



# Exploring OSHA's New and Increased Enforcement Initiatives

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2016 brings two notable changes from the Occupational Safety and Health Administration (OSHA) that will impact the construction industry: 1) increased penalties for Occupational Safety and Health Act (OSH Act) violations; and 2) an expansion of the Worker Endangerment Initiative, an OSHA enforcement initiative being conducted in collaboration with the Department of Justice (DOJ).

## Penalty increase

For 25 years, OSHA was exempt from the requirement to increase its penalties to keep pace with inflation. On Nov. 2, 2015, the budget passed by Congress and signed into law by President Obama removed this exemption. OSHA now must issue its proposed final rule for inflation adjusted penalties by July 1, 2016. It is estimated that penalties could increase as much as 82 percent, to adjust for inflation since 1990. Table 1 shows the potential impact of this change. While this is a significant jump in OSHA penalties, fines remain relatively small in comparison to those typically assessed by other agencies.

Table 1

Violation	Current Penalty	Potential Penalty
Willful/Repeat Violation	\$70,000	\$127,400
Serious/Other than Serious Violation	\$7,000	\$12,740

Increased penalties in 2016 are almost certain, but OSHA could decide to increase the penalties less than the full amount. After OSHA completes its notice and comment rulemaking process, it may decide increasing the penalties the full amount will have a negative economic impact or the social costs of the increase outweigh its benefits. OSHA's new penalties must take effect by Aug. 1, 2016.

## The Worker Endangerment Initiative

The Worker Endangerment Initiative (WEI) started in 2003 as an OSHA, Environmental Protection Agency (EPA) and Environmental Crimes Section of the DOJ collaboration. According to David Uhlmann, chief of the Environmental Crimes Section during the WEI's early years, the WEI "focused on companies that allowed profits to take precedence over compliance with the law and treated workers as if they were expendable."<sup>1</sup> Most of the WEI's prosecutions have focused on violations of environmental protection statutes and federal crime statutes for fraud, obstruction of justice, and conspiracy to commit fraud on the United States, rather than OSHA's criminal provision, because these statutes have stronger criminal provisions.

For example, the five criminal prosecutions of McWane, Inc., a major cast-iron pipe manufacturer, and its subsidiaries, are among the most prominent WEI prosecutions. *U.S. v. Atlantic States Cast Iron Pipe Co.*, 627 F. Supp. 2d 180 (D.N.J. 2009), the last of these cases, was one of the longest environmental criminal trials on record. It resulted in the subsidiary and four of its managers being found guilty of making false statements to OSHA and obstructing the OSHA investigation, in addition to violating environmental laws. The subsidiary was fined \$8 million and subjected to four years of monitoring, and the responsible individuals were sentenced to between six months and 70 months in jail.

More recently, on Nov. 19, 2015, the DOJ announced that it had charged Black Elk Energy Offshore Operations LLC, Grand Isle Shipyards Inc., Wood Group PSN Inc., Don Moss, Curtis Dantin, and Christopher Srubar with crimes for the November 2012 explosion on a Gulf of Mexico oil drilling platform that killed three employees, injured others, and caused an oil spill. That same day, the DOJ

announced a \$41.85 million settlement with ATP Oil & Gas Corporation for the unauthorized oil discharges and the improper operations of the drilling platform in the Gulf of Mexico.

## The expansion of the Worker Endangerment Initiative

On Dec. 17, 2015, the Department of Labor (DOL) and the DOJ announced the expansion of the WEI, with "a plan to more effectively prosecute" crimes that endanger the life and health of employees.<sup>2</sup> The same day, the DOL and DOJ signed a memorandum of understanding ("MOU") that established "a process and framework for notification, consultation and coordination between DOL and DOJ to aid both agencies in more effectively implementing our national workplace statutes," including the OSH Act, the Federal Mine Safety and Health Act and the Migrant and Seasonal Agricultural Worker Protection Act.<sup>3</sup>

Under the expanded initiative, OSHA and the DOJ will cooperate with information and data sharing, and developing and conducting training programs regarding each agency's laws, regulations and procedures "to ensure that valid referrals are made when potential violations are found and to increase the frequency and effectiveness of criminal prosecutions of worker-safety violations."<sup>4</sup> The DOL regional solicitors that handle OSHA cases, in cooperation with the OSHA regional administrators, and the Office of Solicitor Associate Solicitor for the Occupational Safety and Health Division are the OSHA designated points of contact that "shall discuss periodically with DOJ those employers or worker safety matters that may be appropriate for enhanced investigation or criminal referral."<sup>5</sup>

## Preventative steps

Because prosecutions under the expanded WEI will likely increase, employers in the

construction industry should take this opportunity to review their health and safety and environmental programs to ensure compliance with OSHA standards and EPA statutes. Employers should remember that written programs alone are insufficient, and their review should include their training programs to ensure they are current, conducted with the appropriate frequency, and adequately documented. Employers should also review their record retention policies because citations can mount if the required records are unavailable to an OSHA Compliance Officer.

Accidents are not 100 percent avoidable, so employers should make certain that when one occurs, their exposure is not compounded by failing to establish and follow proper protocols. Employers may also want to engage counsel for a privileged review of compliance programs before any issues arise.

*McCarter & English is a law firm of approximately 400 lawyers with offices throughout the mid-Atlantic and New England. Jane and Tiffany advise Connecticut employers on OSHA and environmental matters.* 🍌

## References:

<sup>1</sup> David M. Uhlmann, Am. Constitution Soc'y L. & Policy, Prosecuting Worker Endangerment: The Need for Stronger Criminal Penalties for Violations of the Occupational Safety and Health Act (Sept. 2008).

<sup>2</sup> DOJ, Office of Pub. Affairs, The Departments of Justice and Labor Announce Expansion of Worker Endangerment Initiative to Address Environmental and Worker Safety Violations (Dec. 17, 2015).

<sup>3</sup> See Memorandum of Understanding Between the U.S. Departments of Labor and Justice on Criminal Prosecutions of Worker Safety Laws (Dec. 17, 2015).

<sup>4</sup> Id. at 4.

<sup>5</sup> Id. at 3.