

WHAT TO EXPECT WITH OSHA INSPECTIONS

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WELCOME
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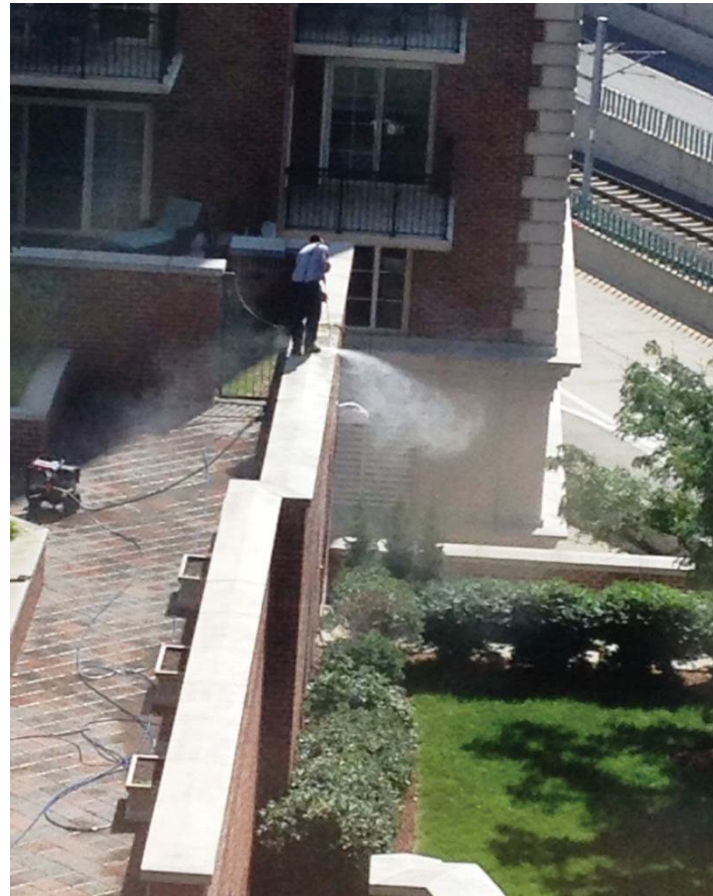
OSHA's Authority

- OSHA regulates employers having one or more employees.
- Only OSHA (and state equivalent agencies) has the power to penalize.
- Employees have no private right of action.
- Unions cannot file “charges” or “complaints.”
- Unions and disgruntled employees may allege to OSHA that a violation has occurred, however, and OSHA will follow-up, keeping the complainant anonymous.

OSHA's Authority, continued

- Safety Standards, such as fall protection, machine guarding, forklifts and personal protective equipment.
- Health Standards (often performance based, can include permissible exposure limits)
- Injury and Illness Recordkeeping.
- General Duty Clause: Each employer . . . shall furnish to each of his employees . . . a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Violating a Safety Standard



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State OSHA Programs

- 21 states have safety and health standards and agencies through “delegated authority.”
- States standards must be at least as strict as federal OSHA standards.
- State enforcement is in lieu of Federal enforcement.
- Several states (especially Cal-OSHA) are more strict.

Potential Penalties

- Willful: Up to \$70,000 for each violation
- Serious: Up to \$7,000 for each violation
 - A serious violation is deemed to exist if there is a substantial probability that death or serious physical harm could result
- Other-than-Serious: Up to \$7,000, but typically under \$1,000 per violation.
- Failure to correct violation after abatement date: \$7,000 per day.
- Violation of posting requirements: \$1,000
- Willful violation causing employee death and false statements may be criminal.

Repeat Violations

- First Repeat in five years = 5x the original penalty (large employers >250 employees)
- Second Repeat = 10X(multiplier of 5 or 10 times the original penalty)
- Repeat penalties are lower when underlying citation is “Other”
- Caution: Will OSHA consider a 2nd Repeat to be Willful?

Repeat Citations

- Not restricted to the facility where the violation was observed.
- “Repeats” may be issued to
 - A. Other facilities of the same company (even in different industries).
 - B. Other facilities of a parent corporation.
 - C. Facilities of subsidiaries owned by a common parent.

Repeat Citations Ramifications

- Automobile manufacturers (100+ facilities)
- Machine shop with facilities in six states
- Multi-state utility company (coal-fired power plants, wind farms and water works)
- Companies sometimes settle quickly without understanding ramifications of repeats, because
- OSHA frequently offers a 30% penalty reduction for non-negotiated settlements.

The Willful Classification

- Intentional disregard of, or plain indifference to, the requirements of the OSH Act or a standard.
- Commonly issued when there has been a fatality or hospitalization of three or more workers.
- In such instances, notice must be given to OSHA within 8 hours by the employer (not the police or coroner).
- Willful + Fatality = automatic consideration for criminal referral to DOJ.

