



# What to Expect From OSHA in 2019 and Beyond...

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**SEYFARTH  
SHAW**

**Presenter:**

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# Program Objectives

- Discuss OSHA enforcement initiatives and trends.
- New penalty and liability policies.
- How to reduce the risk of OSHA citations.
- How to manage an OSHA inspection.



# **OSHA Enforcement Agendas, Defenses and Inspections**



# OSHA Liability

- Initially, employer responsible for its own employees
- Employer had to ensure that its employees were protected against:
  - “Recognized Hazards” To Employee Safety and Health (General Duty Clause)
  - Hazards Identified In Specific Regulations  
(29 CFR 1926, e.g. falls, electrical, lead, silica, etc.) (Construction Industry)  
(29 CFR 1910, e.g. forklifts, confined space, noise, etc.) (General Industry)



# OSHA Liability

- Liability was expanded under “Multi-Employer Workplace Doctrine”
- Now, each Employer is potentially responsible for the safety and health of another Employer’s Employee, if the Employer:
  - Creates the hazard
  - Exposes an Employee to the Hazard
  - Is responsible to correct the hazard, or
  - Is the controlling Employer on the site
- Liability can involve citations (against Employer) and criminal prosecution (against Employer and Management Representatives)



# Many Different Categories of Employers and Employees On-Site

- Owner
- General Contractor
- Subcontractors
- Leased/Borrowed Employees
- Temporary Employees
- Consultants

Key: OSHA is looking at the workplace as a whole – so should you.



# Many Different Categories of Employers and Employees On-Site

## Critical Issues:

- Contractual relationship – must define responsibility for safety and health compliance, employee training, personal protective equipment.
- Do not exercise control over “means and methods” of performing work by independent contractor employees or temporary employees if staffing service has on-site supervision
- Imminent Danger – Host employer must stop work immediately if any employee in imminent danger of injury.





# Aggressive Enforcement

- Use of interpreters
- Emphasis on repeat citations
- Cautionary tale:
  - Use of knowledge of previous inspection to justify willful citation
- Requests for Root Cause analysis and company insurance audits
- Severe Violator Enforcement Program
- Revised Penalty Policy
- Non-English speaking employees
- Recordkeeping/Ergonomics/Dust/Live Electrical Work
- Issuance of Revised Recordkeeping Rules
- Fall Protection – Walking/Working Surfaces



# Aggressive Enforcement

- Employee by Employee Citations
  - PPE Standard – employee failure to use personal protective equipment
  - LOTO procedures – Lockout/tagout procedure not compliant or employees not trained
- Enhanced Use of General Duty Clause
  - Combustible Dust
  - Ergonomics
  - Workplace Violence
  - New chemicals (not listed on Z tables)
  - Arc Flash – Arc Blast
  - Heat Illness – Cold Exposure
  - Avoidance of PELs in Existing Regulations



# Revised Recordkeeping Rule

- Rule will potentially impact employer policies relating to:
  - requirement to timely report injuries or illnesses to employer
  - incentive program metric based on recordable injury or illness (DART rate)
  - post-accident mandatory drug testing



# Employee Literacy Challenges

- OSHA inspections revealing increasing lack of Employee Literacy
- Employees don't "understand" training
- English Speaking employees are unable to read safety and health programs
- OSHA challenges the particular language in safety programs
- Employers are rewriting safety programs to level of fourth grade educational comprehension
- Employers utilize more visual aids such as pictograms



# Native Language Requirements

All training must be given in a language that the employee understands

- Certain OSHA regulations require “training”, others require Employer to prove training was “effective” or “understood”
- OSHA will look at how employer provides work instructions to employees and whether it is different than safety training (e.g. safety training in English but supervisor gives work instructions in Spanish).
- OSHA will interview employees to determine whether they understand English only training (e.g. if employee cannot speak English but all training documents are English only, you have a problem).
- Employers must determine whether employees are literate
- Bilingual trainers and documentation may be required to prove training was compliant.



