

## **INTERACTING WITH OSHA – EMPLOYER’S RIGHTS AND RESPONSIBILITIES**

**Joseph F. Spitzzeri  
LEED Green Associate  
Johnson & Bell, Ltd.  
spitzzerij@jbltd.com**

An OSHA Compliance Safety and Health Officer (CSHO) appears at your door to conduct an inspection, either programmed or unprogrammed. What can and should you do? This paper summarizes CSHO inspections, the types of citations that can be issued, and the available responses to those citations as well as the procedures following a contest of the citation. This paper also summarizes the rights and responsibilities of employers during CSHO inspections and after the issuance of citations, as well as available cooperative programs/agreements between employers and OSHA. The paper focuses on interaction with OSHA itself rather than State OSH plans but identifies the States that have their own approved OSH plans.

### **I. CSHO Mission**

It is the mission of the CSHO to represent OSHA to the public, and in so doing, to carry out the policies and procedures of the agency under the direction of the Supervisor. The CSHO’s primary responsibility is to carry out the mandate given to the Secretary of Labor “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions....”

The CSHO conducts an inspection of the workplace and reports the findings to the Area Director who evaluates them. If a violation exists, OSHA issues a Citation, Notification of Penalty, and abatement date detailing the exact nature of the violation and any associated penalties.

### **Types of Inspections**

Advance notice of inspections is generally prohibited. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise. At the beginning of the inspection the CSHO shall attempt to locate the owner, operator or agent in charge at the workplace and present credentials. If the CSHO does not present his credentials the foreman or other person responding should request them. On construction sites, this will often be a representative of the general contractor. In any instance, on-site management and safety personnel for the general contractor and the involved subcontractor should be notified prior to the CSHO walking the project.

The CSHO may perform unprogrammed or programmed inspections. An unprogrammed inspection is generally not the result of any specific accident or complaint. Unprogrammed inspections are scheduled in response to alleged hazardous working conditions identified at a specific worksite. It is normally a partial inspection limited to the specific working conditions or

practices forming the basis of the unprogrammed inspection. A CSHO must have probable cause to perform an unprogrammed inspection unless it falls into one of OSHA's Emphasis Program hazards. In Construction, these hazards are: fall hazards, amputation hazards, electrocution, excavations/trenching or environmental issues (combustible dust/crystalline silica).

A programmed inspection occurs for one of the following reasons: (1) when OSHA has received an allegation that an imminent danger exists at the construction site; (2) when there has been an accident at the construction site that involved a fatality or five (5) or more people being hospitalized for more than twenty-four (24) hours; and, when OSHA has received a complaint that a hazardous condition exists at a construction site. Programmed inspections are also scheduled upon objective or neutral selection criteria. The worksites are selected according to national scheduling plans for safety and health or special emphasis programs. Normally, no establishment shall be selected for inspection more frequently than once per trimester.

Inspections, either programmed or unprogrammed may fall into one of two categories depending on the scope of the inspection: Comprehensive or Partial. A comprehensive inspection is a substantially complete inspection of the potentially high hazard areas of the establishment. A comprehensive inspection shall include a review of injury and illness records, an assessment of the employer's hazard communication and lockout/tagout programs, an evaluation of the employer's safety and health management program, a walk around to survey those areas, conditions, operations and practices believed to be potentially high hazard areas of the establishment, and employee interviews. A Partial inspection's focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment. A partial inspection shall include a review of injury and illness records, an assessment of the employer's hazard communication and lockout/tagout programs, an evaluation of the employer's safety and health management program, a brief walk around to survey those areas, conditions, operations and practices believed to have the greatest hazard potential, and employee interviews.

Follow-up inspections are usually conducted no later than 30 working days after the latest violation abatement date and take priority over all programmed inspections and any unprogrammed inspection with hazards evaluated as other-than-serious.

Monitoring inspections can also be conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance. Such inspections may be scheduled, among other reasons, as a result of a petition for modification of abatement date, a corporate-wide settlement agreement, or to ensure that terms of a permanent variance are being carried out.

#### **A. Inspection Order of Priority**

- |               |   |   |
|---------------|---|---|
| <b>First</b>  | - | <b>Imminent Danger Inspections</b> – The condition could cause imminent death or serious physical harm immediately or before the danger can be eliminated. Usually within 24 hours of notice. |
| <b>Second</b> | - | <b>Fatalities and Catastrophic investigations</b> – To determine if   |

noncompliance with OSHA standards caused the injuries.

