



CONN MACIEL CAREY

Toolkit: Prepare for and Manage OSHA Inspections

The Occupational Safety and Health Administration (OSHA) has broad authority to conduct workplace inspections and issue citations against employers found in violation of safety and health standards. OSHA gathers virtually all of its “discovery” during inspections. Therefore, it is critical for employers to prepare, assert their rights, and manage the flow of information during inspections.

OSHA has increased enforcement to levels never seen before, from more compliance inspections to higher civil penalties, more citations characterized as “willful” or “repeat,” and more criminal referrals. OSHA has also introduced more aggressive strategies during inspections conducted pursuant to the Occupational Safety and Health Act of 1970, creating a minefield for employers across all industries. The consequences for being caught ill-prepared for an OSHA inspection are more dire now than ever.

This OSHA Inspection Toolkit is a guide for employers to prepare in advance for an OSHA inspection, and once an inspection begins, to manage it to a successful outcome. The Toolkit highlights key issues, such as employers', employees' and OSHA's inspection rights, the various stages of OSHA inspections, and tips and strategies for how best to manage each stage.

This OSHA Inspection Toolkit reflects the collective experience of Conn Maciel Carey's national OSHA • Workplace Safety Practice Group, which has counseled and assisted clients nationwide through thousands of OSHA inspections. The Toolkit provides tips and suggestions, but does not proscribe a one-size-fits-all approach to all OSHA inspections.

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Prepare for an OSHA Inspection

DEVELOP AND IMPLEMENT A COMPREHENSIVE SAFETY AND HEALTH PROGRAM

- Develop written safety policies that are current, accurate, site-specific and fully compliant.
- Ensure your written safety policies are implemented in the field as written.
- Develop a program for employees to report injuries and safety concerns.
- Establish a Safety Committee that includes both employer and employee representatives, to:
 - evaluate safety programs as written and implemented;
 - audit the workplace for potential hazards; and
 - review and discuss workplace incidents and near misses.

AUDIT THE WORKPLACE FOR SAFETY ISSUES AND COMPLIANCE WITH SAFETY POLICIES

- Audits, whether conducted by the Safety Committee, safety or operational managers, or third party safety consultants or counsel, should be conducted at the direction of in-house or outside legal counsel to protect the audit findings under the attorney-client privilege, whenever possible.
- Review prior safety audits and audit recommendations to ensure that all recommendations have been addressed and documented, and problem areas are not ongoing concerns.
- Ensure new audit recommendations are addressed and the steps taken to address the recommendations are documented.

TRAIN STAFF

Understand the OSHA Basics

Employers' representatives need to understand:

- OSHA standards applicable to the employer's industry and workplace.
- Special emphasis programs relevant to the employer's industry.
- The employer's safety and health programs and procedures.

Employers' OSHA Inspection Rights

Employers should understand that they have a right to:

- Demand an administrative warrant from the compliance safety and health officer (CSHO) (see *Protect Employer Interests When OSHA Arrives*, page 4).
- A reasonable inspection at reasonable times (see *Protect Employer Interests When OSHA Arrives*, page 4).
- An Opening Conference (see *Opening Conference*, page 6).
- A copy of formal employee complaints.
- Escort the CSHO during inspections of the workplace, often referred to as the "walkaround inspection" (see *Walkaround Inspection*, page 7).
- Participate in management employee interviews (see *Employee Interviews*, page 8).
- Protect trade secret and confidential business information from public disclosure by OSHA after the inspection.
- A Closing Conference (see *Closing Conference*, page 9).
- Contest alleged violations and citations (see *Post-Citation Considerations*, page 9).

Employees' OSHA Inspection Rights

Employers should understand that their employees have a right to:

- File a safety or health complaint with OSHA.
- Participate in the OSHA inspection process, including designated employee representative participation in:
 - Opening Conferences;
 - CSHO walkarounds;
 - Private interviews with OSHA;
 - Closing Conferences; and
 - Informal Settlement Conferences.
- Access inspection records; for example, copies of the citations, notice of contest and abatement records.
- Protection from retaliation and discrimination for exercising these rights.

