

OSHA Is At Your Door – Are You Ready?

FMI Asset Protection Conference

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Topics

- OSHA Enforcement
 - Never been tougher
 - How can employers prepare for an OSHA inspection?
 - How can employers minimize liability?
- Settlement Strategies
 - When to fight and when to settle
 - Assessing the impact of a settlement on civil liability/future OSHA liability
- OSHA's rulemaking agenda – what are the politics?

Guilty Until Proven Innocent

- Let's take a somewhat crazy example...



Guilty Until Proven Innocent

- Pre-2009, OSHA probably would not have investigated
- Post-2009
 - OSHA has agreements with EMTs, emergency rooms, and police departments, and routinely gets calls regarding workplace accidents
 - Accident caused by intentional act, but standard operating procedure seems to be to issue citations and make employer prove they are not in violation
 - Burden of proof has shifted

OSHA Inspections

- Why is OSHA inspecting?
 - Complaint inspection
 - Signed complaint from current or former employee – OSHA required to inspect
 - Informal complaint – OSHA may contact the employer first (the phone/fax system)
 - Accident
 - Employers must report fatalities and the hospitalization of three or more employees to OSHA
 - Referral
 - May come from another agency or the media

OSHA Inspections

- Programmed Inspections – the Site Specific Targeting List (“SST”)
 - Each year, OSHA surveys approximately 80,000 facilities from 25 industries to determine their injury and illness rates
 - Primary Inspection List: DART rate of 12.0 or more (4,250 sites)
 - Secondary Inspection List: DART rate of 7.0 or more
 - Tertiary Inspection List: DART rate of 5.0 or more

OSHA Inspections

- Which states are the most active?
 - 29 states are covered by federal OSHA
 - 21 states are “state-plan states” that operate their own safety and health plans
 - California – highest fines; easiest for the government to show liability
 - Other active states: Oregon, Michigan, Washington, Iowa, Indiana
- States under huge pressure to issue “tough” citations

Managing The Inspection

- Disclaimer: This is what has worked for me; local relationships are important
- Goals
 - Minimize liability and disruption to production
 - Present the facility in the best light possible
 - Preserve the relationship with local OSHA office
 - Where appropriate, make your case for a good settlement
 - Understand your civil liability

OSHA Inspections

- What is at stake?
 - Civil penalties
 - Serious violations – can range from under \$1000 to hundreds of thousands
 - Willful/Repeated violations – up to \$70,000 per violation
 - Inclusion in Severe Violators Enforcement Program
 - Bad press
 - If injury (particularly of a contractor), tort liability
 - Abatement Costs – The Trojan Horse
 - Abatement costs typically far exceed the proposed penalties
 - Accepting a citation at one plant means you have to abate the violation at all plants

OSHA Inspections

■ Litigation Has Begun

- OSHA inspections must be recognized for what they really are
 - discovery similar to litigation
 - Employee/management interviews = depositions
 - Questions of management about how the facility operates = interrogatories
 - Request for documents = requests for production
- Unless you approach an OSHA inspection with this in mind, you are likely incurring liability unnecessarily

Inspections: Preparing For OSHA

- Designate and train a contact
 - All of OSHA's requests go to this single person
 - Why? ***Control the flow of information***
- Standard inspection protocols
 - OSHA compliance officer accompanied at all times
 - Document requests must be written
 - Advance warning of IH sampling
 - Procedures for photographs/video
 - Protection of trade secret/business confidential information

The Opening Conference

- The Opening Conference
 - OSHA is not permitted to inspect unless consent from management OR they have a warrant
 - Implicit message at opening conference: We will permit the inspection as long as you agree to our inspection protocols
 - Consent must match the scope of the inspection
 - Example: Complaint inspection – Facility is consenting to investigation of the complaint

The Walkaround

■ The Walkaround

- Who will represent the employer?
- Training on how to handle
 - Do not volunteer information
 - Avoid damaging admissions
 - Conversations with employees must be minimal
 - No obligation to “stage” any operation for the compliance officer – Murphy’s law applies

The Walkaround

■ “Plain sight” doctrine

- OSHA can cite any violative condition it sees, even if it is not within the scope of the inspection
- Think about the route you take to the area the compliance officer wants to see
- For longer inspections, try to prepare particular areas the compliance officer wants to see

Document Production

- All requests submitted to a single source
 - Is the document responsive to OSHA's written request?
 - Is the document privileged?
 - Is the request reasonable?
 - For example, a request asking for all safety committee meeting minutes since 1980 is likely not reasonable

Management Interviews

- Interview Issues – Management Interviews
 - Statements by managers/supervisors are binding on the company
 - Example: “We never lock out that piece of equipment during servicing and maintenance even though our procedures require it because we do not think it is necessary”
- Managers/supervisors are entitled to have a representative during interviews

Management Interviews

- Key point: ***Prepare***
 - What questions are likely to be asked?
 - What documents are relevant?
 - How should questions be answered?
- Treat this like a deposition
- In current environment, likely to be confrontational

Employee Interviews

- OSH Act: OSHA has the right to “question privately” any employee, supervisor, or manager
- Tricky issue
 - Some area offices: Hourly employees can have representation if they request it
 - Other area offices: No representation no matter what the employee says
 - If a union steward is present, is the interview “private”?

