

CHAPTER VIII PENALTIES

I) **General Policy.** The penalty structure established in KRS 338.991 primarily serves as an incentive for preventing violations and as an effective deterrent to violations. Penalties are not a source of income for the agency.

II) **Civil Penalties.**

A) **Authority.** KRS 338.991 establishes penalties for KRS Chapter 338 violations.

- i) KRS 338.991(2) establishes that any employer who has received a citation for a serious violation will be assessed a penalty up to \$7,000 for each violation. KRS 338.991(1) provides that any employer who has received citations for alleged willful or repeated violations of any standard, regulation, or order promulgated pursuant to this chapter, may be assessed a penalty up to \$70,000 for each violation.
- ii) KRS 338.991(3) establishes that, when the violation is specifically determined not to be of a serious nature, KY OSH may assess a penalty up to \$7,000 for each violation. KRS 338.991(2) establishes that any employer who has received a citation for an alleged violation of standard, regulation, or order promulgated pursuant to this chapter, which is determined to be of a serious nature will be assessed a penalty up to \$7,000 for each violation.
- iii) KRS 338.991(4) establishes that KY OSH may assess any employer who fails to correct a violation within the period permitted for its correction a penalty up to \$7,000 for each day during which such failure or violation continues.

B) **Minimum Penalties.** KRS Chapter 338 does not require a penalty when a violation is not serious; however, CSHOs must propose a penalty when a violation is serious. The following guidelines apply:

- i) The proposed penalty for any willful violation cannot be less than \$5,000;
- ii) No adjusted proposed penalty for a serious violation can be less than \$500;
- iii) When the adjusted proposed penalty for an other than serious violation would amount to less than \$100, no penalty will be proposed for that violation; and
- i) The proposed penalty for any violation(s) that contributed to the cause of a fatal accident must receive the maximum penalty for its classification with no reductions for size, good faith, or history.

C) **Maximum Penalties.**

- i) The maximum penalty for a serious or an other than serious violation is \$7,000.
- ii) A penalty up to \$70,000 may be proposed for willful or repeated violations.

- iii) Penalties for failure to correct a violation may be up to \$7,000 for each calendar day the violation continues beyond the final abatement date for a maximum of 30 days.

D) **Penalty Calculations.**

- i) Penalty Factors. Penalties are assessed on the basis of four (4) factors:

- (a) The gravity of the violation;

NOTE. The gravity of the violation is the primary consideration in determining penalty amounts. It is the basis for calculating the penalty for both serious and other than serious violations.

- (b) The size of the business;
- (c) The good faith of the employer; and
- (d) The employer's history of previous violations.

- ii) Gravity.

- (a) *Gravity Determination.* To determine the gravity of a violation, a CSHO assesses the severity of the injury or illness that most reasonably could result from the violation and the probability that an injury or illness could result from the violation. These two assessments create the gravity-based penalty.

- (1) **Severity.** The classification of the alleged violations as serious or other than serious is based on the severity of the injury or illness that could result from the violation. The type of injury or illness that could reasonably be expected to result from an employee's exposure is assigned one (1) of the following:

- (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.
- (iv) **Minimal Severity.** Other than serious violations. Although such violations reflect conditions that have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.

- (2) **Probability.** The probability that an injury or illness will result from a hazard affects the penalty to be proposed.

- (i) Categorization.
 - 1. Greater Probability. When the likelihood that an injury or illness will occur is judged by the CSHO to be relatively high.
 - 2. Lesser Probability. When the likelihood that an injury or illness will occur is judged by the CSHO to be relatively low.
- (ii) Probability Factors. The following factors are normally considered and documented in the casefile when violations likely to result in injury or illness are involved:
 - 1. Number of workers exposed to the hazardous conditions, at the same time and/or sequentially;
 - 2. Frequency and duration of employee exposure to the hazardous condition, including overexposures to contaminants;
 - 3. Employee proximity to the hazardous conditions;
 - 4. Use of appropriate personal protective equipment, work practices, or engineering controls;
 - 5. Employee training; and
 - 6. Other factors such as, but not limited to, a comprehensive safety and health program, evidence of corrections underway, warning signs, PPE, lighting, speed, temperature, labels or special procedures, administrative controls, weather, noise, etc.
- (iii) Determination. The CSHO identifies and evaluates all of the factors influencing the probability of the occurrence of an injury or illness.
 - 1. Documentation. CSHOs document probability determinations in the OSHA-1B not the probability-rating box in OSHA Express. CSHOs consider the probability factors previously described. All of the factors outlined above are considered in the final probability assessment and must be documented in the casefile.
 - 2. Adjustments.
 - a. A factor does not materially affect the final probability assessment when it:
 - i. Does not significantly influence the probability of an injury or illness causing condition; or
 - ii. Excessively decreases the penalty.

