

sion, which can be appealed by the employer or OSHA.

12. How can I clear my company's record from any citations issued by OSHA?

There is no method to clear your company's record of past Citations issued by OSHA. However, the longer your company operates without OSHA Citations, the better. OSHA can use past Citations as a basis to issue Citations that have a more severe classification with increased penalties. For instance, if OSHA re-inspects your company in the future, it can issue repeated violations for conditions that were violated during the original inspection. Generally, OSHA will not issue a repeat violation if its last Citation is more than three years old.

13. Can OSHA re-inspect my facility? If so, is there any action that I can take to prevent OSHA from inspecting my facility in the future?

Yes. While you cannot prevent OSHA from re-inspecting your facility in the future, you can minimize the chances of that occurring by being proactive. Establishing safety and health programs that incorporate coordination and communication of safety and health issues among personnel; means for planning and implementing needed training and job orientation for employees; and means for identifying and controlling workplace hazardous and monitoring the effectiveness of such a program, can minimize workplace hazards and, thus, reduce the chances of OSHA re-inspecting your facility. In certain situations you may want to utilize the services of a safety and health consultant to assess your workplace and make recommendations to better comply with OSHA's standards. Your lawyer can assist you with deciding whether to retain a consultant to evaluate your workplace.

THIS PAMPHLET IS NOT INTENDED TO BE LEGAL ADVICE, WHICH CAN ONLY BE GIVEN AFTER THE ATTORNEY UNDERSTANDS THE FACTS OF A PARTICULAR MATTER AND THE GOALS OF A CLIENT.

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WHAT EVERY BUSINESS OWNER NEEDS TO KNOW ABOUT

OSHA

A significant number of business clients are likely to find themselves face-to-face with an inspector from OSHA, and many will be caught off-guard. We recommend that businesses take a two-pronged approach to OSHA compliance.

First, make every effort to comply with OSHA's safety and health rules to protect your employees. Second, be prepared in the event that OSHA initiates an inspection at your establishment. If you have a plan in place that provides guidance to your managers, describes the procedures employed by OSHA and what to expect during an inspection, you can minimize disruption of your business and possible adverse consequences.

To assist our clients and familiarize them with OSHA and its procedures, Cole Schotz has prepared this brochure "What Every Business Owner Needs to Know About OSHA."

1. What is OSHA and what does it do?

The Occupational Safety and Health Administration known as OSHA, is an agency within the United States Department of Labor. OSHA's primary function is to inspect workplaces to ensure that employers comply with federal safety and health standards.

2. Who is subject to OSHA's requirements?

Most employers and their employees are subject to OSHA's requirements. Employees employed by the United States government, state or local governments are not covered by OSHA. Likewise, certain private sector workers are exempt from OSHA's requirements. Specifically excluded are self-employed individuals and workers at facilities where safety and health are regulated by other federal agencies under separate federal statutes.

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3. If OSHA shows up at my facility, do I have to allow the inspector in my facility?

In most cases, OSHA must either obtain your consent or have a warrant to enter your facility and perform an inspection. The inspector, upon arriving at your workplace, may not inform you of your right to request a warrant. Therefore, you and your managers must understand your right to refuse to allow an inspection in your facility without a warrant.

If denied entry to perform an inspection without a warrant, OSHA has the authority to obtain a warrant by *ex parte* application to the District Court. If OSHA gets a warrant, you will not receive advance notice of such application or receive copies of any materials supplied to the court by OSHA in applying for the warrant.

There is no clear-cut formula to follow in deciding whether to grant OSHA permission without a warrant to perform an inspection. That decision is best made as a matter of company policy developed prior to an actual inspection. But it is clearly in your best interest to discuss your options with your lawyer and have a plan in place should an OSHA inspector show up.

4. What does OSHA look for?

There are three phases to an OSHA inspection: the opening conference, the walkthrough and the closing conference.

At the opening conference, the inspector will seek general information concerning your

business (e.g., name, address, etc.) as well as your safety and health program. For instance, the inspector may inquire into the following:

- The comprehensiveness of your company's safety and health program;
- How information on your company's safety and health program is communicated to employees;
- How your company enforces violations of its safety and health rules;
- The type of safety and health training programs that your company has established and how they are implemented;
- How your company performs an accident investigation and whether your company implements preventative measures as a result of the investigation; and
- Whether the OSHA notice is posted on site in your facility.

In addition, the inspector will request access to the records that you are required to maintain under the OSHA's standards (e.g., injury and illness records and hazard communication records, etc.).

If an employee representative (i.e., labor union) is at the facility, the inspector will normally attempt to have a joint opening conference with you and the employee representative.

The next phase of the OSHA inspection is the walkthrough. The walkthrough allows the inspector to identify potential safety and/or health hazards in the workplace. You and the

or until the violation is corrected, whichever is longer. You are required to comply with these posting requirements even if you subsequently decide to contest the Citation.