Employee Interviews

- Even if employer cannot be present, control the flow of information
 - Meet with employee to explain the process
 - Review safety training file and cover any issues you think will arise
 - Explain that employee must tell the truth, and there will be no retaliation
 - Circle back to the employee after the interview

Inspections: Recognizing The Signs That It Isn't Going Well...

- OSHA takes statements under oath
- OSHA wants to bring an expert in to look at your operation
- OSHA is clearly pushing the envelope in terms of jurisdiction
- OSHA starts asking questions about other facilities

The Closing

- Communication is Key
 - Employer should know exactly what evidence has been gathered and what OSHA is thinking about citing
 - If you have clear evidence to refute a violation, provide it
- Learn as much as you can
- Do not argue and avoid admissions

Typical Scenario

- OSHA inspects ABC Store's Omaha facility under the SST Program
 - OSHA sends in a team of compliance officers to perform a wall-to-wall inspection
 - 2 months before the inspection, an employee was seriously injured when unclogging a garbage disposal
 - 2 weeks before the inspection, a contractor employee fell off a ladder while painting and was killed
 - Other company facilities have been inspected through SST

Citations

- Citations are issued to ABC
 - OSHA issues a citation alleging a “willful” violation of the Lockout/Tagout standard (\$70,000)
 - Supervisor turned the garbage disposal on while the employee was working
 - OSHA issues a citation alleging a “serious” violation of the fall protection standards (\$7,000)
 - Contractor employee should have been using fall protection while painting
 - ABC management was not supervising the employee, but OSHA claims ABC is a “controlling employer” that has OSHA liability

The Informal Conference

- Prepare for Informal Conference by:
 - Assessing your civil and OSHA liability
 - If you accept an item, what will the abatement obligations be at the plant and other facilities?
 - If an employee or contractor was injured, how will accepting a citation affect civil liability?
 - Doing your research
 - Are there relevant facts of which OSHA is not aware?
 - Are there interpretation letters, guidance in the rulemaking record, or other information that shows that OSHA is not properly interpreting the standard?

Assessing Liability - LOTO

- Willful lockout/tagout violation
 - What are the abatement costs?
 - How much extra training will be required?
 - Will other ABC facilities have to make changes?
 - What is the potential for a “repeated” violation?
- Civil liability concerns

Assessing Liability – Fall Protection

- OSHA's Multi-Employer Citation Policy
 - As a “host,” ABC is “controlling employer” – general supervisory authority/power to correct violations How can ABC avoid “controlling employer” liability?
- Avoiding liability -- exercise “reasonable care”
 - Evaluate the contractor's programs rates
 - Require the contractor to provide training
 - Periodically inspect the contractor's work

Assessing Liability

- Could ABC have criminal liability?
 - Criminal penalties where an employer violates any standard that “causes death to an employee”
 - Fines of up to \$250,000 for an individual; \$500,000 for an organization
 - Imprisonment for up to six months
- Death of a contractor employee – Can ABC be liable?
 - No because not “willful”
 - No clear answer in the case law
 - Criminal prosecutions are rare

What Are ABC's Defenses?

- LOTO violation: Did supervisor violate a policy? Was he/she disciplined?
 - Unpreventable employee misconduct: Rule in place; employees trained on the rule; employer took steps to detect violations of the rule; discipline imposed when rule violated
 - Tougher defense to make out when supervisor violates the rule
- Not “willful”: Deliberately ignored standard, or “plainly indifferent” to the hazards

Consequences Of A “Willful”

- Press release – seems to be OSHA’s key objective these days
 - Customer relations issues
 - Employee morale issues
 - Government contracting issues
- When? The instant citations are issued
 - Look for creative solutions to head this off
 - Ask specifically about a press release

What Are ABC's Defenses?

- Fall protection item: ABC exercised reasonable care
 - Took steps to confirm that contractor operated safely
 - Periodic inspections of work
 - “Disciplined” contractor when issues found
- Why does this item matter?
 - Typically no workers’ compensation for contractors
 - OSHA citation often admissible

OSHA Litigation

- ABC files a Notice of Contest
 - File is submitted to an attorney from the Solicitor of Labor's Office
 - Discovery begins
 - Case is tried before Administrative Law Judge
 - Appeal to Review Commission
 - Appeal to Circuit Courts of Appeal
- Settlement possible any where along the way
- Current environment – much more effort to settle cases

Settlement Options

- Point out weaknesses in OSHA's case and offer "extra" abatement
 - Example: Corporate-wide changes in LOTO policies
 - Example: Adoption of contractor safety program
 - Example: Retaining third party to audit a particular issue
- Re-characterize
 - "Willful" becomes "serious"; "serious" becomes "other than serious"
 - Problem: Reduces the penalties

Settlement Options

- Convert a violation of a standard into a “General Duty Clause” violation
 - Repeat risk is minimized
 - Can amend the language to make the violation narrower
- Not a settlement option, but litigate
 - OSHA is pushing so hard on enforcement that they are often not bringing good cases
 - Attitude seems to be that they would rather lose than settle – and they are losing

Settlement Options

- Key point through the whole process: ***Be creative***
- OSHA wants to nail you and issue that press release – How do you stop them?
 - Ask for information
 - Go higher up the food chain within OSHA
 - Make a record

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