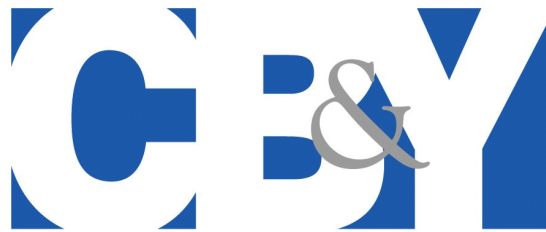


OSHA CITATIONS FOR WORK SITE INJURIES

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More than three decades ago, the Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration to help employers and employees reduce injuries, illnesses, and deaths on the job in America. According to government records, since the inception of the Act, workplace fatalities have been cut by approximately 62 percent and occupational injury and illness rates have declined by 40 percent. Furthermore, at the same time as these drastic reductions, U.S. employment has more than doubled and now includes nearly 115 million workers at more than 7 million work sites.

The United States Department of Labor Occupational Safety and Health Administration employs more than 2,220 employees, including 1,100 inspectors. In 2003 there were 5,559 worker deaths. The fatality rate was approximately 4.0 deaths per 100,000 workers. In the fiscal year 2004, OSHA conducted 39,167 inspections. Twenty-two thousand three hundred sixty or 57.1 % were in the construction industry. From these 39,167 inspections conducted during 2004, 86,708 violations were cited resulting in fines in excess of \$85,192,000.

OSHA enforces occupational safety and health regulations by inspecting workplaces, issuing citations, and imposing monetary penalties for violations of OSHA safety and health standards. Many employers typically inquire as to how OSHA determines when to inspect a site for a particular employer. This can be summed up in reviewing the government's priorities for scheduling OSHA inspections. Department of Labor Occupational Safety Health Administration priorities inspections as follows:

1. **Investigation of Imminent Dangers.** Any conditions or practices that could reasonably be expected to cause death or serious physical harm to employees immediately or before enforcement action can be taken. (These investigations are conducted within 24 hours.)
2. **Fatality and Catastrophe Investigations.** Any work-related incident resulting in the death of an employee or the in-patient hospitalization of three or more employees. (Such incidents must be reported to the nearest OSHA office by telephone or in person within 8 hours of the incident.)
3. **Investigations of Complaints.** Confidential complaints made by employees and referrals by others.
4. **Programmed or Scheduled Inspections.** Regularly scheduled inspections in "high-hazard" industries.

The OSHA Inspection

There are two types of inspections: 1) programmed or scheduled inspections and 2) unscheduled or un-programmed inspections. Inspections conducted by compliance officers are usually scheduled without advance notice, usually in response to a workplace fatality or injury. Scheduled inspections are usually conducted at sites involving heavy industrial sites or large scale construction projects. Whether it is a scheduled or unscheduled inspection, OSHA inspections must be conducted at a reasonable time, generally during the employer's normal working hours, and in a reasonable manner.

When an OSHA compliance officer arrives for unscheduled workplace inspection, you have the right to deny entry and to demand that OSHA obtain a warrant to inspect your premises. OSHA may get a warrant from a judge in a simple and speedy fashion in advance of a proposed inspection or after being denied entry. The failure to object to the inspection or ask for a warrant constitutes voluntary consent. The authority for OSHA compliance officers to conduct site inspections is contained within 29 U.S.C. § 657; 29 C.F.R. § 1903.7, 1903.21.

Prior to the initiation of a walk-around or actual inspection, the OSHA compliance officer should conduct an opening interview where the OSHA compliance officer should provide proof of his credentials and discuss the basis for the inspection. Additionally, compliance officers should disclose during the opening interview the extent, scope, and limits of the inspection as well as any special conditions specifically being tested, such as air quality or materials testing. It is also customary for the inspector to disclose the approximate duration of the inspection and how the inspector intends to conduct the inspection. During a typical opening conference, the compliance officer may request to view the OSHA 200 log records for up to the previous five years. Additionally, OSHA may request to review the employer's written programs with regard to the safety procedures and protocols for the company as well as any particular procedures and protocols utilized at the site. At this time, OSHA may request copies so that the inspector may return to the regional office and review the written materials in greater detail. The employer must make copies available to the inspector if requested.

After the opening conference, the inspector will conduct a walk-around inspection which comprises the inspector surveying the overall facility and/or job site to gain general familiarity with hazards and regulations that may be involved during the inspection. This is preliminary to the actual, on-site inspection. During the walk-around, representatives of the employers and employees are entitled to accompany the OSHA compliance officer on the tour of the workplace. During the walk-around, the compliance officer may identify and/or interview a prescribed number of employees. In particular, if responding to an employee fatality, injury, or complaint, the inspector most likely will identify any employees working in the area or responsible for the area in which the accident and/or fatality occurred.

