



Today's webinar will begin shortly. We are waiting for attendees to log on.

Presented by:

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FISHER & PHILLIPS LLP

A T T O R N E Y S A T L A W

Solutions at Work®

WHAT TO DO WHEN OSHA COMES CALLING: HOW TO LEGALLY PROTECT YOUR RIGHTS



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**THANK YOU
FOR YOUR COMMITMENT TO SAFETY**

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WHY ATTEND THIS TRAINING?

To maintain and constantly improve employee safety

The first step to prepare for an OSHA inspection is to maintain a safe and compliant workplace.

WHY ATTEND THIS TRAINING?

Avoid large OSHA penalties such as:

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. Olivet Management LLC (NY) \$2.3 million
5. E. N. Range, Inc. (FL) - \$2.1 million
6. South Dakota Wheat Growers ((SD) - \$1.6 million
7. Tempel Grain Elevators, LLC (CO) - \$\$1.59 million
8. CES Environmental Services, Inc. (TX) – \$1.4 million
9. AMD Industries, Inc. (IL) - \$1.247 million
10. Goodman Mfg. Co. (TX) - \$1.215 million
11. Piping Technology & Products, Inc. (TX) - \$1.013 million
12. PJ Trailers Mfg., Inc & Delco Trailers (TX) - \$949,800
13. Bostik, Inc. (MA) - \$917,000

WHY ATTEND THIS TRAINING?

Avoid large OSHA penalties such as:

14. A-1 Excavating (WI) - \$861,000
15. WRR Environmental Services (WI) - \$787,000
16. Cooperative Plus (WI) - \$721,000
17. Tribe Mediterranean Foods (MA) - \$702,300
18. Ball Aerosol and Specialty Container (OH) - \$589,00
19. Sims Bark Co & Sims Stone Co. (GA & AL) – \$576,000
20. Republic Engineered Products (OH) - \$563,000
21. Excelsior Brass Works (PA) - \$550,400
22. Dover Chemical Co. (OH) - \$545,000
23. C.A. Franc (PA) - \$539,000 and criminal referral
24. All-Feed Processing & Packaging, Inc. (IL) - \$518,520
25. Loren Cook Co. (MO) - \$511,000

SUPERVISOR LEGAL ROLE IN OSHA CITATIONS

To issue 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.

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.”

SAFETY RESPONSIBILITY : DISCIPLINE – THE KEY ELEMENT

Discipline has a “*pro-employee*” purpose and is the cornerstone of an effective safety management program. Analyze the role of Discipline by the elements of the OSHA “Affirmative Defense” of “Unpreventable Employee Misconduct.”

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**

OSHA'S TOP 10 MOST CITED VIOLATIONS FISCAL YEAR 2014

1. Fall protection, general requirements (1926.501)
2. Hazard communication (1910.1200)
3. Scaffolding (1926.451)
4. Respiratory protection (1910.134)
5. Lockout/Tagout (1910.147)
6. Powered industrial trucks (1910.178)
7. Electrical – wiring method (1910.305)
8. Ladders (1926.1053)
9. Machine guarding (1910.212)
10. Electrical – general requirements (1910.303)

