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OSHA Update and Inspections: Avoiding and Minimizing Citations



Presented by:

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The College
of Labor and
Employment
Lawyers



- Over 200 OSHA fatality cases; and hundreds of other types
- Thought leader, speaker, author, and trainer
- Editor, ABA's *Occupational Safety and Health Law* treatise
- Chambers
- College of Labor and Employment Lawyers
- BTI Client Service All-Star



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Today's Agenda

- OSHA Update
- What is OSHA?
- Reporting
- OSHA Inspection Overview
- Analyzing OSHA Citations
- Contesting an OSHA Citation

OSHA Update

- More inspections
- Higher penalties
- Anti-grouping / Instance-by-Instance Policies
- Severe Violator Enforcement Program
- Walkaround Rule
- Heat Illness Rule (anticipated)
- Impact of the Election?

Key Concepts

- OSHA is not law enforcement, so no *Miranda* rights for employers
- OSHA can only inspect with a warrant or consent (with rare exception)
- Employers must know what OSHA can and cannot do
- Inspections are opportunities to show OSHA all the employer did to avoid an incident
- OSHA's focus is to establish violations
- Employers focus is to avoid or minimize citation items
- Both should be focused on worker safety
- The process should be respectful even in disagreement

OSHA Introduction

Occupational Safety and Health Act of 1970

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.



OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION

OSHA[®]

**Occupational Safety
and Health Administration**

What is OSHA?

- Occupational Safety and Health Act of 1970
- Compromise legislation that passed both chambers and was signed into law by President Nixon
- Key compromise was the creation of the Occupational Safety and Health Review Commission to review contested citations
- Very different approach to the National Labor Relations Board, which reviews its own enforcement actions
- OSH Act has the general duty clause and enabled OSHA to adopt and issue specific standards
- OSHA created to conduct inspections and issue citations
- Statute does not require a warrant for a OSHA inspections, but SCOTUS issued an early decision saying the 4th Amendment requires either a warrant or consent for an inspection

OSHA's Continuing Mission

- OSHA and its state partners, coupled with efforts of employers, safety & health professionals, unions and advocates, have helped **dramatically reduce** workplace injuries and illnesses.
- Worker fatalities in America are **down**—on average, from 38 workers a day in 1970 to **15** a day in **2022**.
- Worker injuries and illnesses are **down**—from 10.9 incidents per 100 workers in 1972 to **3.7** per 100 in **2022**.

How OSHA is Organized



- Region 1: Boston
- Region 2: New York
- Region 3: Philadelphia
- Region 4: Atlanta
- Region 5: Chicago
- Region 6: Dallas
- Region 7: Kansas City
- Region 8: Denver
- Region 9: San Francisco
- Region 10: Seattle

Employer Duties

FEDERAL OSHA

Section 5(a)(1) General Duty Clause – Employer must provide employees a place of employment free from **recognized** hazards that are causing or are likely to cause death or serious physical harm (and feasible means of abatement exist).

Section 5(a)(2) – Employer must comply with applicable occupational safety and health standards.

Why OSHA Conducts Inspections

- **Programmed**

- Special emphasis programs (NEPs or REPs)
- Site-specific targeting

- **Unprogrammed**

- Complaints
- Referrals
- Reports
- Imminent danger



Reporting to OSHA

Reports by Employers – Required!

- Fatality
- Hospitalization (in-patient for treatment)
- Amputation
- Loss of an Eye

All must be work-related!

8 hours for fatality; 24 hours for all others

Reporting Issues

- Amputation
- Hospitalization
- Work-related

Only report if you must report!

Amputation? - New Rule!



Hospitalization

- In-patient hospitalization for treatment
- But, what if you don't have the medical information you need to make a determination?
- How do we handle heart attacks or strokes?

Work-related

- What if the worker was not actually engaged in work at all when he collapsed?
- Compare 2 cases from 2022

Preparing For An OSHA Inspection

Advance preparation for what to do if OSHA shows up will help you minimize or avoid citation items, even if tragedy strikes with a fatality or hospitalization.

