

States Upset By OSHA Decision To Impose New Penalty Policy

State plan officials are expressing concern about an OSHA decision that will increase the severity of penalties in state enforcement programs, asserting that they were not informed or consulted about the new mandate. They are meeting to determine next steps, and an industry source notes that he thinks the move puts OSHA on “thin ice.”

The agency “will most likely require the states to adopt a new penalty policy and the goal of that is to raise the average serious penalty,” said Steve Witt, OSHA director of state and cooperative programs, during the American Society of Safety Engineers (ASSE) annual conference earlier this month. Witt asserts that OSHA can set penalty formula policy, but will have to determine how it will deal with the performance of the states in levying the penalties. “That will raise a number of issues as we move forward,” he said.

However, states are displeased by the move. “We don’t have any intention of letting this issue go,” said a source with the Occupational Safety and Health State Plan Association (OSHSPA). He added that states were first informed about the plan during an OSHSPA meeting last week, after the agency said during an OSHSPA board meeting about a month ago that it planned to take a different approach — indicating that it would look for states to move their penalties in a similar direction, but wasn’t going to require an identical adoption.

OSHA announced “administrative enhancements” to its new penalty policy in April, making it more difficult to reduce penalties and allowing staff to look back further into an employer’s history when factoring prior violations into penalty levels (see *Inside OSHA*, May 4). The new policy is designed to increase OSHA’s overall penalty amounts, as well as the average for a serious violation — from \$1,000 to between \$3,000 and \$4,000. The maximum penalty amount under current law for a serious violation is \$7,000.

Witt noted during the ASSE conference that the change will “have a clear impact on states,” as there is currently a significant range among the average serious penalties by state programs. For example, Oregon has an average initial serious violation penalty of about \$330, while California has an average initial serious penalty of around \$5,500, he said. However, he noted that California only cites about 19 percent of its violations as serious.

He added that the number of serious violations in state programs is significantly lower than in federal OSHA, even though the states generally conduct more inspections. In fiscal 2009, the percentage of violations cited as serious was 43 percent by state programs and 77 percent by federal OSHA. Additionally, states conducted 61,016 inspections and issued 129,363 violations, while federal OSHA conducted 39,004 inspections and issued 87,663 violations.

The OSHSPA source said state programs are concerned by the plan to mandate that states adopt an identical penalty policy, particularly because they were not involved in the process or informed of the planned action. He noted that state programs were not consulted about the decision before it was announced, about which he is “disappointed.” The source said he expects to have future discussions with OSHA about all of OSHSPA’s concerns with the planned policy. OSHSPA has also already been in contact with members about the planned move following last week’s meeting, the source added.

He said such a change in policy would have a significant impact on state plans. The source said he particularly has “significant concerns” about raising the penalties in the middle of a recession, while states are contending with serious economic problems. The OSHSPA source added that he has questioned federal OSHA about the information it has that show the positive effect of the changed penalty structure.

The source said he also is wary because federal OSHA officials continue to state that the agency wants to involve state plans in policy input, but still has yet to do so. “Particularly for an issue this big, the states weren’t too appreciative of that,” he said. “To have no input into the process at this point, and for OSHA to appear to be dictating what they want states to do ... is disconcerting to us,” he said.

State plans previously raised concerns with federal OSHA’s plan to require state plans to adopt all future National Emphasis Programs, particularly without involving states in their development (see *Inside OSHA*, June 15).

“The administration appears to be doing everything it can to exclude the state programs and the states are getting tired of it,” the source said. He added that the main concern among OSHSPA membership is the way OSHA handled the process. “I think it’s safe to say the membership is not happy about how this transpired,” he said.

Furthermore, he questioned the basis behind OSHA’s plan to mandate an identical penalty policy. Under the OSH Act, state plans are required to be “at least as effective” as federal OSHA in the area of standard-setting, he asserted. “It

doesn't address policy, and this is a policy," he said. "We have concerns about that too."

According to section 18 of the OSH Act, a state plan should receive approval if it "provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce."

The OSHSPA source said state plan penalty formulas generally vary depending on the program, as each state, as well as federal OSHA, has different reduction factors and take a variety of circumstances into consideration when assessing penalties. Nevertheless, all of the formulas center on what is prescribed in the OSH Act and tend to be similar, he said.

The source added that, as far as states are aware, the only requirement for states to remain as effective as federal OSHA is for them to follow the penalty parameters that are outlined in the OSH Act and "how they arrive at the final penalty has basically been up to the states." The law also requires federal OSHA and states to take into account the size of the company, its history and good faith.

Additionally, he noted that OSHSPA believes that the OSH Act makes specific allowances for state plans and there would be no reason to have state plans, if the intention was to have identical programs to federal OSHA.

An industry attorney said it's very unclear whether states need to adopt the policy to remain as effective as federal OSHA. He noted that OSHA has never mandated such enforcement policies in the past. "They've always left it to state discretion," he said.

However, he noted that he doesn't think the current structure allows federal OSHA to mandate states in such a way. "As long as we've got the kind of structure with state plans as we do, I do not believe for a second that the 'at least as effective' requirement would require states to impose the same kind of penalties," he said. The source added that some of the states may believe that a cooperative approach is more beneficial than federal OSHA's recent stance focusing on enforcement.

The industry attorney added that federal OSHA has said in the past that it can't mandate states to act on some enforcement policies, including attempts to have corporate-wide settlement agreements apply in facilities that come under state plan jurisdiction. He said the plan is a switch in policy by federal OSHA.

He said he thinks pursuing such an action will put federal OSHA on "thin ice," both legally and from a policy perspective.

However, a union source said he thinks it's a positive step. He noted that, starting with its policy to push states to adopt NEPs, the administration has made it clear that states need to operate the same as federal OSHA on fundamental policies. He added that penalties are a crucial element of the OSH Act, so it makes sense that OSHA would take that action. The source said he believes that states would need to adopt a similar penalty policy as federal OSHA to remain as effective, and finds any argument otherwise to be "factually wrong and politically unsupportable."

Additionally, he noted that it's vital for states to have the same policy because their penalties are often much lower than those done by federal OSHA. "One only wonders what would happen to penalty policies if they didn't, given how weak some of the states perform," he said. — *Sara Ditta*