

WHAT TO DO WHEN THE OSHA INVESTIGATOR KNOCKS AT YOUR DOOR



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What To Do When The OSHA Investigator Knocks At Your Door

by Rodolfo R. Agraz, John C. Artz and Michael T. Heenan

I. INTRODUCTION

Every Company cares about safety and health in the workplace. No company wants anyone to become ill or get hurt. Companies invest substantial time, effort and money in trying to achieve safe and healthful operations. They would do this without regard to government regulation. However, managing compliance with federal and state OSHA requirements is an integral part of managing safety in this day and age.

When OSHA Compliance Officers arrive at your workplace, you could think of the event as a visit, an inspection, an audit or an investigation. It is almost always an enforcement event and therefore more than a visit. *You could call it an inspection if the agency confines its activities to just looking at conditions to determine compliance.* You could call it an audit, if the Compliance Officers are just looking at your injury log and comparing it with your records of accidents. *But it is best to recognize that most OSHA events are actually investigations.*

In an *investigation*, there is not only a review of onsite conditions or records, but also a concentrated effort to unearth information from the *past* as well as the present. This is done partially through observation and casual questioning regarding conditions, but more importantly, it is done through *in-depth examination of documents and utilization of private one-on-one interview techniques with witnesses, including both hourly and supervisory personnel.*

When these law enforcement investigative techniques are used by OSHA, the company is at a serious disadvantage. The OSHA Compliance Officer is a professional investigator. The company is not. What questions will be asked in interviews? Will they be properly phrased to illicit truth or will they be confusing to the witnesses? Can the witness have assistance from the company? What if OSHA demands documents that you do not believe you should have to turn over? Can OSHA hold you responsible for past events? Can OSHA increase enforcement because of conditions you had notice of previously?

It is in every company's interest not only to be safe, but also to have a good safety compliance record. It is also in every company's interest that it not be subjected to unfair investigative techniques and that factual findings by OSHA are not based on inappropriate speculation. It is important to safeguard the company's interest in all types of OSHA events. Many companies receive regular OSHA inspections. Many companies never get inspected. All companies have continuing affirmative obligations and all are potentially subject to investigation by OSHA at anytime.

Inspections and investigations by OSHA are initiated for any number of reasons. If a Compliance Officer is at your door, you need to know, first of all: Why? The answer to that question can significantly affect how you respond. If there has been a fatal accident, of course, you know why an investigation is being initiated.

A fatal accident is the worst thing that can happen in the workplace. It affects every employee. One minute everything is fine and no one can imagine that something terrible is about to happen. The next minute, everyone on the property is in shock. The unimaginable has happened. Not only is the event emotionally devastating, it throws the company immediately into a legal morass.

Company officials need to be prepared to respond to serious situations that they hope will never happen. They need to be prepared and then hope that their preparations are merely "insurance" – that their plans will never have to be implemented. Accidents and all other circumstances which prompt OSHA investigations must be planned for ahead of time so that the company will know what to do immediately in dealing with the unexpected.

No OSHA inspection is routine. Agency investigations and audits can give rise to very serious legal consequences. Civil penalties can be extremely costly. Even criminal prosecutions are a possibility in extreme circumstances – and you never know what is extreme until the facts are uncovered during investigation. Accidents can give rise to civil liability, and can raise potentially complicated workers' compensation and insurance issues, as well as lead to regulatory liability. All inspections conducted by OSHA can have an impact on workforce morale and can result in major sanctions against the company.

This session provides and reviews information and procedures that can help a company through an OSHA investigation. It also helps identify the most important things to do to be prepared for any inquiry into how well the company has met the requirements of law. It can be a starting point for those who are new to managing OSHA compliance, and it can serve as a refresher for those who have long experience with agency enforcement activities.

II. INVESTIGATION CHECKLIST

A. OSHA Is At The Door

1. Review the credentials of the Compliance Safety and Health Officer
2. Learn the purpose of the inspection
 - Imminent Danger
 - Catastrophic or Fatal Accident
 - Complaint
 - Formal
 - Informal
 - Programmed
 - Re-Inspection
3. Contact higher management or Company counsel as necessary

B. Opening Conference

1. Consider having opening and closing conferences separate from those of the employee representative
2. Decide whether to require warrant or consent to inspection

3. Establish ground rules for consent inspection
 - Scope
 - Areas to be entered
 - Trade secrets to be protected

C. Walkaround

1. Stay with the Compliance Officer at all times
2. Take the same photographs and measurements
 - Ask the Compliance Officer why a photograph or measurement was taken
3. Be polite; do not argue; but point out where there is no hazard, or no employee exposure to any hazard, or that the standard does not apply
4. Do not volunteer information
5. Be careful what you say to the Compliance Officer – it may be considered an admission
6. Make note of conversations with employees
7. Do not permit demonstrations of equipment or the interruption of the work of employees
8. Consider how to address apparent violations
9. Plan the route to the area the Compliance Officer is to inspect – “plain sight” doctrine

D. Management Interviews

1. Entitled to have company representative or attorney present
2. No video or audio recording
3. No signed statements
4. Prepare the witness (likely questions and documents)

E. Employee Interviews

1. Company decision to allow during work time
2. Company right to interview

3. Employee right to ask that a company attorney present as long as conflicts are waived
4. Employee right to an attorney if OSHA issues subpoena

F. Document Requests

1. Written requests to a single source
2. Review requests for reasonableness
3. Does the document respond to the request?
4. Is the document privileged?
5. Maintain separate copy of all documents produced

G. Closing Conference

1. Limit participation to seeking information from the Compliance Officer rather than providing information
2. Ask the Compliance Officer why they believe an apparent violation exists
 - What is the standard?
 - What is the hazard?
 - Where is the exposure?
 - How will it be characterized?
3. Try to determine what exactly the Compliance Officer believes is required for abatement
4. Do not argue
5. Do not agree or admit to anything
 - Hazardous condition exists
 - Time for abatement is adequate or reasonable
 - Abatement measure is reasonable
6. If have clear evidence to refute an alleged violation, provide it

