



**2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO**

So You've Been Cited for a Safety Violation . . . Now What??

Ryan McCabe Poor

Partner

Ice Miller, LLP

Ryan.Poor@icemiller.com

317.236.5976

IceMiller
LEGAL COUNSEL

1

Before the Order: How did you get here?

- The Inspection
 - Imminent danger
 - Fatality, hospitalization, amputation, etc.
 - Investigating a complaint
 - Programmed inspection
 - Referral to IOSHA from other agencies
 - Severe Violator Enforcement Program (SVEP)



**2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO**
February 26-28, 2019 | Indiana Convention Center, Indianapolis

2

Evidence of Violations: What is out there?

- Evidence of a violation can take several forms
 - Review of policies/procedures/records (or lack thereof)
 - Visual inspection
 - Photos/video/audio
 - Sampling data (i.e., noise or air samples)
 - Interviews with employees (private) and management (or other witnesses)
 - Uncorrected safety audit?
 - IC 22-8-1.1-24.7: contents of safety audit are not admissible if employer made a good faith and substantial effort to correct every hazard noted
 - Your [history](#)



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

3

The Closing Conference

- May be same day as inspection or later
- A “draft” of the safety order
- Includes results and hazards – but not seriousness or penalties
- Explanation of procedures – see [IOSHA's Closing Conference Guide](#)
- Still under investigation – be mindful with what is said
- Start working now on review and possible defenses
- IOSHA has 6 months from the date of the alleged violation to issue Safety Order



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

4

The Safety Order

- Per IC 22-8-1.1-25.1 must be:
 - In writing
 - Describe the violation with particularity
 - Make reference to the standard violated
 - Fix a reasonable time for abatement; and
 - Impose a proposed penalty
- Review it very closely!
- Must post the Safety Order at or near each place of alleged violation (or if not practicable, in prominent place)
 - Remains posted until abated or 3 working days, whichever is longer



2019 INDIANA SAFETY AND HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

5

What's in a Safety Order?



2019 INDIANA SAFETY AND HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

6

Types and Degrees of Violations

- De minimis
 - Technical violation with no hazard
- Other than serious = up to \$7,000 per violation
 - Minor issues not rising to level of serious physical harm or recordkeeping
- Serious = up to \$7,000 per violation
 - There is a “substantial probability that death or serious physical harm could result from a condition”
 - OSHA does not have to show an accident is probable, just possible, and if one does occur there is a substantial probability the result would be death or serious physical harm



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

7

Types and Degrees of Violations

- Repeat = up to \$70,000 per repeat violation
 - Repeat violation must be substantially similar to previous safety order
 - Usually will look back 3 years (could go up to 5)
 - Do an OSHA establishment search on your organization to check
- Knowing = up to \$70,000 per knowing violation
 - same as “willful” under federal
 - An “intentional disregard or plain indifference to the Act”
 - Aware of standard and condition and did not abate the hazard
 - Aware of legal requirement and the violation
 - Knew must take specific steps and substituted own judgment for standards
 - Aware of requirement but did not communicate to supervisors or employees
 - Aware of plainly hazardous condition and did little or nothing to prevent
 - Not aware of requirement, but aware of practice or condition that is serious hazard and makes little or no effort to determine extent or to fix it
 - Does not require “malice” or bad intent



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

8

Types and Degrees of Violations

- Posting = up to \$7,000 per violation
- Determining penalties
 - Gravity/severity of the violation
 - Probability of injury or illness
 - Size of business
 - Good faith of the employer
 - Compliance history
- Expedited Informal Settlement Agreement (EISA)
 - Penalties less than \$7500 and not frequent violator = 35% reduction if accepted



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

9

What are your options?

- Comply with the safety order/pay fines/abate as indicated
- Contest (file petition for review) – within 15 working days from receipt
 - Becomes final order if not contested – time cannot be extended
 - Call IOSHA to get date if not 100% certain of time to contest
- Informal conference – within 15 working day timeframe, employer may request an informal conference.
 - This does not extend the period for filing a petition for review
 - Opportunity to convince IOSHA to change position
 - Strongly suggested to participate in an informal conference
 - If not successful then may still contest – but, all or nothing



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

10

Should I Contest the Safety Order?

- Was there a violation? Can a violation be proven?
- Do you have a good faith defense to the safety order?
- Does the safety order as written impair a core function of the business?
- If accepted, is there a possibility of repeat or knowing/willful violations?
- Are you ok with the consequences of abatement? Other facilities to consider as well?
- Are you prepared for the cost of contesting?
- Are there non-IOSHA factors at play?
 - Other litigation such as tort actions by non-employees



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

11

What must IOSHA prove?

- General duty clause:
 - The existence of a hazard
 - The hazard was recognized
 - The hazard was causing, or likely to cause, death or serious physical harm
 - That a feasible means of abatement exists
 - Not available when a specific standard covers the hazard
- Violation of a specific standard
 - The cited standard applies
 - There was a violation of the standard's requirements
 - Employees were exposed to the condition or hazard, and
 - The employer knew or could have known of the hazard through reasonable diligence



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

12

Affirmative Defenses (Employer burden)

- Impossibility (infeasibility) of compliance
 - Compliance was impossible or would prevent performance of work
 - Alternative means of protection were used or unavailable
- Greater hazard
 - Compliance would result in greater hazard than noncompliance
 - Alternative means of protection were used or unavailable
 - A variance application had been rejected or would have been inappropriate
- Employee misconduct
 - Violation was result of isolated incident of misconduct in violation of employer rule or policy that was effectively communicated and enforced



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

13

Other Defenses

- These defenses target elements of IOSHA's burden of proof, but are commonly raised as “defenses”
- Invalidity of standard
 - No exposure
 - No evidence employees exposed to hazard
- No employer knowledge
 - The employer did not have actual or constructive knowledge of condition or hazard
- Procedural defenses – i.e., order not issued within 6 months
- Standard is not applicable
 - Cited standard does not apply to facts, facility, or operations



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

14

Other Defenses (cont.)