EXAMPLE: In a particularly dangerous trenching situation, or in a confined space where there is insufficient oxygen to support life, it may be appropriate to increase the weight given to the number of employees exposed.

- b. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the CSHO must use professional judgment to adjust the probability appropriately. Such decisions must be adequately documented in the casefile.
- (b) *Gravity-Based Penalty.* The gravity-based penalty (GBP) is an unadjusted penalty and is calculated in accordance with the following.
- (1) The GBP for each violation is determined based on appropriate, balanced professional judgment combining the severity assessment and the final probability assessment.
 - (2) For serious violations, the GBP is assigned on the basis of the following table:

SEVERITY	PROBABILITY	GBP	GRAVITY
High	Greater	\$7000	High
Medium	Greater	\$6000	Moderate
Low	Greater	\$5000	Moderate
High	Lesser	\$5000	Moderate
Medium	Lesser	\$4000	Moderate
Low	Lesser	\$3000	Low

- (3) The highest gravity classification (high severity and greater probability) is normally the most serious violated conditions, such as those situations involving danger of death or serious injury.
- (4) The gravity of a violation is defined by the GBP.
 - (i) A **high gravity** violation is one with a GBP of \$7,000.
 - (ii) A **moderate gravity** violation is one with a GBP of \$4,000 to \$6,000.
 - (iii) A **low gravity** violation is one with a GBP of \$3,000 or less.
- (5) A minimal severity assessment is used for other than serious violations.
 - (i) Other than serious violations classified as greater probability are assigned a GBP of \$2,000 to which appropriate adjustment factors are applied.
 - (ii) Other than serious violations classified as lesser probability are cited with no penalty.
 - (iii) The commissioner may authorize a penalty between \$1,000 and \$7,000 for an other than serious violation when it is determined to be appropriate to achieve the

necessary deterrent effect. The reasons for such a determination must be documented in the casefile.

- (6) Penalties proposed for other than serious regulatory violations are discussed later in the chapter.
 - (7) A GBP may be assigned in some cases without using the severity and the probability assessment procedures outlined in this chapter when those procedures cannot be applied appropriately.
 - (8) The Penalty Table is used to determine appropriate adjusted penalties for serious and other than serious violations.
- (c) *Gravity Calculations for Combined or Grouped Violations.* The following applies to the calculations of penalties for combined and grouped violations.
- (1) The severity and probability assessments for combined violations are based on the instances with the highest gravity.
 - (2) For grouped violations, the following guidelines apply.
 - (i) **Severity Assessment.** There are two (2) considerations when calculating the severity of grouped violations.
 - 1. The severity assigned to the grouped violation cannot be less than the severity of the most serious reasonably predictable injury and illness that could result from the violation of any single item.
 - 2. If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness serves as the basis for the calculation of the severity factor.
 - (ii) **Probability Assessment.** There are three (3) considerations when calculating the probability of grouped violations.
 - 1. The probability assigned to the grouped violation is no less than the probability of the item that is most likely to result in an injury or illness.
 - 2. When the overall probability of injury or illness is greater with the grouped violation than with any single violation, the greater probability of injury or illness serves as the basis for the calculation of the probability assessment.
 - 3. Some individual probability factors may be increased by grouping and others may not. The increased values are used in the probability calculation when a more appropriate probability assessment will result. For example, the number of employees exposed may be increased while the proximity factor may not.
 - (iii) **Gravity-Based Penalty.**

1. Combined and grouped violations are normally considered as one (1) violation for penalty purposes.
2. In egregious cases, an additional factor of up to the number of violation instances (number of days since the abatement date for failure to abate) may be applied to the gravity-based penalty or the regulatory penalty. Such cases are handled in accordance with OSHA Instruction CPL 02-00-080 Handling of Cases To Be Proposed for Violation-By-Violation Penalties 10/21/1990. Penalties calculated with this additional factor must be discussed with the Office of the General Counsel (OGC) and the commissioner.

