



What Every Business Owner Needs To Know About OSHA (Part Three)

October 7, 2011 by Gerard M. Giordano

The final installment of this three part series describes what employers should expect after an OSHA inspection as well as the employers' rights.

1. What happens after OSHA completes its inspection?

Unless your establishment is in full compliance with OSHA's standards, you will receive a "Citation and Notification of Penalty" from OSHA. Generally, OSHA has up to six months after it initiates the inspection to issue a Citation. A Citation includes: the type of violation (classification); the standard, regulation or section of the Occupational Safety and Health Act that was violated; a description of the violation; the abatement date; and the penalty.

A. The alleged violation could fall into one of the following categories:

Willful - A willful violation is a violation in which the employer knew that a hazardous condition, which violated a standard, regulation or a section of the Occupational Safety and Health Act, existed but made no reasonable effort to eliminate it. If the willful violation results in a death, OSHA can seek criminal sanctions against an employer.

Serious - A serious violation exists:

if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment

unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Repeat - OSHA may cite an employer for a repeated violation if:

(A) the employer has been cited previously for a substantially similar violation;

(B) the previous citation containing the substantially similar violation has become final order of the Occupational Safety and Health Review Commission; and

(C) the current violation occurred within 5 years from the date that the earlier citation became final order or from the final abatement date, whichever is later.

Other-Than-Serious - An other than serious violation exists where an accident or illness that could occur from a violation “would probably not cause death or serious physical harm but would have a direct and immediate relationship on the safety and health of employees.”

De Minimis – A de minimis violation is a “violation of a standard that has no direct or immediate relationship to safety and health.”

In addition, an employer can also be cited for failure to correct a previously cited condition. The Occupational Safety and Health Act allows OSHA to assess penalties for each day a violation continues past the final abatement date.

B. Section of OSHA Standard Violated and Description of the Violation

The citation must also describe the violation and section of OSHA’s standard that was violated.

C. Abatement Date

The abatement date is the date by which the violation must be corrected. The abatement period is “the shortest interval within which the employer can reasonably be expected to correct the violation.” Abatement dates are usually discussed at the closing

conference. In determining the abatement date the inspector generally considers the following factors:

- (a) The seriousness of the alleged violation;
- (b) the equipment, material and/or personnel needed to correct the alleged violation and their availability;
- (c) the time period to obtain the necessary material for correcting the violation;
- (d) the time period to construct or install the abatement equipment; and
- (e) the time period to train personnel.

If an employer is unable to meet an abatement date because of some uncontrollable circumstance, the employer can petition the OSHA Area Director to modify the abatement date contained in the Citation.

D. Penalty

The Citation also sets forth the penalty assessed by OSHA. OSHA is authorized to assess the following civil penalties: \$70,000 for each willful or repeated violation; \$7,000 for each serious or other than serious violation; \$7,000 for each violation of the posting requirement; and \$7,000 per day beyond a stated abatement date for failure to correct a violation.

Penalties are calculated once a violation is classified. In calculating penalties OSHA takes into account the following factors: the seriousness of the violation; the number of employees employed by the employer; the employer's good faith as demonstrated by the employer's efforts to comply with the Occupational Safety and Health Act and OSHA's standards and regulations; and the employer's past history of compliance. OSHA can, at its discretion, reduce the maximum penalty that it will impose after considering these factors.

2. If OSHA issues citations to my company, what should I do?

Once you receive a Citation, you must post the Citation at or near the place where each violation occurred so that it will be conspicuous to employees. The purpose of this is to make employees aware of the hazards to which they may be exposed. The Citation must remain posted for three (3) working days or until the violation is corrected, whichever is longer. You are required to comply with these posting requirements even if you subsequently decide to contest the Citation.

You have two choices once you receive a Citation. The first option is you can comply with the Citation. That is, you can correct the alleged violations by the date specified in the Citation and pay any penalty that may have been assessed. If you do not contest the Citation, the Citation will become a final order in fifteen (15) working days after receiving the Citation. Once the Citation is a final order, it will be binding and not subject to review by any court or agency.

The second option available to you is to contest the Citation. You have fifteen (15) working days from the date of receipt of the Citation to contest the Citation.

However, before you decide which course to take, you should take advantage of an OSHA process known as the Informal Conference. You must request and schedule the Informal Conference with the OSHA Area Office that issued the Citation within the fifteen (15) working day contest period.

If you cannot reach a settlement agreement with OSHA at the informal conference, you may wish to contest the Citation. Generally, a notice of intent to contest all or any portion of the Citation must be submitted in writing to the OSHA Area Office that issued the Citation within fifteen (15) working days after the receipt of the Citation.

3. Should I challenge the OSHA citations?

There is no universal formula to assess whether you should challenge the OSHA Citation. The decision must be made in good faith and based on the facts, which include consideration of alleged violation, its impact on employee health and safety, the classification of the violation, the method of abatement and the cost involved in abating the alleged violation.

4. If I do challenge an OSHA citation, what should I expect?

Once you file a notice of contest, jurisdiction over the matter vests with the Occupational Safety and Health Review Commission (the "Commission"). The Commission, sometimes called "OSHRC," is an independent agency not connected in any way with OSHA. Its primary purpose is to decide contested cases arising from Citations issued by OSHA. It does not perform investigations or promulgate standards.

Once the Notice of Contest is filed with the OSHA Area Office that issued the Citation, the OSHA Area Director will forward a copy of the Notice of Contest to the Commission. The Commission will appoint an Administrative Law Judge who will preside over the hearing and render a decision, which can be appealed by the employer or OSHA.

5. How can I clear my company's record from any citations issued by OSHA?

There is no method to clear your company's record of past Citations issued by OSHA. However, the longer your company operates without OSHA Citations the better. OSHA can use past Citations as a basis to issue Citations that have a more severe classification with increased penalties. For instance, if OSHA re-inspects your company in the future, it can issue repeated violations for conditions that were violated during the original inspection.

6. Can OSHA re-inspect my facility? If so, is there any action that I can take to prevent OSHA from inspecting my facility in the future?

Yes, OSHA can re-inspect your facility. You cannot prevent OSHA from re-inspecting your facility in the future, but you can minimize the chances of that occurring by being proactive. By establishing safety and health programs that incorporate coordination and communication of safety and health issues among personnel; means for planning and implementing needed training and job orientation for employees; and means for identifying and controlling workplace hazardous and monitoring the effectiveness of such program, you can minimize workplace hazards and thus, reduce the chances of OSHA re-inspecting your facility. In certain situations you may want to utilize the services of a safety and health consultant to assess your workplace and make recommendations to better comply with OSHA's standards. Your lawyer can assist you with deciding whether to retain a consultant to evaluate your workplace.

7. If OSHA re-inspects my facility, should I expect the same result as the initial inspection?

The answer to this question is dependent on your company's response to the initial inspection and your company's commitment to health and safety. Only by being proactive and implementing programs that protect employees can you reduce the possibility of future OSHA enforcement actions.

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