


How to Effectively Handle an OSHA Inspection Post-Pandemic




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Why Be Concerned?


- OSHA penalties increased in 2016, 2017, 2018, 2019 and 2020.
- Currently willful and repeat (\$134,937); serious and other (\$13,494)
- Recordkeeping changes in 2015, 2016 and 2017
- More employers placed in the Severe Violators Enforcement Program
- Increased whistleblower complaints with push to find more "cause" determinations especially on employee exposure to Coronavirus and not following CDC and OSHA guidance

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Thank You For Your Commitment To Safety




*"Winning is not a sometime thing, it is an all-time thing."
~ Vince Lombardi*

So Is Safety!

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Why Be Concerned?

- Local, state and national governments look at safety records – bar on submitting bids
- Private sector companies also looking at contractors, vendors, system safety record and OSHA history – may lose clients
- Increased injury and illness reporting requirements

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Why Be Concerned?

- For the past two months, OSHA has limited inspections to fatalities, catastrophic accidents and certain Coronavirus issues.
- OSHA will be looking to make up for lost inspection numbers, as well as citations and penalties.
- Pressure from Congress and unions on doing more aggressive enforcement and on using more unfriendly press releases
- Employees Coronavirus complaints have dramatically increased the number of rapid response informal complaints which will result in more onsite inspections.
- OSHA inspections will initially focus on Coronavirus exposure and illnesses.

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OSHA's Top 10 Most Cited Violations - Fiscal Year 2019

1. Fall Protection, General Requirements (1926.501)
2. Hazard Communication (1910.1200)
3. Scaffolding (1926.451)
4. Lockout/Tagout (1910.147)
5. Respiratory Protection (1910.134)
6. Ladders (1926.1053)
7. Powered Industrial Trucks (1910.178)
8. Fall Protection (1926.503)
9. Machine Guarding (1910.212)
10. PPE – Eye and Face Protection (1926.102)

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Top 10 Most Frequent General Duty Clause Citations



- | | |
|---------------------------------|--------------------------------------|
| 1. Forklift Hazards – 26.9% | 6. PVC Piping Rupture -5.4% |
| - Lack of seatbelts | 7. Fire and Explosions -5.4% |
| - Improper lifting of personnel | 8. Fall Hazards – 5% |
| 2. Crane Hazards – 21.7% | 9. Automobile Lifts and Jacks – 4.6% |
| 3. Dust Explosions -12.0% | 10. Storage Rack Hazards – 3.6% |
| 4. Struck-by Vehicle -10% | |
| 5. Ladder Fall – 5.8% | |

Source: Tracy Cekada and Christopher Janicak – Indiana University of Pennsylvania 2016

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Handling OSHA Informal Complaints (Rapid Response)



- Need to do it right or you may have an onsite inspection
- Recommend against using OSHA's rapid response form
- Do your own investigation and report findings (KISS)
- Avoid making admissions
- Emphasis on corrective actions and going forward
- Have supporting documentation with response letter
- Posting and certification

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OSHA's Burden Of Proof To Issue Citation Of "Vertical" Standard



- Vertical standard – specific only to particular industry
- OSHA has the burden to prove:
 - A hazard
 - Applicable standard
 - Exposure, and
 - That the employer knew of the hazard or should have known of it with the exercise of due diligence

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Effectively Handling An OSHA Inspection: How To Legally Protect Your Rights



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Requirements To Issue 5(A)(1) General Duty Citation



OSHA must prove:

- Condition or activity in the workplace presented a hazard
- Employer or its industry recognized the hazard
- Hazard was likely to cause death or serious physical harm a feasible means existed to eliminate or materially reduce the hazard

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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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Safety Responsibility: 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**



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Throughout The Entire Inspection Always Remember

- It is your facility
- You have rights
 - Inspection conducted in a reasonable manner
 - Inspection conducted during a reasonable time
- Completion of inspection within 6 months
- Be cooperative and responsive **but maintain control of the inspection**



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Pre-inspection Action Plan

- OSHA Poster
- Notification responsibilities
 - Contact persons
 - When you have a reportable incident
 - When OSHA inspectors are onsite
 - Any other unusual safety & health issue
- Assignment of responsibilities
- Training/recording
- Know what OSHA standards are applicable to your operation and that you are fully compliant
- Know your COVID-19 control plan and ensure you have implemented all protective actions and precautions

Equipment needed during inspection
Review of previous citations
Review of insurance and third-party audits
Periodic audits and reviews



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The Knock

- **No advance knowledge**
- Will not “come back later” – 1-hour rule
- Credentials – if unsure, call Area Director to confirm



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Why Me?

