



**2018 INDIANA
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& EXPO**

March 12-14, 2018
Indiana Convention Center, Indianapolis
www.INSafetyConf.com

Effectively Handling An OSHA Inspection Under An Enforcement-Driven OSHA

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Thank You For Your Commitment To Safety



“Winning is not a sometime thing, it is an all-time thing.”

~ Vince Lombardi

So Is Safety!



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Why Be Concerned?

- August 2016 and January 15, 2017 penalty increase
- Recordkeeping changes in 2015 & 2016
- Aggressive enforcement –more inspectors, higher penalties and unfriendly press releases
- More employers placed in the Severe Violators Enforcement Program



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Why Be Concerned? (con't)

- Increased focus on whistleblowers with push to find more “cause” determinations
- On-line whistleblower complaint applications



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Why Be Concerned? (con't)

- Local, state and national governments look at safety records – bar on submitting bids
- Private sector companies also looking at contractors, vendors and system safety record – may lose clients



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Why Be Concerned? (con't)

- Poor safety results in more injuries and increased costs, which reduce company's profitability – could lose jobs
- Increased reporting requirements
 - Injury and illness



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OSHA's Top 10 Most Cited Violations Fiscal Year 2016

1. Fall protection, general requirements (1926.501) – 6,072
2. Hazard communication (1910.1200) – 4,176
3. Scaffolding (1926.451) – 3,288
4. Respiratory protection (1910.134) – 3,097
5. Lockout/Tagout (1910.147) – 2,877



OSHA's Top 10 Most Cited Violations Fiscal Year 2016 (con't)

6. Ladders (1926.1053) – 2,241
7. Powered industrial trucks (1910.178) – 2,162
8. Machine guarding (1910.212) – 1,933
9. Fall protection – training requirements (1926.503) – 1,523
10. Electrical – wiring method (1910.305) – 1,405



Most Frequent General Duty Clause Citations

1. Forklift hazards - 26.9%
 - Lack of seatbelts
 - Improper lifting of personnel
2. Crane hazards - 21.7%
3. Dust Explosions - 12.0%
4. Struck-by Vehicle - 10%
5. Ladder fall - 5.8%
6. PVC Piping Rupture - 5.4%
7. Fire and Explosions - 5.4%
8. Fall Hazards - 5%
9. Automobile Lifts and Jacks - 4.6%
10. Storage Rack Hazards - 3.6%

Source: Tracy Cekada and Christopher Janicak – Indiana University of Pennsylvania 2016



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OSHA Recordkeeping Standard Update

- Final rule published September 18, 2014
- Major changes
 - From Standard Industrial Classification (SIC) to North American Industry Classification System (NAICS)
 - 25 new industries covered
 - Employer reporting requirements
 - Fatalities – 8 hour notification
 - Hospitalization of one (1) employee – 24 hour notification
 - Amputation – 24 hour notification
 - Loss of eye – 24 hour notification



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Recordkeeping Reporting Rules

In-patient hospitalizations: defined as formal admission to in-patient service of a hospital or clinic for care or treatment.

1904.39(b)(10) *Do I have to report an in-patient hospitalization that involves only observation or testing. You must only report diagnostic testing?*

No, you do not have to report an in-patient hospitalization that involves only observation or diagnostic to OSHA each inpatient hospitalization that involves care or treatment.

But, get it in writing.



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OSHA Defines Amputation

The traumatic loss of limb or other external body part.

- Includes:
 - A part, such as limb or appendage, that has been severed, cut off, amputated (either completely or partially)
 - Fingertip amputations with or without bone loss
 - Medical amputations resulting from irreparable damage
 - Amputations of body parts that have since been reattached



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New Electronic Filing Requirements

- By July 1, 2017 – Employers (not exempt) with 250 employees or more at an establishment must have filed OSHA 300A Summary.
- By July 1, 2018 – Employers (not exempt) with 250 employees or more at an establishment must have filed OSHA 300, 301 and 300A.



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New Electronic Filing Requirements (con't)

- By July 1, 2017 – Employers with 20 to 249 employees in one of the 67 specified industries must have filed OSHA 300A summaries. Beginning in 2019, submission deadline changes from July 1 to March 2.

NOTE: OSHA was to post injury and illness data on its website for all workplaces with 20 or more employees and for certain high risk industries.