# Revised Penalty Structure

- OSHA penalties increased to Consumer Price Index (CPI)

	<u>2018</u>	<u>January 1, 2019</u>
• Other Than Serious	\$12,934	\$13,260
• Serious	\$12,934	\$13,260
• Willful	\$129,336	\$132,598
• Repeat	\$129,336	\$132,598
• Failure to Abate	\$12,934 per day	\$13,260 per day

- Will be revised every following year



# Criminal Law Liability

## OSHA

- Potential liability if:
  - Fatality
  - Violation of specific regulation
  - Violation was willful, and
  - Violation caused fatality
- Penalty
  - 6 months imprisonment, and/or
  - \$500,000 fine per fatality for employer
  - \$250,000 fine per fatality for individual

**NOTE: No Miranda Warnings Necessary**



# Criminal Law Liability

## OSHA – Additional Potential Criminal Liability

- Obstruction of justice for interfering with inspection
- Falsification of records
- Lying to federal inspector

## STATE LAW

- Murder
- Manslaughter
- Reckless Endangerment
- Battery

Liability for Employer and Manager





# Unavoidable Employee Misconduct

- More important than ever to establish strong *unavoidable* employee misconduct defense.
- All four elements required
  - (1) Program for the specific hazard, e.g. fall, electrical, lead, asbestos, cadmium, forklift
  - (2) Employee training (documentation)
  - (3) Prior enforcement (disciplinary records)
  - (4) No reasonable opportunity for supervisor to identify and correct hazard.



# Unavoidable Employee Misconduct

- How do we establish this defense?
  - A good hazard assessment
  - Training—there may be a cultural, literacy or language barrier.
  - Need to use translators, interpreters.
  - Need enforcement – this is where most employers fail.
  - Maintain records of enforcement/discipline.



# Whistleblower Laws

- Potential Employer Liability If:
  - Employee engages in “Protected Activity” (e.g., makes complaint about safety or health violation to Employer; files complaint with OSHA; participates in OSHA inspection), and
  - Employee Suffers “Adverse Action” (e.g., termination, discipline, loss of benefits), and
  - Employer takes Adverse Action and Retaliates against Employee because of Protected Activity



# Whistleblower Laws

- Potential Employer Liability If:
  - Employee may File 11(c) Complaint with OSHA seeking damages
  - Potential liability of Employer
  - Personal liability of Manager
  - OSHA will investigate complaint
  - If OSHA finds reasonable cause that there was retaliation, case may be filed in Federal Court
  - All States have Whistleblower Laws that may apply



# How to Reduce the Risk of OSHA Citations

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- Focus on hazards that are at core of your business.
- Focus on hazards that are driving your OSHA recordables.



# Responding to OSHA Communications

- Rapid Response Investigation (RRI)
- Employee Complaint Letters
- Avoiding Admissions of Civil or Criminal Liability (waiver of Fifth Amendment rights) in Responses



# General Recommendations

- Be Truthful
- Keep Responses Simple and Short
- Answer the Question Asked
- Avoid Speculation
- Seek Advice from Experienced OSHA Counsel

# Revised Reporting Obligations



- Under Federal system, all fatalities, including those caused by heart attack, must be reported to OSHA within 8 hours. State Plans can be more restrictive.
- Under Federal system, all workplace incidents that result in hospitalization for treatment, an amputation or loss of any eye must be reported to OSHA within 24 hours of the incident. State Plans can be more restrictive.
- Employer not required to report fatalities or injuries occurring on public highways. Employer may have DOT required reporting depending on nature of accident or injuries.
- Employer required to report if accident occurs on property owned or controlled by Employer.
- Employer only required to report for employees that it controls, not for (a) third party independent contractor employees or (b) temporary employees if temporary staffing company has on-site supervision for temporary employees.



U.S. Department of Labor

**Occupational Safety and Health Administration**

Baton Rouge Area Office  
9100 Bluebonnet Centre Blvd. Suite 201  
Baton Rouge, LA 70809  
Phone: (225) 298-5458 Fax: (225) 298-5457  
<http://www.osha.gov>



May 9, 2017

RE: OSHA Activity No.

Dear

This letter is to follow up the conversation we had on UNKNOWN in reference to the employee injury that occurred on May 08, 2017 at your worksite. As we discussed, there are some important steps you should be taking to ensure the safety of your workers and avoid the need for an OSHA inspection.

In most cases, a serious injury indicates the presence of workplace hazards that threaten the health and safety of other workers. OSHA is very concerned that additional employees at your worksite are at risk of being injured. As we discussed, it is in everyone's interest that you conduct a thorough investigation to determine the reasons for the work related incident, to identify hazards related to the incident and to implement corrective actions.