INSPECTION PRIORITIES

- Imminent danger
- Fatalities/catastrophic accidents
- Employee complaints/referrals
- High-hazard industries (site specific targeting) &
- Special emphasis programs

NOTE: With new OSHA recordkeeping reporting requirements, many new self-referral inspections



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Should You Demand A Warrant?

- A policy call
- Few employers routinely require warrants
- May be necessary to gain time, such as when a manager or counsel needs to be present
- An “ex parte” procedure



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Opening Conference

- Ascertain purpose of the inspection
- Establish "scope" of the Inspection – **get copy of complaint** if applicable
- Set ground rules for inspection
- **Don't volunteer information**
- Treat the Inspector in a professional fashion
- Notification of corporate officials and counsel
- Coordination with on-site contractors and vendors
- Watch out for COVID-19 questions as setups



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The Inspection

- Hourly employee interviews
 - OSHA takes position no management present
 - Up to employee – can have Employee Representative
 - **Advise employee of his/her rights, appreciation of cooperation, and to tell the truth**
- Warning: Employees have whistleblower rights.



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The Walkaround

- **Employer has the right to accompany Compliance Officer ("CO")**
- Require CO to comply with all company safety and health rules, including training, where applicable
- Take accurate notes on areas reviewed and all discussions and comments from CO
- Do everything the CO does (photos, video, air monitoring, etc.)



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The Inspection

- Management and supervisor interviews
 - **Always another management/counsel present – agent of Company**
 - Definition of manager?
 - Fatality investigation – attorney always present
 - Responses limited to scope of inspection – no fishing expedition
 - **No tape-recording**
 - **Signed statement**



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The Walkaround

- Maintain control - Limit the area seen by the CO
- Limit responses to inspectors questions, answer directly to the point and do not debate inspector's assertions especially on COVID-19 issues
- Side-by-side monitoring
- **No staging of event or accident**
- **No destruction of evidence or misrepresentations – even if inadvertently**



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The Inspection

Documentation

- Recordkeeping
- Training
- Safety and health policies
- Monitoring results
- Medical surveillance
- Medical access orders
- **Previous safety audits**
- **Standard required documents**



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Closing Conference

- **Employer's opportunity for free discovery**
- Advise of observed unsafe conditions
- Usually, brief description as to possible violations – no discussion of penalties, classification and abatement dates
- Note any abatement made during the inspection
- Suggest possible corrections



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Penalties Effective January 6, 2020

- Other than serious
Up to \$13,494 per violation
- Serious
Up to \$13,494 per violation
- Posting Requirements
Up to \$13,494 per violation
- Willful
Up to \$134,937 per violation
- Minimum of \$9,054
- Repeat
Up to \$134,937 per violation
- Failure to abate
Up to \$13,494 per day beyond
abatement date



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Closing Conference

- Request photos and monitoring results
- Discuss appeal rights
- **Not a time for debate**
- **All document requests from OSHA need to be reviewed and approved by Counsel prior to being provided to OSHA – all documents provided will be bates stamped and the company will keep a separate copy of all documents provided.**



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Penalties – Criminal Violations

- Willful violation & employee death: **\$10,000 or 6 months or both**
 - Second conviction: **\$20,000 or 12 months or both**
- Advance notice of inspection: **\$1,000 or 6 months or both**
- Falsification of required records, etc.: **\$10,000 or 6 months or both**
- Murder or attempted murder of CO: **Term of years to life**



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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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Citation Options for Handling Citations

- Agree to citations, pay full penalty – this is a No-No
- Informal conference/informal settlement
- **Notice of Contest – 15 working days (Federal); some state plan states different time period**
- Formal settlement
- Hearing



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Hearings

- Occupational Safety and Health Review Commission
- Formal complaint and answer
- 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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31

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Final Questions

"Judge a man by his questions, rather than his answers."
~ Voltaire

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Thank You!

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BE SAFE!

REMEMBER:

Bad decisions make good stories
and usually the evening news.



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