


STRATEGIES IN MANAGING
TODAY'S WORKFORCE

**Fisher
Phillips** South Florida
Labor &
Employment
Conference

What To Do When The Government Shows Up?

- > **Charles S. Caulkins** – Fisher Phillips, Fort Lauderdale
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#FPFL19 

JUNE 7, 2019 | HOLLYWOOD, FL

National Labor Relations Board



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- > New sheriff in town
- > Things that have changed
- > Things to expect

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What Is The NLRB?



- > 5 members
 - > Appointed to five-year staggered terms (3 from majority party)
 - > Issues rules (joint employer, quickie elections, etc.).
 - > Rules on ALJ's decisions.
- > Broad scope of authority
 - > Organizing
 - > Negotiations
 - > Work stoppages
 - > Concerted protected activity
- > Subject to shifts in political ideology
- > Increased focus on non-union employers

Things That Have Changed



- > Appropriate Unit for Bargaining
- > Independent Contractor Test
- > Concerted Protected Activity
- > Joint-Employer Test
- > Handbooks and Work Rules

General Counsel's June 6, 2018 Memo



Category 1: Lawful To Maintain:

- > No recording, no photography rules;
- > Civility rules;
- > Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- > Disruptive behavior rules;
- > Rules protecting confidential, proprietary, and customer information or documents;
- > Rules against defamation or misrepresentation;
- > Rules prohibiting the use of company logos or intellectual property;
- > Rules requiring authorization to speak on behalf of the company; and
- > Rules banning disloyalty, nepotism, or self-enrichment.

General Counsel's June 6, 2018 Memo



Category 2: Warrant Individualized Scrutiny:

- > Depends on the reasoning behind a rule to determine if it can lawfully remain in a handbook. Examples:
- > Confidentiality rules broadly encompassing "employer business" or "employee information";
- > Rules regarding disparagement or criticism of *employer*; and
- > Rules banning off-duty conduct that might harm the employer.

General Counsel's June 6, 2018 Memo



Category 3: Unlawful To Maintain:

- > Confidentiality rules specifically regarding wages, benefits, or working conditions; and
- > Rules against joining outside organizations or voting on matters concerning an employee's employer.

OSHA Developments



- > Drug testing restrictions were "clarified" but not repealed by Trump Administration
- > Penalties increased in January 2019 to more than \$13,000 for serious/non-serious citations and \$132,000 for repeat/willful citations
- > Part of Electronic Recordkeeping requirements were rescinded
- > Scott Mugno withdrew as new head of OSHA nominee last month, so enforcement is status quo and Obama Administration rules remain in effect for now

OSHA Developments



- > Increased use of "informal" investigations, i.e., telephone calls/letters to employer in lieu of on-site inspection
- > If receive such a letter:
 1. Generally 10-15 days to respond
 2. Provide a detailed response – without admitting guilt
 3. Respond by the deadline or you will be inspected
 - a. scope may be far greater than the complaint
 - b. will include producing documents and interviewing employees
- > If OSHA provides "non-mandatory investigative tool," use as guide only
- > Consult with legal counsel

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U.S. Department of Labor
Occupational Safety and Health Administration
Fort Lauderdale Area Office
1500 South Pine Island Road, Suite 100
Fort Lauderdale, FL 33324

April 8, 2019

RE: OSHA Activity No. [REDACTED]

Dear [REDACTED]:

This letter is to follow up the conversation we had on 04/08/2019 in reference to the employee injury that occurred on 04/05/2019 at your worksite. As we discussed, there are some important steps you should be taking to ensure the safety of your workers and avoid the need for an OSHA inspection.

In most cases, a serious injury indicates the presence of workplace hazards that threatens the health and safety of other workers. OSHA is very concerned that additional employees at your worksite are at risk of being injured. As we discussed, it is in everyone's interest that you conduct a thorough investigation to determine the reasons for the work related incident, to identify hazards related to the incident and to implement corrective actions.

Please complete each of the following by 04/16/19:

- Conduct an incident investigation. (See Non-Mandatory Investigative Tool – Attachment A)
- Provide OSHA with written, signed documentation of findings from the investigation.
- Provide OSHA with written, signed abatement certification documenting action taken to correct hazards related to the incident.
- Document findings and send corrective actions to (954) 424-3073 or OSHA.FortLauderdale@dol.gov
- Post a copy of this letter in a conspicuous place where all affected employees will have notice or near the location where the incident occurred.
- Fax or email a copy of the signed Certificate of Posting (Attachment B) to (954) 424-3073 or OSHA.FortLauderdale@dol.gov

If you have a problem meeting this deadline or have any further questions, please call me.

If we do not receive the investigation results, abatement verification and certificate of posting by 04/16/2019, your worksite may be considered for an on-site inspection.

The goal of your incident investigation will be to identify both the immediate and the underlying causes of the incident. To assist you in conducting an investigation, I have attached a guide for your use. To ensure your employees are protected from future injuries. Additional resources are available at OSHA's Safety and Health Topics website at <https://www.osha-slc.org/topics/production/production/production/production/production/index.html> to assist you with conducting an incident investigation.