COVERAGE & EXEMPTIONS

General rule: applies to all employers

- In all states, territories, & D.C.
- Except as specifically exempted



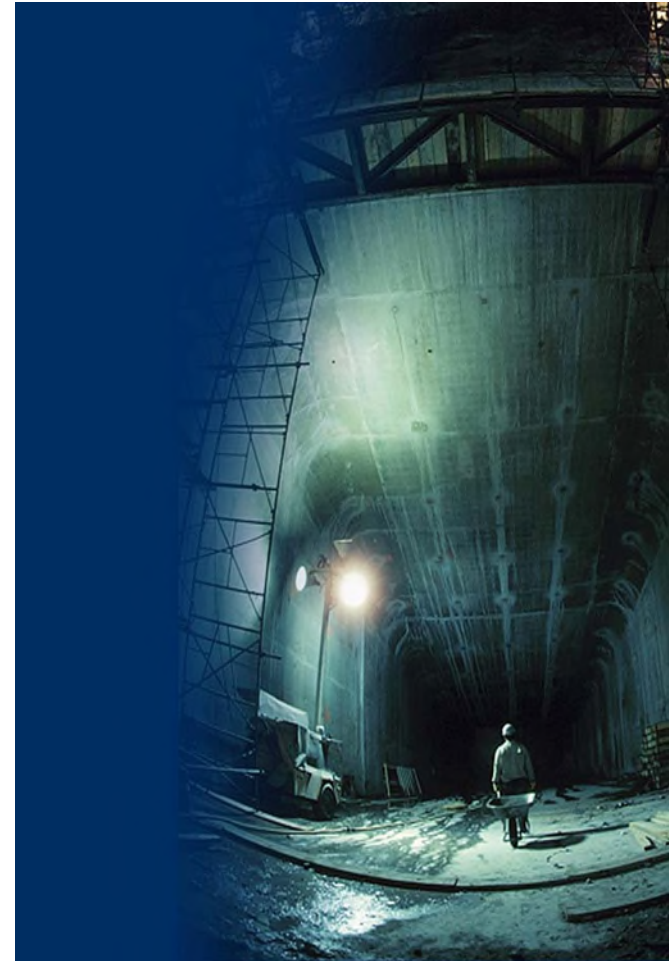
PRE-INSPECTION ACTION PLAN

- OSHA Poster
- Assignment of responsibilities
- Training/recordkeeping
- Hazard assessment and abatement
- Equipment needed during inspection
- Review of previous citations
- **Review of insurance and third-party audits**
- **Periodic audits and reviews**

WHY ME?

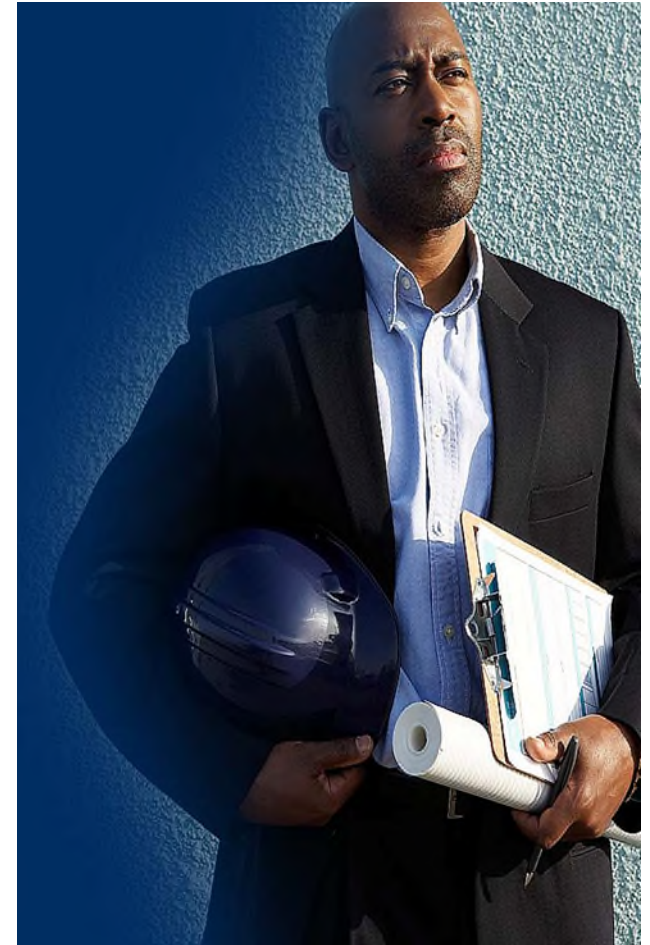
INSPECTION PRIORITIES

- Imminent danger
- Fatalities/catastrophic accidents
- Employee complaints/referrals
- High-hazard industries &
- Special emphasis programs



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



MAINTAINING CONTROL

- Includes determining before an inspection...
 - What OSHA standards are applicable – do you comply?
 - Assure support staff (receptionists, secretaries, guards) are trained.
 - Know what to say when government is at your door.
 - Who is the right company person to contact, including your OSHA Counsel?

THE KNOCK

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



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

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
- Trade secret issues

THE WALKAROUND

- Inspection may last several hours or several months
- **Employer – right to accompany Compliance Officer (“CO”)**
- An Employee Representative, if any, must be permitted to attend entire inspection
- Limit the area seen by the CO

THE WALKAROUND

- 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.)
- Maintain control
- **No staging of event or accident**
- **No destruction of evidence or misrepresentations – even if inadvertently**

THE INSPECTION

- CO will usually take photographs
 - Video equipment
 - Right to protect proprietary trade secrets
- CO may perform relevant tests
 - e.g., air sampling, noise monitoring
- **Advise CO that only side-by-side sampling or monitoring will be allowed**

THE INSPECTION

- Interviews
 - Schedule away from production floor or work area
 - Normally in company conference room
- **Tape-recording**
- **Signed statement**
- Deposition

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

THE INSPECTION

- Management and supervisor interviews
 - **Always another management/counsel present – agent of Company**
 - Definition of manager?
 - Fatality investigation – attorney always present
 - **No tape-recording**
 - **Signed statement**

THE INSPECTION

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

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
- Request photos and monitoring results
- Discuss appeal rights
- **Not a time for debate**

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

PENALTIES

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

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

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

CITATION 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**
- Formal settlement
- Hearing

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



Final Questions

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CURRENT OR PAST ADMINISTRATIONS.**

BE SAFE!



Thank You

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