Please complete each of the **following by May 16, 2017:**

- Conduct an incident investigation. (See Non-Mandatory Investigative Tool — Attachment A)
- Provide OSHA with written, signed documentation of findings from the investigation.
- Provide OSHA with written, signed abatement certification documenting action taken to correct hazards related to the incident.
- Document findings and send corrective actions to (225) 298-5457 or [oshabatonrougeRdol.gov](http://oshabatonrougeRdol.gov)
- Post a copy of this letter in a conspicuous place where all affected employees will have notice or near the location where the incident occurred.
- Fax or email a copy of the signed Certificate of Posting (Attachment B) to (225) 298-5457 or [oshabatonrougedol.gov](http://oshabatonrougedol.gov)

If you have a problem meeting this deadline or have any further questions, please call me.

**If we do not receive the investigation results, abatement verification and certificate of posting by May 16, 2017, your worksite may be considered for an on-site inspection.**

The goal of your incident investigation will be to identify both the immediate and the underlying causes of the incident. To assist you in conducting an investigation, I have attached a guide for your use, to ensure your employees are protected from future injuries. Additional resources are available at OSHA's Safety and Health Topics website at <https://www.osha.gov/dosp/products/topics/incidentinvestigation/index.html> to assist **you with** conducting an Incident Investigation.

After correcting any immediate hazards, small and medium-sized businesses may be interested in requesting free, confidential assistance from the On-Site Consultation Program. Consultants from a state agency or university will work with you to identify workplace hazards, provide advice on compliance with OSHA standards, and assist you in establishing a safety and health management program. These services are separate from enforcement and do not result in penalties or citations. To find out more information about OSHA's On-Site Consultation Program, please visit the programs website at <https://www.osha.gov/dcsp/smallbusiness/consult.html> or call [State Consultation Office Contact Information] to reach your local On-Site Consultation office. Also, please find a copy of the OSHA pamphlet, "FREE Safety and Health Consultation Services" for your use in English or Spanish.

Please note that it is against the law for employers to retaliate or discriminate in any way against an employee for raising safety and health issues or for exercising their rights under the OSHA law. This includes the right to report a work-related injury or illness to their employer, or to contact OSHA. More information about the Whistleblower Protection Program can be found at <http://www.whistleblowers.gov/>.

If you have any questions, please call me at (225) 298-5458 or email me at [oshabatonrouge@dol.gov](mailto:oshabatonrouge@dol.gov). Your support and interest in the safety and health of your employees is appreciated.

Sincerely



**Dorinda** Folse  
Area Director

## NON-MANDATORY INVESTIGATIVE TOOL

### • ESTABLISHMENT INFORMATION

- 1) Name of Investigator: \_\_\_\_\_
- 2) Job Title: \_\_\_\_\_
- 3) Name of Company \_\_\_\_\_
- 4) Address: \_\_\_\_\_
- 5) Contact Phone: \_\_\_\_\_
- 6) Fax \_\_\_\_\_
- 7) E-Mail \_\_\_\_\_
- 8) NAICS \_\_\_\_\_
- 9) How many Employees at: a) Work site \_\_\_\_\_ b) All Locations \_\_\_\_\_
- 10) Union : Yes \_\_\_\_\_ No \_\_\_\_\_
- 11) Union Name and Contact Info: \_\_\_\_\_

### • INJURED EMPLOYEE INFORMATION

- 1) Injured Employee Name: \_\_\_\_\_
- 2) Age: \_\_\_\_\_
- 3) Gender Male \_\_\_\_\_ Female \_\_\_\_\_

(For additional employees, use continuation section at end of form.)

- 4) Employee Typical Job Title: \_\_\_\_\_
- 5) Job at Time of Incident: \_\_\_\_\_
- 6) Type of Employment (check all that apply):  Full Time  Part Time  Seasonal  
 Temporary  Other:
- 7) Length of Employment with the Company: \_\_\_\_\_
- 8) Amount of time in current position at time of incident: \_\_\_\_\_
- 9) Nature of Injury: \_\_\_\_\_
- 10) Part of Body: \_\_\_\_\_

### • INCIDENT INVESTIGATION

- 1) Date and time of the incident: \_\_\_\_\_
- 2) Location of incident: \_\_\_\_\_

**3) What was the employee doing just before the incident occurred?** *Instructions: Describe the activity; including the tools, equipment, or material the employee was using. Be specific. Example: "climbing a ladder while carrying roofing materials" and "changing gasket on a chlorine line".*

**4) What Happened?** *Instructions: Provide a detailed description of the incident and how the injury occurred. Provide details such as measurements, sequence of events, equipment RPMs, trench dimensions, the type of vehicle(s) involved, discuss use of hazard controls such as guards or PPE. Examples: "bucket of chemical X spilled on the floor", "ladder slipped on wet floor", "worker fell 20ft.", "employee was sprayed with chlorine when gasket broke during replacement" and "employee was not wearing PPE".*

