

Client Alert

Tort Litigation & Environmental Practice Group

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OSHA Releases New Field Operations Manual with Increased Penalty Authority, Inspector Discretion, and Industry Coverage

U.S. OSHA recently released its new Field Operations Manual (“Manual”).¹ The Manual is the field guidance that directs the work of OSHA’s Compliance, Safety & Health Officers (“CSHOs”) commonly referred to as “OSHA inspectors.” OSHA makes the Manual publicly available so that the regulated community can understand the guidelines governing inspectors’ actions at their worksites.

The new Manual, like its 2011 predecessor, provides enforcement policies and procedures and ensures that federal inspectors uniformly enforce occupational safety and health standards. The new Manual increases OSHA’s penalty authority, grants inspectors greater discretion, and includes additional revisions that will further impact industry. *Regulated companies should be familiar with the new Manual in order to be better prepared during OSHA inspections.*

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The following summarizes some of the more significant changes to the Manual.

Increased Penalty Authority

The new Manual increases maximum civil penalty amounts and makes substantial changes to penalty adjustments that both increase the potential dollar amount of penalties and restrict available reductions.

These changes include:

- Increasing the maximum penalty amounts for high, moderate & low gravity violations based on *previous* statutory authorization.² (Note that a recently passed Congressional budget amendment authorizes the first substantial *additional* increases to OSHA’s penalty authority since 1990. These penalty increases are authorized for August 2016 and beyond and will likely require rulemaking to be made effective. We will cover this development in a subsequent Alert.³)

- Mandating a penalty increase of 10% for citations that have become a final order.⁴
- Increasing the length of time from three to five years that prior citations remain “on the books” for use in determining repeat violations.⁵
- Reducing employer good faith penalty discounts from 35% to 25%. Additionally, no increase or reduction is allowed for employers that have not been inspected within the last 5 years.⁶
- Reducing penalty discounts for smaller employers. In the case of businesses with 26-100 employees, the maximum reduction is now 30% (down from 40%). Businesses with 101-250 employees may now only obtain a 10% reduction (down from 20%).⁷
- Penalty adjustments will now be calculated using an algorithm that can result in smaller reductions than would have been the case under the previous procedure.⁸

Inspectors Get Greater Discretion

Two other revisions provide inspectors greater discretion. First, the Manual now refers specifically to inspectors’ ability to deny an employer or employee representative the right to participate in an inspection if the inspector believes that the representative’s “conduct interferes with a fair and orderly inspection.”⁹ While this power has always existed under the OSH Act, its reference in the Manual increases the potential for inspectors to use this power.

Second, trade secret protections for documents, including photographs, videotapes, environmental samples and OSHA documentation forms, now attach only if the inspector “has no clear reason to question such identification.”¹⁰ This level of discretion can lead to confusion and increase the probability of conflict between the inspector and the employer, particularly in highly-sensitive industries. It can also necessitate seeking advice from legal counsel at a very early stage in the inspection.

New Recordkeeping and Reporting Requirements

The Manual incorporates the recent revisions to OSHA’s Injury and Illness Recording and Reporting regulation that became effective on January 1, 2015.¹¹ Recordkeeping and reporting violations have been a frequent trigger for employee complaints and for OSHA citations and penalties. The revision to the regulation and emphasis in the Manual will likely continue or even magnify the frequency and number of citations. These revisions also expand the number of industries required to keep records of work-related injuries and illnesses.

Other Significant Changes

Other significant changes to the Manual include:

- Allowing workers without a certified or recognized bargaining agent to authorize third-party organizations or individuals to act as their representative during an inspection.¹²
- The availability of digital signatures to employees who lodge a complaint through the OSHA website, thereby speeding up the process by which OSHA initiates an investigation.¹³ Previously, employee complaints required a process including faxing and mail which presented multiple opportunities for the employee to lose interest in pursuing the complaint.

- Increasing the likelihood of one or more *unprogrammed* inspections when a fatality or catastrophic event occurs at a multi-employer worksite.¹⁴ Regular OSHA practice is to perform an unprogrammed ‘wall-to-wall’ inspection following a workplace fatality or catastrophic event occurring at a single-employer worksite. This change means that at a multi-employer worksite an employer not involved in a fatality or catastrophic event is nevertheless open to an unprogrammed inspection even with no involvement in the incident.
- The new Manual highlights OSHA’s February 11, 2015 policy memorandum concerning the addition of *upstream oil and gas hazards* to the list of High-Emphasis Hazards in the Severe Violator Enforcement Program.

King & Spalding has significant experience in occupational health and safety matters including performing privileged health and safety audits of facilities, as well as challenging citations and negotiating settlements. If you have questions about this Manual or how OSHA regulations may affect you and your business, please contact Jim Vines or Joe Eisert.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

¹ U.S. Department of Labor, Occupational Safety & Health Administration. *Field Operations Manual*, By David Michaels, PhD, MPH, October 2015 (OSHA Directive No. CPL 02-00-159); available at https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf

² *Field Operation Manual*, Chapter 3, Part III.A.4 (Table 6-2: Serious Violations). The OSH Act allows

³ Section 701, Bipartisan Budget Act of 2015, Pub. L. No. 114-74 (Nov. 2, 2015).

⁴ *Id.* at Chapter 3, Part III.B.2.b.

⁵ *Id.* at Chapter 3, Part III.B.2.d.

⁶ *Id.* at Chapter 3, Part III.B.1.a, 2.c.

⁷ *Id.* at Chapter 3, Part III.B.4.b.

⁸ *Id.* at Chapter 3, Part III.B.5

⁹ *Id.* at Chapter 3, Parts V.E and VII.A

¹⁰ *Id.* at Chapter 3, Part V.E.2

¹¹ See Final Rule, Occupational Injury and Illness Recording and Reporting Requirements—NAICS Update and Reporting Revisions, 79 Fed. Reg. 56130 (Sept. 18, 2014). The revised IIRR regulation adds to the requirement that employers report work-related fatalities to OSHA within eight hours of the event a requirement to report all work-related in-patient hospitalizations, amputations, and losses of an eye within 24 hours of the event.

¹² *Id.* at Chapter 3, Part VII.A.2.

¹³ *Id.* at Chapter 9, Part I.E.5.

¹⁴ *Id.* at Chapter 11, Part II.I.2.d.