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New Mexico Occupational Health and Safety Bureau (OHSB) Directive 24-08

Subject: Field Operations Manual, Chapter 6 – OHSB Penalty Policy

I. Purpose

This notice establishes an OHSB penalty policy to adjust civil penalties following the passage of New Mexico Senate Bill 229 by the Legislature in 2017 and signed into law on April 6, 2017.

II. Scope

This notice applies to the State of New Mexico OHSB.

III. References

The following documents are referenced in or applicable to this notice:

A. New Mexico Occupational Health and Safety Act (the Act), NMSA 1978,50-9-1 to -25 (1953, as amended through 2018);

B. 11.5.1 through 11.5.6 NMAC;

C. New Mexico Field Operations Manual

D. 29 C.F.R. § 1903;

E. OSHA Instruction CPL 02-00-135, Recordkeeping Policies and Procedures Manual, December 30, 2004; and

F. CPL 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act issued May 28, 1998, or the most current version.

IV. Cancellation

This notice cancels OHSB Directive 23-08, OHSB Penalty Policy, dated March 30, 2023, and supersedes all previous OHSB penalty policies.

V. Action

OHSB Compliance personnel will ensure that the procedures contained in this notice are followed. This notice is effective for all citations issued on or after April 1, 2023, for violations occurring after March 31, 2023.

VI. Background

In 1972, the New Mexico Legislature passed the Occupational Health and Safety Act (the Act), NMSA 1978, Sections 50-9-1 to -25, that led to the creation of the Occupational Health and Safety Bureau (OHSB) within the New Mexico Environment Department (NMED or the Department). The purpose of the OHS Act, and the mission of OHSB, is to "Assure every employee in New Mexico safe and healthful working conditions." The OHS Act designates the Department as the agency for all purposes under federal legislation relating to occupational health and safety and for all action necessary to secure to the state the benefits of that legislation. OHSB operates its state OSHA plan by approval of federal OSHA under provisions of the federal Occupational Safety and Health Act of 1970. To maintain state plan approval, New Mexico must enforce rules that are "at least as effective" as federal OSHA rules, including those establishing maximum and minimum penalties as contained in 29 C.F.R. 1903.15. 29 C.F.R. § 1902.4(c)(2)(xi).

In November 2015, Congress enacted the Federal Civil Penalties Adjustment Act of 2015 ("FCPAA") requiring federal agencies, including OSHA, to adjust their penalties to account for inflation. Pub. L. 114-74 (Nov. 2, 2015) 129 Stat. 599. Such inflation adjustments had not been made to OSHA penalties since 1990. *Id*. In July 2016, federal OSHA published a Final Rule to increase federal penalties as prescribed by Congress; federal OSHA concurrently notified all state plans of their obligation to make an "at least as effective" change to state maximum penalties. 81 Fed. Reg. 43430 (July 1, 2016). In October 2016, the Department notified federal OSHA of the state's intent to seek legislation during the 2017 session to increase statutory maximum penalties in accordance with federal law.

Senate Bill 229 ("SB 229"), signed into law on April 6, 2017, amended the Act to adjust maximum and minimum penalties in conformance with federal law. The legislation conforms to the requirements of the federal Occupational Safety and Health Act, the FCPAA, and federal OSHA rules for approval of state occupational health and safety plans. SB 229 also contained an emergency clause, that made the changes effective upon the governor's signing the legislation. The penalty levels contained in this notice reflect increases to maximum and minimum penalties, and assessed penalties, to conform with SB 229 and in response to increased penalty assessments by OSHA. SB 229 also amended the Occupational Health and Safety Act, NMSA 1978, Section 50-9-24(J), requiring the Cabinet Secretary of the Environment Department to adjust penalty levels on an annual basis as follows:

> *"No later than April 1 of each year, the secretary shall adjust as necessary the minimum and maximum penalty amounts established in Subsections A through D and G of this section to account for inflation. The amounts shall be increased by the percentage of the preceding calendar year's increase of the consumer price index for all urban consumers, United States city average for all items, published by the United States department of labor. The amount of the increase, if any, shall be rounded to the nearest dollar, but shall not exceed one hundred fifty percent of the current penalty amount. The secretary may issue rules to carry out the provisions of this subsection that conform with the federal Occupational Safety and Health Act of 1970."*

No later than April 1st of each year, the penalty amounts listed herein shall be amended pursuant to NMSA

1978, Section 50-9-24(J). The amended penalty amounts will be memorialized by the amendment of Appendix A to this chapter which will include an updated maximum and minimum penalty table. Appendix A will include the signature of the Secretary. The penalty amounts established in this appendix shall be calculated as directed by NMSA 1978, Section 50-9-24(J).