- Third** - **Investigation of Complaints/Referrals** – Formal complaint from employee. Usually conducted within 30 days.
- Fourth** - **Severe Violator Enforcement Program Inspections** – Mandatory follow-up inspections are required in severe violator cases. Also, nationwide inspections of related workplaces/worksites may occur. These inspections may be conducted either separately or concurrently with programmed/unprogrammed inspections.
- Fifth** - **Programmed Inspections** – Usually only in “high hazard” establishments.

### **B. Inspector Authority**

Upon presenting appropriate credentials to the owner, the CSHO has the authority to investigate and inspect during regular working hours and at other reasonable times, and within reasonable limits and manner, any place of employment and to question privately any employer, owner, operator, agent or employee. A warrant is not necessary if the employer consents to OSHA entry to the workplace. Managers, supervisors or others in apparent authoritative positions (gate guard) may consent. The CSHO must comply with all safety and health rules and practices at the establishment and wear or use the safety clothing for protection of employees. It is recommended that the employer’s representative present in a businesslike manner and be polite, respectful and cooperative with the CSHO. A hostile or negative attitude generally does not serve the employer’s best interests as it could lead to a lengthened inspection or stiffer penalties in the event of citations.

### **C. Opening Conference**

Prior to the actual inspection at the construction site, an opening conference will be held. The purpose of the opening conference is to discuss the inspection with a representative of the employer and employee(s) (usually the union steward) such as the nature, purpose and scope of the inspection as well as to establish procedures for the inspection. The employer should use the opportunity to define the scope of the investigation and the company’s preventative program including: written safety program signed by the employee; ongoing safety orientation; private inspections and consultations; written disciplinary procedures; minutes from joint employer/employee safety meetings; and a review of recent safety issues and corrective actions taken. The opening conference should be brief and not exceed one hour. The employer should attend via its safety director and a member of the corporate hierarchy to show the employer’s concern with safety and the citation. Obtain the CSHO’s full name, business address and phone number by obtaining the CSHO’s business card.

The CSHO should be asked the reason for the inspection. Obtain a copy of the complaint or allegation if the inspection is the result of a complaint or allegation. The CSHO can be asked

whether the complaint is an employee, former employee, customer, subcontractor or outside source but the CSHO is not permitted to reveal the name of the complainant. The CSHO should not be pushed if he/she refuses to divulge any of this information.

Inform the CSHO of the day's scheduled activities, particularly any significant activities scheduled to occur. The CSHO has a responsibility to conduct the inspection so as to avoid undue and unnecessary disruption to the normal operations of the construction project. The employer representative should make efforts to delay the start of the inspection until higher management can be contacted in the event the CSHO presents any unreasonable requests during the opening conference (or at any time during the inspection).

#### **D. Walk around Inspection**

The employer and the employee representatives "shall be given" an opportunity to accompany the inspection tour "for the purpose of aiding in such inspection". The employer should keep notes of the records reviewed; the areas and material/equipment inspected; questions asked and of whom; and take photos of any areas, material/equipment photographed by the CSHO. Also copy any documents provided to the CSHO. An exit interview should be conducted with the employees interviewed as soon after their interview as possible. Under only rare circumstances should the CSHO be denied access to the project – that is where the CSHO is presenting unreasonable requests and even then the CSHO should be allowed access not involving the unreasonable requests until the issues can be resolved.

#### **E. Records Review**

Normally, the employer should only volunteer to disclose those records it is required to maintain under the Act such as the log and summary of occupational illnesses and injuries, the supplemental record and the annual summary. Other records such as company accident reports should not be voluntarily disclosed prior to review by counsel. Trade secrets or other proprietary records or documents should be so identified to preserve their confidentiality. Keep in mind that injury logs, supplementary records and annual summaries are required to be retained in each establishment for 5 years following the end of the year to which they relate. If ownership changes, the new owner must keep the records for the portion of the year they own the company, and they shall preserve the records of the previous owner for the applicable time period.

#### **F. Employee Interviews**

OSHA has a right to speak privately with the individual employees however the employer representative should request to be present. However, if an employee cannot be reasonably removed from his work station, the employer need not do so. To avoid problems, arrange for interviews off site. Keep a list of employees interviewed and conduct exit interviews with them. Make sure the employee is advised that the exit interview is voluntary and that he is not threatening the employee in any way. Supervisors and other members of management are not required to cooperate with the CSHO and should be cautioned against making statements and admissions that could be used by OSHA in a subsequent hearing.

Management and supervisors are entitled to be represented by the employer's attorney during these interviews. Non management/supervisory employees can request representation at the private interview and OSHA should grant this request as it is a voluntary process if no subpoena has been issued. If a subpoena has been issued the witness can still demand representation.