- General duty clause
 - A specific standard applies
 - No feasible abatement
 - Employer's own employees not exposed
- Res judicata and collateral estoppel
 - Issues were litigated in an earlier action
- Multiemployer worksite
 - Not controlling, correcting, creating, or exposing employer



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

15

The Informal Conference . . .

- Must be scheduled within the 15 working day window for filing notice of contest
 - Possible additional 5-day window once contest filed
- Who will attend?
 - IOSHA
 - Employer
 - Union?
 - Expert?
- Best to attend in-person if possible and available



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

16

Preparing for the Informal Conference

- Evaluate facts against applicable standards ([research!](#))
- Is there anything incorrect factually? Does the standard apply and show a violation?
 - Documentation and hard evidence is crucial – take it with you (or send it before conference)
- Do you have defenses available?
- Is there anything that impairs your operational abilities?
- What do you have to take? What can you live with?
- Develop a plan for settlement
- Make an outline for each safety order
- Be strategic and realistic about what you ask for



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

17

Settlement Options

- Delete – legally or factually deficient/inaccurate order
- Reduce classification or penalty
 - Low hazard?
 - Abated immediately or other good faith efforts?
 - Agree to work with INSafe or private contractor or take other action?
- Group violations
 - Similar violations may be grouped to reduce penalties
- Move penalties to another item
- Amend description of violation
- Modify abatement



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

18

The Settlement Agreement



2019 INDIANA SAFETY AND HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

19

Abatement

- Employers must be given a reasonable amount of time to abate
- If you do not believe you have been given enough time:
 - Contest the safety order
 - Request additional time for abatement; and
 - File a petition for modification of the abatement date (PMA)
 - No later than the end of the first business day after expiration of the abatement period
 - Must be posted and provided to employee representative (union)
- Must [certify abatement and provide documentation](#) to IOSHA
 - Must be posted for 3 working days



2019 INDIANA SAFETY AND HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

20

Petition for Review

- Must be filed within 15 working days of receipt of safety order
- All or nothing – can't pick and choose what to settle/contest
- Sample language:

Dear _____:

This letter is written as a Petition for Review in which the Respondent contests the issuance of the Safety Order, the alleged violations, the designation of severity/nature of offense, the abatement date, and the proposed penalty for which the Safety Order was issued. The basis for this Petition for Review is that the Safety Order as issued is contrary to the facts and contrary to law.

Very truly yours,



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

21

Litigating the Safety Order

- Commissioner's action on petition for review
 - Commissioner has 5 working days to review (also useful to conclude settlement if necessary)
 - May affirm the safety order, grant petition, and certify dispute to Board of Safety Review
 - Must post copy of granted petition and notice
 - Informs employees if right to party status and review of pleadings
 - May amend the safety order
 - Petition becomes moot and employer allowed 15 working days to file new petition
 - May dismiss the safety order



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

22

Board of Safety Review

- Empowered to conduct hearings on safety orders
 - May affirm, modify, or dismiss the commissioner's action with respect to violation, penalty, and/or abatement
 - Enforcement of safety order is suspended until final decision of Board
- Fully staffed has 5 members
 - Appointed by governor for 4-year terms
 - 2 labor, 2 management, 1 ASSE
- Will schedule initial pre-hearing conference
 - Will issue Order on Prehearing Conference
- Will select ALJ to conduct hearing



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

23

Board of Safety Review (cont.)

- Initial Prehearing Conference
 - Commissioner of Labor will be represented by counsel
 - Board normally represented by ALJ and Board's secretary
 - Set hearing date, discovery cutoff date, filing witness and exhibit lists, motions for summary judgment
 - Usually includes informal settlement discussion after formal hearing
- Discovery
 - Production of documents
 - Interrogatories
 - Depositions
 - Request for admissions
 - Inspection of property



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

24

Board of Safety Review (cont.)

- Rules for litigating the safety order come from:
 - The Indiana Occupational Safety and Health Act (IC 22-8-1.1 et seq.)
 - The Indiana Administrative Orders and Procedures Act (IC 4-21.5)
 - Proceedings Before the Board of Safety Review (615 IAC 1-2-1 et seq.)
- Many procedural requirements
- Hearings
 - Witnesses (under oath) examined and cross-examined, exhibits marked, and recording or transcript made
 - Board is guided “to the extent practicable” by Indiana Rules of Trial Procedure, but hearing regulated “in an informal manner without regard to technical, common law rules of evidence applicable to civil actions in courts”



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

25

Board of Safety Review (cont.)

- Hearings (cont.)
 - Commissioner has burden of proof and goes first
 - Employer then has opportunity to present defense
 - Opportunity to submit proposed findings of fact and conclusions of law
 - Also may submit post-hearing brief
 - ALJ submits decision and findings of fact within 90 days of receiving briefs/proposed findings
- May appeal ALJ decision to Board of Safety Review
- May appeal Board decision to Court



2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO
February 26-28, 2019 | Indiana Convention Center, Indianapolis

26

QUESTIONS?

Thank You!

Ryan McCabe Poor

ryan.poor@icemiller.com

(317) 236-5976

IceMiller
LEGAL COUNSEL



**2019 INDIANA SAFETY AND
HEALTH CONFERENCE & EXPO**
February 26-28, 2019 | Indiana Convention Center, Indianapolis