III. PREPARING FOR AN OSHA INSPECTION

A. Specific

1. What have you done in the past, *i.e.*, what is your present plan?

2. Consider now whether and under what circumstances you want to require OSHA to get a warrant before you will permit any entry.
3. Determine who will be called if a Compliance Officer arrives, and who will accompany him or her on the walkaround portion of the investigation. Make sure these persons are aware of what should and should not be said and done. You may want to refer to the handout, *What to Do When OSHA is at Your Door*.
4. If your operation is larger, you should use a management team for the inspection:
 - It should be one safety professional (who will be the principal spokesperson for the company and the contact person with OSHA);
 - One person who is primarily the video and still photographer, who also takes detailed notes of the walkaround;
 - The manager from the specific area;
 - An overall manager as well, if the scope of the inspection calls for it;
 - A maintenance foreman with a radio to permit immediate corrections as desired; and
 - Legal counsel (in appropriate cases).
5. Make sure all of these individuals have been trained ahead of time to understand their roles in the investigation, *i.e.*, to let the spokesperson lead any discussions with OSHA, to answer the questions where necessary but not volunteer additional information, to convey the impression that you have a safe operation, and to be able to take immediate corrective action where desired. Make sure that there are digital still and video cameras available, fully charged and ready to go.
6. What role should your legal counsel play?
 - Consider whether to have counsel present at the opening conference of an inspection. This may be appropriate in a death case where you anticipate there may be a willful violation, which could result in criminal prosecution, or in any major accident which did not result in a fatality.
 - Counsel can prepare managers for interviews, and sit in on them.

- As a general rule, counsel does not sit in on interviews of hourly employees (although they can do so if the individual requests it and there is no apparent conflict). This should be considered ahead of time. The Company should take a neutral position on this, so as not to be seen as attempting to coerce the hourly employees.
- At the closing conference, counsel may prevent you from making damaging admissions.

B. General

1. What hazardous practices, procedures, or areas are there in your workplace?
 - Assess the hazards in your workplace
 - Review the OSHA 300 logs to see if any injury trends can be identified
 - Review any other documents, audits, or surveys, which may identify existing or potential hazards in your workplace
 - Make an inventory of hazards you find, so you can address them
2. Write a plan to protect your workers from the hazards
 - Plan must be designed with input from all three groups: top management, front-line management, and hourly workers
 - Make sure you follow the plan
 - Train employees, and document the training; make sure the training is effective
 - On a regular basis, check to make sure that the plan is being followed, and that it's working
3. If you are subject to the construction standards (Section 1926), remember that you must have a safety plan for the site. It's not a bad idea for general industry, either (so long as you are committed to following the plan).
4. Safety Equipment
 - 29 C.F.R. § 1910.132 requires a Workplace Hazard Assessment and a written certification of appropriate personal protective equipment

- What kind of program do you have to make sure that your employees wear the required safety gear? Do you routinely discipline for their failure to do so? You should. Management must wear the appropriate personal protective equipment (PPE) as well.
- If you want to be able to establish the Isolated Employee Misconduct defense, you must be able to show that you had a rule requiring the wearing of the equipment, that the rule was uniformly enforced, and that action was taken in the form of discipline for individuals who violated either this rule, or at least safety rules in general.
- Must make sure line management enforces the rule (and follows it too).
- If a standard requires that PPE be made available, make sure that individuals are trained and understand when they must use it. "Available" does not usually mean optional use by the worker. Is the necessary written PPE certification in place? Do you follow the new rule on employer payment for PPE?
- Emergency or personal protective equipment must be readily available, kept clean, inspected periodically for damage, and employees trained in its use. The training must be documented.
- Respirators – for those individuals called upon to wear respirators (even if only on an emergency basis), is the appropriate model provided? Have you had an approved respirator fit test performed? Is it current, or does it need to be updated? What about the evaluation certification? (29 C.F.R. § 1910.134)
- Are your fire extinguishers and sprinkler systems regularly inspected and recharged? Are employees trained in their use? (29 C.F.R. §§ 1910.155 *et seq.* and 1926.150 *et seq.*)
- Are the proper guards in place on your machines? Are they periodically checked to make sure no one has removed the guards "for ease of operation?" (29 C.F.R. §§ 1910.212 *et seq.*)

5. Safety Training

- Have you performed all required training, both initial and annual?
- Is the training documented? How?

- Is the training effective? How do you know?

6. General Duty Clause

- "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"
- Used where there is no specific standard, and there is a recognized hazard likely to cause death or serious physical injury
- Ergonomics and heat stress are examples of recognized hazards which are addressed through the General Duty Clause

7. Specific Standards

- Fall Protection (29 C.F.R. §§ 1910.23 *et seq.* and 1926.500 *et seq.*)
- Exit Routes and Emergency Action Plans (29 C.F.R. § 1910.38)
- Occupational Noise (29 C.F.R. §§ 1910.95 and 1926.52)
- Process Safety Management of Highly Hazardous Chemicals (29 C.F.R. §§ 1910.119 and 1926.64)
- Personal Protective Equipment (PPE) (29 C.F.R. §§ 1910.132 *et seq.* and 1926.95 *et seq.*)
- Confined Spaces (29 C.F.R. § 1910.146)
- Control of Hazardous Energy (Lockout/Tagout) (29 C.F.R. § 1910.147)
- Powered Industrial Trucks (29 C.F.R. § 1910.178)
- Cranes and Hoists (29 C.F.R. §§ 1910.179 and 1926.550 *et seq.*)
- Air Contaminants (29 C.F.R. §§ 1910.1000 *et seq.*)
- Asbestos (29 C.F.R. §§ 1910.1001 and 1926.1101)
- Lead (29 C.F.R. § 1910.1025)
- Bloodborne Pathogens (29 C.F.R. § 1910.1030)

- Hazard Communication (program, inventory, MSDSs, labels, training, all up to date) (29 C.F.R. §§ 1910.1200 and 1926.59)
- Scaffolds (29 C.F.R. §§ 1926.450 *et seq.*)
- Excavations (29 C.F.R. §§ 1926.650 *et seq.*)
- Any other specific standards which apply to your line of work

Someone in the organization must stay familiar with the various OSHA standards to see whether you are in compliance. Some standards require a written policy and/or plan. Once the policy is prepared, it must be communicated to the employees and training must be documented.