VII. General Penalty Policy

The penalty structure in NMSA 1978, Section 50-9-24 (Section 50-9-24 of the Act) is designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but also to other employers. While penalties are not designed as punishment for violations, penalty amounts should be sufficient to serve as an effective deterrent to violations. Proposed penalties, therefore, serve the public purpose intended under the Act, and criteria approved by the Bureau Chief for such penalties are based on fulfilling this public purpose.

The penalty structure described in this notice is part of OHSB's general enforcement policy and shall normally be applied as set forth below. If, in a specific case, the Compliance Program Manager determines that it is warranted to depart from the general policy to achieve the appropriate deterrent effect, the extent of the departure and the reasons for doing so should be fully explained in the inspection case file.

VIII. Civil Penalties

A. Statutory Authority for Civil Penalties

Section 50-9-24 of the Act provides OHSB with the statutory authority to propose civil penalties for violations of the Act. Civil penalties advance the purpose of the Act by encouraging compliance and deterring violations. Proposed penalties are the penalty amounts OHSB issues with citations.

1. Section 50-9-24.A of the Act provides that any employer who willfully or repeatedly violates the Act may be assessed a civil penalty as provided in Appendix A of this Chapter for each violation, but not less than the minimum penalty provided in Appendix A for each willful violation.
2. Section 50-9-24.B of the Act provides that any employer who has received a citation for a serious violation of the Act shall be assessed a civil penalty as provided in Appendix A of this Chapter for each such violation.
3. Section 50-9-24.C of the Act provides that any employer who has received a citation for a violation of the Act that is determined not to be of a serious nature may be assessed a civil penalty as provided in Appendix A of this Chapter for each such violation.
4. Section 50-9-24.D of the Act provides that any employer who fails to correct a violation for which a citation has been issued within the period permitted for its correction, may be assessed a civil penalty as provided in Appendix A of this Chapter for each day during which such failure or violation continues.
5. Section 50-9-24.G of the Act provides that, when a violation of a posting requirement is cited, a civil penalty as provided in Appendix A of this Chapter shall be assessed for each violation.

Note: While OHSB proposes penalties, the Occupational Health and Safety Review Commission assesses penalties.

B. Appropriations Act Restrictions

In providing funding for State OSHA programs, Congress usually places restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard industries. The Department of Labor Appropriations Act normally contains limits on these enforcement activities on a year-by-year basis.

Refer to OSHA Instruction CPL 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act, issued May 28, 1998, or the most current version, for detailed information about this important subject. Appendix A of the directive, which contains the current list of low-hazard industries, is updated annually.

C. Public Employers

Section 50-9-24.E of the Act provides for potential relief from penalties assessed against the state, a political subdivision of the state or any agency of either. For citations described as serious, other-than-serious, or for posting requirements, a penalty shall be deemed paid if the violation is corrected within the time permitted for correction.

D. Minimum Penalties

The following policies apply:

1. The proposed penalty for any willful violation shall not be less than the amount prescribed by Section 50-9-24.A and Section 50-9-24.J of the Act, as provided in Appendix A of this Chapter. This penalty is a statutory minimum and not subject to administrative discretion. The minimum penalty applies to all willful violations, whether serious or other-than-serious.
2. When the proposed penalty for a serious violation (citation item) would amount to less than $1,000 based on the Bureau's penalty policy, a $1,000 penalty shall be proposed for that violation.
3. When the proposed penalty for an other-than-serious violation (citation item), or a regulatory violation other than a posting violation, would amount to less than $200 based on the Bureau's penalty policy, no penalty shall be proposed for that violation.
4. When a proposed penalty for a posting violation (citation item) would amount to less than $200, a $200 penalty shall be proposed for that violation.

E. Maximum Penalties

The civil penalty amounts authorized in Section 50-9-24 of the Act are generally maximum amounts before any permissible reductions are taken. Table 6A in Appendix A of this Chapter summarizes the maximum amounts for proposed civil penalties.

IX. Penalty Factors

Section 50-9-24.H of the Act provides that penalties shall be assessed giving due consideration to:

- The gravity of the violation;
- The size of the business of the employer;

- The good faith of the employer; and
- The employer's history of previous violations.

A. Gravity of Violation

The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for serious and other-than-serious violations. To determine the gravity of a violation the severity of the injury or illness that could result from the alleged violation and the probability that an injury or illness could occur as a result of the alleged violation should be considered.

1. Severity assessment

   The first step is the classification of the alleged violation as serious or other-than-serious, based on the severity of the potential injury or illness that could result from the hazard. The following categories shall be considered in assessing the severity of potential injuries or illnesses:

   a. For serious:

      (i) High Severity: death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.

      (ii) Medium Severity: injuries or temporary, reversible illnesses resulting in hospitalization or a variable, but limited, period of disability.

      (iii) Low Severity: injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.

   b. For other-than-serious

      Minimal Severity: although such violations reflect conditions that have a direct and immediate relationship to the safety and health of employees, the most serious injury or illness that could reasonably be expected to result from an employee's exposure would not be low, medium, or high severity and would not cause death or serious physical harm.