OSHA Inspection Topics

- Preparing for inspections
- Inspection overview and timeline
 - Arrival and opening
 - Walkaround
 - Initial document requests or subpoenas
 - Interviews
 - Follow-up and closing conference
- General “rules” for inspections
- Top 10 mistakes
- Legal privileges
- Rapid Response Investigations (or RRIIs)

No “Miranda” style warning!

- OSHA is not a law enforcement agency
- It does not have to tell employers their rights.
- You should know your rights and responsibilities and also know what OSHA can and cannot do
- Hold OSHA accountable to the law
- And still conduct yourself as if a *Miranda-type* warning was issued – you have a right to remain silent (with some exceptions); and **anything management says can be used against the employer in an OSHA enforcement action**

How to Avoid or Minimize A Citation *and Keep Workers Safe!*

- Rule
- Training
- Compliance
- Enforcement

Before OSHA Arrives (plan ahead)

- Access - warrant or controlled consent
- Operations - pause or limit during inspection
- Team – members and leadership
- OSHA logs – last 5 years upon request
- Other key documents - safety program, training materials, compliance, and enforcement
- Accident report – internal, external, or both
- OSHA counsel and protection of privileged communications and analysis
- Pre Walk-around – look for any possible hazards or violations that might be seen by the CSHO during the walk-around

Management's Role

- Help the company show OSHA it has complied with applicable standards or its general duty to maintain a workplace free from recognized hazards.
- Management works with the safety team and their in-house and outside legal counsel.
- The Safety and Legal teams can guide management on how to best present the company's safety and compliance and the four factors that help avoid or minimize citations.

CSHO May Say . . .

- “I just need to take a quick look around. It won’t take long, and I really need to just get this done.”
- “I don’t want to be here any longer than I have to be. We both have our process and mine says I have to take a look around and just talk to a few people here. The quicker we can start, the quicker I will get out of here!”
- “Listen. I’m from the government. It is my job to help folks like you. If there are any safety issues, I can work with you to help you address them and you will look great to your safety team.”

How to Say “No” to OSHA

“Thank you for coming. We appreciate all you do and are happy to work with you during this inspection. But, I can’t get started with anything until we go through our protocol. It starts with me calling our safety team. Can you wait a few minutes while I get that process started?”



OSHA Inspection Overview and Timeline

OSHA On-site Inspection Overview

- CSHO arrives
- Opening conference
- Walk-around
- Document requests / subpoena
- Interviews of employees and supervisors+
- Follow-up activity
- Closing conference
- Citation or not
- Informal settlement conference
- OSHRC contested citation litigation & appeals

Timeline of an OSHA Inspection

0 to 3 weeks

- Opening / walk-around / initial closing
- Initial document requests and witness interviews

3 weeks to 2 months

- CSHO's internal review with AAD
- Follow-up document requests / subpoena
- Follow-up interviews
- Third-party interviews (former employees and others)

2 to 5 months

- AD internal review; regional administrator and SOL review

5 to 6 months

- Closing conference
- **Hard Deadline - 6 months from the alleged violation to issue a citation or forever barred by the OSH Act**



CSHO Arrival and Opening Conference

CSHO Arrival

- Generally, an CSHO cannot enter a worksite without a warrant or the employer's permission.
- Absent extraordinary circumstances, the employer may require an OSHA inspection to occur during normal business/operation hours.
- The employer has the right to refuse entry if the CSHO does not have a warrant—but is this wise?



Is a warrant warranted or wise?

- If a warrant is issued, woe be to the employer.
 - OSHA is 800 lb. gorilla in the room.
 - Do you really want to get it upset?
 - Unless the fear of an immediate inspection is greater than the fear of an agitated OSHA, it may be the wiser choice to answer to grant permission.

When to Begin?

- An employer may ask the inspector to delay the inspection (up to one hour-ish), pending the arrival of the employer representative.
- The inspector does not have to be allowed on-site to wait. If allowed to wait inside the gate as a courtesy—away from open administrative offices; away from safety office; away from production areas; and away from employee break room.
- If company representative has not arrived within one hour, the Opening Conference can be prolonged by employer questions.