8. Recordkeeping

- Do you record all occupational injuries and illnesses on the OSHA Log (OSHA Form 300) within the appropriate time periods (generally six working days after learning of the injury)? The new recordkeeping standard took effect on January 1, 2002. 29 C.F.R. Part 1904, "Recording and Reporting Occupational Injuries and Illnesses." If not familiar, visit www.osha-slc.gov/recordkeeping/index.html.
- Do you have the appropriate company executive certify the Annual Summary of Occupational Illnesses and Injuries (OSHA Form 301), and make sure the summary for the previous year is posted from February 1 through April 30 each year?
- Do you orally report to OSHA within eight hours a single fatality or the hospitalization of three or more employees? (Don't fax or leave voicemail; if you can't talk to a person at local area office, call 800/321-6742.) (29 C.F.R. § 1904.39)
- Do you have records to back up the determinations that are made on the injury log? What about occupational problems such as hearing loss or asbestosis?
- Even where you contest a claim, do you make sure that once a determination is made, it is entered on the log (subject to being stricken later)?
- Do you have a plan to keep records for the appropriate time period? (Some records must be kept 30 years after employment ends.)

9. Medical Records
 - Governed by 29 C.F.R. § 1910.1020
 - Employees must be reminded each year of their right of access to medical records
 - Retain medical records for employment plus 30 years and exposure records for 30 years
10. Address “multiemployer worksite” obligations
 - When you have contractors’ employees onsite, how do you advise them of your emergency and safety rules and make sure they’re complying?
 - How do you protect them from hazards created by you or other contractors?
 - How do you control the exposure of other employees to any such hazards?
 - How do you determine that they are able to comply with OSHA standards while they perform their own work?
11. How do you handle workers’ safety complaints?
 - A management individual, usually the Safety and Health Manager, should be designated to respond to any safety complaints from workers.
 - You don’t have to do what the worker says or wants, but anyone who registers a complaint is entitled to have you consider and respond to it on a reasonably prompt basis.
 - If you don’t act on an internal complaint, you have invited the worker to ask OSHA to come in to act on it for you.
12. If you have potential environmental hazards in the workplace:
 - Do you sample for them to make sure you are below the appropriate levels?
 - How often do you sample?
 - If you get a sample out of limits, what actions do you take? Don’t ignore an out-of-limits sample!

13. Do you have a safety committee or organization of both management and labor representatives which meets regularly and reports in writing on its meetings? Worker involvement may result in a more effective safety program.
14. While volunteers are not covered by the Occupational Safety and Health Act, there are different interpretations of "volunteer." Even where workers are not subject to the Act (either because they are volunteers or because they are employees of a municipality), OSHA standards should be reviewed to see if they would be appropriate as good general safety practices.
15. "Mock Inspection" or "Safety and Health Audit"

Consider having an inspection made to identify potential OSHA violations. If you do this, be sure that you either carry out **all** of the recommendations of the inspection, or that you document the rationale behind not doing it. Because the results may be discoverable by OSHA, consider having it done through legal counsel, which under certain circumstances may protect it from discovery.

C. Additional Considerations For Fatality Or Catastrophe Investigations

1. Fatality or catastrophe investigations require additional considerations. OSHA has a specific compliance directive, CPL 02-00-137 (4/14/05) which governs the investigation procedures.
2. In addition to OSHA, you may have to deal with paramedics/EMTs, police, coroner's office, district attorney, news media, and the family of the worker in the accident.
3. You need to consider all these possibilities before the event occurs, so you already have a plan to follow. Don't let any of these other participants detour you off your planned path.
4. You may want to send a memorandum to all employees urging cooperation. Some points to consider making are:
 - On [date], we were shocked and saddened that our colleague, _____, was injured/died in an accident at our facility while working _____. At this time, the cause of the accident is still unknown. But the investigation continues, and we have cooperated and will continue to cooperate in every possible way with all of the authorities who are investigating this incident, including OSHA. The Company expects all employees to do the same.

- You should avoid discussing this matter with the press. All press inquiries should be immediately directed to _____.
 - We urge all employees to fully cooperate with the authorities who are conducting the investigation so that the cause of the accident may be known. We recognize, however, that it is your decision whether you wish to speak to any investigator about the incident. If you choose to speak with the authorities, you should tell the truth as to those matters for which you have personal knowledge, regardless of whether you believe your statements are unflattering to the Company or other employees. It is important not to guess or speculate about the answer to any question. If you are asked a question for which you do not have personal knowledge, please say so, and refer the investigator to _____ so that the appropriate person to answer the question may be identified. Follow the same procedure if you believe that your answer to a question may require you to disclose sensitive or confidential business or trade secret information of the Company or its customers. We can then make appropriate arrangements with the authorities to provide them with the information they seek while preventing public disclosure of protected business information. Remember, the authorities are just doing what they think they need to do in order to complete their investigation and we want to facilitate it and fully cooperate with them. If you have any questions or concerns about the questions that are being asked of you, please call _____.
 - We will not take any action against employees for truthfully answering the investigators' questions. We encourage you to fully cooperate with the investigation, and we will not make any threats to, or take any action concerning, your continued employment, job benefits, or job responsibilities based on your personal decision whether to cooperate with authorities.
 - We have retained outside legal counsel to assist us in cooperating with the authorities in the investigation. Our outside counsel does not represent our employees in every capacity. But the Company and its outside counsel can refer you to an attorney if you should wish to speak to one. You, however, will have to pay for the legal fees or costs yourself.
5. In the OSHA investigation, pay special attention to the interviews
- Managers can (and should) have representation, and you may insist upon it