2. Probability Assessment

   The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation but does affect the amount of the proposed penalty.

   a. Probability shall be categorized either as "greater" or as "lesser"

      (i) Greater Probability: results when the likelihood that an injury or illness will occur is judged to be relatively high.

      (ii) Lesser Probability: results when the likelihood that an injury or illness will occur is judged to be relatively low.

   b. Determining probability

      The following factors shall be considered, as appropriate, when violations are likely to result in injury or illness:

      (i) Number of employees exposed;

(ii) Frequency of exposure or duration of employee overexposure to contaminants;

(iii) Employee proximity to the hazardous conditions;

(iv) Use of appropriate personal protective equipment (PPE);

(v) Medical surveillance program;

(vi) Employee age;

(vii) Effective training on recognition and avoidance of the associated hazard;

(viii) Other pertinent working conditions.

Example 6-1: Greater probability might include an employee exposed to the identified hazard for four hours a day, five days a week. Lesser probability may be present when an employee is performing a non-routine task following two previous exposures within the previous year, with no injuries or illnesses associated with the identified hazard.

c. Final Probability Assessment

All the factors outlined above shall be considered in determining a final probability assessment.

When strict adherence to the probability assessment procedures would result in unreasonably high or low gravity, the assessment may be adjusted at the discretion of the Compliance Program Manager. Such decisions shall be adequately documented in the case file.

3. Gravity-Based Penalty (GBP)

The GBP for each violation shall be determined based on combining the severity assessment and the final probability assessment.

The GBP is an unadjusted penalty and is calculated in accordance with the procedures below:

Note: Throughout this manual when the term “unadjusted penalty” is used, it is the same as GBP.

4. Serious Violations and GBP

a. For serious violations, the GBP shall be assigned based in Appendix B Table 6B-1 of this Chapter.

b. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness.

5. Other-Than-Serious Violations and GBP

a. The severity of other-than-serious safety and health violations should always be categorized as minimal.

b. If the Compliance Program Manager determines it is appropriate to achieve the necessary deterrent, a GBP of up to the statutory maximum described in

Appendix A of this Chapter may be proposed. The reasons for such a determination shall be fully explained in the case file.

Table 6-2: Gravity Based Penalties for Other-Than-Serious Violations

Probability	GBP
Greater	Minimum $1,000 to Maximum as Provided in Chapter 6, Appendix A
Lesser	$0

6. Exceptions to GBP Calculations

   For some cases, a GBP may be assigned without using the severity and probability assessment procedures outlined in this section when these procedures cannot appropriately be used. In such cases, the assessment assigned and the reasons for such assignment shall be fully explained in the case file.

7. Egregious Cases

   In egregious cases, an additional factor of up to the number of violations instances may be applied. To apply a penalty for each occurrence of a violation, rather than combining violations, item (a) below must apply and at least one of the items (b) through (g) must also apply.

   a. The case must be classified as willful.

   b. The violations resulted in a worker fatality, a worksite catastrophe, or a significant number of injuries or illnesses.

   c. The violations resulted in persistently high rates of worker injuries or illnesses.

   d. The employer has an extensive history of prior violations.

   e. The employer has intentionally disregarded its safety and health responsibilities.

   f. The employer's conduct amounts to clear bad faith in the performance of duties under the Act.

   g. The employer has committed many violations, significantly undermining the effectiveness of any safety and health program that might be in place.

   Penalties calculated with this additional factor shall not be proposed without the concurrence of the Bureau Chief and NMED Office of General Counsel.

8. Gravity Calculations for Combined or Grouped Violations

   Combined or grouped violations will be considered as one violation with one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations.

Multiple violations of a single standard may be combined into one citation item. When a hazard is identified, which involves interrelated violations of different standards, the violations may be grouped into a single item.

a. Combined Violations

The severity and the probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation once the instance with the highest gravity is identified.

b. Grouped Violations

The following guidelines shall be followed:

(i) Grouped severity assessment

There are two considerations for calculating the severity of grouped violations:

(a) The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item; and

(b) If the injury or illness that is reasonably predictable from the grouped items is more than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor.

(ii) Grouped probability assessment

There are two considerations for calculating the probability of grouped violations:

(a) The probability assigned to the grouped violation shall be no less than the probability of the item that is most likely to result in an injury or illness; and

(b) If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment.

B. Penalty Adjustment

1. General

a. Penalty adjustments will vary depending upon the employer's "size" (number of employees), "good faith," and "history of previous violations."

(i) Size adjustment may range from a maximum reduction of 70 percent (80 percent for serious willful violations) to a maximum increase of 20 percent;

(ii) An adjustment of up to 10 percent may be applied for history, and

(iii) A maximum reduction of 30 percent may be applied for good faith.