CSHO Arrives / Opening Conference

- Presentation of credentials (not a badge!)
- Introductions; background and experience of CSHO
- Relationship building matters
- Reason for and scope of the inspection
- Address abatement of any lingering hazards
- Limitations on operations
- Discuss walk-around and plans for the initial phase
- Trade secrets, confidential information, sensitive areas
- Confirm CSHO is opening the inspection with the correct employer

A Note About Internal Investigations . . .

- The employer may choose to conduct an internal investigation under attorney-client privilege
- Why? Protect report from disclosure to OSHA and other third parties
- For a report to remain privileged, certain protocols must be followed

A Note About Internal Investigations . . .

- Text messages/emails/documents created before these protocols are put into place – discoverable
- Example: Front-line supervisor sends a text to boss immediately after an accident stating: “We screwed this up. We were in a hurry and did the job without fall protection” – this is discoverable.
- Supervisors need to understand this, and protocols for privileged investigations must be in place in advance

The Walkaround

Walk-around with CSHO

- Limit those who accompany the CSHO
- Limit CSHO access by using a controlled pathway
- Explain basics of operation, not details
- Avoid discussing the incident or alleged exposures
- “Plain view” means
 - No employee interviews; no demonstrations
 - Take the same pictures; ask why if not obvious
- Tip: CSHO must address any hazards or violations in plain view
- Tip: Anything management says can be used against the employer

Walkaround Tips

- The employer can control the path to the injury site and the places the inspector is allowed to go.
- The employer can demand that an employer representative accompany the inspector during the physical inspection.
- Employer may take photographs/video of same items and from same viewpoint as inspector.
- Employer may prohibit an inspector from taking photographs or video due to concerns of trade secrets being disclosed.
- **NEVER LEAVE THE INSPECTOR UNATTENDED.**



Document Requests

Document Requests

- May include
 - OSHA 300s, 300As, 301s
 - Safety Programs
 - Training Records
 - Accident Investigation
 - Witness Statements
- Consider engaging counsel to direct investigation/interviews for privilege

Document Requests

- OSHA Logs (300, 301, 300A) within 4 business hours
- All Other Documents – not typically required without a subpoena
 - Restrictive: only provide what OSHA requests
 - Effective: provide what helps avoid or minimize a citation even if the CSHO did not specifically ask for the document
 - What do we need to show to establish a defense?
- Tracking system
 - Bates numbers to track what was submitted, when, and how
 - Confirm requests in writing (does not have to be formal)
 - Mark all as confidential

OSHA Subpoenas for Docs or Witnesses

- An emerging trend in some OSHA regions and area offices
- Don't panic
- Subpoenas are actually an opportunity to engage with OSHA's counsel directly during the inspection on contested issues, such as scope and privileges
- When would you actually request OSHA issue a subpoena?



OSHA's Interviews of Company Witnesses

Interviews of Non-management Employees



Non-management Employee Interviews

- OSHA has right to “question privately” any employee; employees have right to be questioned privately
- Allow interviews to be conducted on-site, on the clock
- No rule against employer interviewing hourly employees before or after OSHA interview
- Interviews are voluntary, unless OSHA issues subpoena
 - But don't encourage workers not to cooperate with OSHA

Preparing Employees for Interviews

- Why is OSHA here and how the process works
- The particular employee's role and likely discussion points
- Tell the truth!
- Don't speculate
- No individual liability and no job risk
- Interview is voluntary, but encourage participation
- Employee does not have to read or sign CSHO notes
- Remind employee about safety training and company policies
- Don't represent both the company and employees; clear conflict and poor strategy for presenting credible evidence

Interviews – Supervisory Employees



Management Interviews

- Statements by managers/supervisors are binding on employer
 - Employer therefore entitled to have management representative or attorney present
 - Caveat: Some state plans' rules (e.g., Michigan) disallow
 - Typical ground rules
 - No audio or video recording of interviews
 - No signing of statements
- Prepare managers/supervisors who will be questioned
 - Like a deposition, not a conversation
- Lying to CSHO is criminal offense and OSHA will prosecute