Employee interviews are usually confidential unless the employee requests an employer representative to be present during the interview. It is important to note also that the employee has the right to refuse to talk to any inspector. It should also be noted that if the inspector feels the employees are withholding information or uncomfortable for any reason, or may be subject

to retaliation, the inspector is entitled to call the employees at home or invite them to the OSHA office to conduct the employee interviews. During the interviews, the inspector may question employees about the company's safety plan, or facts and circumstances surrounding the incident or the confidential complaint made against the employer. During the employee interview process, it is the employer's and/or the employee's right to terminate the inspection if the inspector is overly aggressive, tries to intimidate or becomes rude during the inspection process or during the employee interviews. When an employer initially grants the inspector entry for limited inspection, such as one responding to a specific employee complaint, the employer may object to an expansion of the inspection to other areas of the workplace. If an employer allows the inspector to enter, but objects to the inspection of certain portions of the workplace or interferes in any way with or limits any important aspect of the inspection, such as air sampling, materials testing, photographing, videotaping, attaching sampling devices, or questioning employees, OSHA will consider this a refusal of entry.

During the thorough inspection, the compliance officer will likely retrace his steps, noting possible violations. The inspector will also photograph conditions believed to represent a violative condition and take measurements if necessary.

After the on-site inspection is conducted, OSHA compliance officers typically withdraw from the site to review notes, photographs, video, documents, and conduct further employee interviews. The closing conference can rarely occur at the time of the inspection. However, most closing conferences are held open for some time to provide the compliance officer enough time to review any and all pertinent information gathered from the inspection. During the closing conference, the inspector will typically review any issues he observed during the inspection as well as provide notification of purported violations. However, during the closing conference, some credit may be given to the employer for making corrections to known problems as well as making good-faith efforts to comply with OSHA. In most cases, it is to the employer's benefit to conduct the closing conference as soon as possible as the time line that citations must be issued begins upon the conclusion of the closing conference.

The Citation and Notification of Penalty *(See Attached)*

Under the OSHA regulations, citations must be issued within reasonable promptness after the closing conference and cases have determined that this must be issued within six months of the violation. Contents of the citation must provide fair notice to the respondent employer of the nature of the violation, the standard violated, as well as the location of the violation.

Citations and Notifications of Penalty are issued the employer, not the employee regardless of whether the violation stemmed from the employee's course of conduct. They are also specific to the inspection site and notify the employer of the rights and responsibilities of the employer in dealing with the Citation and proposed penalty. Citations and Notifications of Penalty provides written notification and a fair description of the purported violation; the period the employer has to abate the violation; and the proposed monetary penalty.

There are generally three levels of citations:

- Other-than-Serious:
 - Comprising of violations that have a direct relationship to job safety and health, but probably would not cause death or serious physical harm.
 - Penalties are discretionary
 - Range up to \$7,000 for each violation
- Serious:
 - Violations where there is substantial probability death or serious physical harm could result *and* that the employer knew, or should have known, of the hazard.
 - Penalties must be proposed
 - Range up to \$7,000 per serious violation
- Willful:
 - Violations the employer commits intentionally, knowingly, or with plain indifference to the law. The employer either knows what he or she is doing constitutes a violation, or is aware a hazardous condition existed and made no reasonable effort to eliminate it.
 - Penalties range from \$5,000 to \$70,000 per occurrence.
 - Possible Criminal Charges
 - Imprisonment for up to six months; and/or
 - Fine of \$250,000 for an individual or \$500,000 for a corporation;
 - A second conviction doubles the possible term of imprisonment

Additional types of violations include:

- Repeated:
 - Violations of any standard, regulation, rule, or order where, upon re-inspection, a substantially similar violation is found. Note: To be a basis of a repeat citation, the original citation must be final. A citation under contest may not serve as the basis for a subsequent repeat citation.

- Penalties of up to \$70,000 per occurrence
- Failure to Abate
 - Penalties of up to \$7,000 *per day* for each day the violation continues beyond the prescribed abatement date
- Violating posting requirements
 - Civil penalty of up to \$7,000.
- Falsifying records, reports, or applications
 - Criminal fine of \$10,000 or up to six months in jail, or both.
- Assaulting a compliance officer or otherwise resisting, opposing, intimidating or interfering with a compliance officer in the performance of his or her duties.
 - Criminal fine of not more than \$5,000 and imprisonment for not more than three years.

Although extremely rare, it should be noted OSHA has been empowered with the authority to shut not just the job-site, but an entire business operation down. The OSHA penalties can be found at (29 U.S.C. §§ 666, 659(a)).

