



AFTER THE OSHA INSPECTION: WHAT DO WE DO NOW? EFFECTIVELY HANDLING OSHA'S SETTLEMENT PROCESS



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SAFETY AND HEALTH IN THE 21ST CENTURY

Having great safety and health is vital because ...

- 1) it is morally the right thing.
- 2) it allows your employees to go home each night safely to their family and loved ones.
- 3) it keeps you from having to do the worst job any person would possibly have to do.
- 4) it is the law.
- 5) it is essential for a company to be profitable and competitive in today's marketplace.

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SAFETY AND HEALTH IN THE 21ST CENTURY

Being a good steward of Company resources and challenging citations does not conflict with your goal of “zero injuries.”

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WHAT CONCERNS DRIVE YOUR RESPONSE TO CITATIONS?

- Penalties
- Repeat exposure
- Severe Violators Enforcement Program concerns
- Effect on business
- Other pending litigation
- Morale
- Company integrity

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EXAMPLES OF PENALTIES

1. BP Products North America, Inc. (TX) - \$87 million
2. Whitesell Corp. (AL) - \$3.07 million
3. BP-Husky Refinery (OH) - \$3.04 million
4. E. N. Range, Inc. (FL) - \$2.1 million
5. South Dakota Wheat Growers ((SD) - \$1.6 million
6. Tempel Grain Elevators, LLC (CO) - \$\$1.59 million
7. CES Environmental Services, Inc. (TX) – \$1.4 million
8. Goodman Mfg. Co. (TX) - \$1.215 million
9. A-1 Excavating (WI) - \$861,000
10. WRR Environmental Services (WI) - \$787,000
11. Cooperative Plus (WI) - \$721,000
12. Sims Bark Co & Sims Stone Co. (GA & AL) – \$576,000

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EXAMPLES OF PENALTIES

13. Republic Engineered Products (OH) - \$563,00
14. Excelsior Brass Works (PA) - \$550,400
15. C.A. Franc (PA) - \$539,000 and criminal referral
16. All-Feed Processing & Packaging, Inc. (IL) - \$518,520
17. Loren Cook Co. (MO) - \$511,000
18. Cranesville Aggregate Co. (NY) - \$509,000
19. New Jersey Transit (NJ) - \$500,000
20. Parker Hannifin Corp. (MS) - \$487,700
21. Cambridge Contracting, Inc. (NY) - \$484,000.
22. Endres Processing Ohio, LLC (OH) - \$473,000
23. U.S. Minerals (IN) - \$466,400
24. US Minerals (IL) - \$396,000
25. Mar-Jac Poultry, Inc. (GA) - \$379,800

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SEVERE VIOLATORS ENFORCEMENT PROGRAM

- The following circumstances will be reviewed as a possible SVEP case:
 - Fatality or catastrophe situation
 - Industry operations or processes that expose employees to the most severe occupational hazards and those identified as “High-Emphasis Hazards”
 - Exposing employees to hazards related to the potential release of a highly hazardous chemical
 - All egregious enforcement actions.

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SEVERE VIOLATORS ENFORCEMENT PROGRAM

- The SVEP also includes the following action elements for employers who meet the SVEP criteria:
 - Enhanced follow-up inspections
 - Nationwide referrals, which will include State Plan states
 - Increased company awareness, which will include issuing news releases
 - Enhanced settlement provisions
 - Increased use of Federal court enforcement action (contempt of court) under Sec. 11(b) of the OSH Act

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WHAT YOU RECEIVE: CITATIONS

- In writing
- Violation described “with particularity”
- Timely – citation must issue within 6 months of the violation
- Proposed penalty specified
- Served by certified mail
- Post for 3 days or until abatement, whichever is longer

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TYPES OF CITATIONS

- De minimis
- Other than serious
- Serious
- Willful
- Repeat
- Egregious
- Criminal

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PENALTIES

- Other than serious
 - Up to \$7,000 per violation
- Serious
 - Up to \$7,000 per violation

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PENALTIES

- Willful
 - Up to \$70,000 per violation
 - Grouping Permitted
 - \$5,000 Minimum
- Repeat
 - Up to \$70,000 per violation
- Egregious
 - Up to \$70,000 per violation
 - No Grouping
- Failure to abate
 - Up to \$7,000 per day

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EMPLOYER OPTIONS

- Agree to citations, pay full penalty
- Informal conference/informal settlement
- **Notice of Contest – 15 working days (Federal); some state plan states different time period**
- Next level of negotiations (differs in state plans)
- Formal settlement
- Hearing

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PRIOR TO INFORMAL CONFERENCE

- Posting of Citations
- Review of Citations
 - Timing of receipt of Citation (6-month rule)
 - Description of alleged violations
 - Standard cited
 - Classification of violation
 - Elements OSHA must prove
 - Possible defenses

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SUPERVISOR LEGAL ROLE IN OSHA CITATIONS

To make out a federal OSHA citation, OSHA must prove that an employer knew of a violation, or with exercise of reasonable diligence, could have known of a non-compliant condition.