OSHA Penalty Strategy Under the Obama Administration

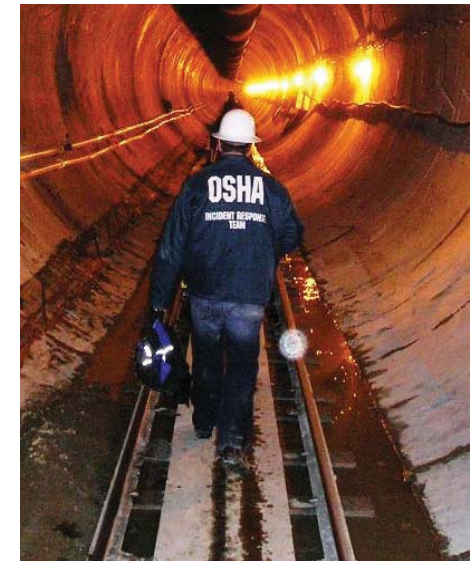
- OSH Act penalty scheme stagnant for over 20 years.
- Congress failed to pass legislation increasing penalties in past four years.
- DOL leadership has mandated multiple citations for the same violative condition.
- Where one Serious Citation might have been issued, three or four are now written.
- Repeat Citation “lookback” extended from three to five years.
- More aggressive strategy on Willful Citations.

Anatomy of an OSHA Inspection

- Compliance Safety and Health Officer (CSHO) – Safety
- Sometimes, an Industrial Hygienist (IH or CIH) – Health
- Inspections last one day to six months.
- Fatality cases usually take six months.
- Photographs, videotape.
- Samples of noise levels and air contaminants are possible with a health inspection.
- Interviews of supervisors and hourly employees.

When Does OSHA Inspect?

- Imminent danger investigations
- Fatality/catastrophe investigations
- Complaints
 - Formal complaints trigger inspections
 - Otherwise fax or telephone inquiry, where possible
- Program Inspections
 - National and local emphasis
 - High illness or injury rates



Employer Rights in Inspection

- May request a warrant (to be discussed)
- An employer representative may accompany inspector
- Can receive copy of complaint
- Trade secrets are protected, if they are identified
- Can take a short period to get the proper personnel in place

OSHA Rights in an Inspection

- May take pictures and videotape
- May take environmental samples
- May speak privately to employees
- May view facility and any document required to be kept by regulation (subject to warrant and subpoena)
- No advance warning
- An employee representative may accompany inspector

When OSHA Is At The Door

- Ask for credentials.
- Put the Inspector in a Conference Room.
- Assemble your team.
- During the opening conference, ask the reason for the inspection.
- Determine what the inspector wants to see.
- Notify the inspector of trade secrets and proprietary processes.

Inside the facility. . .

- Assign a closed mouth person to accompany the inspector.
- Never leave the inspector alone (one exception).
- If there are multiple inspectors, ensure each is accompanied.
- Chart a course that matches the inspector's area of interest (while avoiding as many other areas as possible).

Inside the facility . . .

- Anything the inspector sees is subject to a citation, even if not part of the planned inspection.
- Require personal protective equipment, if you require it for employees.
- No wandering, no browsing.
- Let the inspector talk to employees, but you can object if it interferes.

Inside the facility . . .

- Anything the inspector says is calculated to learn something.
- Chat only about the weather (if not relevant to your operations) or, better yet, don't talk much at all--Don't lie!
- Maintain an arms length relationship--they are trained to be nice.
- Take duplicates of pictures and samples.
- Do not admit a violation or attempt to explain it.
- Correct the violation.

Inside the facility . . .

- Prepare supervisors and managers for interviews.
- Serve as a witness/helper during interviews of supervisors and managers.
- Prepare hourly employees for interviews (when possible).

Upon Receipt of Citation

- Post the Citation.
- Evaluate defenses.
- Schedule an Informal Settlement Conference.
- Consider a contest if there is no violation even if the penalty is small to avoid future repeats.
- Consider consultation with an attorney.

Citations – The First 15 Days

- Date of receipt starts a 15 working day clock.
- Within 15 working days:
 1. Opportunity to settle with the Area Director at an Informal Settlement Conference.
 2. Notice of Contest must be filed by end of period.
 3. Failure to settle or file Notice of Contest – case over.
- Notice of Contest triggers a formal administrative process. (Settlement is still possible)

What Can Your Company Accomplish at an Informal Settlement Conference?

- Negotiate a settlement with the Area Director.
- Convince the Area Director to withdraw some or all of the Citations.
- Reclassify Serious Citations to “Other.”
- Reclassify Repeat Citations to Serious.
- Reclassify Willful Citations to Serious or Repeat.
- Convince the Area Director not to refer a Willful Citation to DOJ.