Note: All proposed penalties are subject to the minimum and maximum penalty requirements of Section VIII.D and VIII.E. Adjustment factors shall be calculated only once for each inspection.

b. After the classification (as serious or other-than-serious) and the gravity-based penalty have been determined for each violation, the adjustment factors (for size, good faith, and history) shall be applied subject to these limitations:

(i) Penalties proposed for violations that are classified as repeated shall be reduced only for size.

(ii) Penalties proposed for violations classified as willful shall be reduced only for size and history.

(iii) Penalties proposed for serious violations classified as high severity/greater probability shall be reduced only for size and history.

2. Size Adjustment

A size adjustment is applied to the GBP based on the maximum number of employees of an employer at all workplaces nationwide at any time during the 12 months prior to the opening conference date.

a. A maximum penalty reduction of 70 percent is permitted for small employers (80 percent for serious willful violations, see Table 6-5).

b. A penalty increase of 20 percent is permitted for large employers.

c. The adjustment rates to be applied are shown in Table 6-3.

Table 6-3: Rate Adjustment Based Upon Employer Size

Employees	Percent Adjustment
1-10	70 % reduction
11-25	60 % reduction
26-100	30 % reduction
101-250	No adjustment
251 or more	20% increase

d. When an employer with 1-25 employees has one or more serious violations of high gravity or several serious violations of moderate gravity, indicating a lack of concern for employee safety and health, the Compliance Officer (CO) may recommend that only a partial reduction in penalty be permitted for size. If the Compliance Program Manager approves the partial reduction, the justification shall be fully explained in the case file.

3. History Adjustment

a. Allowable Percentage Reduction

A reduction of 10 percent shall be given to employers who have been inspected by OHSB, by any other State Plan, or by OSHA nationwide in the previous five years, and who were not issued citation(s)any serious, willful, or repeated violations.

b. Allowable Percentage Increase

An increase of 10 percent shall be applied to employers who have been issued serious high gravity citations that have become a **final order** by the Commission, another State Plan's adjudicated body or the federal Review Commission within the previous five years. The penalty shall not exceed the statutory maximum.

c. No Reduction or Increase

No reduction or increase will be applied for employers who have not been inspected by OHSB, another State Plan or federal OSHA and for employers who have been issued citations that have become a **final order** for serious violations within the last five years that were not classified as high gravity within the previous five years.

d. Time Limitation and Final Order

The five-year history of no prior citations shall be calculated from the opening conference date of the current inspection. Only citations that have become a final order of the Commission within the five years immediately before the opening conference date shall be considered.

e. Reasons for Not Giving a Reduction

A history reduction will not be given:

(i) For a repeated violation;

(ii) To an employer being cited for failure to certify abatement;

(iii) To an employer being cited for failure to comply with posting requirements; or

(iv) To an employer being cited for failure to tag movable equipment.

4. Good Faith Reduction

A penalty reduction is permitted in recognition of an employer's effort to implement an effective safety and health management system in the workplace. The following factors apply to reductions for good faith:

a. Reduction Not Permitted:

(i) No reduction shall be given for high gravity serious violations.

(ii) No reduction shall be given if a willful violation is found. Additionally, when a willful violation has been documented, no reduction for good faith can be applied to any of the violations found during the same inspection.

(iii) No reduction shall be given for repeated violations. If a repeated violation is found, no reduction for good faith can be applied to any of the violations found during the same inspection.

(iv) No reduction shall be given if a failure to abate violation is found during an inspection. No good faith reduction shall be given for any violation in the inspection in which the FTA was found.

(v) No reduction shall be given to employers being cited under abatement verification for any violations of 11.5.25 NMAC.

(vi) No reduction shall be given if the employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 11.5.16 NMAC.

(vii) No reduction shall be given to an employer who has no health and safety management system, or if the system in place has major deficiencies.

b. Fifteen Percent Reduction

A 15 percent reduction for good faith shall normally be given if the employer has a documented and effective safety and health program, with only incidental deficiencies.

Example 6-2: An acceptable program should include minutes of employee safety and health meetings, documented employee safety and health training sessions, or any other evidence of measures advancing safety and health in the workplace.

c. Twenty-Five Percent Reduction

The 25 percent reduction for "good faith" normally requires a written safety and health management system. In exceptional cases, the CO may recommend a full 25 percent reduction for an employer with 1-25 employees who has implemented an effective safety and health management system but has not reduced it to writing.

To qualify for this reduction, the employer's safety and health management system must:

(i) Provide for appropriate management commitment and employee involvement;

(ii) Provide for worksite analysis to identify hazards;

(iii) Address hazard prevention and control measures;

(iv) Require safety and health training;

(v) Provide for effective communication of hazards and controls between employers and employees at multi-employer worksites, and for limited and non-English speaking employees; and

(vi) Have no significant deficiencies.