NOTE. Once a the gravity-based penalty is determined, the CSHO considers the size of the business, the good faith of the employer and the history of previous violations in deciding the extent, if any, to which the gravity-based penalty is reduced.

iii) Penalty Adjustment Factors.

- (a) *General.* The GBP may be reduced by as much as 85% depending upon the employer's good faith, size of business, and history of previous violations. Up to 50% reduction is permitted for size, up to 25% reduction for good faith, and up to 10% reduction for history. The 10% history adjustment factor may be increased, decreased, or not affected.
 - (1) Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors are generally calculated once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors are applied subject to the limitations indicated in the following paragraphs.
 - (2) The good faith penalty reduction factor cannot be applied to violations classified as high severity and greater probability, repeat, willful, and failure-to-abate.
 - (3) When a failure-to-abate penalty or willful citation is issued, a reduction for good faith cannot be applied to any of the violations found during the inspection.
 - (4) The penalty reduction for size, good faith, and history are calculated on the basis of the criteria described in the following paragraphs.
- (b) *Size.* A maximum penalty reduction of 50% is permitted for small businesses. Size is based on the maximum number of employees at all workplaces nationwide at any one time during the previous 12 months.
 - (1) Size reductions are applied as follows:

EMPLOYEES	PERCENT REDUCTION
1-25	50
26-100	30
101-250	10
250+	None

- (2) When a small business (250 employees or less) has one (1) or more serious high gravity violations or a number of serious moderate gravity violations, indicating a lack of concern for employee safety and health, the commissioner may determine that only a partial reduction in penalty is applied for size.
- (c) *Good Faith.* A penalty reduction up to 25% is permitted in recognition of an employer's good faith.
- (1) A reduction of 25% is normally applied when the employer has documented and implemented OSHA's "Recommended Practices for Safety & Health Programs" if general industry; or OSHA's "Recommended Practices for Safety & Health Programs in Construction" if construction; or the ANSI/ASSP Z10 "Occupational Health and Safety Management Systems;" and documented and implemented all programs and training required by and complying with standards or regulations. The employer may use an equivalent recommended practice to satisfy this requirement.
- (2) A reduction of 15% is normally applied when the employer does not meet the criteria established in (1) above but has all programs and training required by and complying with standards or regulations has not documented and implemented OSHA's "Recommended Practices for Safety & Health Programs" if general industry; or OSHA's "Recommended Practices for Safety & Health Programs in Construction" if construction; or the ANSI/ASSP Z10 "Occupational Health and Safety Management Systems," but has documented and implemented all programs and training required by and complying with standards or regulations.
- (3) No reduction is given to an employer who does not meet the criteria established in (1) and (2) above.
- (4) A reduction is not applied when the employer does not provide its OSHA's "Recommended Practices for Safety & Health Programs" if general industry; or OSHA's "Recommended Practices for Safety & Health Programs in Construction" if construction; or the ANSI/ASSP Z10 "Occupational Health and Safety Management Systems," or any other program or training required by and complying with standards or regulations
- (d) *History.*
- (1) A 10% reduction applies when employers have been inspected but not cited by KY OSH for any serious, willful, or repeated violations or failure-to-abate penalties that have become final orders within the past five (5) years.

- (2) A 10% increase applies when employers have been inspected and cited by KY OSH for any serious, willful, repeat or to abate violations that have become final orders within the past five (5) years.

NOTE. KY OSH cannot propose penalties greater than the statutory maximum.

- (3) No penalty reduction or increase applies when employers have not been inspected within the past five (5) years.

- (e) *Total.* The total reduction is normally the sum of the reductions for each adjustment factor.

EXAMPLE: An employer has a GBP of \$5,000. It gets a 30% reduction for size and 25% reduction for good faith but gets a 10% increase for history. Calculate penalty reduction factors as $30\% + 25\% - 10\% = 45\%$ reduction.

EXAMPLE: An employer has a GBP of \$5,000. It gets a 30% reduction for size and 25% reduction for good faith and 10% reduction for history. Calculate penalty reduction factors as $30\% + 25\% + 10\% = 65\%$ reduction.