OSHA's Inspection Rights

Employers should understand that OSHA has rights during inspections, including the right to:

- Inspect workplaces with probable cause, consent or when hazards are observable in plain view.
- Decline to provide advance notice of inspections.
- Inspect records.
- Collect physical evidence; for example, air or noise samples and photographs.
- Conduct employee interviews.
- Issue subpoenas for records, physical evidence and interviews.

ESTABLISH AN INSPECTION TEAM AND INSPECTION PROTOCOLS



Prepare a notification plan, identifying who must be informed (and by whom) of the arrival of an OSHA CSHO, including:

- senior management;
- field supervisors; and/or
- outside OSHA counsel.



Designate an inspection team and assign the following responsibilities (one person can fill multiple roles):

- team leader (management spokesperson and OSHA point of contact, generally OSHA counsel, a site-safety director or other senior manager);
- walkaround representative (escort OSHA throughout the inspection);
- document production manager (manage the document control system);
- photographer (take side-by-side pictures of the CSHO's pictures);
- sampler (coordinate industrial hygiene sampling and take side-by-side samples of the CSHO's samples);
- contractor liaison (coordinate inspection activities with contractors);
- union liaison (coordinate inspection activities with the employees' union);
- interview representative (prepare employees for interviews and participate in management interviews); and
- Opening and Closing Conference participants (generally only OSHA counsel, the inspection team leader, walkaround representative and document production manager).



Equip the inspection team with the following materials:

- contact list;
- camera;
- video recorder;
- template for document production log;
- labels for designating documents as trade secret or business confidential; and
- OSHA's Field Operations Manual.



Designate walkaround routes for each area of the facility. In doing so:

- understand the "plain view doctrine," which permits OSHA to investigate a hazard located in areas beyond the scope of the employer's consent or inspection warrant if the CSHO observes the hazard in plain view from an area within the scope of consent or the warrant;
- plan route to inspection area that circumvents sensitive areas of the facility (even by exterior routes); and
- avoid providing a full tour of the facility.



Designate in advance the location where the Opening Conference and employee interviews will be held, and where the CSHO will be permitted to work.



Establish Interview and Document Protocols (see *Best Practices During Opening Conference*, page 6).

