DEALING WITH OSHA INSPECTIONS AND CONTESTING OSHA CITATIONS

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HAND ARENDALL

I. WHAT TO DO BEFORE OSHA ARRIVES

A. Preventive Measures to Decrease Citation Risks.

Preparation to reduce the risk of citations should begin before OSHA ever arrives. Of course, the best way to avoid inspection is to have reduced injuries and good employee morale. In fact, a good safety and health record makes sound business sense by reducing worker=s compensation costs and other losses. Preparing for an actual inspection is seldom a recommended motive for operating an effective and self-supporting safety program; but there are things that can be addressed to help a company fare better in an inspection. Depending on the company=s confidence in its site management and site managers, an inspection policy should be implemented. This policy should explain whether a company will require a warrant, how management will participate and document the inspection as it progresses, and when to proceed with the actual walk-through. Opening conferences, correction procedures, and closing conference information should all be addressed. The idea is to develop a method of dealing with inspection that moves smoothly throughout the process without appearing to be impersonal or deceptive to the compliance officer.

B. Anticipating An Inspection -- Always Be Prepared.

Because many OSHA inspections are triggered by employee complaints and because aggravated employees tend to complicate and deepen inspections, it is extremely important to consistently apply safety programs and discipline for non-compliance to safety issues. In fact, companies showing effective follow-up evidence for employees who deviated from company policies, including managers, can often emerge from inspections without citations. A cooperative atmosphere with employees, sound administration of safety policies and a consistent

documentation of disciplinary action will probably do more to prevent accidents and reduce injuries and citations than any other specific action. Because many of the OSHA regulations are unclear and subject to interpretation, a company should read and understand the regulations as they apply to that specific company. The company should also document its rationale behind specific compliance efforts. In the event of a discrepancy with the compliance officer, this action will enable the company to show that due diligence was taken when developing their programming for compliance.

II. HOW TO SURVIVE AN OSHA INSPECTION

A. Types Of OSHA Inspections

It is important first to know what type of inspection is being conducted, because the permissible scope of the inspection may vary depending on the type of inspection.

1. Programmed Inspections.

   Programmed inspections are scheduled according to a national scheduling plan, using objective, neutral criteria. Work sites are randomly chosen for inspection according to OSHA=s special emphasis programs to promote specific safety and health issues.

2. Unprogrammed Inspections.

   Unprogrammed inspections are scheduled in response to a report of specific safety or health violations at a particular work site.

   (a) Imminent Danger - any condition or practice that creates a danger which could reasonably be expected to cause death or serious physical harm.

   An inspection will be scheduled the same day a report of imminent danger is received, if possible, and not later than the employer=s next working day.

   (b) Fatality - an employee death resulting from an accident or illness caused by a workplace hazard.

Employers are required to report the occurrence of a fatality/catastrophe within 8 hours after the occurrence.

The hospitalization of 3 or more employees as a result of an accident or illness caused by a workplace hazard is treated as a fatality.

3. Complaints or Referrals

Complaints or referrals are notices of a hazard or violation believed to exist in a specific workplace.

A complaint may be filed by any employee of the company.

NOTE: Section 11(c) of the OSHA Act states that Ano person shall discharge or in any manner discriminate against any employee@ for filing a complaint or exercising any other right afforded by the Act. An employee=s remedies under this section include rehiring or reinstatement to his former position with back pay.

Referrals are generally non-employee reports.

The 11th Circuit has limited OSHA complaint inspections to the scope of the complaint. Donovan v. Sarasota Concrete, 693 F. 3d 1061 (11th Cir. 1982).

B. The Employer=s Rights And Obligations Prior To An Inspection

1. Advance Notice of Inspection

(a) Generally, the employer will not receive advance notice of an inspection, because in most cases it is a crime to give advance notice of an OSHA inspection.

(b) However, notice is permitted in limited circumstances, such as:

(1) Where there is an apparent imminent danger and the inspection would be most effective if conducted after regular working hours;

(2) Where special inspection preparation is necessary;

(3) Where notice is needed to ensure the presence of the employer, employee representative, or other personnel needed to conduct the inspection; or

(4) Whenever the OSHA Area Director determines that giving

advance notice would enhance the effectiveness of an inspection.