You have two choices once you receive a Citation. You can comply with the Citation. That is, you can correct the alleged violations by the date specified in the Citation and pay any penalty that may have been assessed. The other option is to contest the Citation. You have 15 working days from the receipt of the Citation to contest it. If you do not contest the Citation, the Citation will become a final order of the Occupational Safety and Health Commission ("Commission") in 15 working days after receiving the Citation. Once the Citation is a final order, it is binding and will not be subject to review by any court or agency.

The other option available to you is to contest the Citation. You have 15 working days from the date of receipt of the Citation to contest the Citation.

However, before you decide which course to take, you should take advantage of an OSHA process known as the Informal Conference. You must request and schedule the Informal Conference with the OSHA Area Office that issued the Citation within the 15 working day contest period. You are allowed to have counsel present at the Informal Conference.

If you cannot reach a settlement agreement with OSHA at the informal conference, you may wish to contest the Citation. Generally, a notice of intent to contest all or any portion of the Citation must be submitted in writing

to the OSHA Area Office that issued the Citation within 15 working days after the receipt of the Citation.

10. Should I challenge the OSHA Citations?

There is no universal formula to assess whether you should challenge the OSHA Citation. The decision must be determined based on the facts, which include consideration of the alleged violation, its impact on employee health and safety, the classification of the violation, the method of abatement and the cost involved in abating the alleged violation.

11. If I do challenge an OSHA citation, what should I expect?

Once you file a notice of contest, jurisdiction over the matter vests with the Occupational Safety and Health Review Commission (the "Commission"). The Commission, sometimes called "OSHRC," is an independent agency not connected in any way with OSHA. Its primary purpose is to adjudicate contested cases arising from Citations issued by OSHA. It neither performs investigations nor promulgates safety or health standards.

Once the Notice of Contest is filed with the OSHA Area Office that issued the Citation, the OSHA Area Director will forward a copy of the Notice of Contest to the Commission within 15 working days of the receipt of the Notice of Contest. The Commission will appoint an Administrative Law Judge who will preside over the hearing and render a deci-

- (i) Consult your attorney at the time an OSHA inspection is initiated and at any time you are unsure how to respond to a certain request made by the inspector. For example, don't release any internal reports before you consult with your lawyer. They may be protected by the attorney client privilege or some other privilege.

The following is a list of “don’ts”:

- (a) Do not give any internal reports or policies, etc. without consulting with your lawyer.
- (b) Do not forcibly interfere with the conduct of an inspection.
- (c) Do not discriminate against or punish any employee who cooperates with OSHA or who may exercise his or her rights under the OSH Act.
- (d) Do not provide the compliance officer with false or misleading information. Providing false information to OSHA is punishable as a crime under the OSH Act.
- (e) Do not argue with or antagonize an inspector during an inspection.

6. How long will OSHA be at my facility?

OSHA will remain at your facility until it completes its investigation. The inspection could last a couple of hours or up to several months. The length of time is determined by

the scope of the inspection; that is, whether it is confined to one area or the entire facility. It is also dependent on the type of inspection. That is, whether the inspector will be required to make subsequent visits to the facility to perform monitoring to establish employee exposure to workplace contaminants or noise.

7. Do I have to let my employees talk to the OSHA inspector?

OSHA inspectors are authorized to use various investigatory techniques, such as observing employees' activities in the workplace, conducting employee interviews, and taking photographs and measurements in the workplace (i.e., air and noise monitoring).

The OSH Act authorizes OSHA to interview employees privately to obtain whatever information is necessary or useful for the inspector to perform his or her inspection effectively. The interviews, however, must be conducted in a reasonable manner and within a reasonable time limit. If they appear to be unreasonable, you should consult your attorney. On occasion, interviews may be conducted at locations other than the workplace (e.g., employee's house or OSHA area office). OSHA's regulations afford any employee the right to bring any alleged violation to the attention of the inspector.

OSHA inspectors are also authorized to take photographs whenever such photographs are deemed necessary. Generally, an employer cannot prohibit an inspector from taking photographs because a certain process or equipment is a trade secret. To

protect a trade secret, you should inform the inspector of the process or equipment that is proprietary. Once informed of trade secret status, the inspector is obligated to treat the information obtained from the inspection in a manner assuring confidentiality.

In order for OSHA to document employee exposure to chemical or physical hazards, it is often necessary for the inspector to perform “full shift” monitoring. Typically, during the walkthrough phase of the inspection the inspector will identify certain areas where monitoring must be performed. Normally, the inspector will then return at the start of a work shift on another day to perform the monitoring. As the term “full shift” suggests, the inspector will monitor employees for the full term of the work shift.

Monitoring employees for chemical and/or physical hazards usually consists of placing monitoring devices such as air samplers or noise dosimeters on the employees. Employees are free to refuse to wear such monitoring devices. Generally, however, the employer may not object to such investigatory procedures. Once the monitoring devices are placed on the employees, the inspector will, throughout the day, observe the employees and document their work practices, use of personal protective equipment and other relevant information.