Cost/Benefit Analysis on the Use of Legal Counsel

Husch Blackwell can *Triage* your Citations within 24 hours to answer these questions:

- Should we just pay the penalty and move on?
- If I go to an Informal Settlement Conference, how much can I expect to accomplish?
- Should I attempt to reclassify some of the citations?
- Will OSHA withdraw some of the citations?
- How low will OSHA go (on the penalty)?
- What are my chances of success in litigation?

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Using Legal Counsel (continued)

- Historically, Husch Blackwell's strategies achieve a 50% to 100% penalty reduction (unless we recommend that you pay and move on).*
- We can represent your company at the Informal Conference (usually for less than \$2,500), or
- We can prepare talking points for you to negotiate at the Informal Conference.

*Past performance is no guarantee of future success.

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Miscellaneous (but important) Details

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OSHA Inspection Warrants

- Solicitor of Labor must petition a federal judge.
- State plans – State AG's office petitions a state judge.
- Warrants obtained *ex parte*, so employer always loses.
- The Solicitor's office is so busy that a two week delay is to be expected.
- What happens in two weeks?
- Approximately 25% of the time, the agency moves on (no warrant obtained).

Common Myths

- OSHA may force an employer to make an hourly worker available for an interview.
- There is a mold standard.
- An employer cannot be cited for a contractor's violations.
- Very small employers must keep OSHA 300 Logs.
- Prompt abatement is an admission of liability.

Contractors

- OSHA may cite your company for exposure to a *contractor's* employees if your company:
 - Creates the hazardous or unsafe conditions;
 - Controls the area of exposure;
 - Exposes the contractor's employees to an unsafe condition; or
 - is able to correct a violation.(even if your employees are not exposed)

Contractors (continued)

- The employer creating a hazard must fix it if it has authority. If not, it should notify the employer who does and take steps to minimize the hazard.
- Use a contract to establish your contractor's responsibility and accountability over safety.
- Require your contractors to indemnify against OSHA penalties.
- Examine your contractors' citation track record before retaining them.

Anonymous Complaint Process

- OSHA's "Fax Complaint" Policy.
- Five to ten days for employer to respond.
- Employer knee-jerk reaction – tell the duty officer...
 "We know who filed the complaint," or
 "Yes, we've heard that complaint recently from two of our people."
- Best advice – Say nothing about the suspected whistleblower, *even internally*.

OSHA's Whistleblower Protections

- Specially trained OSHA investigators.
- More talented than discrimination agency investigators or NLRB agents.
- Trained under other statutes as well (SOX).
- SOL may file a civil action in federal court.
- Remedies: reinstatement, backpay, “exemplary damages” (2x), and pre- and post-judgment interest. (No civil penalties, unlike MSHA)

Lean and Safety

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Discussion Topics

- **Lean Concepts Related to Safety**
 - Employee Involvement
 - Employee Communication
 - 5S and Warehouse Discipline
 - Preventive Maintenance
 - Continuous Improvement

Employee Involvement

- **Kaizen Events**
 - Cross functional teams
 - “Reduce Safety violations by 50%” vs. “Reduce LTA by 50%”
- **Accident and Injury Follow Up**
 - Root Cause Identification
 - Remediation
 - Communication
 - Led by plant floor
- **Everyone should be visibly involved in Safety**
 - Rank and file
 - Supervision
 - Accounting
 - HR and Legal

Employee Communication

- **Safety Metrics and Goals**
 - Employee participation in development
- **Plant Signage**
 - Billboard style
 - Frequent updates
- **Formal programs**
 - DuPont STOP (trademarked program)



Employee Communication

HEALTH & SAFETY SCOREBOARD™				
DEPARTMENT	LOST HOURS THIS MONTH			YEAR TO DATE
	ILLNESS	ACCIDENT	TOTAL	
PRESSROOM	122	20	132	898
BINDERY	36	0	36	426
FINISHING	72	8	80	68
WAREHOUSE	0	4	4	
PRE-PRESS	140	12	152	
TOTAL	360	44	404	



HEALTH & SAFETY SCOREBOARD™				
DEPARTMENT	LOST HOURS THIS MONTH			YEAR TO DATE
	ILLNESS	ACCIDENT	TOTAL	



5S and Warehouse Discipline

- 5S = Clean and Organized Workplace
 - Slips and falls
- Standardized Processes
 - Process is followed the same way every time
- Employee Accountability



5S and Warehouse Discipline



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Preventive Maintenance

- Properly maintained machinery requires the same discipline as an effective safety program
- Computerized Reporting System
 - Formal
 - Improves Communication
 - Relates well to engineering or maintenance mindset