- You cannot insist on sitting in on interviews of nonmanagement employees; they do not have to agree to be interviewed, and can request counsel, but this is entirely voluntary
 - If company counsel participates in nonmanagement interviews, make sure there are no apparent conflicts, and that the employee understands that the attorney's obligation is to the Company, so if a conflict arises, representation will be withdrawn
6. Dealing with news media – have a generic news media response prepared in advance
- Sorry to learn today of a death/serious accident
 - At this time, cause is still unknown
 - We are investigating the accident and will cooperate fully with others
 - We will take any steps necessary to determine what happened

As further information is discovered, we will make it available as appropriate.

7. Be prepared to resist a persistent reporter
- Stand firm, simply say we don't know what happened and we are trying to find out
 - "Company will not start speculating or guessing"
 - Don't be bullied, and don't be pressured into thinking you have to say anything more – you don't
 - Appeal to the reporter's sense of decency – this was a serious accident; please let us try to find out what happened
 - Last ditch option, if they won't take no for an answer: say you have nothing more to add at this time, say goodbye and hang up, or politely ask them to leave
8. Dealing with the family
- Keep lines of communication open

- Make sure financial details are addressed promptly, so family does not have to worry about them (workers' compensation, funeral expenses, etc.)
 - Return personal items promptly
 - Try to provide enough information that the family isn't driven to engage an attorney just to find out what happened
 - Keep in mind that in a fatality investigation, OSHA will be in contact with the family at each step of the investigation
9. OSHA's dealings with the family
- OSHA will generally contact family members of employees involved in fatal or catastrophic occupational accidents or illnesses at an early point in the investigation and give them an opportunity to discuss the circumstances of the accident or illness. Statements may be taken from the families.
 - OSHA will maintain follow-up contact with family members so that they can be kept up-to-date on the status of the investigation. Family members or their legal representatives will be provided with a copy of all citations, subsequent settlement agreements or Review Commission decisions as these are issued.
 - The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed. If a contest is filed, the case file will not be made available until after the litigation is complete. Additionally, if a criminal referral is under consideration or has been made, the case file cannot be released to the family.
10. Be on the lookout for signs that all is not going well
- Subpoenas from OSHA rather than just requests
 - Desire to take sworn statements from managers, rather than just interviewing them
 - OSHA wants to bring its own experts into the workplace to the accident site
 - A different OSHA investigation team takes over the investigation

- The local district attorney is sending attorneys and investigators

11. Potential Criminal Violations

- Section 17(e) of the Act provides criminal penalties for an employer who is convicted of having willfully violated an OSHA standard, rule or order when the violation results in the death of an employee (but not violations of the general duty clause). When there are violations of a standard, rule or order, or a violation of the general duty clause, criminal provisions relating to false statements and obstruction of justice may also be relevant.
- OSHA will evaluate the circumstances surrounding all occupationally related fatalities to determine whether the fatality was caused by a willful violation of a standard, thus creating the basis for a possible criminal referral. OSHA's compliance directive states that the evidence obtained during a fatality investigation is of paramount importance and must be carefully gathered and considered.
- Early in the investigation, the Area Director, in consultation with the investigator, should make an initial determination as to whether there is potential for a criminal violation, based on consideration of the following:
 - A fatality has occurred
 - There is evidence that an OSHA standard has been violated and that the violation contributed to the death
 - There is reason to believe that the employer was aware of the requirements of the standard and knew that he was in violation of the standard, or that the employer was plainly indifferent to employee safety
- If the Regional Administrator agrees with the Area Director's assessment of the case, the Regional Administrator will notify the Regional Solicitor. A Regional team or trained criminal investigator may assist in or perform portions of an investigation, as appropriate.
- In addition to criminal prosecution under Section 17(e) of the OSH Act, you may potentially face prosecution under a number of other sections of the United States Code, including,

- Conspiracy, making false statements, fraud, obstruction of justice, and destruction, alteration or falsification of records during a federal investigation
- Environmental laws such as the Clean Water Act, the Clean Air Act, the Resource Recovery and Conservation Act, and the Comprehensive Environmental Response, Compensation, and Liability Act

12. General Recommendations

- Never proceed with any investigation without a goal, a clear understanding and a plan for what is about to take place
- Always know what is at stake
- Maintain confidentiality of your investigation findings
- Remember that anything may potentially be disclosed at any time, so reports and statements should be based on solid, indisputable facts and carefully worded to present the truth unambiguously, while speculation, opinions and admissions should be avoided as they may be premature or inaccurate
- Never write or record anything which you would not want to see on the front page of the newspaper
- Never allow your company to be outmatched by an experienced government investigator

IV. MAKE A PLAN! NOW IS THE TIME TO GET THOSE QUESTIONS ANSWERED AND PROBLEMS ADDRESSED — NOT WHEN OSHA IS INSIDE YOUR FACILITY!

A. Frequently Asked Questions About OSHA Citations

1. When should I file the notice of contest?
 - The notice of contest must be filed no later than the 15th working day after receipt of the citation and proposed penalty. Filing is accomplished by mail so long as the notice of contest is postmarked (USPS, not postage meter) on the 15th working day. Certified mail is recommended, but not required. The notice of contest can also be sent by facsimile or delivered by messenger. Saturdays, Sundays and Federal holidays are excluded in calculating the 15 working days.