2. Warrant Requirement

(a) OSHA must have a warrant to conduct an OSHA inspection, and an employer has a constitutional right to insist upon a search warrant, based upon probable cause, as a prerequisite to an OSHA inspection. Marshal v. Barlow=s, Inc. 436 U.S. 307 (1978).

(b) OSHA may obtain a warrant by:

(1) Presenting specific evidence of an existing violation of the OSHA Act at the workplace, or

(2) Showing that the workplace was selected in accordance with OSHA=s general scheduling plan under neutral criteria.

(c) Typically, OSHA will not obtain a warrant, but will request voluntary cooperation with its inspection.

3. Subpoena Requirements

(a) The Eleventh Circuit Court of Appeals requires OSHA to obtain a subpoena to review any employer document, including documents required to be maintained by the OSHA Act. Brock v. Emerson Electric Co., 834 F. 2d 994 (11th Cir. 1988).

(b) The subpoena must be Asufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.@ Id. at 997.

4. Opening Conference

(a) The OSHA inspector must identify himself and will generally ask for voluntary cooperation with the inspection.

(b) The inspector should identify the purpose of the inspection, and whether it is a programmed or unprogrammed inspection.

(c) The employer should try to obtain as much information from the inspector before agreeing to the inspection.

(d) If the inspection is based upon an employee complaint, the employer is entitled to receive a copy of the complaint, but is not entitled to know the identity of the employee filing the complaint.

(e) The employer should ask specifically what the inspector wants to see to establish the scope of the inspection prior to its commencement.

5. Calling a Lawyer

(a) Informing the company=s lawyer early in the inspection process is vital to protecting the interests of the company.

(b) After the opening conference, but before consenting to the inspection, it is a good idea to call the company=s lawyer and relay as much information as possible regarding OSHA=s request for the inspection. Any documents (such as a complaint or warrant) should be faxed to the lawyer immediately.

C. The Employer=s Rights And Obligations During The Inspection

1. Accompanying the Inspector

(a) The employer=s representative has a legal right to accompany the inspector during a site inspection.

(b) The employer should designate a representative (preferably the site supervisor) for each work site who will accompany the OSHA inspector.

(c) All other employees at the work site should be instructed who the appropriate employer representative is and that they are not authorized to consent to an OSHA inspection on behalf of the employer. All OSHA inquiries should be directed to the designated employer representative.

2. Employee Representation

(a) The OSHA Act provides that employee representatives must be given the opportunity to also accompany the inspector.

(b) However, the Act does not require that they be compensated during the time that they are accompanying the inspector.

3. Taking Concurrent Sampling

The employer=s representative has the right to duplicate the inspector=s investigation, and should make it a point to do so, including taking his own photographs, measurements, and extensive notes of the investigation.

4. Inspector=s Questions

(a) The employer has no legal obligation to answer OSHA=s questions, but it is generally a good idea to cooperate with the OSHA inspector.

(b) The employer=s representative must be mindful that any statements or answers made by him will be binding on the company, and he should avoid any answers that might be taken as an admission of non-compliance or a violation of the OSHA Act.

(c) The representative must also be mindful that giving false information to an OSHA inspector is a federal crime.

(d) In answering questions, the employer representative should not volunteer any additional information that is not requested by the OSHA inspector.

(e) It is generally a good idea to contact the company lawyer before answering any question. Since interviews of supervisory personnel are considered interviews of the company, the company may demand to have its lawyer present.

5. Employee Interviews

(a) OSHA may interview non-supervisory employees of the company, but has no absolute right to do so on company time.

(b) The employer may request to be present, but has no right to be.

(c) The employee may request to have an attorney present during the interview.

D. The Employer=s Rights And Obligations After The Inspection

1. Closing Conference

(a) Generally, the OSHA inspector will conclude the investigation with a closing conference, indicating the tentative results of the inspection.

(b) The employer=s representative should take careful notes of all alleged violations.