Where young persons (i.e., less than 18 years old) are employed, the CO's evaluation must consider whether the employer's safety and health

management system appropriately addresses the needs of such employees with regard to the types of work they perform and the potential hazards to which they may be exposed.

Where persons who speak limited or no English are employed, the CO's evaluation must consider whether the employer's safety and health management system appropriately addresses the needs of such employees regarding the types of work they perform and the potential hazards to which they may be exposed.

Note: One example of an effective safety and health management system is given in Safety and Health Program Management Guidelines: Issuance of Voluntary Guidelines (54 Fed. Reg. 3904 (Jan. 16, 1989)).

d. Twenty Five Percent Reduction and Ten Percent Additional Reduction for OHSB Strategic Partnership Participation

(i) OHSB may provide an additional 10 percent reduction for good faith beyond the normal available reductions when the employer is an OHSB Strategic Partnership (OSP) site.

(ii) Employers in OSP sites must have taken specific significant steps beyond those listed in subparagraph c above and must have achieved a high level of employee protection.

(iii) For an employer to receive this benefit, it must be specified in the partnership agreement (not all partnerships offer this benefit), and the employer must be working toward the goals of the partnership in a demonstrated fashion, which would be observed through the verification process.

(iv) In cases where the total penalty reduction is 100% or more, the minimum penalty provisions will apply.

(v) This is an additional good faith reduction; it will not apply unless the employer first qualifies for the 25% reduction described in subparagraph c above.

5. Penalty Adjustment Application

The penalty adjustment shall be applied serially for each factor as follows: Size then History then Good Faith. The penalty adjustment factors will be applied serially to the GBP (e.g., 10 percent, then 20 percent, etc., instead of 30 percent). The OSHA Information System (OIS) will process the calculations automatically upon entering the adjustment factors.

X. Effect on Penalties if Employer Immediately Corrects

Appropriate penalties will be proposed with respect to an alleged violation even though, after being informed of the violation by the CO, the employer immediately corrects or initiates steps to correct the hazard. In limited circumstances, this prompt abatement of a hazardous condition may be considered in determining the amount of the proposed penalties under the Good Faith penalty reduction.

XI. Repeated Violations

A. General

1. Each repeated violation shall be evaluated as serious or other-than-serious, based on current workplace conditions, and not on hazards found in the prior case.
2. A Gravity-Based Penalty (GBP) shall then be calculated for repeated violations based on facts noted during the current inspection.
3. Only the adjustment factor for size, appropriate to the facts at the time of the re-inspection, shall be applied.

Note: Section 50.9.24.A of the Act provides that an employer who repeatedly violates the Act may be assessed a civil penalty of not more than the statutory maximum provided for in Appendix A of this Chapter, for each violation.

B. Penalty Increase Factors

The amount of any increase to a proposed penalty for repeated violations shall be determined by the size of the employer's business.

1. Small Employers

   For employers with 250 or fewer employees nationwide, the GBP shall be multiplied by 2 for the first repeated violation and multiplied by 5 for the second repeated violation. If the Compliance Program Manager determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by 10. The reasons for imposing a multiplier of 10 shall be explained in the case file.

2. Large Employers

   For employers with more than 250 employees nationwide, the GBP shall be multiplied by 5 for the first repeated violation and multiplied by 10 for the second repeated violation.

C. Other-Than-Serious, No Initial Penalty

For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of $500 shall be proposed for the first repeated violation, $1,000 for the second repeated violation, and $2,000 for a third repetition. This penalty will not be increased due to the size of the employer described in subsection B above.

D. Regulatory Violations

1. For calculating the GBP for regulatory violations, see Section IX and Section XVI of this notice.
2. For repeated instances of regulatory violations, the initial penalty shall be multiplied by 2 for the first repeated violation and multiplied by 5 for the second repeated violation. If the Compliance Program Manager determines that it is appropriate to achieve the necessary deterrent effect, the initial penalty may be multiplied by 10. The reasons for imposing a multiplier of 10 shall be explained in the case file.

XII. Willful Violations

NMSA 1978, Section 50-9-24(A) provides that an employer who willfully violates the Act may be assessed a civil penalty of not more, or less, than the amounts listed in Appendix A of this Chapter for each violation.

A. General

1. Each willful violation shall be classified as serious or other-than-serious.
2. There shall be no adjustment for good faith.
3. In no case shall the proposed penalty for a willful violation after reductions be less than the minimum provided for in Appendix A of this Chapter.

B. Serious Willful Penalty Reductions

1. Reduction for size. The reduction factors for size for serious willful violations shall be applied as shown in the following chart. The reductions shown in the chart help mitigate the impact of penalties for small employers. However, in no case shall the proposed penalty be less than the statutory minimum, provided for in Appendix A of this Chapter, for these employers.