The 4<sup>th</sup> Circuit Court of Appeals has held that the employer's attorney cannot be disqualified from representing an employee during an interview where both the employer and employee have executed conflict waivers. *Reich v. Muth*, 34 F.3d 240 (4<sup>th</sup> Cir. 1994).

### **G. Closing Conference**

The closing conference takes place after the inspection tour and its purpose is to review the findings of the inspection with the employer and the employee representative. It also provides the employer an opportunity to speak with the CSHO before a citation is issued. The CSHO is required to prepare and place in the case file a written summary of the closing conference. The employer may obtain a copy of the summary upon request to the Area Director. The employer representative should not commit to an abatement date without first speaking to upper level employer representatives.

As soon as possible after the closing conference, the employer representative should contact the company President or other designated upper level representative and provide a verbal report of the inspection. The safety director should prepare a written report of the inspection and send it to the company President or other designated upper level representative as soon as possible. OSHA will send a report of the inspection to the company representative. Upon receipt, the company President or other designated representative should be contacted to determine what further action is required.

The safety director shall post a copy of any citations that are issued as well as abatement certifications as required by OSHA.

## **II. Types of Citations**

**Timing** – Citations must be issued in writing with reasonable promptness. No citations may be issued after 6 months following the violation. OSHA has argued that continuing violations allow the agency more time to issue citations.

**General Duty Clause (Section 5(a)(1))** – Section 5(a)(1) imposes a “general duty” on employers to furnish “employment and places of employment ... free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees”. This is a “catch-all” clause to provide employees a safe work place. Because Section 5(a)(1) was designed to augment rather than supplant standards, a citation under Section 5(a)(1) is only proper if no specific standard applies.

**Severe Violator** – Issued where employers have demonstrated recalcitrance or indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations in certain specified circumstances.

**Willful** – Issued when the employer knew that a hazardous condition existed but made no reasonable effort to eliminate it and in which the hazardous condition violated a standard, regulation or the OSH Act. Penalty range - \$5,000.00 - \$70,000.00.

**Serious** – Issued when the workplace hazard could cause serious injury or illness that would most likely result in death or serious physical harm, unless the employer did not know or could not have known of the violation. OSHA may propose a penalty of up to \$7,000.00 for each violation.

**Other Than Serious** – Issued when most serious injury or illness cannot be reasonably predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health. Penalty – up to \$7,000.00 for each violation.

**De Minimus** – No direct or immediate relationship to safety or health and do not result in citations.

**Other** – A violation that has a direct relationship to job safety and health but is not serious in nature.

**Failure to Abate** – Employer has not corrected a violation and the abatement period has passed or is covered under a settlement agreement. Penalty may be up to \$7,000.00 per day for each violation.

**Repeated** – When the employer has been cited previously for a substantially similar condition anywhere in the nation and the citation has become a final order of the OSHRC. It is a repeat violation if it occurs either within 5 years from the date the earlier citation becomes a final order or from the final abatement date, whichever is later. Fixed and non-fixed establishments have a nationwide operational scope. Penalty up to \$70,000.00 for each violation.

A 10% penalty increase for any employer with a serious, willful, repeat or failure to abate violation in the last 5 years up to the statutory maximum. Likewise, an employer may receive a 10% discount off the penalty if the employer has not received a serious, willful, repeat or failure to abate violation in the last 5 years.

For purposes of determining whether a violation is repeated, the following criteria generally apply:

(1) **Fixed establishments:** Citations issued to employers having fixed establishments (such as factories, terminals, and stores) are not normally limited to the cited establishment. A multifacility employer, for example, can be cited for a repeat violation if the violation recurred at any plant nationwide; and,

(2) **Nonfixed establishments:** For employers engaged in businesses having no fixed establishments (construction sites and oil and gas drilling sites), repeat violations are alleged based on prior violations occurring anywhere, and at any of the employer's identified establishments nationwide.

**Gravity Based Penalty** – Gravity based penalties can be between \$3,000.00 and \$7,000.00 based upon the severity, probability and gravity of the offense. Penalties will be calculated serially, unlike the prior practice in which all of the penalty reductions are added and then the total percentage is multiplied by the gravity-based penalty to arrive at the proposed penalty. The penalty adjustment factors will be applied serially as follows: History, Good Faith, Quick-Fix, and Size.