2. Challenging a Citation

(a) If a citation is issued, the employer will have 15 working days from

the receipt of the citation to notify the OSHA Area Director in writing of its intent to contest the citation.

(b) Failure to contest in writing within 15 working days will result in the citation becoming final.

(c) OSHA will generally request an informal conference to negotiate a settlement agreement. The company=s lawyer may participate in the informal conference.

3. Defenses

Both procedural and substantive defenses are available in contesting a citation. Procedural defenses involve the validity of the enforcement procedures of the Secretary and the Commission and the adjudication of contested cases. Substantive defenses include a challenge to the Secretary's prima facia case by disproving one of the elements such as application of the wrong standard, application of a standard inapplicable to the employer or no employee access to the hazard. The following is a list of defenses which can be raised in a contest, if appropriate:

(a) citation of the wrong employer;

(b) *res judicata*;

(c) improper promulgation of the standard;

(d) vagueness of the standard;

(e) no hazard exists;

(f) allocation of responsibility by agreement;

(g) violation not within the scope of employment;

(h) **unpreventable employee misconduct;**

(i) concerted employee refusal to comply;

(j) impossibility / infeasibility of compliance;

(k) inconvenience;

(l) greater hazard posed by compliance;

(m) technological infeasibility;

(n) economic infeasibility;

(o) harassment or selective enforcement;

(p) estoppel;

(q) reliance;

(r) emergency;

(s) change of conditions.

4. Administrative and Judicial Process

(a) After notice of contest, the Solicitor of Labor will file a complaint with the Occupational Safety and Health Review Commission.

(b) The employer must file an answer to this complaint.

(c) Discovery is conducted similar to a regular court case with the following exceptions:

- Depositions may only be taken by consent or by permission of the administrative law judge.
- The employer is not entitled to know the identity of any non-supervisory informants.
- The employer cannot obtain information on OSHA=s deliberative process.

(d) A hearing will be held before an Administrative Law Judge.

(e) The Administrative Law Judge will issue findings of fact and conclusions of law.

(f) The losing party may file written Exceptions.

(g) The Occupational Safety and Health Review Commission will review the findings of fact and conclusions of law, giving deference to the Administrative Law Judge.

(h) The losing party may petition to the appropriate federal court of appeals for judicial review.

(i) In certain circumstances, OSHA may obtain an injunction from a federal district court, without going through the foregoing administrative procedures, where there is an imminent threat of serious injury or death.

III. MULTI-EMPLOYER WORKSITE DOCTRINE

A. Generally

The Secretary is not limited to citing only one employer in situations involving multiple employers, and more than one employer may be cited for a single violative condition. Multi-employer situations most often arise in general contractor and subcontractor situations. A general contractor and subcontractor situation involves exposure of employees of one employer to hazards controlled by another employer, in which case the distinctions of exposure and control do not necessarily preclude citation of one employer or both employers. This situation also raises issues of control of the hazard in either creating or having the ability to abate it, and exposure of the employee in allowing access to the zone of danger.

B. OSHA Directive On Multi-Employer Work Site Citations

In 1999, OSHA issued a clarification to help Compliance Officer's better determine liability in multi-employer work site conditions. It defined four types of employers, *creating, controlling, exposing* and *correcting*, and identified the obligations of each with respect to the multi-employer work site doctrine. The directive stated that it was not imposing any new duties on employers, but was only providing clearer and more detailed guidance to Compliance Officers.

The *creating employer* is defined as one who has caused the hazardous condition that

violates an OSHA standard. A creating employer is citable even if the only employees exposed are those of other employers at the site.

The *exposing employer* is defined as one whose own employees are exposed to the hazard. If the exposing employer created the violation, it is citable for the violation as a creating employer as well. If the exposing employer has the authority to correct the hazard it must do so. If the violation was created by another employer, the exposing employer is citable if it:

(1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition;

(2) did not ask the creating and/or controlling employer to correct the hazard;

(3) did not inform its employees of the hazard; **and**

(4) did not take reasonable alternative protective measures.