Table 6-4: Size Reduction for Serious Willful Violations

Number of Employees	Percent Reduction
10 or fewer	80%
11-20	60%
21-30	50%
31-40	40%
41-50	30%
51-100	20%
101-250	10%
251 or more	0%

2. The adjustment factor for history shall be applied.
3. The proposed penalty shall then be determined from Appendix B Table 6B-2 of this Chapter.

C. Willful Regulatory Violations

1. To calculate the GBP for regulatory violations, see Section IX and Section XVI for other-than-serious violations.
2. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after adjustment for size and history, be less than the statutory minimum provided for in Appendix A of this Chapter.

XIII. Penalties for Failure to Abate

A. General

1. Failure to Abate penalties shall be proposed when:

   a. A citation issued to an employer has become a final order of the Review Commission (See FOM Chapter 7 for a definition of the final order date);

   b. The condition, hazard or practice found upon re-inspection is the same for which the employer was originally cited and has never been corrected by the employer (i.e. the violation was continuous); and

   c. The abatement date of the violation has passed. See §1903.19 for the definition of the abatement date.

B. Calculation of Additional Penalties

1. Unabated violations

   A GBP for unabated violations shall be calculated for failure to abate a serious or other-than-serious violation based on the facts noted upon re-inspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited.

   Exception: When the CO believes and documents in the case file that the employer has made a good faith effort to correct the violation and had an objective reasonable belief that it was fully abated, the Compliance Program Manager may reduce or eliminate the cumulative daily penalty.

2. No initial proposed penalty

   In instances when no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Compliance Program Manager. In no case shall the GBP be less than $1,000 per day.

3. Permissible adjustment factor

   Only the adjustment factor for size, based upon the circumstances noted during the re-inspection, shall be applied to arrive at the daily-proposed penalty.

4. Daily penalty multiplier

   The daily-proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:

   a. The number of days unabated shall be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the date of re-inspection.

   b. Normally the maximum total proposed penalty for failure to abate a violation shall not exceed 30 times the amount of the daily-proposed penalty.

   c. At the discretion of the Compliance Program Manager, a lesser penalty may be proposed. The reasoning for the lesser penalty shall be fully explained (e.g., achievement of an appropriate deterrent effect) in the case file.

   d. If a penalty greater than the normal maximum amount of 30 times the amount of the daily-proposed penalty is deemed appropriate by the Compliance

Program Manager, the case shall be treated under the violation-by-violation penalty policy described in Section XIV below.

C. Partial Abatement

1. When the violation has been partially abated, the Compliance Program Manager may authorize a reduction of 25 percent to 75 percent to the amount of the proposed penalty calculated as outlined above.

2. When a violation consists of several instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily-proposed penalty shall take into consideration the extent to which the violation has been abated.

   Example 6-3: When three out of five instances have been corrected, the daily-proposed penalty (calculated as outlined above, without regard to any partial abatement) may be reduced by 60 percent.

XIV. Violation-by-Violation (Egregious) Penalty Policy

Each instance of noncompliance shall be considered a separate violation with individual proposed penalties for each violation. This procedure is known as the egregious or violation-by-violation penalty procedure.

Penalties calculated using the violation-by-violation policy shall not be proposed without the concurrence of the Bureau Chief and NMED Office of General Counsel (OGC).

XV. Significant Enforcement Actions

A. Definition

A significant enforcement action, or significant case, is one that results from an investigation in which the total proposed penalty is $100,000 or more.

B. Multi-employer Inspections

Multiple related inspections involving the same employer or involving more than one employer in the same location (such as multi-employer worksites) and submitted together, may also be considered a significant enforcement action if the total aggregate penalty is $100,000 or more.

XVI. Penalty and Citation Policy for Violations of Regulatory Requirements

NMSA 1978, Section 50-9-24(G) provides that any employer that violates any of the posting requirements (which includes recordkeeping violations) shall be assessed a civil penalty of up to the maximum provided for in Appendix A of this Chapter for each violation.

Gravity Based Penalties (GBP) for regulatory violations, including posting requirements, shall have the adjustment factors for size and history applied. GBPs for regulatory violations that are classified as willful shall not be adjusted for “size”, “history”, or “good faith”. See Section XII.C of this notice.

A. Posting Requirements

1. Failure to post the OHSB Occupational Health and Safety Information Poster

A citation for failure to post the OHSB Occupational Health and Safety Information poster per 11.5.1.17 NMAC is warranted if:

a. The pattern of violative conditions for an establishment demonstrates a consistent disregard for the employer's responsibilities under the Act and 11.5.1.17 NMAC; and

b. Interviews show that employees are unaware of their rights under the Act; or

c. The employer has been previously cited or advised by OHSB of the posting requirement.