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New Injury And Illness Reporting Requirements (1904.35)

1. Inform employees of right to report work-related injuries and illness free from retaliation.
2. Procedures for reporting work-related injuries and illnesses must be reasonable and not to discourage employees from reporting.
3. Employer cannot retaliate against employees for reporting work-related injuries and illnesses.

Note: Potential impact on safety incentive programs and drug testing.



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Reasonable Reporting System

- Prohibits employers from adopting “unreasonable” reporting procedures
- What makes a system “unreasonable”?
- TEST: Whether the action would deter a “reasonable employee” from reporting a work-related injury or illness?



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New Whistleblower / Retaliation Provisions

- 1904.36 modified to reference 1909.35
- Now OSHA can cite employers for whistleblower retaliation claims



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Temporary Employee Issues

Imagine the possibilities if an employer doesn't even know the number of temps on site and has not focused on this issue. Temporary employees:

- Don't receive same training as full-time employees performing same duties
- Aren't included in Hearing Conservation or Respiratory Protection Programs
- Are not included in safety meetings
- Have no documentation of on-the-job training
- Are not aware of emergency response plans
- Supervisory roles may be unclear



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OSHA's Burden Of Proof To Issue Citation Of "Vertical" Standard

- Vertical standard – specific only to particular industry (e.g., construction industry)
- OSHA has the burden to prove:
 - A hazard
 - Applicable standard
 - Exposure
 - And that the employer knew of the citation or should have known of it with the exercise of due diligence



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OSHA Must Prove To Issue 5(a)(1) General Duty Citation

- Condition or activity in the workplace presented a hazard
- Employer or its industry recognized the hazard
- Hazard was likely to cause death or serious physical harm a feasible means existed to eliminate or materially reduce the hazard



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OSHA Delays Enforcing Silica Standard

- OSHA announced a delay in enforcement of the crystalline silica standard that applies to the construction industry to conduct additional outreach and provide educational materials and guidance for employers.
- The agency has determined that additional guidance is necessary due to the unique nature of the requirements in the construction industry standard.
- Originally scheduled to begin June 23, 2017, enforcement is now set to begin on September 23, 2017.



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Anticipated Future Changes by the Trump Administration

- OSHA will likely move away from an enforcement-based strategy and toward compliance assistance and cooperative programs for employers
- Less recordkeeping audits



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Anticipated Future Changes by the Trump Administration

- Scale back the federal whistleblower oversight of OSHA
- Changes may not be too dramatic
 - Trump's election win was partly due to his pro-employee stance, therefore he will not want to alienate blue-collar workers by aggressively decreasing OSHA enforcement



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Anticipated Future Changes by the New Administration (con't)

- Less recordkeeping audits
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Effectively Handling An OSHA Inspection:

How To Legally Protect Your Rights



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Supervisor Role In OSHA Citations

Learning Of OSHA Violations

“Because employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by providing that a supervisory employee knew of or was responsible for the violation.”



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Safety Responsibility

Unpreventable Employee Misconduct Defense Elements:

- Establish work rules designed to ensure safe work and to avoid OSHA violations
- Communicate the work rules to employees
- Train the employees as needed
- Take appropriate steps to discover violations
- Effectively enforce the rules and practices when violations are discovered
- **Document the above actions**



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Pre-inspection Action Plan

- OSHA Poster
- Assignment of responsibilities
- Training/recordkeeping
- Equipment needed during inspection
- Review of previous citations
- **Review of insurance and third-party audits**
- **Periodic audits and reviews**



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Why Me?

INSPECTION PRIORITIES

- Imminent danger
- Fatalities/catastrophic accidents
- Employee complaints/referrals
- High-hazard industries
- Special emphasis programs



Note: With new OSHA recordkeeping reporting requirements, many new self-referral inspections



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Throughout Entire Inspection Always Remember

- It is your facility
- You have rights. . .
 - Inspection conducted in a reasonable manner
 - Inspection conducted during a reasonable time
- Completion of inspection within
- Be cooperative and responsive



but maintain control of the inspection



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Elements of an OSHA Inspection



The Knock at the Door



The Opening Conference



The Walk-Around



The Closing Conference



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The Knock

- **No advance knowledge**
- Will not “come back later”
1-hour rule
- Credentials - if unsure, call Area Director to confirm
- Restrict admittance until management personnel are on site



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Should You Demand A Warrant?

- A policy call
- Few employers routinely require warrants
- May be necessary to gain time, such as when a manager or legal counsel needs to be present
- An “ex parte” procedure



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Inspection Warrants

What About Expanded Warrants?