Defining Best-In-Class Performance

Definition of Maturity Class	Mean Class Performance
Best-in-Class: Top 20% of aggregate performance scorers	- 90% OEE - 0.2% Repeat Accident Rate - 0.05 Injury Frequency Rate - 2% Unscheduled Asset Downtime
Industry Average: Middle 50% of aggregate performance scorers	- 85% OEE - 2.4% Repeat Accident Rate - 0.9 Injury Frequency Rate - 6% Unscheduled Asset Downtime
Laggard: Bottom 30% of aggregate performance scorers	- 76% OEE - 10% Repeat Accident Rate - 3.0 Injury Frequency Rate - 14% Unscheduled Asset Downtime

Source: Aberdeen Group, September 2010

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Continuous Improvement

- Result should be zero lost time accidents
- Fix vs. Improve
- DMAIC Model
 - Define
 - Measure
 - Analyze
 - Improve
 - Control

What Will OSHA Be Looking for if it Inspects My Facility?

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The CSHO Will Know Your Citations History (and so should you)

- OSHA keeps a database of your citations, company-wide. Your subsidiaries and affiliates may be included.
- The database is publically available.
- To locate your history, use our handout, “Obtaining a History of Your Company’s OSHA Citations.”
- Your past citations should be on a “compliance audit checklist” for all company facilities.

What are the 10 Most Frequently Cited Standards in my Industry or Business Sector?

- OSHA keeps a database of the standards most frequently violated, categorized by Standard Industrial Classification Codes (“SIC Codes”).
- Diligent CSHOs will examine the list in your SIC Code before arriving at your plant.
- The lists are publically available.

Your Industry's "Top 10 List" (continued)

- Your Safety & Health team should examine the list for your industry or business sector annually, adding those standards to a "compliance audit checklist."
- To locate the Top 10 list for your industry or business sector, use our handout, "Obtaining a List of the 10 Standards Most Frequently Cited by OSHA in Your Industry."

Injury and Illness Logs

- OSHA's leadership believes there is widespread cheating by employers.
- In our experience, there is widespread confusion, not cheating.
- 300 Logs and Workers' Compensation files are routinely examined during all inspections.
- Citations and penalties are on the rise.

Temporary Workers

- In 2012, 11.5% of the 4,693 workplace fatalities were suffered by temporary workers.
- Enforcement Initiative launched in April, 2013.
- Temporary workers defined as “those who are paid by a temporary help agency, whether or not their job is temporary.”
- CSHOs will interview some of your temporary workers about their training, the hazards in their jobs, and their injury and illness history.

Temporary Workers (continued)

- The “primary employer” is responsible for the safety of temporary employees if it directly supervises the employee’s work.
- Temporary employees require training.
 - Even temporary employees that are trained already often need site-specific training.
- Temporary employees must be included on the illness and injury log if they are supervised by the facility.

Hazardous Chemical Release Local Emphasis Program

- November 12, 2013 – New program launched in Missouri, Kansas and Nebraska.
- Targets companies which have had a site-specific chemical release exceeding 100,000 pounds.
- 14 specific chemicals are covered.

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OSHA's Local Emphasis Programs in Missouri

- Bloodborne Pathogens
- Grain Handling Industry
- Recycle & Scrap Material Hazards (General Industry)
- Powered Industrial Trucks (Construction & General Industry)
- Missouri Workers Compensation

OSHA's Local Emphasis Programs in Missouri (continued)

- Amputations
- Region-wide Problem Solving Initiative on Falls, Scaffolds, and Electrocutions from Overhead Power Lines in Construction
- Work Places with Noise and Respiratory Hazards
- High Hazard Work Places Safety Inspection

OSHA'S Local Emphasis Programs in Southern Illinois

- Building Renovation-Rehabilitation
- Fall hazards in Construction and General Industry
- Powered Industrial Vehicles
- Grain Handling Facilities
- Tree Trimming Operations

10 Most Frequently Cited OSHA Standards

1. Fall protection, construction (29 CFR 1926.501)
2. Hazard communication standard, general industry (29 CFR 1926.451)
3. Scaffolding, construction (29 CFR 1926.451)
4. Respiratory protection, general industry (29 CFR 1910.134)
5. Control of hazardous energy (lockout/tagout), general industry (29 CFR 1910.147)

10 Most Frequently Cited OSHA Standards (Continued)

6. Powered industrial trucks, general industry
(29 CFR 1910.178)
7. Electrical, wiring methods, components and equipment, general industry (29 CFR 1910.305)
8. Ladders, construction (29 CFR 1926.1053)
9. Machine guarding, general industry
(29 CFR 1910.212)
10. Electrical systems design, general industry
(29 CFR 1910.303)

Strain Relief (The Inspector's Low-Hanging Fruit)



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Be Careful Out There



Questions?

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