- E) **Effect on Penalties If Employer Corrects or Initiates Corrective Action.** CSHOs propose penalties when KY OSH issues citations even though the employer immediately eliminates or initiates steps to abate the hazard.
- F) **Repeated Violations.** KRS 338.991(1) provides that an employer who repeatedly violates the law may be assessed a civil penalty of not more than \$70,000 for each violation.
- i) Gravity-Based Penalty Factors. KY OSH calculates a GBP for repeated violations based on facts noted during the current inspection. Only penalty adjustments for size and history, appropriate to the facts at the time of the re-inspection, are applied.
- ii) Penalty Increase Factors. The amount of the increased penalty for a repeated violation is determined by size.
- (a) *Smaller Employers.* For employers with 250 or fewer employees, the GBP is doubled for the first repeated violation and quintupled for the second repeated violation. If the commissioner determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by ten (10).

EXAMPLE: An employer with 100 employees was found in serious violation of 29 CFR 1910.1200 (h)(1) during a 5/2/2010 inspection. The employer was cited for the same standard before. The final order for the previous serious violation was 3/4/2006. The employer would receive a repeat serious violation with a penalty increase of two (2) since this is the first repeated violation.

EXAMPLE: An employer with 100 employees was found in violation of 29 CFR 1910.1200(h)(1) during a 5/2/2010 inspection. The employer was cited for the same standard twice before. The final order for the first serious violation was 12/12/2005. The final order for the first repeat serious violation was 3/4/2006. The employer would receive

a repeat serious violation with a penalty increase of five (5) since this is the second repeated violation.

- (b) *Larger Employers.* For employers with more than 250 employees, the GBP is multiplied by five (5) for the first repeated violation and multiplied by ten (10) for the second repeated violation.

EXAMPLE: An employer with 300 employees was found in violation of 29 CFR 1910.1200 (h)(1) during a 5/12/2010 inspection. The employer was cited for the same standard twice before. The final order for the first serious violation was 12/12/1999. The final order for the second serious violation was 3/4/2006. The employer would receive a repeat serious violation with a penalty increase of five (5) since this is the first repeated violation.

EXAMPLE: An employer with 300 employees was found in violation of 29 CFR 1910.1200(h)(1) during a 5/2/2010 inspection. The employer was cited for the same standard twice before. The final order for the first serious violation was 12/12/2005. The final order for the first repeat serious violation was 3/4/2006. The employer would receive a repeat serious violation with a penalty increase of ten (10) since this is the second repeated violation.

- iii) Other Than Serious, No Initial Penalty. For a repeated other than serious violation that has no initial penalty, a GBP penalty of \$500 is assessed for the first repeated violation, \$1,000 if the violation has been cited twice before, and \$2,000 for a third repeat.
- iv) Regulatory Violations. For repeated violations of regulatory violations, the initial penalty is doubled for the first repeated violation and quintupled for the second repeated violation. If the commissioner determines that it is appropriate to achieve the necessary deterrent effect, the initial penalty may be multiplied by ten (10).

G) Failure to Abate. KY OSH issues a Notification of Failure to Abate an Alleged Violation (KY OSH-2B) in cases where employers have not corrected violations as required.

- i) Failure to Abate. KY OSH issues failure to abate penalties when an employer has not corrected a previously cited violation that is a final order.
- ii) Employer Contest. If an employer contests one (1) or more of the violations, the period for abatement does not begin for contested violations until the day following the entry of the final order affirming the citation.
 - (a) When the employer contests only the penalty, the employer must correct the violation within the prescribed abatement period.
 - (b) When an employer contests an abatement date in good faith, a Failure to Abate Notice is not issued for the contested item until a final order affirming a date is entered, the new abatement period (if any) has been completed, and the employer has still failed to abate.