Scope-

In the Matter of the Establishment Inspection of Mar-Jac Poultry, Inc.

(N.D. Ga. 2016):

- OSHA obtained a warrant to inspect an entire plant after a worker was injured by an electrical panel, based on a Regional Emphasis Program (“REP”) for poultry plants.
- In August 2016, a federal magistrate judge recommended the warrant be quashed because the inspection was overbroad.
- On November 2, 2016, the federal district court judge agreed based on Fourth Amendment considerations, and quashed the warrant saying OSHA could not inspect the entire operation, just the area surrounding the electrical panel where the accident occurred.



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Opening Conference

- Ascertain purpose of the inspection
- Establish “scope” of the Inspection – get copy of complaint if applicable
- Set ground rules for inspection-protect confidential information and processes
- **Don't volunteer information**



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Opening Conference (con't)

- Treat the Inspector in a professional fashion
- Notification of corporate officials and legal counsel
- Coordination with on-site contractors and vendors



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The Walkaround

- **Employer – right to accompany Compliance Officer (“CO”)**
- Require CO to comply with all company safety and health rules, including training, where applicable
- Take accurate notes on areas reviewed and all discussions and comments from CO



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The Walkaround (con't)

- Do everything the CO does (photos, video, air monitoring, etc.)
- Maintain control - Limit the area seen by the CO
- Side-by-side monitoring
- **No staging of event or accident**



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The Walkaround (con't)

- **No destruction of evidence or misrepresentations – even if inadvertently**
- Take the inspector on a pre-staged route, if appropriate
- Have a “team” go ahead of the inspector to identify and fix obvious problems (hopefully these issues are minor and corrected quickly)
- Have a “team” trail behind the inspector to immediately abate identified problems (demonstrate good faith)



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The Inspection

- Hourly employee interviews
 - OSHA takes position no management present
 - Up to employee – can have Employee Representative
 - **Advise employee of his/her rights, appreciation of cooperation, and to tell the truth**
- Warning: Employees have whistleblower rights



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The Inspection

- Management and supervisor interviews
 - **Always another management/legal counsel present - agent of Company**
 - Definition of manager?
 - Fatality investigation – attorney always present
 - **No tape-recording**
 - **Signed statement**



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The Inspection

- Documentation
 - Recordkeeping
 - Training programs and records
 - Safety and health policies
 - Monitoring results
 - Medical surveillance
 - Medical access orders
 - **Previous safety audits**
 - **Standard required documents**



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Closing Conference

- **Employer's opportunity for free discovery**
- Advise of observed unsafe conditions
- Usually, brief description as to possible violations – no discussion of penalties, classification and abatement dates



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Closing Conference (con't)

- Request photos and monitoring results
- Discuss appeal rights
- **Not a time for debate**
- **All document requests from OSHA need to be reviewed and approved by Risk Management and/or legal counsel prior to being provided to OSHA**



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Citations

- In writing
- Violation described “with particularity”
- Timely – citation must issue within 6 months of the violation
- Corporate-wide abatement
- Proposed penalty specified
- Served by certified mail
- Post for 3 days or until abatement, whichever is longer



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Penalties

Effective January 15, 2017:

- Other than serious
Up to \$12,675 per violation
- Increased from \$7,000
- Serious
Up to \$12,675 per violation
- Increased from \$7,000
- Posting Requirements
Up to \$12,675 per violation
- Increased from \$7,000



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Penalties

Effective January 15, 2017:

- Willful
Up to \$126,749 per violation
- Increased from \$70,000
- Repeat
Up to \$126,749 per violation
- Increased from \$70,000
- Failure to abate
Up to \$12,675 per day beyond abatement date
- Increased from \$7,000



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Penalties – Criminal Violations

- Willful violation & employee death:
\$10,000 or 6 months or both
Second conviction:
\$20,000 or 12 months or both
- Advance notice of inspection
\$1,000 or 6 months or both
- Falsification of required records, etc.
\$10,000 or 6 months or both
- Murder or attempted murder of CO
Term of years to life



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Citation Options

- Agree to citations, pay full penalty
- Informal conference/informal settlement
- **Notice of Contest – 15 working days
(Federal); some state plan states different
time period**
- Formal settlement
- Hearing



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Final Questions



“Judge a man by his questions,
rather than his answers.”

~ Voltaire



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Be Safe!



REMEMBER:
Bad decisions make good
stories and usually the
evening news.



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Thank You

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- **Using the link in the email reminder
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