8. What happens after OSHA completes its inspection?

Unless your establishment is in full compliance with OSHA's standards, you will receive a “Citation and Notification of

Penalty” from OSHA. A Citation includes: the type of violation (classification); the standard, regulation or section of the OSH Act that was violated; a description of the violation; the abatement date; and the penalty.

A. The classifications of the alleged violation include the following:

Willful - A willful violation is a violation in which the employer knew that a hazardous condition, which violated a standard, regulation or a section of the OSH Act, existed but made no reasonable effort to eliminate it. If the willful violation results in a death, OSHA can seek criminal sanctions against an employer.

Serious - A serious violation exists:

If there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Repeat - OSHA may cite an employer for a repeated violation if:

(A) the employer has been cited previously for a substantially similar violation;

(B) the previous citation containing the substantially similar violation has become final order of the Occupational Safety and Health Review Commission; and

(C) the current violation occurred within three years from the date that the earlier citation became final order or from the final abatement date, whichever is later.

Other-Than-Serious - An other than serious violation exists where an accident or illness that could occur from a violation “would probably not cause death or serious physical harm but would have a direct and immediate relationship on the safety and health of employees.”

De Minimis – A deminimis violation is a “violation of a standard that has no direct or immediate relationship to safety and health.”

In addition to the foregoing categories, an employer can also be cited for failure to abate a previously cited condition. The OSH Act allows OSHA to assess penalties for each day a violation continues past the final abatement date.

B. Section of OSHA Standard Violated and Description of the Violation

The citation will also describe the violation and section of OSHA’s standard that was violated.

C. Abatement Date

The abatement date is the date by which the violation must be corrected. The abatement period is “the shortest interval within which the employer can reasonably be expected to correct the violation.” Abatement dates are usually discussed at the closing conference.

If an employer is unable to meet an abatement date because of some uncontrollable circumstance, the employer can petition the OSHA Area Director to modify the abatement date contained in the Citation.

D. Penalty

The Citation also sets forth the penalty assessed by OSHA. OSHA is authorized to assess the following civil penalties: \$70,000 for each willful or repeated violation; \$7,000 for each serious or other than serious violation; \$7,000 for each violation of the posting requirement; and \$7,000 per day beyond a stated abatement date for failure to correct a violation.

Penalties are calculated once a violation is classified. In calculating penalties, OSHA takes into account the following factors: the seriousness of the violation; the number of employees employed by the employer; the employer’s good faith as demonstrated by the employer’s efforts to comply with the OSH Act and OSHA’s standards and regulations; and the employer’s past history of compliance. OSHA can, at its discretion, reduce the maximum penalty that it can impose after considering these factors.

9. If OSHA issues a citation to my company, what should I do?

Once you receive a Citation, you must post the Citation at or near the place where each violation occurred so that employees will be able to review it. The purpose of this is to make employees aware of the hazards to which they may be exposed. The Citation must remain posted for three working days

employee representative will be given the opportunity to accompany the inspector.

During this phase of the inspection, the inspector will assess your safety and health program, collect information on the plant processes and document any hazards in the workplace.

The final phase of the OSHA inspection is the closing conference. The inspector is required to have a closing conference with you and the employee representative. As with the opening conference, the closing conference can be performed jointly or separately.

At the closing conference the inspector must describe any and all alleged violations observed during the inspection and identify the applicable sections of the OSHA standards or Occupational Safety and Health Act (the “OSH Act”) that were allegedly violated. Citations are not issued at the closing conference, but are issued at a later date under the signature of the Area Director. In addition, the inspector is required to advise you and the employee representative of your rights following an OSHA inspection.

5. What should I do or not do during an inspection?

There are certain actions that you should take to protect your interest during an OSHA inspection. These actions include:

- (a) Check the inspector’s identification to ensure he/she is who he/she says he/she is.

- (b) Ascertain from the inspector the reason for the inspection. If the inspection is the result of a complaint, you should request a copy of the complaint.
- (c) Have someone from management escort the inspector through the entire inspection process (i.e., from opening to closing conference).
- (d) Document the inspector’s activities (i.e., who does the inspector interview, what measurements does the inspector make, etc.).
- (e) Sit in on any interviews that the inspector may conduct with employees if allowed to do so by the inspector.
- (f) If the inspector performs any monitoring (e.g., noise or air), you should consider performing similar monitoring at the same time. The purpose of the “side by side” monitoring is to document and confirm the results obtained by OSHA.
- (g) Request the results of all monitoring performed by the inspector.
- (h) At the closing conference, if the inspector indicates that violations have been found, question the inspector as to why certain conditions constitute a violation. In addition, you should request from the inspector recommended methods to correct any alleged violations.