



NSHBA's Safety Corner

September 16, 2011

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Not Your Father's OSHA Anymore

Since its creation in 1970, OSHA's approach was to set minimum standards and help employers meet or exceed them. The success is in the numbers: By 2000 the annual fatality rate had dropped 76%, and has stayed virtually constant since.

But under the leadership of Dr. David Michaels, OSHA's approach has changed dramatically. In April of 2010, Dr. Michaels issued a memorandum to regional OSHA administrators titled "Administrative Enhancements to OSHA's Penalty Policies." This memorandum signaled a shift from OSHA as a compliance organization to OSHA as an enforcement agency. The motivation for this was, according to Dr. Michaels, that "American workers still face unacceptable hazards." Apparently because the number of workers killed on the job has stayed fairly constant after dropping so dramatically in the first 30 years of the OSH Act, Dr. Michaels believes that the stick will save more lives than the carrot.

Historically, if an employer is cited for a violation, OSHA's policy has been to consider several factors that can help an employer discount the nominal penalties:

- Its history of violations
- Its good-faith efforts to implement an effective safety program
- Its "quick-fix" response to abate hazards found during an inspection, and
- Its size

These factors are given a different discount value, such as 10% for history and 15% for good-faith efforts. The discount for size varies according to how many employees a firm has, with the smallest category (1–25 employees) receiving the highest discount. This offers the greatest advantage to building contractors since the overwhelming majority of firms have fewer than 26 employees.

However, OSHA's "administrative enhancements" change the way these discounts and other policies are to be implemented:

- The time frame for considering an employer's history of violations expanded from three years to five.
- If an employer has any high-gravity serious, willful, repeat or failure-to-abate violations in this expanded five-year history, then a 10% penalty can be added.
- The time period for determining repeated violations also expands from three to five years.
- Violations are graded according to their low to high severity, lesser or greater probability, and low to high gravity. A "Gravity-Based Penalty" determines fines that range from \$3,000 to \$7,000.
- The size discount was reduced (the discount for small employers, with 1-25 employees, has been reduced from 60% to 40%).
- If an employer agrees to hire a third-party safety consultant, it's eligible for a 20% penalty reduction.
- OSHA changed the way it adds up multiple discounts. Previously, it would add up the percentage reductions and discount the penalty by the total percentage. Now, they're applied serially (the percentage for each discount factor is applied one at a time to a declining balance), resulting in a higher net penalty.

These changes may never affect your business, since residential building projects don't attract the same scrutiny as commercial projects. But a serious injury or fatality has a way of putting even a small contractor in OSHA's crosshairs – and now, it's using a bigger gun. In light of this, how would you grade your company's safety culture?