2. What must the notice of contest contain?
 - The notice of contest need only contain a statement of what citations are being contested, as well as which proposed penalties. You should not contest a proposed penalty of \$0, although you can contest the underlying citation.

3. What about the informal conference?
 - OSHA encourages you to meet with the area director after receipt of the citations to see whether they can be resolved without the necessity of litigation. Even if an informal conference is scheduled or held, this does not change the 15-working-day period in which the citation must be contested. Additionally, even if the area director agrees to amend the citations, the notice of contest must be filed within 15 working days. As a general rule, the contest can always be withdrawn at a later date, so if in doubt, file it.

4. What happens after the notice of contest is filed?
 - The notice of contest is transmitted by the local OSHA area office within 15 working days to the Occupational Safety and Health Review Commission. The attorneys for the Department of Labor (DOL) are required to prepare and file a formal complaint within 20 days after OSHA's receipt of the notice of contest, but this time may be extended. Once the employer receives the complaint, 20 days are provided to file an answer. The case is assigned to an administrative law judge, and is usually set for hearing within the next 90-180 days. Depending upon the issues in the case, there may be some discovery (interrogatories or requests for production) filed by either side.

5. Do cases ever settle before the hearing?
 - It is not uncommon for cases to settle prior to the hearing, when the attorney for the DOL meets with the employer or its counsel. In many cases, there is a genuine meeting in the middle where penalties are reduced, the classifications of the citations may be changed, and the alleged hazards are abated.

6. If there is a hearing, what will happen?
 - The attorney for the DOL and the employer or its counsel will present their cases to the administrative law judge. The primary witnesses for the DOL are generally the compliance officer, and perhaps one or more company hourly employees. The employer's witnesses are generally

managerial employees and sometimes (rarely) hourly employees. Expert witnesses are permitted. It is the government's obligation to prove the basic elements of a violation and the basis for the proposed penalty, and the employer is trying to counter these. Each side presents its testimony. After the hearing closes, a transcript is available and the parties are generally given additional time to file a brief in support of their positions with the judge. After reviewing the record and briefs, the judge issues a decision. The judge has the power to lower or raise any proposed penalty which has been contested, which is why penalties of \$0 should not be contested (even though the underlying citation may be contested).

7. Do the employees play any role in the hearing?
 - Under the law, nonmanagerial employees are entitled to assert party status and participate in the hearing, just as the DOL and the employer do. This means they can be represented by counsel, can offer and cross-examine witnesses, and can submit a brief. They often are called as witnesses by the government in support of its case-in-chief.

8. What appeal is there from a Judge's decision?
 - Any party may petition the Occupational Safety and Health Review Commission for review of the administrative law judge's decision. If review is granted, the Review Commission accepts briefs and in rare instances, takes oral argument. No new evidence may be presented. A party aggrieved by a decision of the Review Commission, whether a refusal to grant review or a decision on the merits, may appeal to a Federal Circuit Court of Appeals. A party may not appeal to the circuit court if it did not first ask for review from the Review Commission.

9. What are the factors which usually govern whether a citation should be contested?
 - These vary according to employer and particular situation, but certainly the following are significant:
 - A willful citation where an employee death has occurred. This is because if a willful violation is found under these circumstances, it opens the door to criminal prosecution under the OSH Act.
 - Any citation where the proposed penalties are great, this being relative of course.

- Any case where, regardless of proposed penalty, the abatement required would be impossible or costly, either directly or indirectly through disruption of the established work procedures. Thus, if the employer believes it cannot live with the abatement required, the citation should be contested.
 - Any citation which the employer believes to be improper, whether because the cited regulation is not applicable or because the employer believes its conduct did not violate the act or regulations, should be carefully considered for contest.
10. Is it expensive to have legal counsel represent the employer in a contest of a citation?
- While the answer is relative, it depends on the issues involved. It is not generally complicated for counsel to review a citation and proposed penalty and discuss with the employer the ramifications this has on the employer's operations. Similarly, it is not particularly time-consuming to file a notice of contest, or even to file an answer to a complaint involving a citation of only a few items. The greatest cost would come where a case is actually litigated through the hearing stage with briefs filed thereafter, but as with all legal expenses, the cost of the consequences of not fighting a citation could end up to be even greater.

WHAT TO DO WHEN OSHA IS AT YOUR DOOR

1. Review the credentials of the Compliance Safety and Health Officer (CSHO) and learn the purpose of the inspection: complaint, accident/fatality, programmed, imminent danger, etc.
2. Contact higher management or Company counsel as necessary. If a serious injury or fatality has occurred, you may want counsel to be present during the inspection.
3. Determine whether to require a search warrant before permitting the inspection to proceed. If not, establish the scope of the inspection before it begins. (If that scope is not respected, you may stop the inspection by withdrawing your permission to continue the inspection without a warrant.)
4. During the opening conference:
 - a. Consider having your opening and closing conferences separate from those of the employee representative.
 - b. Confirm the ground rules about the scope and other details of the inspection, such as the areas to be entered or any trade secrets which must be protected.
5. During the walkaround:
 - a. Stay with the CSHO at all times.
 - b. Be polite; do not argue, although you may point out that there is no hazard, or no employee exposure to any hazard, or that the standard does not apply.
 - c. Be careful what you say to the CSHO; it may be considered an admission.
 - d. You do not have to provide work or safety rules or other materials to the CSHO (unless they are subpoenaed), but you may want to provide them. Get a written, signed request.
 - e. Be the CSHO's "shadow" - take the same photographs and measurements. Take extensive notes of what the CSHO observes, persons spoken to, and what is said.
 - f. You decide whether to allow the CSHO to interview your employees on Company time.
 - g. Do not permit demonstrations of your equipment or the interruption of the work of employees.
 - h. Ask the CSHO why a photograph or measurement was taken. Ask about the CSHO's background and make a careful record of the responses.
 - i. Be prepared to correct apparent violations during the inspection, and tell the CSHO.
6. During the closing conference:
 - a. Limit your participation to seeking information from the CSHO rather than providing information to him or her.
 - b. Ask the CSHO specifically why an apparent violation exists: what is the hazard, where is the exposure, etc.
 - c. Try to determine exactly what the CSHO believes is required for abatement.
 - d. Do not agree or admit to anything. For example, do not agree that any hazardous condition exists, or that any particular time for abatement is adequate or reasonable.
 - e. Do not argue with the CSHO or try to talk the CSHO out of issuing a citation.