**Size Reduction** – A penalty reduction between 10 – 40% for employers with less than 250 employees: 40% for 1 – 25 employees; 30% for 26 – 100 employees; 10% for 101 – 250 employees; no size reduction will be applied for employers with 251 or more employees.

**Good Faith** – A penalty reduction is permitted in recognition of an employer's effort to implement an effective workplace safety and health management system. A system must already be in place to receive the good faith penalty reduction. Reductions are not allowed in cases of high gravity serious, willful, repeat, or failure-to-abate violations.

**Quick Fix** – The 15% Quick-Fix reduction is retained for employers who immediately abate hazards found during an inspection. The 10% reduction for employers with a strategic partnership agreement is eliminated.

### **III. Response to Citation**

**Contest** – The employer can contest the citation by sending a written Notice of Intent to Contest to the Area Director within 15 working days from receipt of the citation. The employer can contest either or all of the following: citations, penalty or abatement period.

**Posting** – The citation must be posted immediately after receipt and for at least 3 working days or until corrected even if the citation is contested. It must be posted at or near the place of violation. The abatement must also be posted.

**Abatement** – If there is no contest, the citation conditions must be abated within the abatement period. A certification of abatement must be provided to the Area Director by a member of management. Any petition for modification of the abatement period must be requested not later than 1 working day after the abatement date. It is OSHA policy to offer assistance in every feasible manner toward removal of safety or health hazards from the workplace. Abatement assistance may be offered in connection with an enforcement inspection or independently of such an inspection.

**Petition for Modification of Abatement** – OSHA assigns abatement dates on the basis of the best information available when issuing the citation. If you are unable to meet an abatement date

because of uncontrollable events or other circumstances, and the 15 working day contest period has expired, you may file a Petition for Modification of Abatement with the OSHA Area Director. However, Petitions for Modification should be filed prior to the expiration of the 15 working day contest period.

**Informal Conference** – An informal conference can be requested with the CSHO and/or Area Director but the conference must occur within the 15 working day Notice of Intent to Contest period. An informal conference can be requested by phone call to the Area office. **The informal conference does not extend the 15 working day period to contest nor does it take the place of it.** The Area Director has the authority to reduce the penalty by as much as 30% at the informal conference. Any reduction in excess of 30% must be approved by the Regional Administrator.

**No Contest** – If the employer does not file a Notice of Intent to Contest within 15 working days, the citation becomes a final order not subject to review.

**Payment** – Penalties are payable within 15 working days of receipt of the penalty notice if no contest is made. Payment should be by check or money order payable to the DOL-OSHA. Indicate on your payment the OSHA number from the upper right-hand corner of your citation notice and send it to the OSHA Area Office listed on the Citation and Notification of Penalty.

### **III. Procedure After Contest**

The Notice of Intent to Contest will be sent to the OSHRC who will appoint an administrative law judge and docket the notice of contest.

**Complaint** – Filed by the Secretary of Labor within 20 calendar days of receipt of the employer's notice of contest.

**Answer/Motion to Dismiss** – File with the Commission within 20 calendar days after receiving the complaint from the Secretary of Labor.

**Affirmative Defenses** – Common affirmative defenses include: statute of limitations (Section 9(c) of the Act specifies that no citation may be issued after the expiration of six months following the occurrence); collateral estoppel; res judicata; employee misconduct/isolated occurrence (usually arises from employee's unsafe act where employer did not know of the incident and could not have reasonably expected the act to have occurred due to the employer's safety policies and training); infeasibility of compliance - technologically or economically; creation of greater hazard by compliance with standard; multiemployer work site defenses for exposing employer that it didn't create hazard, took steps reasonable under the circumstances to protect its employee from the hazard or that it lacked the expertise to recognize the condition as hazardous; reasonable promptness defense (either in issuance of citation or failure to allow employer on walk around inspection are technical defenses which employer is required to show prejudice to sustain); and, exemption/preemption (employer or employee is covered by another



federal act whose policy or purpose is to assure safe and healthful working conditions for employees).

**Corporate Disclosure Statement** – A corporate disclosure statement is required to be filed with the initial document filed with the Commission.

**Hearing Request** – Employer must request conventional or EZ trial within 20 days of receipt of docketing. EZ trial permitted only when the total proposed penalties are less than \$20,000.00, no willful or repeat violations are involved, there are no fatalities, and the hearing will take less than 2 days.

**Hearing Notice** – Notice of the hearing date and location will be provided 30 days in advance of the hearing.

**Discovery** – Conventional hearing – interrogatories up to 25 in number, requests to produce, requests to admit, depositions and subpoenas. EZ hearing – exchange of written documents. Other discovery only by order of court.