**5) What was the injury or illness?** *Instructions: Describe the part of the body that was affected and how it was affected. Be more specific than "hurt", "painful" or "sore". Examples: "fractured vertebrae" and "chemical burn to the hand".*

**6) What object or substance directly harmed the employee?** *Instructions: Provide the type, brand, size, distinguishing features, condition, or specific part that harmed the employee. Example: "band saw blade".*

**A. WHAT CAUSED OR ALLOWED THIS INCIDENT TO HAPPEN?**

*Instructions: What were the underlying reasons the incident occurred – and are the factors that need to be addressed to prevent future incidents? If safety procedures were not being followed, why were they not being followed? If a machine was faulty or a safety device failed, why did it fail? It is common to find factors that contributed to the incident in several of these areas: equipment/machinery, tools, procedures and policies, training or lack of training, work environment. If you identify these factors, try to determine why these factors were not addressed before the incident.*

**B. CORRECTIVE ACTIONS TAKEN TO PREVENT FUTURE INCIDENTS**

**1) Hazardous condition(s) identified and corrective action taken by employer.** *Instructions: Describe the immediate measures taken, interim and/or long-term actions necessary to correct hazardous condition(s). Also, use this section to track the completion of multi-step corrective actions as well as final corrective actions used to abate the hazardous condition.*

**U.S. Department of Labor Occupational Safety and Health Administration**

Marlton Area Office Area Office  
701 Route 73 South  
Building 2, Suite 120  
Marlton, NJ 08053  
Phone: (856) 596-5200 Fax: (856) 596-5201  
<http://www.osha.gov>



May 9, 2017

RE: OSHA Complaint No.

Dear

On May 5, 2017 the Occupational Safety and Health Administration (OSHA) received a notice of alleged workplace hazard(s) at your worksite at:

We notified you, by telephone, of these alleged hazards on May 9, 2017. The specific nature of the alleged hazards are as follows:

- **Employees are allegedly experiencing headaches, nausea, etc. as a result of propane powered industrial trucks being operated in a poorly vented environment.**
- **Employees are allegedly exposed to slip and fall hazards as a result of the roof leaking.**

We have not determined whether the hazards, as alleged, exist at your workplace and we do not intend to conduct an inspection at this time. However, since allegations of violations and/or hazards have been made, we request that you immediately investigate the alleged conditions and make any necessary corrections or modifications. Please advise me in writing, no later than **May 16, 2017** of the results of your investigation. You must provide supporting documentation of your findings, including any applicable measurements or monitoring results, and photographs/video which you believe would be helpful, as well as a description of any corrective action you have taken or are in the process of taking, including documentation of the corrected condition.

This letter is not a citation or a notification of proposed penalty which, according to the Occupational Safety and Health Act, may be issued only after an inspection or investigation of

the workplace. It is our goal to assure that hazards are promptly identified and eliminated. Please take immediate corrective action where needed. **If we do not receive a response from you by May 16, 2017 indicating that appropriate action has been taken or that no hazard exists and why, an OSHA inspection will be conducted.** An inspection may include a review of the following: injury and illness records, hazard communication, personal protective equipment, emergency action or response, blood borne pathogens, confined space entry, lockout, and related safety and health issues.

Please note, however, that OSHA selects for inspection some cases where we have received letters in which employers have indicated satisfactory corrective action. This is to ensure that employers have actually taken the action stated in their letters.

If you need assistance to help resolve the issues of this complaint, the State of New Jersey offers a free OSHA consultation service. If required, a consultant will visit your workplace and assess the validity of the complaint item(s). In addition, you will be provided with methods of correcting the hazard, if necessary. This service is provided on a priority basis to small, high hazard employers. To discuss or request their services, call the consultation project **at** the following address:

On-Site Consultation  
New Jersey Department of Labor & Workforce Development  
Division of Public Safety & Occupational Safety & Health  
1 John Fitch Plaza  
P.O. Box 953  
Trenton, NJ 08625-0953  
Safety (609) 292-0404  
Health (609) 984-0785

You are requested to post a copy of this letter where it will be readily accessible for review by all of your employees and return a copy of the signed Certificate of Posting (Attachment A) to this office. In addition, you are requested to provide a copy of this letter and your response to it to a representative of any recognized employee union or safety committee if these are at your facility. Failure to do this may result in an on-site inspection. The complainant has been furnished a copy of this letter and will be advised of your response. Section 11(c) of the Occupational Safety and Health Act provides protection for employees against discrimination because of their involvement in protected safety and health activity.