After correcting any immediate hazards, small and medium-sized businesses may be interested in requesting free, confidential assistance from the On-Site Consultation Program. Consultants from a state agency or university will work with you to identify workplace hazards, provide advice on compliance with OSHA standards, and assist you in establishing a safety and health management program. These services are separate from enforcement and do not result in penalties or citations. To find out more information about OSHA's On-Site Consultation Program, please visit the program website at <https://www.osha.gov/dslcp/smallbusiness/consult.html> or call 1-866-273-1185 to reach your local On-Site Consultation office. Also, please find a copy of the OSHA pamphlet, "FREE Safety and Health Consultation Services" for your use in English or Spanish.

Please note that it is against the law for employers to retaliate or discriminate in any way against an employee for raising safety and health issues or for exercising their rights under the OSHA law. This includes the right to report a work-related injury or illness to their employer, or to contact OSHA. More information about the Whistleblower Protection Program can be found at <http://www.whistleblowers.gov/>.

If you have any questions, please call me at (954) 424-0242 or email me at OSHA.FortLauderdale@dol.gov. Your support and interest in the safety and health of your employees is appreciated.

Sincerely,
[Signature]
Cond
An

Callout 1: Conduct an incident investigation. (See non-Mandatory Investigative Tool – Attachment A)

Callout 2: If we do not receive the investigation results, abatement verification and certificate of posting by 04/16/19, your worksite may be considered for an on-site inspection.

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OSHA Developments



- > Increased use of EISAs ("Expedited Informal Settlement Agreements")
 1. Monetary penalties only
 2. If accept, give up your right to negotiate the citations themselves
 - a. Potential for Repeat citations for 5 years
 - b. Still required to abate all citations
 - c. Consult with legal counsel

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U.S. Department of Labor Occupational Safety and Health Administration
1000 South Pine Island Road
Suite 100
Fort Lauderdale, FL 33304

04/16/2019

Dear Employer,

The recent inspection of your workplace revealed no violations, nor were there a significant number of violations. The compliance officer has reported that you have a good understanding of OSHA requirements and that you are willing to make those corrections by the abatement date(s) set forth in the citation(s). These factors, along with the good faith you have exhibited, make your workplace eligible for an Informal Settlement Agreement (EISA). Under this program, an employer and OSHA may enter into an Informal Settlement Agreement without going through the formal procedure of a contested citation. However, if you decide to enter into the EISA, you should be aware that you relinquish your right to contest the citations and penalties of this inspection.

The EISA can be used only where the sole issue of dispute is the dollar amount of proposed penalties. If you wish to discuss, change, or object to any other aspect of the inspection or citations -- including abatement dates, validity of violations, classification of violations -- then the EISA cannot be used. Under those circumstances, you may request an Informal Conference with me and/or exercise your contest rights as explained elsewhere.

You should carefully read the enclosed EISA to determine whether the terms of the agreement are acceptable to you. Key elements of the agreement call for OSHA to agree to a 40 percent reduction in the total penalty amount proposed; for the Employer to correct the violations by the abatement date(s) set forth in the citation(s); for the Employer to provide evidence of corrective actions taken and to provide written certification that all items have been abated at the time of final abatement. (The Certification Correction Action Worksheet is attached to the Citation and Notification of Penalty.) Please note that failure to comply with any of the terms set forth in the agreement will cause the penalty to revert to the initially proposed amount.

The signed agreement and a check for the full amount of the reduced penalty must be delivered to the Area Office prior to the expiration of the 15-working day contest period. If mailed, the letter must be postmarked not later than the day that the 15-working day contest period ends.

If you have any questions regarding the EISA, please contact this office at 954-424-0242.

Sincerely,
Condell Eastwood,
Area Director

Key elements of the agreement call for...the Employer to correct the violations by the abatement date(s) set forth in the citation(s); for the Employer to provide evidence of corrective actions taken and to provide written certification that all items have been abated at the time of final abatement.

The EISA can be used only where the sole issue of dispute is the dollar amount of proposed penalties.

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DOL (W&H) Developments



- > Proposed regulations regarding white-collar exemptions
- > Opinion letter interpretations as to independent contractors

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Overtime Rule 2.0



Proposed Rule In A Nutshell

- > Proposed minimum salary threshold is \$679 per week (which annualizes to \$35,308 per year).
- > Continues current rule of one threshold regardless of which exemption, industry, or locality.
- > Dramatic change to HCE - \$147,414 per year.
- > No changes proposed to duties tests for the exemptions.
- > No "automatic" updates – but propose to regularly update with notice.

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The Future of Overtime Rule 2.0



The Second Time Around

- > Written with the benefit of prior feedback and litigation.
- > Expect final rule to look a lot like proposal.
- > Expect a quick turnaround.
- > Expect some type of litigation from interested parties.

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What To Do Now?



Do Not Panic!

- > **Perspective:** This is a process. Do not run out and make changes tomorrow based on a proposal.
- > **Be Prepared:** Start evaluating your exempt positions and be ready to make changes before end of 2019 if necessary.
- > **Experience:** You've been through this before. You likely already know where to focus this time around.

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FINAL QUESTIONS




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THANK YOU

FOR JOINING US

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