The *correcting employer* is defined as one who is responsible for correcting hazards. A subcontractor whose sole duty is the responsibility for erecting and maintaining the safety/health equipment or devise would be characterized as a "correcting employer". The correcting employer would be citable if it failed to exercise reasonable care in discovering and correcting the violations in light of the amount of activity and size of the project site.

The *controlling employer* is defined as one who has general supervisory authority over the work site, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract, as in the case of a general contractor with control of the site, or by the exercise of control in practice as in the case of a construction manager who, although he does not have direct control over safety, does exercise control over the sequencing of work, which may affect site safety. If the employer has broad responsibility

involving almost all aspects of the job and the authority to resolve such things as disputes between subcontractors, set schedules and determine sequencing, he may be considered a controlling employer. For example, a construction manager managing multiple prime contractors could be a controlling employer.

The controlling employer must exercise reasonable care to prevent and detect violations on the site. This duty of reasonable care is less than what is required of a subcontractor to its own employees, and the controlling employer is not required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards as the subcontractors that it employs. There are a number of factors given for the Compliance Officer to evaluate how often and closely the general contractor must inspect for violations. They include: the scale of the project; the nature and pace of the work, which includes the frequency with which the number or types of hazards change; the level of knowledge of the controlling employer regarding the safety history, safety practices and level of expertise of the employer that it controls. More frequent inspections may be required if the controlling employer does not know its compliance history or if the controlling employer knows that the subcontractor has a history of bad safety practices. Similarly, less frequent inspections may be appropriate if the controlling employer knows that the subcontractor has a very active safety program.

After determining the level of reasonable care, the Compliance Officer evaluates three factors to determine whether the controlling employer has exercised reasonable care. The Compliance Officer should evaluate whether the controlling employer (1) conducted periodic inspections of appropriate frequency, (2) implemented an effective system for correcting

hazards, and (3) whether it enforced the other employer's compliance with safety requirements by using an effective, graduated system of enforcement including follow-up inspections.

IV. CIVIL AND CRIMINAL PENALTIES

Section 17(e) of the Occupational Safety and Health Act (the "Act") authorizes criminal penalties of up to $10,000 and/or six months' imprisonment for a willful violation of the Act that results in the death of an employee. Giving advance notice of a planned inspection to an employer carries a criminal penalty of up to $1000 and/or six months' imprisonment.

The Act provides for penalties of $7,000 maximum for serious and for other-than-serious violations. Willful violations carry a maximum penalty of $70,000 and a minimum of $25,000 for serious violations, and $5,000 for other-than-serious violations. OSHA may cite an employer for an egregious violation on a violation-by-violation basis for each employee exposed to the hazard resulting in penalties in the $100,000's to low millions range.

The Act provides for a maximum penalty of $70,000 for repeat violations. As a practical matter, for employers with fewer than 250 employees the penalty is doubled for the first repeat and quintupled if the employer has been cited twice or more before. For employers with greater than 250 employees, the penalty is multiplied by five for the first repeat and ten for subsequent repeats.

So the short answer on penalty amounts for a typical inspection that result in a penalty is to multiply $5,000 by one or two violations. Unless the inspection resulted from a death or multiple injury case, the odds are that the employer will not receive a willful citation.

The following is a list of civil and criminal penalties which may be assessed as a result of

an OSHA inspection.

A. **<u>Civil penalty for willful or repeated violation</u>**

1. $70,000 maximum for each violation

2. $5,000 minimum for each willful violation

B. **<u>Civil penalty for a serious violation</u>** (deemed to exist where there is a substantial probability that death or serious physical harm can result from a condition, practice, means, method, operation, or process)