Preliminary Inspection Issues

PROTECT EMPLOYER INTERESTS WHEN OSHA ARRIVES

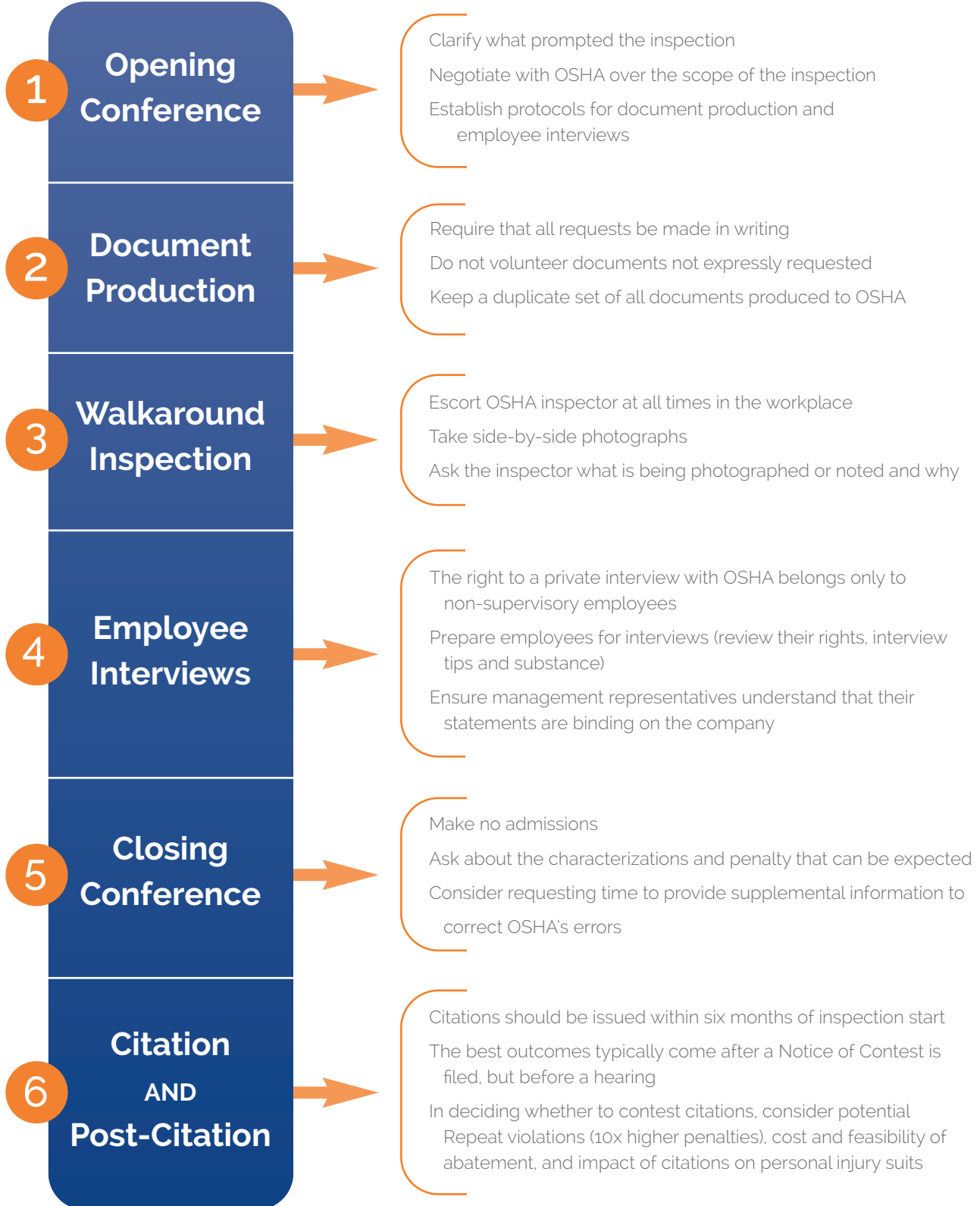
- When the OSHA CSHO arrives, notify your team leader, OSHA counsel and others in your notification plan.
- If the team leader is unavailable, CSHOs must wait a “reasonable” amount of time (normally not to exceed an hour) for management to arrive. Employers should understand and exercise their right to have a representative of their choosing present during the inspection:
 - Section 8(e) of the OSH Act provides: "the employer shall be given an opportunity to accompany the Secretary [of Labor] during the physical inspection of the workplace"; and
 - OSHA's Field Operations Manual provides: "[w]hen neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the owner, operator or management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. This delay should normally not exceed one hour."
- Determine whether anyone else, such as a union representative, plans to accompany the CSHO during the inspection (see *Union Participation at Non-Union Facility*, page 4).
- Consider asking for a warrant. To enter a workplace to begin an inspection, OSHA must have an administrative warrant or employer consent. Employers should consider whether to demand a warrant instead of consenting to the inspection when:
 - OSHA has no probable cause to inspect (for example, there has been no employee complaint, neutral inspection program, referral or accident);
 - the employer requires additional time before the inspection; and/or
 - OSHA is unwilling to negotiate a reasonable scope and conditions for the inspection.
- Generally, employers should waive the warrant requirement and consent to an inspection, but only after negotiating a reasonable scope and conditions for the inspection. When evaluating whether to consent to an inspection, consider:
 - the risk of potential retaliation by OSHA;
 - the risk of signaling to OSHA that the employer has something to hide;
 - the benefit of the appearance of cooperation; and
 - the benefit of the opportunity to negotiate scope and conditions of the inspection.
- Regardless of warrant or consent, OSHA's inspection must be conducted:
 - at reasonable times during normal work hours;
 - in a reasonable manner; and
 - within reasonable limits.