- iii) Calculation of Additional Penalties. A GBP for unabated violations is calculated based on the facts noted upon re-inspection. The recalculated GBP cannot be less than the penalty proposed for the item originally cited.
- (a) When no penalty was initially proposed, an appropriate penalty is determined after consulting with the supervisor. The penalty cannot be less than \$2,000 per day.
 - (b) Only the adjustment factors for size and history, based upon the circumstances noted during the re-inspection, are applied to arrive at the proposed daily penalty.
 - (c) The proposed daily penalty is multiplied by the number of calendar days the violation has continued unabated, except as provided below.
 - (1) The number of days unabated is counted from the day following the abatement date specified in the citation or the final order. The number of days includes all calendar days between that date and the date of re-inspection, excluding the date of re-inspection.
 - (2) Normally the maximum total proposed penalty for failure-to-abate a particular violation does not exceed 30 times the amount of the daily proposed penalty.
 - (3) At the discretion of the commissioner, a lesser penalty may be proposed with the reasons for doing so documented in the casefile.
 - (4) When the commissioner deems a penalty in excess of the normal maximum amount of 30 times the amount of the proposed daily penalty appropriate.
 - (d) In unusual circumstances, such as when the gravity of the violation is at the highest level (high severity and greater probability), or the employer has willfully failed to abate the violation, or has failed to abate a second time, higher penalties are proposed. The commissioner must approve the proposed penalty.
- iv) Partial Abatement. When the employer partially abates the citation, the commissioner may authorize a reduction of 25% to 75% of the proposed penalty. The rationale must be documented in the casefile.
- (a) When a violation consists of a number of instances and the follow-up inspection reveals some instances of the violation have been corrected, the additional proposed daily penalty will take into consideration the extent that the violation is abated.

EXAMPLE: When three (3) out of five (5) instances have been corrected, the proposed daily penalty may be reduced by 60%.
 - (b) In multi-step correction items, only the failure to comply with substantive (rather than procedural) requirements will generally incur a full failure to abate penalty.
 - (c) When a Failure to Abate Notice is issued for procedural requirements, the director will consider substantive abatement in calculating the proposed daily penalty.

(d) Good Faith Effort to Abate. When the CSHO documents in the casefile that the employer has made good faith efforts to fully abate the violation, the commissioner may reduce or eliminate the proposed daily penalty.

H) **Willful Violations.** KRS 338.991(1) provides that an employer who willfully violates the law may be assessed a civil penalty not more than \$70,000 but not less than \$5,000 for each violation.

i) Gravity-Based Penalty Factors. Willful violations are classified as serious or other than serious. After determining the gravity of the violation, a GBP will be determined based on the facts noted during the inspection. The adjustment factors for size and history are applied.

ii) Serious Violations. For willful serious violations, the adjusted GBP is multiplied by ten (10).

(a) In no case is the proposed penalty less than \$5,000.

(b) The commissioner may assess a higher penalty (up to the statutory maximum of \$70,000) or a lower penalty based upon consideration of factors such as the degree of willfulness and the achievement of an appropriate deterrent effect. The rationale for such action is documented in the casefile.

iii) Other than serious Violations. For willful other than serious violations, the minimum penalty of \$5,000 is assessed.

iv) Regulatory Violations. When regulatory violations are willful, the unadjusted initial penalty will be multiplied by ten (10). After adjustment for size and history, the penalty cannot be less than \$5,000.

I) **Violation of Regulatory Requirements.**

i) Violation by violation penalties. For egregious violations, KY OSH may apply an additional penalty, as described in accordance with the procedures set forth in OSHA Instruction CPL 02-00-080, Handling of Cases to be Proposed for Violation-by-Violation Penalties, 10/21/1999.

ii) Grouping. Violations of posting and recordkeeping requirements that involve the same document are grouped as an other than serious violation. The unadjusted penalty for the grouped violations would then take on the highest dollar value of the individual items.

iii) Posting Requirements. Penalties for violations of posting requirements are proposed as follows:

(a) *OSH Notice.* If the employer has not displayed the OSH poster (notice), KY OSH issues an other than serious citation. The gravity based penalty is \$3,500.

(b) *Annual Summary.* If an employer fails to post the OSHA-300A Form or equivalent, as required by 29 CFR 1904, even if there are no injuries or illnesses, an other than serious citation is issued with a gravity based penalty of \$3,500.

- (c) *Citation.* If an employer received a citation and the employer did not post the citation as required by 803 KAR 2:125, KY OSH issues an other than serious citation with a gravity based penalty of \$3,500.

iv) Reporting and Recordkeeping Requirements.

