

OSHA'S ENFORCEMENT OF ITS HEALTH STANDARDS – HOW TO STAY COMPLIANT AND BE SAFE

EPAZ

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OSHA

- OSH Act of 1970
- Health and safety standards
 - Safety – fall protection, ladders, scaffolds, lockout/tagout, machine guarding
 - Health – hazard communication, lead, silica, asbestos
- 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.”*
 - Heat, workplace violence, other “recognized” hazards – by industry, employer, or obvious
- Enforcement – OSHA Area Office (inspectors, AAD, AD); Solicitor’s Office

What OSHA Needs to Prove to Legally Establish a Violation

1. Standard applies
2. Standard was violated (not complied with)
3. One or more employees had access/exposure to the hazard
4. Employer actually knew, or (in the alternative) should have known of the alleged violation or hazardous condition

Knock, Knock... OSHA's Here!

- You will get no warning – there is no Miranda warning
- Once inspection begins, litigation has also begun – OSHA wants to prove its case – already (in its mind) has probable cause

Why OSHA Shows Up

- Programmed inspections – e.g., National Emphasis Program (“NEP”); Site-Specific Targeting (SST)
- Un-programmed inspections – anonymous complaint, reported injury, CSHO observation from public place (“just happened to be driving by”)

4th Amendment to the U.S. Constitution

- Protection from unreasonable searches and seizures
- OSHA needs a warrant OR your consent to do an inspection
- The danger of “implied consent” – you didn’t object, so you must have consented
- Your right to discuss the scope of the inspection

Practice Pointer: bring up the 4th Amendment and the warrant requirement

“We understand the 4th Amendment applies – we are inclined to consent to the inspection, but before we do, we want to make sure there is a clear understanding of the scope of the inspection and what you (the OSHA inspector) plan to do today.”

Six Stages of an OSHA Inspection

- Event that triggers the inspection (reason for OSHA to show up)
- Opening conference
- Walkaround inspection
- Document requests
- Interviews
- Closing conference

Event No. 1 (- Opening Conference)

- Inspector shows up at your facility and asks to speak with whomever is in charge – YOU are the supervisor
 - At that point, do you HAVE to talk to the inspector?
 - Can you ask the inspector to LEAVE?

Event No. 2 (- Opening Conference)

- You call your Corporate Safety Director, who speaks with the inspector and tells the inspector to come back in two days when he can be there and that he does not consent
- At that point, the OSHA inspector can?
 - A. Refuse to leave
 - B. Get an electronic search warrant
 - C. Shut down the job
 - D. Leave

Understanding What Documents & Information You Need to Share With OSHA

You Must Know What the “Probable Cause” Is for the Inspection

- What is probable cause? The legal justification/grounds for the inspection.
- Why is it important? The inspection must be limited to the probable cause.
- Discussion: Unprogrammed versus Programmed Inspections
- Discussion: OSHA’s efforts to obtain documents

Important Rights – The Right to Say “No”

■ The right to:

- Refuse entry if no warrant
- Refuse to sign anything
- Refuse to be recorded
- Refuse to speak to the inspector (if no subpoena) – everything is **voluntary**
- Object to the inspector taking photos or video due a concern that trade secrets may be disclosed
- Refuse any “unreasonable” request (OSH Act of 1970)
- Refuse to perform a “demonstration” of any work process or activity

The “Walkaround” - Controlling the Flow of Information

- Need to know the limits of OSHA’s enforcement authority
- OSHA has six months to complete the inspection and issue a Citation
- Personal/confidential information
- Think: what is the SCOPE of the inspection?
- Walkaround items
 - Side-by-side photos
 - Employer representative
 - Ask questions
 - Address inspector concerns without making admissions

Determining Overly Broad OSHA Requests

- Example: anonymous complaint to OSHA
 1. No flaggers, blocking with no flaggers.
 2. No fall protection on the roof.
 3. No railings.
 4. Tripping hazards.

- OSHA requests: which are objectionable?
 - Fall protection plan and training
 - 300 logs
 - Inspection records
 - SDS
 - Lockout/tagout control of hazardous energy

Interview “Must Know” Rights

- Distinction between supervisors and non-supervisors
- Distinction between the employer and employees
- Supervisor can have company representation, attorney
- Non-supervisor can be interviewed privately by OSHA, unless employee retains his/her own attorney or asks for some other representative

RECAP:

The First Day an OSHA Inspector Shows Up, REMEMBER:

- Unless the inspector has subpoena, no obligation to speak with inspector
- Schedule any formal management interviews for later date
 - Distinction: full interview versus sharing basic facts
- No management interviews before managers are prepared
- No documents given on site first day (exception: 300 logs, if requested)

- Must get an understanding of the probable cause and limit the inspection
 - Use words like “*Fourth Amendment*,” “*warrant*,” “*consent*,” “*clear understanding of the scope*”

Negative Impact on Related Civil Litigation

- Violations admissible as evidence of negligence or negligence per se
- Personal injury plaintiffs can get “OSHA File”
 - Inspector’s notes
 - Violation worksheets
 - Photos
 - Employer’s documents
 - Employee statements (admissions)

5 Takeaways

- Know your rights. How to remember.
- Consider your options and know the risks of a Citation.
- There is a legal process and safety process.
- OSHA inspectors are doing their jobs, just like you are.
- Need to know your goals if cited. You do have options.