UNION PARTICIPATION AT NON-UNION FACILITY

OSHA has historically tried to permit employees at non-union workplaces to designate union officials as their OSHA inspection representatives. Employers reluctant to provide unions with such access to their workplaces and employees should consider the following steps:

- Establish a written procedure for the start of OSHA inspections that lists questions to ask, including whether anyone will accompany the CSHO.
- If anyone is planning to accompany the CSHO:
 - obtain the third party's identity and employer and/or organization affiliation;
 - ascertain his/her purpose for participating in the inspection;
 - ask if, how, and how many employees requested or selected the third party to represent them; and
 - inquire whether the third party has a special skill or credential necessary to assist the CSHO.
- Consent to the OSHA inspection (unless there is some other reason to refuse the inspection), but decline to allow the union representative at a non-union site from participating.
- Make it clear that you are not refusing OSHA's request to inspect the workplace, but you are exercising your right to exclude uninvited third parties with no governmental purpose.
- The CSHO will have to choose to: (a) proceed without the union representative; or (b) seek a warrant from a federal district court to proceed with the union representative.
- If OSHA obtains a warrant that includes participation of a union representative at a non-union workplace, challenge the warrant at the district court.
- Take control of the situation before the inspection begins, and consult OSHA defense counsel.

Overview of an OSHA Inspection



Opening Conference

OPENING CONFERENCE

At the start of its inspection, OSHA must conduct an Opening Conference. Employers should understand the basics of an Opening Conference.

Understand and Enforce OSHA's Opening Conference Obligations

During the Opening Conference, the CSHO owes several duties to the employer. If the CSHO does not adhere to these obligations, employers may request clarification on all points. Obligations include:

- Explaining why the employer is being inspected, for example:
 - is this a routine, scheduled or programmed inspection;
 - is the inspection related to a referral, accident or employee complaint; and/or
 - is this a Special Emphasis Program inspection.
- Producing a copy of an employee complaint that triggered the inspection.
- Describing intended scope and duration of the inspection.
- Delivering OSHA's first request for documents and information.

Best Practices During Opening Conference

During the Opening Conference, the employer's designated team leader should:

- Introduce the inspection team to the CSHO.
- Resolve the warrant question (see *Protect Employer Interests When OSHA Arrives*, page 4).
- If the CSHO does not volunteer all of the information outlined above, ask for clarification on all points.
- Describe the employer's document production protocol. The Team Leaders should request that OSHA's document and information requests be:
 - delivered in writing (note that 300 Logs and 300A forms must be produced to OSHA within four hours of a request, whether or not the request is in writing); and
 - provided to the designated Document Production Manager.

- Discuss protocol for arranging employee interviews (see *Employee Interviews*, page 8).
- Expect the CSHO to request and be prepared to provide copies of:
 - at least the previous three years of OSHA 300 Logs and 300A Summaries;
 - a personal protective equipment (PPE) hazard assessment;
 - an emergency action plan;
 - numerous written safety and health programs (for example, a Lockout/Tagout program or Permit-Required Confined Space program); and
 - relevant employee training records.
- Arrange for daily close-out meetings with the CSHO in order to:
 - learn about concerns the CSHO has identified;
 - consider proactive presentations regarding the CSHO's concerns (it is easier to avoid citations before they are issued, so if the CSHO expresses concerns about a missing program element or training, consider demonstrating how the employer complies);
 - plan the next day's inspection activities;
 - learn who OSHA wants to interview, schedule the interviews, and prepare the interviewees; and
 - learn what sampling OSHA has planned and prepare for sampling.

Make sure to understand OSHA's responsibilities. If the CSHO does not volunteer all of the required information, ask for clarification on all points.