OSHA's Interviews of Management

- Managers don't read and don't sign the CSHO's notes
The Jaslyn Johnson Rule!!
- Tell CSHO in advance
- Participate to clarify or explain – be helpful
- Avoid “objecting” or treating as a formal deposition; don't interfere but don't let confusion or lack of clarity stand either
- OK to ask witness questions too; remember this is informal; but be sure you know the answer before asking!
- Have relevant and helpful documents available
- Take pictures of any diagrams drawn or any notes made on documents

Do Not Retaliate

- Section 11(c) of the OSH Act prohibits employers from retaliating against any employee (management or not) for engaging in protected activities, such as
 - Filing a complaint with OSHA
 - Participating in an OSHA inspection
 - Exercising any other rights under the Act

After the Initial On-site Phase

- Follow-up interviews
- Follow-up document requests
- What is OSHA doing that you may not know about? – third party interviews and document requests
- Do you need an expert? – ex., forensic engineering experts can help determine why a structure collapsed
- What else do you need to do? – Don't just wait on OSHA to take action
- Calendar OSHA's 6-month statutory deadline

Closing Conference

Closing Conference

- Compliance Officer will discuss results of inspection
- Ask questions about specific standards being cited, bases for allegations, and classification of the citation
- Don't expect answer as to classification or proposed penalty
- Don't argue; listen
- Don't admit to violations or recognized hazards

Top 10 Mistakes

1. Over-reporting to OSHA
2. Rolling out the red carpet for OSHA
3. Allowing employees to work during the walkaround
4. Plain view hazards during the walkaround
5. Not preparing employees for interviews

Top 10 Mistakes

6. Managers reading and signing CSHO interview notes
7. Rushing the internal investigation and report
8. No discipline for safety violations
9. Not having a compliance program
10. Not participating in an informal settlement conference

Honorable Mention

- Signing on the dotted line of a citation
- Failing to provide abatement certification
- Failing to pay the penalty
- Not keeping OSHA logs updated
- Not including an exculpatory clause in a settlement agreement

Honorable Mention

- Telling OSHA to “get a warrant!”
- Being combative with the CSHO
- Equipment demonstrations
- Calling OSHA just before the six-month deadline expires to check the status
- Not producing logs within four hours

BONUS “MISTAKE”

Failing to Train Managers and Staff on
What to Do if OSHA Shows Up



Rapid Response Investigations (RRI)

Rapid Response Investigation (RRI)

- Alternative to an OSHA on-site inspection
- Employer is expected to conduct its own investigation into the work-related incident and share its findings with OSHA
- Generally does not involve an onsite inspection of the workplace, but one may be initiated after the employer's response or if the employer does not respond
- **Tip: Don't use OSHA's "Non-mandatory Investigative Tool"**
- Narrative letter: company's safety programs and applicable rules; employee training; compliance efforts; disciplinary actions; and immediate and sustained corrective actions

DIRTY STEEL-TOE BOOTS PODCAST

A podcast for safety professionals and in-house counsel responsible for workplace safety and health legal issues, including OSHA inspections, citations, litigation, and regulatory actions.

Ep. 1: Podcast Launch and 4 Starter Tips

Ep. 2: Who Is OSHA?

Ep. 3: Why Is OSHA Here?

Ep. 4: Corporate Safety Culture w/ VP of EHS, Mark Ligon

Ep. 5: A First Look at OSHA's New ETS

Ep. 6: Florida's New Law Restricting Employer Vaccine Mandates w/ Dee Anna Hays

Ep. 7: The SCOTUS Decision on OSHA's ETS w/ Eric Hobbs

Ep. 8: Who is the DOL Solicitor? w/ Jaslyn Johnson

Ep 9: OSHA's NEP on Heat Hazards w/ Karen Tynan



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LINKEDIN POSTINGS ON OSHA TOPICS

- **Inspections**
- **Citations**
- **Informal settlement conferences**
- **Contesting citations**
- **Litigating citations**
- **OSHRC**
- **OSHA regulatory updates**
- **Enforcement trends**
- **Policy and people**



“These posts are one of the most useful things I see on Linked In and I am updating my manager training on inspections yet again.”
– Corporate Safety Director

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