- (a) *OSHA-300 and 300A Forms.* If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, OSHA Form 300, or the Summary of Work-Related Injuries and Illnesses, OSHA Form 300A, as required by 29 CFR 1904, an other than serious citation is issued with a gravity based penalty of \$3,500 for each year the form was not maintained.

- (1) When no recordable injuries or illnesses have occurred at a workplace during the current calendar year, the employer does not need to complete the OSHA Form 300 until the end of the calendar year.
- (2) An OSHA-300 or 300A Form with significant deficiencies (such as, but not limited to, 300s not totaled or certified, incomplete entries, missing entries, entries recorded late, etc.), is considered as not maintained.

- (b) *OSHA-301 Forms.* If the employer does not maintain, or inaccurately maintains the OSHA Form 301, or equivalent, as required by 29 CFR 1904, an other than serious citation is issued with a gravity based penalty of \$3,500 for each form up to a maximum of \$7,000.

- (1) Minor inaccuracies are cited with no penalty.
- (2) If large numbers of violations or other circumstances indicate the violations are willful, then other penalties including violation-by-violation may be applied.
- (3) *Electronic Submission.* If an employer fails to submit electronically the records, required by 29 CFR 1904 to www.osha.gov, even if there are no injuries or illnesses, an other than serious citation is issued with a gravity based penalty of \$3,500 up to \$7,000.

- (c) *Reporting Fatalities.* Employers are required to orally report to the Division of OSH Compliance within eight (8) hours, any occurrence of a fatality that occurs at the workplace.

- (1) An other than serious citation is issued for failure to report with a gravity based penalty of \$7,000.
- (2) If the director becomes aware of an incident required to be reported by 803 KAR 2:181 through means other than the employer's reporting, before the end of the eight (8) hour reporting period and an inspection is opened with twenty-four (24) hours of becoming aware, no failure to report violation is issued.

(d) *Reporting Hospitalizations, Amputations and Loss of an Eye.* Employers are required to orally report to the Division of OSH Compliance within 72 hours, any workplace occurrence of an amputation, hospitalization, or employee loss of an eye(s).

- (1) An other than serious citation is issued for failure to report with a gravity based penalty of \$5,000.
- (2) If the commissioner determines that it is appropriate to achieve the necessary deterrent effect, a gravity based penalty of \$7,000 may be assessed.
- (3) If the director becomes aware of an incident required to be reported by 803 KAR 2:181 through means other than the employer's reporting, before the end of the 72-hour reporting period, and an inspection is opened within twenty-four (24) hours of becoming aware, no failure to report violation is issued.

(e) *Reporting Mechanical Power Press Point of Operations Injuries.* An employer who fails to report a point of operation injury within 30 calendar days is assessed a gravity based penalty of \$5,000.

NOTE. If the director becomes aware of an incident required to be reported by 29 CFR 1910.217 through means other than reporting from the employer before the end of the 30 day reporting period, and an inspection is opened, no failure to report violation is issued.

v) Access to Records.

- (a) *29 CFR 1904.* If an employer fails to provide records required by 29 CFR 1904 for inspection and copying by any employee, former employee, authorized representative of employees, or authorized representative of the commissioner, KY OSH issues a citation with a gravity based penalty of \$3,500 for each form not made available up to a maximum of \$7,000.
- (b) *29 CFR 1910.1020.* If an employer is cited for failing to provide records as required under 29 CFR 1910.1020 for inspection and copying by any employee, former employee, authorized representative of employees, or authorized representative of the commissioner, a gravity based penalty of \$3,500 is proposed for each record, either medical or exposure record, on an individual employee basis up to a maximum of \$7,000.
- (c) This does not preclude the commissioner's use of violation-by-violation penalties where appropriate with a penalty more than \$3,500 for each violation.

vi) Notification Requirements. When an employer receives advanced notice of an inspection and fails to notify the authorized employee representative as required by 803 KAR 2:080, an other than serious citation is issued with a gravity based penalty of \$3,500.

III) **Criminal Penalties.** The commissioner, in consultation with the OGC and with approval of the secretary, refers cases for criminal prosecution to the Kentucky Attorney General.

A) KRS 338 provides for criminal penalties in the following cases:

- i) Knowingly giving false information (KRS 338.991(8));
- ii) Giving unauthorized advance notice (KRS 338.991(9)); and
- iii) Willfully causing bodily harm to any authorized representative of the commissioner while engaged in the performance of investigative, inspection or law enforcement function (KRS 339.991(10)).