Conduct a Management Walkthrough During the Opening Conference

While the CSHO is occupied at the Opening Conference, management should conduct a walkthrough of the facility to:

- Clean up disorganized work areas.
- Remind employees to wear appropriate PPE.
- Ensure employees are working safely and complying with the employer's safety programs and policies.
- Advise employees and contractors of OSHA's presence.

Document Production

ADHERE TO BEST PRACTICES FOR DOCUMENT PRODUCTION

1. Label all documents produced with unique identifying numbers for tracking and future reference during settlement negotiations and litigation.
2. If the employer produces trade secret or confidential business information (CBI) to OSHA:
 - label information as trade secret or CBI; and
 - produce documents under cover sheets invoking the protection of the U.S. Trade Secret Act (18 U.S.C. § 1905).
3. Redact personally-identifiable medical records (except if OSHA obtains medical access order).
4. Make and keep duplicates of every record produced to OSHA.
5. Track all documents produced on a Document Control Log.

AVOID COMMON DOCUMENT PRODUCTION MISTAKES

1. Do not generate non-privileged documents during an inspection.
2. Do not leave documents or information in plain sight (for example, file away binders and loose documents, and erase whiteboards from earlier meetings).
3. Do not volunteer information that OSHA did not request.

Walkaround Inspection

The CSHO will conduct a “walkaround” inspection of the facility looking for violations of the OSH Act or OSHA’s standards.

UNDERSTAND THE CSHO’S ACTIVITY DURING A WALKAROUND

During the walkaround, the CSHO may:

- Take photographs.
- Conduct industrial hygiene monitoring (testing and recording employee exposures to health hazards).
- Conduct brief “stop and talk” interviews with non-management employees.
- Take handwritten notes of potential violative conditions.
- Identify alleged hazards and suggest corrective actions.

EMPLOYER STRATEGY DURING THE WALKAROUND

During the walkaround, the employer should:

- Escort the CSHO at **all** times while at the facility.
- Require the CSHO to abide by all employer safety rules (including use of required PPE).

- Be cordial and professional, but assert your rights.
- Gather intelligence about the CSHO’s focus by tracking:
 - where the CSHO asks to go;
 - the topics of the CSHO’s questions;
 - what the CSHO photographs; and
 - the subjects of the CSHO’s written notes.
- Take detailed notes about everything the CSHO says, does or asks.
- Pay close attention to how sampling or air monitoring is conducted and what activities monitored employees are doing.
- Take side-by-side photographs, videos and samples.
- Ask the CSHO what is being photographed and why.
- Immediately correct alleged hazards identified by the CSHO without admitting a violation.
- Do **not** demonstrate work tasks or the operation of equipment not otherwise scheduled to be performed in the ordinary course of business.

Employee Interviews

The CSHO will conduct employee interviews of managers and hourly employees.

UNDERSTAND THE CSHO'S ROLE IN EMPLOYEE INTERVIEWS

During inspection interviews, the CSHO may:

- Demand privacy for hourly employee interviews. This right, however, belongs to the hourly employee, not OSHA, and management-level employees do not have a corresponding right to a private interview.
- Take handwritten interview notes.
- Ask to audio or video record the interviews.
- Ask witnesses to write statements, or review and sign the CSHO's notes.
- Ask questions about documents (for example, written programs, training records, or operating procedures) that have been produced during the inspection.

UNDERSTAND THE EMPLOYER'S ROLE IN EMPLOYEE INTERVIEWS

With respect to employee interviews, the employer:

- Must never discriminate against employees for agreeing to be interviewed or for anything they say to OSHA in an interview.
- Should attempt to schedule interviews in advance.
- Should object to impromptu interviews in the work area that last more than approximately five minutes.
- Has a right to participate in all management interviews, and should exercise that right.
- Does not have a right to participate in hourly employee interviews, unless the employee requests it without coercion.
- Can request alternative times and locations for an interview if the interview unreasonably hinders business.
- Should prepare all employees for their interviews.