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SUPERVISOR ROLE IN OSHA CITATIONS: LEARNING OF OSHA VIOLATIONS

“Because employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by providing that a supervisory employee knew of or was responsible for the violation.”

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AFFIRMATIVE DEFENSES TO CITATIONS

- Substantive defense
 - Invalidity of standard
 - Vagueness
 - Procedural defect in adoption
- Pre-emption of Standard
- Pre-emption of General Duty Clause
- Pre-emption of Act

AFFIRMATIVE DEFENSES TO CITATIONS

- Multi-employer work site
- Infeasibility
- Greater hazard
- De minimis violation
- Unpreventable employee misconduct

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UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE ELEMENTS

- Establish work rules designed to ensure safe work and to avoid OSHA violations
- Communicate the work rules to employees
- Train the employees as needed
- Take appropriate steps to discover violations
- Effectively enforce the rules and practices when violations are discovered; and
- **Document the above actions**

AFFIRMATIVE DEFENSES TO CITATIONS

- Procedural Defenses
 - Improper inspection
 - Lack of particularity
 - Lack of reasonable promptness
 - Statute of limitations
 - Estoppel
 - Vindictive prosecution

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OSHA INFORMAL CONFERENCE

- Post notice of informal conference
- Meeting location: normally at OSHA area office
- Attendees
 - OSHA's Area Director or designee
 - Company representative
 - Employees or their representative
- OSHA's Field Operations Manual – Informal Conference, Chapter 7, Subpart II

OSHA INFORMAL CONFERENCE

- Conference subjects
 - Purpose of informal conference
 - Rights of participants
 - Contest rights and time constraints
 - Issues involving inspection
 - Discussion of issues on citations

Note: OSHA will not express opinions on legal issues; also, no discussion on possible criminal referral to Department of Justice

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INFORMAL SETTLEMENT AGREEMENT

- Content of Agreement
 - Agreement between OSHA and employer (sometimes Union representative will be a signatory to agreement)
 - General facts about inspection
 - List original citations and agreed changes to citations
 - Withdraw
 - Change in classification
 - Change in penalties
 - Change in abatement date

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INFORMAL SETTLEMENT AGREEMENT

- Content of Agreement (cont'd)
 - Employer agrees to waive contest of citations
 - Employer agrees to pay new penalty amount
 - Employer agrees to comply with Act and applicable standards
 - Other items agreed to by employer
 - Posting of agreement
 - Parties bear own attorneys' fees, costs and other expenses

Note: Need to include non-admission clause

Note: Do not agree to implement comprehensive safety and health management system

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AFTER INFORMAL CONFERENCE

- If settlement agreed upon, need to sign within 15 working days or file Notice of Contest
- If no settlement, file Notice of Contest
- Can settle case after Notice of Contest is filed
- Once Notice of Contest is filed, citations, penalties and abatement dates are stayed pending decision of Review Commission

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SETTLEMENT AFTER NOTICE OF CONTEST

- Formal settlement with OSHA attorney
- Review Commission settlement procedures
 - Request by either party for settlement judge
 - Mandatory settlement
 - Settlement judge will not handle hearing
 - Settlement judge will direct limited discovery
 - Settlement judge will preside over settlement conferences
 - Confidentiality of settlement proceedings
 - Report of settlement judge
- Corporate-wide settlement

HEARINGS

- Occupational Safety and Health Review Commission
- Formal complaint and answer
- Simplified proceedings
- Discovery similar to Federal Court
- Hearing before Administrative Law Judge
- ALJ issues written opinion
- Appeal to three-member Review Commission
- Other options – expedited proceedings



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“If I seem unduly clear to you,
you must have misunderstood what I said.

~ Alan Greenspan – Former Fed Chairman

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Final Questions?

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