**Appeals** – Interlocutory appeals of rulings of the ALJ can be made in conventional hearings but not in EZ hearings. A review of the ALJ decision can be made by filing a Petition for Discretionary Review with the ALJ within 10 days of receipt of the decision, or by filing a Petition with the Commission within 20 days of receipt of the date of docketing of the decision. If the Commission does not review the ALJ's decision, it becomes a final order within 30 days after the decision has been filed. If the Commission does review the ALJ decision, it will issue its own written decision and that becomes a final order of the Commission upon filing. Further appeals can be made to the Court of Appeals within 60 days of the final order. However, the Appellate Courts do require exhaustion of administrative remedies so Petitions for Discretionary Review must be filed.

**Settlement** – The Assistant Regional Director has authority to settle citations after the employer's filing of notice of contest. Settlement is permitted after proceedings are initiated before the Review Commission upon submission to and approval of the Judge or Commission.

#### **IV. State Plans**

Currently, 24 states (listed below), Puerto Rico and the Virgin Islands operate OSHA-approved state plans: 22 of these plans cover the private and public sectors and 4 (noted in italics) cover only public sector employment.

State Plans – Alaska, Arizona, California, *Connecticut*, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, *New Jersey*, New Mexico, *New York*, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, *Virgin Islands*, Virginia, Washington, Wyoming.

#### **V. Cooperative Programs**

**Voluntary Protection Programs** – These programs promote effective worksite based safety and health. In the VPP, management, labor and OSHA establish cooperative relationships at workplaces that have implemented a comprehensive safety and health management system. Approval into a VPP is OSHA’s official recognition of the outstanding efforts of employers and employees who have achieved exemplary occupational safety and health. There are three levels recognized: Star, Merit and Star Demonstration. Participants receive exemptions from OSHA programmed inspections.

**Strategic Partnership Program** – This program helps encourage, assist and recognize the efforts of partners to eliminate serious workplace hazards and achieve a high level of worker safety and health. These programs seeks a broader impact by building cooperative relationships with groups of employers and employees such as trade unions, trade and professional associations, universities and other government agencies. Participants receive exemptions from OSHA programmed inspections.

**Safety and Health Achievement Recognition Program** – This program recognizes small employers who operate an exemplary safety and health management system. Participants are exempt from programmed inspections during the period the certification is valid.

**Alliance Programs** – Through these programs, OSHA works with groups committed to safety and health, including businesses, trade or professional organizations, unions and educational institutions, to leverage resources and expertise to develop compliance assistance tools and resources and share information with employers and employees to help prevent injuries, illnesses and fatalities in the workplace. Participants do not receive exemptions from OSHA programmed inspections.

## **VI. OSHA Regional Offices**

- |                   |   |  |
|-------------------|---|--|
| <b>Region I</b>   | - | CT, ME, MA, NH, RI, VT. JFK Federal Building, Room E340, Boston, MA 02203. 617/565-9860.   |
| <b>Region II</b>  | - | NJ, NY, PR, VI. 201 Varick Street, Room 670, New York, NY 10014. 212/337-2378.   |
| <b>Region III</b> | - | DE, DC, MD, PA, VA, WV. The Curtis Center, 170 S. Independence Mall West, Suite 740 West, Philadelphia, PA 19106-3309. 215/861-4900. |
| <b>Region IV</b>  | - | AL, FL, GA, KY, MS, NC, SC, TN. 61 Forsyth Street, SW, Room 6T50, Atlanta, GA 30303. 404/562-2300.                                   |
| <b>Region V</b>   | - | IL, IN, MI, MN, OH, WI. 230 South Dearborn Street, Room 3244, Chicago, IL 60604. 312/353-2220.                                       |

- Region VI** - AR, LA, NM, OK, TX. 525 Griffen Street, Room 602, Dallas, TX 75202. 972/850-4145.
- Region VII** - IA, KS, MO, NE. Two Pershing Square, 2300 Main Street, Suite 1010, Kansas City, MO 64108.
- Region VIII** - CO, MT, ND, SD, UT, WY. 1999 Broadway, Suite 1690, P.O. Box 46550, Denver, CO 80202-5716. 720/264-6550.
- Region IX** - AZ, CA, HI, NV, American Samoa, Guam, and the Northern Mariana Islands. 90 7<sup>th</sup> Street, Suite 18-100, San Francisco, CA 94103. 415/625-2547.
- Region X** - AK, ID, OR, WA. 1111 Third Avenue, Suite 715, Seattle, WA 98101-3212. 206/553-5930.