If the criteria above are met and the employer has not displayed (posted) the notice furnished by the OHSB as prescribed in 11.5.1.17 NMAC, an other-than-serious citation shall normally be issued. The GBP for this alleged violation shall be $1,000.

2. Failure to post a citation

If an employer received a citation that has not been posted as prescribed in 11.5.1.24 NMAC, an other-than-serious citation shall normally be issued. The GBP shall be $3,000.

For information regarding the OSHA 300A form, see OSHA Instruction CPL 02-00-135, Recordkeeping Policies and Procedures Manual, December 30, 2004.

B. Advance Notice of Inspection

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by 11.5.1.21.B.(4) NMAC, an other-than-serious citation shall be issued. The violation shall have a GBP of $2,000.

C. Abatement Verification Regulation Violations

1. General

The penalty provisions of 11.5.1.25 NMAC (which incorporates §1903.19) apply to all citations issued under this regulation. Only the reduction factor for size shall apply when assessing penalties.

Refer to Chapter 7 of the FOM, Abatement Verification, for detailed citation policy for this regulation.

2. Penalty for failing to certify abatement

a. The penalty for failing to submit abatement certification documents in accordance with §1903.19(c)(1), shall be $1,000, and only the reduction factor for "size" shall apply.

b. A penalty for failure to submit abatement verification documents shall not exceed the penalty for the entire original citation.

3. Penalty for failing to notify employees

a. The penalty for not notifying employees about abatement activities in accordance with §1903.19 [paragraphs (g)(1), (g)(2), and (g)(4)] shall follow the same penalty structure (GBP of $3,000) as for Failure to Post a Citation.

b. No “good faith” or “history” reductions shall be given to employers cited for failure to notify employees.

4. Penalty for failing to tag movable equipment

a. The penalty for not tagging movable equipment involved in serious, willful, or repeat violations in accordance with §1903.19 [paragraphs (i)(1), (i)(2), (i)(3), (i)(5), and (i)(6)] shall follow the same penalty structure (GBP of $3,000) as for Failure to Post a Citation.

b. No “good faith” or “history” reductions shall be given to employers cited for failure to tag movable equipment.

D. Injury and Illness Recordkeeping and Reporting

1. 11.5.1.16 NMAC incorporates §1904.

2. Part §1904 violations, if cited, shall be as other-than-serious unless for repeated and willful violations.

3. The penalty policies for repeated and willful regulatory violations described in paragraphs XI.D and XII.C of this notice may be applied to recordkeeping violations.

4. OHSB’s penalty policy for egregious violations described in Section XIV of this notice may be applied to recordkeeping violations.

5. See OSHA Instruction CPL 02-00-135, Recordkeeping Policies and Procedures Manual, issued December 30, 2004; specifically, Chapter 2, Enforcement Policies and Procedures, Section II, Inspection and Citation Procedures.

Note: 29 CFR Part 1904.39 has new requirements for reporting work-related fatalities, hospitalizations, amputations, or losses of an eye. The new rule, as incorporated under 11.5.1.16 NMAC, went into effect on July 16, 2015, for workplaces under OHSB jurisdiction.

XVII. Failure to Provide Access to Medical Records or Exposure Records

A. Proposed Penalties

If the employer is cited for failing to provide access to records as required under §1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, a GBP of $1,000 shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). A maximum GBP as provided for in Appendix A of this Chapter may be proposed for such violations.

Example 6-4: If the evidence demonstrates an authorized employee representative requested exposure and medical records for three employees and the request was denied by the employer, a citation would be issued for 6 instances (i.e., one medical record and one exposure record (total two) for each of three employees) of violation of §1910.1020, with a GBP of $6,000.

B. Use of Violation-by-Violation Penalties

The above policy does not preclude the use of violation-by-violation penalties when appropriate.

XVIII. Criminal Penalties

A. The Act

The Act provides for criminal penalties in the following cases:

1. Willful violation of an OHSB standard, rule, or order causing the death of an employee. NMSA 1978, § 50-9-24(J).
2. Giving unauthorized advance notice. NMSA 1978, § 50-9-24(K).
3. Knowingly giving false information. NMSA 1978, § 50-9-2(L).

B. Courts

Criminal penalties may be imposed upon an employer after conviction in a court of competent jurisdiction. Neither OHSB nor the Review Commission is authorized by law to impose criminal penalties.

XIX. Handling Monies Received from Employers

A. Compliance Program Manager Responsibilities

The Compliance Manager is responsible for:

1. Informing employers of the OHSB's debt collection procedures;
2. Collecting assessed penalties from employers;
3. Reporting penalty amounts collected and those due;
4. Referring cases with uncollected penalties to the OGC;
5. Transferring selected case to the OGC for legal action; and
6. Transferring collected monies in accordance with current department procedures.