Health Hazards

- Chemical
 - Forms – solids, liquids, gases/vapors, aerosols
 - Health risks - Heart ailments, CNS damage, Cancer, Lung, kidney, liver damage, Sterility, burns, rashes
 - Exposure entry routes
 - Inhalation – breathed in (most common route)
 - Ingestion – swallowing via eating or drinking
 - Absorption – drawn through skin or eye surface
 - Injection – penetration through the skin
- Hazard communication program
 - Written program
 - SDS
 - Training

Chemical Hazards and Controls

- Hierarchy of controls
 - Elimination/substitution - OSHA 7 steps for transitioning to safer chemicals
 - Engineering controls
 - Ventilation
 - Process and equipment modification
 - Isolation/automation
 - Administrative and work practice controls
 - Establish written programs & policies
 - Training
 - Monitor/measure exposure levels
 - Inspections and maintenance
 - Restricted area signage; develop SOPs
 - PPE
 - Respirators, gloves, safety glasses, long clothing

Hazard Assessments and Controls

- Hazard identification – how to identify hazards
- Controls – including training
- Assessing exposure
 - Air monitoring – personal and area
 - Noise monitoring
 - Observation – PPE use and work practices
 - Ventilation measurements
 - Wipe samples – surfaces and personnel

Permissible Exposure Limits (PELs)

- Establish the acceptable amount or concentration of a substance in the workplace
- Intended to protect workers from adverse health effects related to hazardous chemical exposure
- Most OSHA PELs
 - Time weighted averages (**TWA**) (average over an 8 hour day)
 - Found in 1910 Subpart Z (“Toxic and Hazardous Substances”)
 - Also, **ceiling limits** – level never to be exceeded during work shift
- Substance-specific standards
 - Mostly carcinogens
 - Potentially exposed workers must be monitored/protected

1910 Subpart Z

- Tables Z-1 (Limits for Air Contaminants), Z-2, Z-3
- Substance-specific standards – examples:
 - 1910.1001 (asbestos)
 - 1910.1017 (vinyl chloride)
 - 1910.1018 (inorganic arsenic)
 - 1910.1025 (lead)
 - 1910.1026 (chromium)
 - 1910.1027 (cadmium)
 - 1910.1028 (benzene)

OSHA's Proposed Heat Illness Prevention Rule

- July 2, 2024 - OSHA revealed an unofficial version of its Notice of Proposed Rulemaking (NPRM) for an Indoor and Outdoor Heat Illness Prevention Rule
- OSHA has not yet published the official NPRM in the Federal Register
- 120-day period to submit public comments to OSHA after the NPRM is published

OSHA Heat Illness Rule

- OSHA will require employers to develop and implement comprehensive, site-specific written Heat Injury and Illness Prevention Plans (“HIIPP”).
 - The HIIPP will have to include:
 - a list all types of work activities covered by the HIIPP
 - all policies and procedures necessary to comply with OSHA’s heat illness rule
 - establish the employer’s chosen heat metric
 - identify one or more specific Heat Safety Coordinator(s).
- Plan reviewed at least annually and whenever a heat-related illness occurs that requires medical treatment beyond first aid or worse.
- Indoor and outdoor heat

AZ Heat Emphasis Program

- Does the employer have a Heat Illness and Injury Program?
 - Was there a written program?
 - How did the employer monitor ambient temperature(s) and levels of work exertion at the worksite?
 - Was there unlimited cool water that was easily accessible to the employees?
 - Did the employer provide additional breaks for hydration?
 - Were there scheduled rest breaks?
 - Was there access to a shaded area?
 - Did the employer provide time for acclimatization of new and returning workers?
 - Was a “buddy” system in place on hot days?
 - Were administrative controls used (earlier start times, and employee/job rotation) to limit heat exposures?
 - Did the employer provide training on heat illness signs, how to report signs and symptoms, first aid, how to contact emergency personnel, prevention, and the importance of hydration?