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PREPARING FOR AN OSHA INSPECTION

SPECIFIC

1. What have you done in the past, *i.e.*, what is your present plan?
2. Consider now whether and under what circumstances you want to require OSHA to get a warrant before you will permit any entry.
3. Determine who will be called if a compliance officer arrives, and who will accompany him or her on the walkaround portion of the investigation. Make sure these persons are aware of what should and should not be said and done. You may want to refer to the handout, *What to Do When OSHA is at Your Door*.
4. If your operation is larger, you should use a management team for the inspection:
 - It should be one safety professional (who will be the principal spokesperson for the company and the contact person with OSHA), and
 - One person who is primarily the video and still photographer, who also takes detailed notes of the walkaround, and
 - The manager from the specific area, and
 - An overall manager as well, if the scope of the inspection calls for it, and
 - A maintenance foreman with a radio to permit immediate corrections as desired, and
 - Legal counsel (in appropriate cases).
5. Make sure all of these individuals have been trained ahead of time to understand their roles in the investigation, *i.e.*, to let the Spokesperson lead any discussions with OSHA, to answer the questions where necessary but not volunteer additional information, to convey the impression that you have a safe operation, to be able to take immediate corrective action where desired. Make sure that there are digital still and video cameras available, fully charged and ready to go..
6. What role should your legal counsel play?
 - Consider whether to have counsel present at the opening conference of an inspection. This may be appropriate in a death case where you anticipate there may be a willful violation, which could result in criminal prosecution, or in any major accident which did not result in a fatality.
 - Counsel can prepare managers for interviews, and sit in on them.
 - As a general rule, counsel does not sit in on interviews of hourly employees (although they can do so if the individual requests it and there is no apparent conflict). This should be considered

ahead of time. The Company should take a neutral position on this, so as not to be seen as attempting to coerce the hourly employees.

- At the closing conference, counsel may prevent you from making damaging admissions.

GENERAL

1. What hazardous practices, procedures, or areas are there in your workplace?

- Assess the hazards in your workplace
- Review the OSHA 300 logs to see if any injury trends can be identified
- Review any other documents, audits, or surveys, which may identify existing or potential hazards in your workplace
- Make an inventory of hazards you find, so you can address them

2. Write a plan to protect your workers from the hazards

- Plan must be designed with input from all three groups: top management, front-line management, and the hourly workers
- Make sure you follow the plan
- Train employees, and document the training; make sure the training is effective
- On a regular basis, check to make sure that the plan is being followed, and that it's working

3. If you are subject to the construction standards (Section 1926), remember that you must have a safety plan for the site. It's not a bad idea for general industry, either (so long as you are committed to following the plan).

4. Safety Equipment

- 29 C.F.R. § 1910.132 requires a Workplace Hazard Assessment and a written certification of appropriate personal protective equipment
- What kind of program do you have to make sure that your employees wear the required safety gear? Do you routinely discipline for their failure to do so? You should. Management must wear the appropriate PPE as well.
- If you want to be able to establish the Isolated Employee Misconduct defense, you must be able to show that you had a rule requiring the wearing of the equipment, that the rule was uniformly enforced, and that action was taken in the form of discipline for individuals who violated either this rule, or at least safety rules in general

- Must make sure line management enforces the rule (and follows it too).
- If a standard requires that personal protective equipment be made available, make sure that individuals are trained and understand when they must use it. “Available” does not usually mean optional use by the worker. Is the necessary written PPE certification in place? Do you follow the new rule on employer payment for PPE?
- Emergency or personal protective equipment must be readily available, kept clean, inspected periodically for damage, and employees trained in its use. The training must be documented.
- Respirators - for those individuals called upon to wear respirators (even if only on an emergency basis), is the appropriate model provided? Have you had an approved respirator fit test performed? Is it current, or does it need to be updated? What about the evaluation certification? (29 C.F.R. § 1910.134)
- Are your fire extinguishers and sprinkler systems regularly inspected and recharged? Are employees trained in their use? (29 C.F.R. §§ 1910.155 *et seq.* and 1926.150 *et seq.*)
- Are the proper guards in place on your machines? Are they periodically checked to make sure no one has removed the guards “for ease of operation?” (29 C.F.R. §§ 1910.212 *et seq.*)

5. Safety Training:

- Have you performed all required training, both initial and annual?
- Is the training documented? How?
- Is the training effective? How do you know?