- $7,000 maximum for each violation

C. **<u>Civil penalty for violations determined not serious</u>**

- $7,000 maximum for each violation

D. **<u>Civil penalty for failure to correct violation within allotted time</u>**

- $7,000 maximum per day such violation continues

E. **<u>Civil penalty for violation of posting requirement</u>**

- $7,000 maximum for each violation

F. **<u>Criminal penalty for willful violation causing death to employee</u>**

1. Upon conviction, maximum fine of $10,000

2. Or imprisonment for up to 6 months

3. Or both

G. **<u>Criminal penalty for giving advance notice of inspection</u>**

1. Upon conviction, maximum fine of $1,000

2. Or imprisonment for up to 6 months

3. Or both

H. **<u>Criminal penalty for false statements, representations or certification</u>**

1. Upon conviction, maximum fine of $10,000

2. Or imprisonment for up to 6 months

3. Or both

V. HOW DOES OSHA CALCULATE PENALTIES?

Calculating Gravity-Based and Downward-Adjusted Penalties

Calculating proposed penalties for violations involves first a gravity-based assessment and then appropriate downward adjustments for the employer's size, history and good faith. The gravity-based assessment considers the severity of the violation and the probability that an injury or illness will occur as a result of the violation. Injuries which could result in death or permanent disability are high severity, temporary illnesses or injuries resulting in hospitalization and a limited period of disability are medium severity, no hospitalization would be low severity, and other-than-serious violations that would not likely cause injury or illness are minimal severity. The "probability assessment" is either that a greater or lesser probability exists that the violation will result in an injury or illness. For a serious or willful violation, the completion of this analysis results in the gravity-based penalty (GBP) as follows:

Severity	**Probability**	**Gravity**	**Serious GBP**	Serious Willful GBP
High	Greater	High	$5,000	**$70,000**
Medium	Greater	High	$3,500	**$70,000**
Low	Greater	Moderate	$2,500	**$55,000**
High	Lesser	Moderate	$2,500	**$55,000**
Medium	Lesser	Moderate	$2,000	**$55,000**
Low	**Lesser**	**Low**	**$1,500**	**$40,000**

However, if the Area Director determines that it is appropriate to achieve the necessary deterrent effect, a gravity-based penalty of $7,000 may be assessed for a serious violation. Other-than-serious violations do not involve a severity assessment and the Area Director may

assess a gravity-based penalty of between $1,000 and $7,000. After calculating the gravity-based penalty, the following downward-adjustment factors are applied. The maximum downward adjustment for an other-than-serious or serious violation if 95%. The maximum downward adjustment for a serious-willful violation is 40%. For other-than-serious willful violations the minimum willful penalty of $5,000 shall be assessed.

1. Adjustment for Size

The following adjustments for size based upon the number of employees will be applied to the penalty amount for **Serious** violations.

Employees	Serious % Reduction
1-25	**60**
26-100	**40**
101-250	**20**
251 or more	**None**

The following adjustments for size based upon the number of employees will be applied to the penalty amount for **Willful** violations:

Employees	Willful % Reduction
10 or less	**80**
11-20	**60**
21-30	**50**
31-40	**40**
41-50	**30**
51-100	**20**
101-250	**10**
250 or more	**0**

With regard to willful violations, the following table reflects the dollars amounts involved

in these reductions:

PENALTIES TO BE PROPOSED

Total % reduction for for size and/or history	High Gravity	Moderate Gravity	Low Gravity
0%	$ 70,000	$ 55,000	$ 40,000
10%	63,000	49,500	36,000
20%	56,000	44,000	32,000
30%	49,000	38,500	28,000
40%	42,000	33,000	24,000
50%	35,000	27,500	20,000
60%	28,000	22,000	16,000
70%	21,000	16,500	12,000
80%	14,000	11,000	8,000
90%	7,000	5,500	5,000

2. Adjustment for Good Faith

Employers cited for willful violations are not eligible for any reduction for good faith (if they showed good faith they would not be receiving a willful violation). Employers cited for other than willful violations are eligible for a 25% reduction if they have a written safety and health program which has deficiencies that only are incidental. A reduction of 15% may be given to an employer with a written safety and health program that has more than incidental deficiencies. A good-faith reduction of 25% also may be given to small employers (1-25 employees) who have implemented an effective safety and health program but who have not reduced it to writing.

3. Adjustment for History

Employers who have not been cited for any serious, willful or repeat violations in the past three years are eligible for a 10% reduction for history for other-than-serious, serious and willful violations.