Adjustments to proposed penalty amounts do and regularly occur. This can occur at the time of the closing conference, but most of the time this happens during the informal conference. If the employer wishes to request an informal conference, a request must be filed with the Area Director during the 15 working day contest period. This deadline is mentioned at least twice in this paper because many employers do not fully read the Citation and Notification of Penalty, which outlines this requirement. Factors most commonly utilized for the downward adjustment of penalties or more importantly the level type of penalty include the actual and/or perceived gravity of the violation (most influential/important); the employer's good faith efforts to comply with OSHA and its inspectors, the size of the business and the history (or lack thereof) of previous violations of the same type, level and character. However, no good faith adjustment will be made for purported willful violations.

The law requires the employer to post a copy of the Citation and Notification of Penalty on the work site where affected employees will have legal notice of it. 29 U.S.C. § 658(b). It also must be posted in a prominent place at or near the violation. If this is not workable because of the job site conditions or the nature of the work, it must be posted where it is readily observable by all affected employees. The posted notification must remain viewable for a minimum of three working days, excluding weekends and federal holidays or until the violation is abated, whichever is longer. Penalty amounts may be redacted so not to notify employees or inquisitive passers by.

Contesting the Citation

The OSHA proposed penalty amounts automatically become final against the cited employer when the enforcement action is *not* contested. If an employer disagrees with any part of the OSHA citation, the employer **must notify the OSHA Area Director in writing of that disagreement within 15 working days of receiving the citation.**¹ (Mondays through Fridays, excluding Federal holidays) This is called a Notice of Contest. If the Notice of Contest is late, the employer may be precluded from having the dispute resolved by the Occupational Safety and Health Review Commission (“OSHRC”).

Only the OSHA Area Director has the authority to tell an employer what penalties the agency will propose. The Notice of Contest must not be sent directly to the OSHRC. Within 15 days of receipt of the Notice of Contest, the Area Director will forward it on to the OSHRC along with a copy of the contested citations. From that point on, jurisdiction will lie with the OSHRC. However, if this time period is not complied with, the employer is not entitled to have the citation vacated unless he can show some prejudice has resulted. The OSHRC has up to six months following inspection to issue a final report.

Who Can Contest?

An often overlooked portion of the OSHA citation process is that the employer is not the only person with a right to contest the citation and/or abatement period. An affected employee or his/her union may also challenge the citation. However, employees (or unions) are limited to voicing objection to the abatement period only. This challenge may be made even if the employer decides not to contest the citation. An employee/union challenge must be brought within 15 working days of *the employer’s posting of the citation*. 29 U.S.C. § 659(c); 29 C.F.R. § 1903.17(b). *See also* 29 C.F.R. § 2200.38(a). Additionally, employees must follow the same rules as an employer would follow for filing a Notice of Contest. If the employee chooses to contest the time allowed for abatement, the employer may join in the contest.

Any party filing a notice of contest is automatically considered a party to the proceedings. Each party to a contest must serve every other party or representative with copies of every document it files with the OSHRC or Administrative Law Judge.

¹ There have been a limited number of exceptions to the requirement for either filing untimely or not filing in writing. All are very fact dependent and require a high standard of proof to overcome the rule. *See e.g., Secretary v. Wood Products Co.*, 4 O.S.H. Cas. (BNA) 1688 (1976) (where employer was still allowed to bring a contest claim after failing to file a written Notice of Contest when the employer had made “several telephone contacts” with the Area Director in his region.). However, the OSHRC has stepped away from its leniency in allowing oral notification to suffice in recent years. *See Secretary v. Favino Mech. Constr. Ltd.*, 15 O.S.H. Cas. (BNA) 1295 (1991); *Secretary v. Jung Woo Constr. Corp.*, 15 O.S.H. Cas. (BNA) 1290 (1991).

The Notice of Contest must contain a statement the employer intends to contest (1) the alleged violations, (2) the specific abatement periods, and/or (3) the penalties proposed by OSHA. The notice should state in detail those matters being contested. If the employer contests whether a violation occurred, both the abatement period and the proposed penalty will be suspended until the OSHRC issues its final decision.

After receipt of the Notice of Contest, OSHRC Executive Secretary will send Notice of Docket to employer, Department of Labor and any other party to the case. Once the case is docketed, the Secretary becomes the *Complainant* and the employer becomes the *Respondent*.

If, at any time the condition causing the issuance of the citation cannot be corrected for some reason, the employer may apply for a variance. There are two types of variances: temporary and permanent.

Temporary variance: employers have the option of applying for a temporary variance when compliance cannot be achieved by the standard's effective date because of unavailability of professional or technical personnel, materials, or equipment, or because necessary construction cannot be completed within the prescribed time.

Permanent variance: if the employer can show it can provide equally effective protection for its employees through alternative means an employer may seek a permanent variance.

Practice Note: Variances are unusual. In most cases variances are denied. However, a variance request can be effective if the employer applies for the variance upon recognizing a potential hazardous condition or workplace before an inspection or issuance of a citation.