6. General Duty Clause

- “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”
- Used where there is no specific standard, and there is a recognized hazard likely to cause death or serious physical injury
- Ergonomics and heat stress are examples of recognized hazards which are addressed through the General Duty Clause

7. Specific Standards

- Fall Protection (29 C.F.R. §§ 1910.23 *et seq.* and 1926.500 *et seq.*)

- Exit Routes and Emergency Action Plans (29 C.F.R. § 1910.38)
- Occupational Noise (29 C.F.R. §§ 1910.95 and 1926.52)
- Process Safety Management of Highly Hazardous Chemicals (29 C.F.R. §§ 1910.119 and 1926.64)
- Personal Protective Equipment (PPE) (29 C.F.R. §§ 1910.132 *et seq.* and 1926.95 *et seq.*)
- Confined Spaces (29 C.F.R. § 1910.146)
- Control of Hazardous Energy (Lockout/Tagout) (29 C.F.R. § 1910.147)
- Powered Industrial Trucks (29 C.F.R. § 1910.178)
- Cranes and Hoists (29 C.F.R. §§ 1910.179 and 1926.550 *et seq.*)
- Air Contaminants (29 C.F.R. §§ 1910.1000 *et seq.*)
- Asbestos (29 C.F.R. §§ 1910.1001 and 1926.1101)
- Lead (29 C.F.R. § 1910.1025)
- Bloodborne Pathogens (29 C.F.R. § 1910.1030)
- Hazard Communication (program, inventory, MSDSs, labels, training, all up to date) (29 C.F.R. §§ 1910.1200 and 1926.59)
- Scaffolds (29 C.F.R. §§ 1926.450 *et seq.*)
- Excavations (29 C.F.R. §§ 1926.650 *et seq.*)
- Any other specific standards which apply to your line of work

Someone in the organization must stay familiar with the various OSHA standards to see whether you are in compliance. Some standards require a written policy and/or plan. Once the policy is prepared, it must be communicated to the employees and training must be documented.

8. Recordkeeping

- Do you record all occupational injuries and illnesses on the OSHA Log (OSHA Form 300) within the appropriate time periods (generally six working days after learning of the injury)? The new recordkeeping standard took effect on January 1, 2002. 29 C.F.R. Part 1904, "Recording and Reporting Occupational Injuries and Illnesses." If not familiar, visit www.osha-slc.gov/recordkeeping/index.html

- Do you have the appropriate company executive certify the Annual Summary of Occupational Illnesses and Injuries (OSHA Form 301), and make sure the summary for the previous year is posted from February 1 through April 30 each year?
- Do you orally report to OSHA within eight hours a single fatality or the hospitalization of three or more employees? (Don't fax or leave voicemail; if you can't talk to a person at local area office, call 800/321-6742.) (29 C.F.R. § 1904.39)
- Do you have records to back up the determinations that are made on the injury log? What about occupational problems such as hearing loss or asbestosis?
- Even where you contest a claim, do you make sure that once a determination is made, it is entered on the log (subject to being stricken later)?
- Do you have a plan to keep records for the appropriate time period? (Some records must be kept 30 years after employment ends.)

9. Medical Records

- Governed by 29 C.F.R. § 1910.1020
- Employees must be reminded each year of their right of access to medical records
- Retain medical records for employment plus 30 years and exposure records for 30 years

10. Address "multiemployer worksite" obligations:

- When you have contractors' employees on site, how do you advise them of your emergency and safety rules and make sure they're complying?
- How do you protect them from hazards created by you or other contractors?
- How do you control the exposure of other employees to any such hazards?
- How do you determine that they are able to comply with OSHA standards while they perform their own work?

11. How do you handle workers' safety complaints?

- A management individual, usually the Safety and Health Manager, should be designated to respond to any safety complaints from the workers.
- You don't have to do what the worker says or wants, but anyone who registers a complaint is entitled to have you consider and respond to it on a reasonably prompt basis.

- If you don't act on an internal complaint, you have invited the worker to ask OSHA to come in to act on it for you.
12. If you have potential environmental hazards in the workplace:
- Do you sample for them to make sure you are below the appropriate levels?
 - How often do you sample?
 - If you get a sample out of limits, what actions do you take? Don't ignore an out-of-limits sample!
13. Do you have a safety committee or organization of both management and labor representatives which meets regularly and reports in writing on its meetings? Worker involvement may result in a more effective safety program.
14. While volunteers are not covered by the Occupational Safety and Health Act, there are different interpretations of "volunteer." Even where workers are not subject to the Act (either because they are volunteers or because they are employees of a municipality), OSHA standards should be reviewed to see if they would be appropriate as good general safety practices.
15. "Mock Inspection" or "Safety and Health Audit"

Consider having an inspection made to identify potential OSHA violations. If you do this, be sure that you either carry out **all** of the recommendations of the inspection, or that you document the rationale behind not doing it. Because the results may be discoverable by OSHA, consider having it done through legal counsel, which under certain circumstances may protect it from discovery.

ADDITIONAL CONSIDERATIONS FOR FATALITY OR CATASTROPHE INVESTIGATIONS

1. Fatality or catastrophe investigations require additional considerations. OSHA has a specific compliance directive, CPL 02-00-137 (4/14/05) which governs the investigation procedures.
2. In addition to OSHA, you may may have to deal with paramedics/EMTs, police, coroner's office, district attorney, news media, and the family of the worker in the accident.
3. You need to consider all these possibilities before the event occurs, so you already have a plan to follow. Don't let any of these other participants detour you off your planned path.
4. You may want to send a memorandum to all employees urging cooperation. Some points to consider making are:
 - On [date], we were shocked and saddened that our colleague, _____, was injured/died in an accident at our facility while working _____. At this time, the cause of the accident

is still unknown. But the investigation continues, and we have cooperated and will continue to cooperate in every possible way with all of the authorities who are investigating this incident, including OSHA. The Company expects all employees to do the same.