B) The courts impose criminal penalties, not KY OSH or the Review Commission.

IV) **Handling Money Received From Employers**

A) **Responsibilities.** KY OSH is responsible for collecting penalties owed to the Division of OSH Compliance. The division is responsible for:

- i) Informing employers of KY OSH's debt collection procedures;
- ii) Ensuring assessed penalties are collected from employers;
- iii) Reporting amounts collected and those due;
- iv) Ensuring interest and other charges on overdue penalty amounts are correct;
- v) Referring cases with uncollected penalties to the Department of Revenue;
- vi) Ensuring liens are filed when appropriate; and,
- vii) Transferring collected monies in accordance with the procedures set forth in this chapter.

B) **Receiving Payments.**

- i) Methods of Payment. Employers must remit the payment to the KY OSH office by certified check, personal check, company check, postal money order, bank draft or bank money order, payable to the Kentucky State Treasurer, and cash. KY OSH does not accept credit card payments for penalties. Upon request of the employer and for good cause, alternate methods of payment are permissible, such as payments in installments or inter-accounting for other state agencies.

NOTE. Cash payment is not normally accepted. When an employer pays an OSH penalty in cash, the KY OSH representative accepting the payment must have the employer sign a form witnessed by the KY OSH representative. The form must include the date of the cash payment. Additionally, the employer and the KY OSH representative must initial the amount of the payment. The KY OSH representative must make a copy of the cash payment form for the employer representative as proof of payment. The KY OSH representative will process the payment and hand-carry the cash payment to fiscal with the appropriate paperwork. All documentation of the cash payment must be included in the casefile.

- ii) All payments must be stamped with the date received and recorded in the KY OSH Penalty Log. The information included in the log is company name, date received, OSH1 number, and the amount of payment. When a payment has any issues, two (2) agency representatives must sign the penalty log to demonstrate KY OSH is aware of the issue, date the issue is noted, as well as a description and disposition.
 - iii) The employer is encouraged to include the inspection number(s) with the payment instrument to ensure the payment is applied to the appropriate inspection. When a single employer is making payments on multiple cases, KY OSH may have to contact the employer to ensure the penalty payment is applied to the correct inspection.
 - iv) Penalty payments are entered in OSH Express bi-weekly, which allows time for errors to get fixed before processing. The date received is entered as the date of payment. A copy of the Case Audit Report must be included in the casefile.
 - v) Three (3) copies of the payment instrument must be made. One (1) copy of the penalty payment instrument is placed in the casefile, one (1) copy is sent to fiscal, and one (1) copy remains in OSH Compliance for auditing purposes.
 - vi) OSHAExpress screens reflecting penalty payments must be printed and kept in the Penalty Payment Book.
 - vii) Payments are entered in a spreadsheet and totaled at the end of the process to ensure that the total corresponds to the OSHAExpress printout.
 - viii) A memo addressed and delivered to the agency's fiscal branch lists payments received.
 - ix) Copies of the check are placed in each casefile appearing in the memo, placed in the penalty book, and retained for the monthly Audit Report.
 - x) After penalty payments are balanced in OSHAExpress, the spreadsheet, the memo, and the original payment instruments are delivered to fiscal.
 - xi) A copy of the check and memo is scanned to the OGC.
- C) **Auditing.** The accounting is audited monthly. The penalty instruments are matched to the memo and the penalty logbook.
- D) **Adjustment to Payments.**
- i) When the written amount on the payment instrument is incorrect or differs from the amount referenced in the accompanying correspondence, the payment instrument is returned to the employer with a request for new payment. Before returning the payment, void the existing payment by crossing through it on the penalty log sheet, initial, and date. When feasible, contact the employer prior to returning.
 - ii) When the payment instrument is unsigned, KY OSH will return the payment to the employer.

iii) When an employer mistakenly makes the payment payable to a KY OSH official by name, the payment is returned to the employer with a request to make payment to the KY State Treasurer.

E) **Incorrectly Dated or Insufficient Funds.** Payment instruments returned to the KY OSH office due to insufficient funds are returned to fiscal.