The Informal Conference (29 U.S.C. § 659)

When an employer receives a citation, the employer may correct the violations and pay the penalties, negotiate with OSHA to either reduce and amend the citations or withdraw them altogether or as outlined above – contest the citations, penalties and/or abatement periods. However, before the employer must make such a decision, the employer may request an Informal Conference with the OSHA Area Director. However, the Informal Conference, settlement discussions or any other negotiations *do not* delay the 15 working days deadline for filing a notice of contest.

The Informal Conference is a meeting between the employer representatives and the OSHA area director where both sides discuss the case, the inspection process, the inspection methods, conditions, findings, proposed penalties and abatement period. This is essentially a settlement conference. OSHA prefers to settle most cases, only reserving litigation for the most significant or serious of cases. Therefore, OSHA permits its area directors to negotiate with employers on all matters relating to the citation. This Informal Conference must be conducted within the 15-working-day contest period.

Practice Note: The employer is not the only party with the right to request an Informal Conference. If OSHA initiated an inspection due to an employee complaint, the employee or authorized employee representative may request an informal review of any decision *not* to issue a citation.

An employer can settle at any time with OSHA. If an agreement is reached, the parties will enter into a formal written settlement agreement. This agreement must be filed with the Administrative Law Judge if one has already been appointed. Nevertheless, it is extremely important the employer and their representatives pay close attention to the release and settlement. The reason for this is the release and settlement agreement is a document which may be used in future actions to establish a particular standard of conduct or a particular course of action. Therefore, be sure to narrowly draft the release and settlement so to preclude a broad application of the agreement to other circumstances. A sample Compromise Settlement Agreement has been included in this presentation for your review. Please pay close attention to the exculpatory language utilized within this agreement. (*See attached form*)

Complaint/Answer

A. Basics

- Complaint
 - Secretary of Labor files Complaint with Commission within 20 days of receipt of the Notice of Contest from employer (Commission Rule 34)
- Answer
 - Answer required within 20 days of receipt of the Complaint (Commission Rule 34)
 - Defenses:
 - Lack of knowledge of the violation;
 - No employees were exposed to a hazard;
 - Violation stemmed from an unanticipated employee violation of employer's work rules;
 - Compliance with the OSHA standard would create a greater hazard; or
 - Compliance with the OSHA standard is impossible or not feasible.
 - Defenses to a general duty violation: to prove it was employee misconduct, and not employer malfeasance that caused the violation, the employer must show:

- Employee violated a well-enforced work rule;
- Employee's conduct could not be predicted; or
- Employee's conduct could not be prevented.

Employer Liability for Employee's Conduct: Employers may still be penalized under OSHA for the deliberate conduct of an employee in violating a safety rule if the employer did not consistently enforce discipline for safety violations or provided inadequate training. Additionally, employers are responsible for the acts of supervisors even though they have no knowledge of their conduct or may not approve after the fact of a supervisor's actions. Thus, if a supervisor fails to prohibit unsafe worker practices, the company may be liable."

B. Complaint/Answer for Employee Contest

- Employee Contest of Abatement Period (Commission Rules 38 and 103)
 - Secretary of Labor files "Complaint" stating why abatement period is reasonable
 - Employees file Answer stating why abatement period is unreasonable

E-Z Trial

A. Basics

- Shortened version of an administrative proceeding
- Expedited Hearing Date
- Generally, no discovery (Rule 208)
- Similar to mediation
- Appearance may be with or without counsel
- OSHRC has adopted simplified rules eliminating most formal legal procedures
- Can appeal decisions *de novo*

B. Procurement of E-Z Trial

- Chief Administrative Law Judge may designate a case for E-Z Trial after Notice of Contest is received by OSHRC
- Parties may request E-Z trial within 20 days of the date on the Notice of Docket

C. Characteristics of E-Z Trial Cases

- Simple issues of law or fact with few citation items
- Total proposed penalty of less than or equal to \$20,000.00
- No willfulness or repeat violations
- No fatalities
- Hearings expected to take less than 2 days
- Small employers

Formal Trial

A. Basics

- Trial is before an administrative law judge (ALJ)
- Commission Rules govern (29 CFR Part 2200)
- Federal Rules of Civil Procedure and Evidence

B. Process

- Complaint/Answer (see IV above)
- Discovery (Rules 51 - 57)
 - Interrogatories
 - Depositions
 - Requests for Admissions
- Interlocutory Appeal (Rule 73)
- Withdrawal of Notice to Contest (Rule 102)
- Hearings
 - 30 days notice
 - Commission Judge presides
 - Commission follows Federal Rules of Evidence
- Post-hearing briefs (Rule 74)
- Judge's Decision and Petition for Discretionary Review by Commission in Washington, D.C.
- *Sua Sponte* Discretion for Review
- Decisions final within 30 days decision is filed