- You should avoid discussing this matter with the press. All press inquiries should be immediately directed to _____.
 - We urge all employees to fully cooperate with the authorities who are conducting the investigation so that the cause of the accident may be known. We recognize, however, that it is your decision whether you wish to speak to any investigator about the incident. If you choose to speak with the authorities, you should tell the truth as to those matters for which you have personal knowledge, regardless of whether you believe your statements are unflattering to the Company or other employees. It is important not to guess or speculate about the answer to any question. If you are asked a question for which you do not have personal knowledge, please say so, and refer the investigator to _____ so that the appropriate person to answer the question may be identified. Follow the same procedure if you believe that your answer to a question may require you to disclose sensitive or confidential business or trade secret information of the Company or its customers. We can then make appropriate arrangements with the authorities to provide them with the information they seek while preventing public disclosure of protected business information. Remember, the authorities are just doing what they think they need to do in order to complete their investigation and we want to facilitate it and fully cooperate with them. If you have any questions or concerns about the questions that are being asked of you, please call _____.
 - We will not take any action against employees for truthfully answering the investigators' questions. We encourage you to fully cooperate with the investigation, and we will not make any threats to, or take any action concerning, your continued employment, job benefits, or job responsibilities based on your personal decision whether to cooperate with authorities.
 - We have retained outside legal counsel to assist us in cooperating with the authorities in the investigation. Our outside counsel does not represent our employees in every capacity. But the Company and its outside counsel can refer you to an attorney if you should wish to speak to one. You, however, will have to pay for the lawyer's legal fees or costs yourself.
5. In the OSHA investigation, pay special attention to the interviews
- Managers can (and should) have representation, and you may insist upon it
 - You cannot insist on sitting in on interviews of nonmanagement employees; they do not have to agree to be interviewed, and can request counsel, but this is entirely voluntary
 - If company counsel participates in nonmanagement interviews, make sure there are no apparent conflicts, and that the employee understands that the attorney's obligation is to the Company, so if a conflict arises, representation will be withdrawn
6. Dealing with news media - have a generic news media response prepared in advance

- Sorry to learn today of a death/serious accident
- At this time, cause is still unknown
- We are investigating the accident and will cooperate fully with others
- We will take any steps necessary to determine what happened

As further information is discovered, we will make it available as appropriate

7. Be prepared to resist a persistent reporter:

- Stand firm, simply say we don't know what happened and we are trying to find out
- "Company will not start speculating or guessing"
- Don't be bullied, and don't be pressured into thinking you have to say anything more – you don't
- Appeal to the reporter's sense of decency - this was a serious accident; please let us try to find out what happened
- Last ditch option, if they won't take no for an answer: say you have nothing more to add at this time, say goodbye and hang up, or politely ask them to leave

8. Dealing with the family

- Keep lines of communication open
- Make sure financial details are addressed promptly, so family does not have to worry about them (workers' compensation, funeral expenses, etc.)
- Return personal items promptly
- Try to provide enough information that the family isn't driven to engage an attorney just to find out what happened
- Keep in mind that in a fatality investigation, OSHA will be in contact with the family at each step of the investigation

9. OSHA's dealings with the family

- OSHA will generally contact family members of employees involved in fatal or catastrophic occupational accidents or illnesses at an early point in the investigation and give them an opportunity to discuss the circumstances of the accident or illness. Statements may be taken from the families.

- OSHA will maintain follow-up contact with family members so that they can be kept up-to-date on the status of the investigation. Family members or their legal representatives will be provided with a copy of all citations, subsequent settlement agreements or Review Commission decisions as these are issued.
- The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed. If a contest is filed, the case file will not be made available until after the litigation is complete. Additionally, if a criminal referral is under consideration or has been made, the case file cannot be released to the family.

10. Be on the lookout for signs that all is not going well

- Subpoenas from OSHA rather than just requests
- Desire to take sworn statements from managers, rather than just interviewing them
- OSHA wants to bring its own experts into the workplace to the accident site
- A different OSHA investigation team takes over the investigation
- The local district attorney is sending attorneys and investigators

11. Potential Criminal Violations

- Section 17(e) of the Act provides criminal penalties for an employer who is convicted of having willfully violated an OSHA standard, rule or order when the violation results in the death of an employee (but not violations of the general duty clause). When there are violations of a standard, rule or order, or a violation of the general duty clause, criminal provisions relating to false statements and obstruction of justice may also be relevant.
- OSHA will evaluate the circumstances surrounding all occupationally related fatalities to determine whether the fatality was caused by a willful violation of a standard, thus creating the basis for a possible criminal referral. OSHA's compliance directive states that the evidence obtained during a fatality investigation is of paramount importance and must be carefully gathered and considered.
- Early in the investigation, the Area Director, in consultation with the investigator, should make an initial determination as to whether there is potential for a criminal violation, based on consideration of the following:
 - A fatality has occurred
 - There is evidence that an OSHA standard has been violated and that the violation contributed to the death

- There is reason to believe that the employer was aware of the requirements of the standard and knew that he was in violation of the standard, or that the employer was plainly indifferent to employee safety
- If the Regional Administrator agrees with the Area Director's assessment of the case, the Regional Administrator will notify the Regional Solicitor. A Regional team or trained criminal investigator may assist in or perform portions of an investigation, as appropriate.
- In addition to criminal prosecution under Section 17(e) of the OSH Act, you may potentially face prosecution under a number of other sections of the United States Code, including,
 - Conspiracy, making false statements, fraud, obstruction of justice, and destruction, alteration or falsification of records during a federal investigation
 - Environmental laws such as the Clean Water Act, the Clean Air Act, the Resource Recovery and Conservation Act, and the Comprehensive Environmental Response, Compensation, and Liability Act

12. General Recommendations

- Never proceed with any investigation without a goal, a clear understanding and a plan for what is about to take place
- Always know what is at stake
- Maintain confidentiality of your investigation findings
- Remember that anything may potentially be disclosed at any time, so reports and statements should be based on solid, indisputable facts and carefully worded to present the truth unambiguously, while speculation, opinions and admissions should be avoided as they may be premature or inaccurate
- Never write or record anything which you would not want to see on the front page of the newspaper
- Never allow your company to be outmatched by an experienced government investigator

MAKE A PLAN! NOW IS THE TIME TO GET THOSE QUESTIONS ANSWERED AND PROBLEMS ADDRESSED — NOT WHEN OSHA IS INSIDE YOUR FACILITY!