



**DATE:** February 17, 2023  
**TO:** Phylmar Regulatory Roundtable  
**FROM:** Helen Cleary  
**RE:** **FedOSHA Enforcement Update**

On January 26, 2023, the U.S. Department of Labor [announced](#) its Occupational Safety and Health Administration (OSHA) **"issued new enforcement guidance to make its penalties more effective in stopping employers from repeatedly exposing workers to life-threatening hazards or failing to comply with certain workplace safety and health requirements."**

The title of the News Release described the announcement as *"enforcement changes to save lives, target employers who put profit over safety."*

OSHA Assistant Secretary Doug Parker echoed this in his statement and added:

*"Smart, impactful enforcement means using all the tools available to us when an employer 'doesn't get it' and will respond to only additional deterrence in the form of increased citations and penalties."*

The two memorandums instruct OSHA Regional Administrators and Area Office Directors to:

1. **Cite** certain, high-gravity serious violations, as **"instance-by-instance citations"**
2. Exercise discretion to **NOT group violations and instead cite employers separately**

Both policies are designed to increase the monetary penalties resulting from violations. They are a part of the Agency's strategy to deter employers from disregarding workplace safety and compliance responsibilities.

Following is an overview of the two recent memorandums:

### 1. [Application of Instance-by-Instance Penalty Adjustments](#)

The authority to issue instance-by-instance citations is expanded by the new policy outlined in the memorandum. The current policy has been in effect since 1990 but only applies to egregious willful citations.

The **scope** of the new guidance includes:

- a. General industry, agriculture, maritime, and construction
- b. High-gravity serious violations
- c. Falls, trenching, machine guarding, respiratory protection, permit required confined space, lockout tagout, and other-than-serious violations specific to recordkeeping

The following **factors should be considered** when deciding to issue an instance-by-instance citation:

- a. Within the past five years, the employer has received a willful, repeat, or failure to abate violation. The classification should be current.
- b. The employer failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye (29 CFR 1904.39).
- c. The proposed citations are related to a fatality or catastrophe.
- d. The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.

The instance-by-instance (IBI) citation may be applied when the standard allows a citation per instance (i.e., per machine, location, employee, entry) and when the instance cannot be abated by a single method of abatement.

A separate penalty will be assessed for each violation and prior to issuance, IBI citations shall undergo a “pre-issuance review.”

**Following issuance of IBI citations, “OSHA will issue a press release for the purpose of furthering deterrence.”**

The new policy **becomes effective on March 27, 2023** (60 days from the issuance of the memo on January 26, 2023.)

## **2. Exercising Discretion When Not to Group Violations**

This memorandum is a reminder to Regional Administrators and Area Directors of their current authority and OSHA’s existing policy to NOT group violations:

*"...the agency may refrain from grouping violations where there is evidence that worksite conditions giving rise to the violations are separate and distinct, or where different conduct gave rise to the violations."*

The memo also states that the Agency should use discretion and cite without grouping "to achieve an adequate deterrent effect" and that the approach "not only enhances deterrence, but also more accurately captures an employer's overall lack of compliance."

**Grouping should be considered when:**

- a. "Two or more serious or other-than-serious violations constitute a single hazardous condition that is overall classified by the most serious item
- b. Grouping two or more other-than-serious violations considered together create a substantial probability of death or serious physical harm, or
- c. Grouping two or more other-than-serious violations results in a high gravity other-than serious violation."

**Not-grouping should be considered when:**

- a. Grouping does not elevate the gravity or classification and resulting penalty, and the evidence allows for separate citations.
- b. If a directive encourages grouping, discretion may be used to cite separately. Examples of these cases include—
  - Where violations have different abatement methods
  - Each violative condition may result in death or serious physical harm
  - Each violative condition exposes workers to a related but different hazard

**As a reminder, PRR is hosting [Larry Halprin](#), partner at Keller & Heckman, on Wednesday February 22, 2023, 10-11am pacific, to discuss FedOSHA's new enforcement guidance.**