F) **Endorsing Payments.** All payment instruments must be endorsed as:

FOR DEPOSIT ONLY
KENTUCKY STATE TREASURER

G) **Depositing Payments.** All payments must be kept in the safe in OSH Compliance and, unless otherwise indicated, transmitted monthly in accordance with the procedures established in this chapter.

H) **Refunds.**

i) Prior to Processing. When a refund is due prior to processing, a KY OSH representative must return the erroneous payment instrument to the employer with a letter explaining the overpayment and requesting a correct amount.

ii) After Processing. When a refund is due after the agency's fiscal branch has processed the payment, the administrative staff drafts a refund letter to the agency's fiscal branch to set up a vendor code. KY OSH must send the employer a letter with the refund check.

I) **Payments Received by the Office of General Counsel.** Payments received by the OGC are stamped the date received and retained in its safe until transferred to OSH Compliance for processing.

V) **Debt Collection.**

A) **Initial Notification.** KY OSH notifies employers penalties are due and informs them of KY OSH's debt collection procedures prior to assessing any applicable delinquent charges.

i) Time Allowed for Payment of Penalties. The date when penalties are due and payable depends on whether or not the employer contests the citation(s).

(a) *Uncontested.*

(1) When citations and/or proposed penalties are uncontested, the penalties are due and payable no later than 15 working days following the employer's receipt of the Citation and Notification of Penalty.

(2) In the case of an informal settlement agreement, KY OSH establishes the date payment is due in a letter to the employer.

(b) *Contested.* When the employer contests a citation and/or proposed penalty, the date the penalty is due depends upon the final order.

(c) *Partially*. When part of a citation and/or proposed penalty is contested, the payment due date for the uncontested items is the day it becomes a final order.

- ii) Assessment of Additional Charges. An employer may be assessed additional charges for late payment of penalties in accordance with KRS 338.201(1), KRS 45.239(4), and KRS 45.241, et seq.

B) Notification of Overdue Debt (Dunning Letter).

- i) Uncontested Case with Penalties. When KY OSH does not receive payment within 30 calendar days after the final order date, KY OSH must send a dunning letter to the employer by certified mail. KY OSH will keep copy of the letter in the casefile.
- ii) Contested Case with Penalties. When KY OSH does not receive payment within the period specified in the Review Commission's Order of Settlement or Order of Dismissal, and neither party has filed an appeal, the OGC sends a dunning letter notifying the employer the penalty is due. OGC must retain a copy in the casefile.

NOTE. An employer's notice of contest may not include all assessed penalties. KY OSH may withhold penalty collection of uncontested penalties until the contested penalties are final orders.

- iii) Exceptions to Sending the Dunning Letter. KY OSH does not send a dunning letter when an employer is currently making payments pursuant to an approved payment plan.

NOTE. When an employer enters into a written plan establishing a set payment schedule, but subsequently fails to make a payment by the due date, KY OSH sends a dunning letter to the employer. When an employer fails to respond, KY OSH refers the unpaid portion of the debt for collection.

C) Debt Collection Methods.

- i) Administrative Lien. If an employer ID is not obtained, KY OSH may file an administrative lien pursuant to KRS 338.201.
- ii) Department of Revenue.
 - (a) *Authority*. KRS 338, KRS 45.239(4) and 45.241, et seq., authorizes the Department of Revenue to collect delinquent debts owed the Commonwealth. This may include seizure of property or rights to property, real and personal; attachment of funds held by a bank; wages; and the seizure and sale of any real estate owned.
 - (b) The Department of Revenue may file a Notice of State Lien on property. This lien may encumber all real and personal property owned now or acquired after the filing of the lien. Credit reports may display this lien. Any tax refund(s) or other monies owed to the employer by the Commonwealth may be diverted to the outstanding debt.

- (1) The Department of Revenue may add a 25% percent collection fee to the total debt amount to defray the cost of collection.
- (2) When the Revenue Cabinet cannot collect a penalty, KY OSH must forward the casefile to the OGC for lien consideration under KRS 338.201.

D) Uncollectible Penalties.

- i) When KY OSH cannot collect penalties, regardless of action taken, KY OSH updates the system to reflect the most recent action. In bankruptcy cases, the casefile is referred to the OGC.
- ii) All attempts to collect payment must be documented in the casefile.