If you have any questions regarding this matter, please contact the Marlton Area Office at 701 Route 73 South, Building 2, Suite 120, Marlton, NJ 08053. Your personal support and interest in the safety and health of your employees is appreciated.

Sincerely,

**CERTIFICATE OF POSTING  
OSHA NOTIFICATION OF ALLEGED HAZARD(S)**

Employer Name:  
Complaint Number:

Date of Posting: \_\_\_\_\_

Date Copy Given to  
an Employee Representative: \_\_\_\_\_

On behalf of the employer, I certify that a copy of the complaint letter received from the Occupational Safety and Health Administration (OSHA) has been posted in a conspicuous place, where all affected employees will have notice, or near such location where the violation occurred, and such notice has been given to each authorized representative of affected employees, if any. This notice was or will be posted for a minimum of ten (10) days or until any hazardous conditions found are corrected.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Employer/Establishment name





# Inspection Management

- Increased enforcement and penalties make inspection management more critical than ever.
- The most effective defenses are developed Before and During an OSHA inspection, not after the inspection

➤ Why?



# Inspection Management (cont.)

- Inspection Plan – Basic Blocking Tackling
  - (1) Point person and backup/weekend person (Murphy's Law is that accidents will happen during the night shift and on weekends).
  - (2) Relevant written OSHA policies and logs should be readily available.
    - ✓ Keep copy in easily accessible binder
      - Update annually or as otherwise required



# Inspection Management (cont.)

- When OSHA Arrives:
  - Politely receive the compliance officer.
  - Show compliance officer to conference room/empty office.
  - Inspection Focus
    - ✓ Determine why OSHA is inspecting
    - ✓ Types of inspections:
      - (1) Fatality/catastrophe
      - (2) Employee complaint
      - (3) Programmed
        - Local National emphasis program
        - Wall to wall inspection



# Inspection Management (cont.)

- When OSHA Arrives:
  - Immediately notify the point person.
  - Point person takes control of the inspection is responsible for all communications with Compliance Officer and shadows Compliance Officer throughout inspection.
  - First impression is important.
- Two Keys to Successful Inspection Management
  - (1) Focus
  - (2) Control



# Inspection Management (cont.)

## OSHA rights during inspection

- To access worksite if have underlying legal basis
- Right to request documents that Employer required to maintain
- Right to conduct walkaround inspection, area should be limited to hazard that is basis for inspection
- Right to conduct employee interviews but employee can decline and employee not required to provide reason'
- No right to require employee to sign statement, tape record interview or photograph employee without employee consent



# Inspection Management (cont.)

- The Reason OSHA is Inspecting Drives the Scope of the Inspection
- Once You Determine the Scope, Control Inspection by Limiting it to Only Those Items Within the Scope

Example: Employee is injured by a forklift and Employer is required to report injury to OSHA. OSHA has a legal basis to conduct an on-site inspection but it should be limited to the area where the accident occurred and the hazards associated with the operation and maintenance of the forklift.



# Inspection Management (cont.)

- Plain View Doctrine
  - Compliance officer can issue citations for any violations in “plain view.”
  - If Compliance Officer doesn’t see it he/she can’t cite you for it.
- Admissions
  - Based on statements from managers, supervisors, foreman and leadmen that they were aware of hazard
  - Never admit to a violation (“I’ll check into that”).
  - Never admit you don’t have something (“let me get back to you on that”).



# Inspection Management (cont.)

- Immediately Correct Unsafe Conditions Identified by The Compliance Officer Without Admitting That The Condition Constitutes a Violation
  - May avoid the citation
  - May lessen the classification or penalty of a citation
  - OSHA must give employer credit for a “quick fix” of a potential hazard





# Inspection Management (cont.)

- Employee Interviews
  - Non-Management Interviews
    - ✓ Explain employee rights
    - ✓ Conduct your own investigation
  - Management Interview
    - ✓ Right To Counsel
    - ✓ Binding Admissions
  - Avoid the “casual” interview
  - Remember: Everything is on the record. Do not engage in idle conversation concerning safety issues.



# Inspection Management (cont.)

- Document Control Is Important
  - No Such Thing As A “Safety Program”
    - ✓ Ask Compliance Officer which specific program he/she is looking for.
  - Only Provide OSHA with Documents That Are Within The Scope Of The Inspection.
  - OSHA Can Issue Citations For Violations Relating To Any Document The Employer Gives To Them.
  - General Rule Of Thumb: Less Is More



# Thank you!

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