PREPARE ALL EMPLOYEES FOR INTERVIEWS

The employer should prepare employees for OSHA interviews by:

- Using experienced OSHA defense counsel.
- Not coercing or intimidating employees into:
 - refusing an interview;
 - providing specific answers; or
 - requesting a manager be in the interview.
- Informing employees that the interview is voluntary, but that OSHA may issue subpoenas to compel testimony.
- Describing employees' interview rights:
 - to have a representative with them;
 - not to be video or audio recorded;
 - not to write out or sign a statement or sign the CSHO's notes;
 - to demand a copy of a statement if one is written or signed;
 - to examine documents that are the subject of interview questions; and
 - to take a break at any time for any reason.
- Offering employees interview tips:
 - always tell the truth;
 - listen carefully to the question;
 - answer only the question asked;
 - give short, concise answers and wait for the next question (do not fill awkward silences);
 - stick to the facts and provide only firsthand knowledge;
 - do not guess or speculate;
 - "I don't know" and "I don't remember" are appropriate if true;
 - be positive and confident; and
 - do not let the CSHO put words in your mouth.
- Reminding employees of applicable safety rules and safety training they have received. Use records to refresh their memory.

The right to a private interview belongs **ONLY** to non-supervisory employees — not to managers and not to OSHA.

CAUTION

Inform management representatives that OSHA treats them as agents of the employer and their statements, admissions and knowledge bind the company.

Closing Conference

CLOSING CONFERENCE

If OSHA is going to issue citations, it must conduct a "Closing Conference." A Closing Conference is generally held at the end of the entire inspection, which may be weeks or months after the close of the on-site inspection.

Between the close of the on-site inspection and the Closing Conference, the CSHO:

- Reviews:
 - documents;
 - interview notes;
 - sample results; and
 - other physical evidence collected during the inspection.
- Researches:
 - standards;
 - interpretations; and
 - compliance directives.
- Writes proposed:
 - citations;
 - penalties; and
 - abatement requirements.
- Gets the citation package approved by the CSHO's superiors.

At the Closing Conference, the CSHO generally:

- explains the employer's post-citation rights.
- communicates OSHA's findings, including:
 - standards allegedly violated;
 - bases for alleged violations; and
 - possible abatement and abatement dates.

At the Closing Conference, the CSHO generally does **not** share:

- characterization (e.g., willful, repeat, serious);
- penalty amount; or
- the actual citations.

During the Closing Conference, the **employer** should:

- Listen carefully and take detailed notes.
- Make no admissions.
- Identify for the CSHO any alleged violations that have already been corrected.
- Make no abatement or abatement date promises.
- Ask the CSHO about characterizations and penalty amounts.
- Ask when the employer can expect to receive the citations.
- Request time to provide supplemental information to correct factual errors that form the basis of proposed citations.

Citation AND Post-Citation

ISSUANCE OF CITATIONS

Employers should be aware that:

- No citation may be issued six months after the occurrence of a violation (as a practical matter, within six months of the start of an inspection).
- Citations must be delivered by hand or certified mail with return receipt requested.
- If the total penalty approaches \$100,000 or the citations involve a unique regulatory issue, then OSHA will issue an inflammatory press release at the time the citations are issued.

POST-CITATION CONSIDERATIONS

After receiving an OSHA citation, employers may:

- Pay the fine and accept the citation.
This is never the best option.
- Request a variance.
These are rarely granted.
- Resolve citations at an informal settlement conference. **This has become a less effective option.**
- Contest the citation and negotiate a formal settlement with OSHA's counsel. **This is usually the best option.**
- Contest the citation and proceed to a hearing before an administrative law judge under the OSH Review Commission.

In deciding whether to contest citations, employers should consult with OSHA defense counsel and consider:

- Are the alleged violations accurate?
- Does the citation expose the employer to future, "repeat" violations with 10x higher penalties?
- Are proposed penalties excessive?
- Is the required abatement action clear and feasible?
- Are the employer's sister facilities able to conform to the required abatement?
- Does the proposed citation qualify the employer for the Severe Violator Enforcement Program?
- Do the citations relate to a potential personal injury or wrongful death civil suit?

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