Case Example – Lead Exposure

- Cit. 1, Item 1a 1910.1025(f)(1)(ii) Employees not using respirators, despite 1/18/23 air monitoring that revealed airborne lead concentrations above the PEL
- Cit. 1, Item 1b 1910.134(g)(1)(i)(A) Employees, who were not clean shaven, wearing respirators
- Cit. 1, Item 1c 1910.134(h)(1) Respirators not cleaned/disinfected using procedures in Appendix B-2
- Cit. 1, Item 2 1910.1025(c)(1) Employer did not prevent exposure to lead greater than 50 mg/m3 on 1/18/23
- Cit. 1, Item 3a 1910.1025(d)(6)(iii) Did not conduct monitoring (quarterly, then 7 days apart), in view of initial monitoring conducted the end of 2017
- Cit. 1, Item 3b 1910.1025(d)(7) Additional monitoring not conducted when processes changed between Oct./Nov. 2022
- Cit. 1, Item 4a 1910.1025(e)(1)(i) In view of exposure above the PEL on 1/18/23, employer did not implement sufficient engineering, work practice, or administrative controls to reduce lead
- Cit. 1, Item 4b 1910.1025(e)(3)(ii)(B) Written lead compliance program did not describe specific means to achieve compliance
- Cit. 1, Item 4c 1910.1025(e)(3)(iv) Lead program not revised/updated annually
- Cit. 1, Item 5 1910.1025(g)(1) In view of exposure above the PEL on 1/18/23, protective work clothing and equipment not used.
- Cit. 1, Item 6a 1910.1025(h)(1) Lead samples on 1/18/23 revealed accumulations of lead
- Cit. 1, Item 6b 1910.1025(h)(2)(ii) Lead removal measures in paint removal area were insufficient (no dates given)
- Cit. 1, Item 7a 1910.1025(i)(2)(ii) Change rooms not equipped with storage facilities for clothing
- Cit. 1, Item 7b 1910.1025(i)(3)(i) In view of exposure above the PEL on 1/18/23, exposed employees should have been required to shower at end of shift
- Cit. 1, Item 7c 1910.1025(i)(3)(iii) Employer allowed workers not to shower/leave in work clothes
- Cit. 1, Item 8a 1910.1025(j)(1)(i) No medical surveillance program, which had been eliminated in 2020
- Cit. 1, Item 8b 1910.1025(j)(3)(i)(B) In view of exposure above the PEL on 1/18/23, should have been medical consultations performed for lead prior to assignment in the area
- Cit. 2, Item 1 1904.39(a)(2) Failure to report in-patient hospitalization within 24 hours

Defenses

- Duplicate violations - *Multiple Violations Are Duplicative and Should Therefore Be Dismissed*
- No knowledge
- No trigger to require implementation - *No Obligation to Comply With Ten of the Alleged Lead Violations Until 1/18/23, the First Time Monitoring Results Were Above the PEL in Over Five Years*
- Prior results
- No exposure – shut down operations; immediately addressed the results
- Result: 13 of 18 violations withdrawn two days before trial

20 Rights that Employers Have

10. Employers, you have the right ...

1. for the inspection to occur during regular working hours (OSH Act)
2. to see the inspector's credentials (29 CFR 1903.7(a))
3. to be told the nature and purpose of the inspection, including whether the inspection is a **programmed** or **unprogrammed** inspection (1903.7(a))
4. to be told the general scope of the inspection (1903.7(a))
5. to receive a copy of the written complaint, if any, that triggered the inspection (1903.11(a))

Employer Rights (cont.)

6. to refuse to permit the inspector entry if the inspector doesn't have a warrant (4th Amendment to U.S. Constitution; 1903.4(a))

7. if the inspector doesn't have a warrant, to confine the inspection to a certain area (4th Amendment; 1903.4(a))

8. to negotiate a proper scope of the inspection and protocol prior to consenting (4th Amendment)

9. for an employer representative to accompany the inspector during the physical inspection (1903.8(a))

10. to ask the inspector to delay the inspection up to one hour, pending the arrival of the employer representative (OSHA Field Operations Manual ("FOM"), Ch. 3, p. 6)

(consider: if inspector won't wait, no consent)

Employer Rights

11. not to give a statement to an OSHA inspector (OSHA FOM, Ch. 3, p. 20)
12. if you are a supervisor, to have a company attorney present when OSHA interviews you (OSHA FOM, Ch. 3, p. 22)
13. if you are not a supervisor, to have a personal attorney present when OSHA interviews you (OSHA FOM, Ch. 3, p. 22)
14. to refuse to sign a written statement prepared by the inspector during your interview (OSHA FOM, Ch. 3, p. 22)
15. for your employee to tell you that he or she spoke with OSHA (OSHA FOM, Ch. 3, p. 23)

More Employer Rights

16. if you are a supervisor, to obtain a copy of your OSHA interview statement (OSHA FOM, Ch. 3, p. 22)
17. to object to the inspector taking photos or video due a concern that trade secrets may be disclosed (OSHA FOM, Ch. 5, p. 13, 1903.9(c))
18. to be told of any safety and health violations at the time the inspector documents them (OSHA FOM, Ch. 3, p. 18)
19. to have the inspector evaluate your safety and health management system to determine its “good faith effort” for the purpose of penalty calculation (OSHA FOM, Ch. 3, p. 18)
20. for the inspector “to record, at a minimum, the identity of the exposed employee, the hazard to which the employee was exposed, the employee’s proximity to the hazard, the employer’s knowledge of the condition, the manner in which important measurements were obtained, and how long the condition has existed” (OSHA FOM, Ch. 3, p. 18)

Resources

- www.osha.gov
- OSHA Field Operations Manual
- OSHA Letters of Interpretation
- Multi-Employer Citation Policy (1999)

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Questions – Thank you

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