B. Collection of Penalties

It is OHSB policy to collect penalties owed to the state as a result of the legitimate exercise of statutory authority. The Compliance Program Manager shall be guided by the following regarding penalty collection:

1. Time allowed for payment of penalties

   The date when penalties become due and payable depends on whether the employer contests.

   a. When citations and proposed penalties are uncontested, the penalties are due and payable 15 working days following the employer's receipt of the citation and notification of penalty.

   b. When citations and proposed penalties are contested and subsequently affirmed or modified by the Review Commission, the penalties are due and payable on the date of the final order date.

   c. When only part of the citation or proposed penalty is contested, the due date for payment for the uncontested items will be as described in subparagraph a above. The due date for the contested items will be as described in subparagraph b above.

2. Methods of payment

   Employers assessed penalties shall remit the total payment due by certified check, personal check, company check, postal money order, bank draft, or bank money order; payable to the "State of New Mexico", "New Mexico Environment Department", "NMED", "Occupational Health and Safety Bureau", "(OHSB)", "OSHA" or any combination thereof. Payment in cash shall not be accepted. Upon the request of the employer OSHB will review the outstanding penalties and discuss all available payment options.

C. Handling Monies Received

Monies received in payment of penalties shall be deposited, recorded and handled in accordance with the State of New Mexico Manual of Model Accounting Practices (MAPs) – Financials:

1. The check shall be restrictively endorsed "For Deposit Only" and date stamped. OHSB shall document all monies received either with a pre-numbered receipt/deposit ticket and by entering them in a cash receipt log that specifies the amount and date of the receipt and the source of revenue.
2. Payments are to be deposited by close of the next business day after receipt. The collections shall be deposited by an OHSB staff member other than the person who received the payment per MAP's standard.
3. The deposit slip shall be retained by the State of New Mexico - New Mexico Environment Department (NMED) as per MAP's standard.
4. A copy of the deposit slip shall be retained by OHSB, and the transaction shall be recorded in OIS.

Payments in the wrong amount or invalid payments, e.g., unsigned checks, shall be returned to the employer via certified mail with instructions for correcting the deficiency.

D. Delinquent Penalties

1. It is OHSB policy to notify employers that debts are valid and overdue and to request payment. The Compliance Program Manager shall notify employers in accordance with the following procedures:
   a. When the specified time for penalty payment has elapsed, the Compliance Program Manager shall inform the employer by certified mail of the facts related to the delinquent penalty payment and require payment within 10 days.
   b. If the payment is not received within 10 days of the notification of delinquency, the Compliance Program Manager shall refer the case to the Office of General Counsel (OGC) for collection efforts.
2. For contested cases, the OGC shall pursue collection of penalties as soon as practicable after a decision has been rendered.
3. All uncollected penalties will be tracked and followed up on a quarterly basis.

E. Uncollectible Penalties

Once the Review Commission's Final Order for a Citation and Notification of Penalty becomes effective, the Bureau is responsible for collecting the penalties.

Before the Bureau may determine that a penalty is uncollectible, the Bureau must ensure that the employer:

1. Has received the citation;
2. Has not contested the citation, or has contested the citation and had a settlement conference or hearing resulting in a final order;
3. Has been contacted in person or by telephone on at least one occasion to request remittance of the amount owed; and
4. Has received a letter from the Bureau that provides notice that the matter will be forwarded to legal counsel for collection within a date certain and there has been no response.

To document the record that the penalty is uncollectible, the Bureau shall investigate whether any of the following events have occurred:

1. Death. The employer is deceased, **and** his/her company is no longer in business. If the company continues to operate, and the final order is assessed against the company, then the company is still liable for penalties.
2. Defunct employer. An employer is defunct when it is no longer in business and the Bureau cannot locate the employer or its officials to pursue unpaid penalties. The Bureau must make reasonable efforts to contact the employer and its officials (such as seeking corporate or other information from the Public Regulation Commission, Secretary of State, Regulation and Licensing Department, local governing bodies, etc.).
3. Discharge in bankruptcy. The Bureau must seek to timely file a claim in the bankruptcy proceeding and if timely, proceed through discharge. If the filing is untimely, the Bureau shall document the file as an unclaimed debt of a bankrupt employer.
4. Mistake of fact or mathematical error. The Bureau must ensure that the employer received the citation and there are no prejudicial errors in the timing, assessment, or employer identification related to the citation and penalty. If there are prejudicial errors, such as wrong party identified, late filing, or incorrect amount, then the Bureau shall document the file as an erroneous debt.
5. Resources. When the total penalty amount is less than or equal to $1,000, no legal action will be pursued regarding collection unless the Bureau Chief determines that the expense of such action is warranted due to the deterrent effect it may produce.

If any of the above circumstances exist, the Program Manager shall prepare a memo to the Bureau Chief recommending that collection of the penalty from the employer not be pursued. The Bureau shall keep a permanent detailed record or file of the debts taken off the books to show the debts have not been forgiven but have been removed from active collection,