s Director of Enforcement and Director of Construction have joined together to issue two memos to its Regional Administrators and State Plan Designees to alert them on how to interpret penalties in certain cases.

**Instance-by-Instance Citations**

First, the memo “[Application of Instance-by-Instance Penalty Adjustments](https://www.osha.gov/memos/2023-01-26/application-of-instance-by-instance-penalty-adjustments)” adds more circumstances in which these types of penalties can be charged. Instance-by-Instance penalties are fines for every single instance that the violation occurs, such as penalties by machine, by entry, by location, or by employee.

The memo says that high-gravity serious violations of the following standards can now be subject to Instance-by-Instance penalties:

* Fall Protection
* Trenching
* Machine Guarding
* Respiratory Protection
* Permit-Required Confined Spaces
* Lockout/Tagout
* Other-than-serious violations of the recordkeeping standard

Only those standards that have text which allows for violations of individualized duties rather than general course of conduct can be used to find incident-by-incident penalties. For example, if machines are missing guards or if employees do not put lockout/tagout devices on each energy isolating device, you could be fined per instance because they are needed on each machine.

Memo guidance says discretion can be used for Instance-by-Instance penalties when penalty adjustments don’t advance the deterrent goal. The following factors are to be considered:

* Willful, repeat, or failure to abate violations within the past five years where that classification is current;
* Failure to report a fatality, inpatient hospitalization, amputation, or loss of an eye;
* The proposed citations are related to a fatality/catastrophe; or
* The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.

Penalty evidence and justification must be documented and the Regional Office of the Solicitor must be consulted before these will be issued.

**Grouping Penalties**

Next, the memo “[Exercising Discretion When Not to Group Violations](https://www.osha.gov/memos/2023-01-26/exercising-discretion-when-not-to-group-violations)” reminds Regional Administrators and Area Directors that they have the discretion to NOT group violations together in instances where it could help create a deterrent. Grouping is allowed when:

* Two or more serious or other-than-serious violations are so closely related they constitute a single hazardous condition (then they are grouped based on the most serious item);
* Two or more violations are found which, if considered individually, represent other-than-serious violations but together could create a substantial probability of death or serious physical harm (then the violations are grouped as a serious violation); and,
* When several other-than-serious violations are found (then they are grouped to create a high gravity other-than serious violation).

The memo is reminding that violations don’t have to be grouped if it doesn’t elevate the gravity/classification of the citation when the evidence could allow for multiple citations. That is, if OSHA can find evidence that the violations could have different abatement methods, if each one could have resulted in death or serious harm, or if each violation condition could expose workers to different hazards, then they can charge each violation separately without grouping them.

In addition, guidance in the OSHA Field Operations Manual says violations are not to be grouped when:

* Violations are found in separate inspections on more than one day;
* The same violations are found at multiple sites, but at different locations. If your company is inspected at different branches/locations/sites and you violate the same standard at each place, then you are fined separately at each place;
* Separate sections of the General Duty Clause are violated. Separate sections of the General Duty Clause cannot be grouped together, but a General Duty Clause section can be grouped with a related regulation; and,
* Violations are so egregious that they trigger OSHA’s Instance-by-Instance Penalties.

**OSHA Fines Increased**

Dollar amounts on OSHA fines also were increased at the beginning of the year. The maximum penalty amounts in 2023 are $15,625 per violation for serious, other-than-serious, posting requirement, and failure to abate violations, and $156,259 per violation for willful and repeat violations. This is an increase in 7.5%, which is the biggest year to year increase since 2016.

**Do You Know Where You Stand?**

iSi’s safety audit team can help you determine where you stand on compliance with OSHA regulations and provide a prioritized list of findings. [Contact us today](https://isienvironmental.com/contact-us/) to learn more about our audits!