NTEPS Meeting
Managing an OSHA Inspection: What You Need to Know
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Presented by
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AUTHOR

• Chair of the Greenberg Traurig OSHA Practice Group
• Former general counsel of the federal OSHRC
• Focus practice exclusively on workplace safety and health-related issues
• Represent employers in broad range of industries nationwide, most of which involves litigation
OSHA INSPECTIONS – REASONS TO PREPARE

• Knowing How to Manage an OSHA Inspection Can:
  • Significantly reduce the legal risk associated with accepting OSHA citations as written; and
  • Minimize business interruption.
OSHA CITATIONS – THE RISKS

• Administrative Liability
  • Citation penalties
    • Other/Serious - Maximum $13,494
    • Willful/Repeat - Maximum $134,937
    • Failure to Abate - Maximum of $13,494 Each Day (PMA)
    • Egregious - Per Instance Violation
# TOP OSHA ENFORCEMENT CASES

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Inspection #</th>
<th>Issuance Date</th>
<th>Total Issued Penalty</th>
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<tbody>
<tr>
<td>BP Products North America</td>
<td>311982674, 306314640</td>
<td>10/29/2009</td>
<td>$81,340,000</td>
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<td>BP Products North America</td>
<td>308314640, 308314988</td>
<td>09/21/2005</td>
<td>$21,361,500</td>
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<td>IMC Fertilizer/Angus Chemical</td>
<td>107627863, 107697871</td>
<td>10/31/1991</td>
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<td>Imperial Sugar</td>
<td>31008712, 311522858</td>
<td>07/25/2008</td>
<td>$8,777,500</td>
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<td>O&amp;G Industries, Inc.*</td>
<td>109179927, 314955460</td>
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<td>Samsung Guam, Inc.</td>
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<td>09/21/1995</td>
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<td>CITGO Petroleum</td>
<td>110313880</td>
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<td>$8,155,000</td>
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<td>Dayton Tire</td>
<td>109091548</td>
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<td>USX (aka U.S. Steel Corp.)</td>
<td>100554950, 108278288</td>
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<td>Keystone Construction Maintenance</td>
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<td>$6,623,000</td>
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<td>Phillip 66/Fish Engineering</td>
<td>106612443, 107365251</td>
<td>04/19/1990</td>
<td>$6,395,200</td>
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<td>Hercules, Inc.</td>
<td>108352040, 108349270</td>
<td>09/08/1993</td>
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<td>Arcadian</td>
<td>102281292, 10228128</td>
<td>01/27/1993</td>
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<td>E. Smalis Painting</td>
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<tr>
<td>John Morrell</td>
<td>101456325</td>
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<td>$4,330,000</td>
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</tbody>
</table>
OSHA CITATIONS – THE RISKS

• Civil liability – Violations of OSHA Standards
  • Evidence of negligence in 32 states
  • Negligence per se in 14 states
  • Final Order
    • ConAgra $100M
OSHA CITATIONS – THE RISKS

• Criminal Liability
  • Criminal conviction
    • Willful with death - guilty of misdemeanor with a maximum of 6 months imprisonment
  • Criminal penalties
    • Willful with death - maximum of $250,000 for individuals and $500,000 for the organization
  • State criminal conviction and penalties
OSHA CITATIONS – THE RISKS

• Abatement Costs
  • Capital and labor
  • Business interruption
  • Multiple sites
OSHA CITATIONS – THE RISKS

• Negative Publicity
  • Press releases to “shame employers”
    • Creates impression of dangerous place to work
    • Presumed guilty
    • May impact ability to maintain or obtain work
OSHA CITATIONS – THE RISKS

• Follow-up Inspections
  • Misconception that bowing down will make OSHA disappear
  • OSHA will keep coming (BP Texas City)
OSHA CITATIONS – THE RISKS

• Severe Violator Enforcement Program
  • Certain criteria must be met in order to be placed into SVEP
  • OSHA can inspect all worksites simultaneously or over several months
  • SVEP log on OSHA’s webpage with names of employers in program
  • Employers can litigate and have qualifying criterion withdrawn either at trial or through settlement agreement to get out of SVEP
OSHA CITATIONS – THE RISKS

• Increase in Worker’s Compensation Costs
  • Some states’ citations can increase cost by 100 percent.
OSHA CITATIONS – THE RISKS

• Inhibit Ability to Obtain and Maintain Contract Work
  • ISNetworld
  • Government projects
OSHA CITATIONS – THE RISKS

• Organizing Campaigns and Collective Bargaining Negotiations
  • Palermo Pizza in Milwaukee, Wisconsin
OSHA CITATIONS – THE RISKS

• Culture

• Accepting OSHA citations, particularly when the company did nothing wrong, can damage workplace safety and health culture.
OSHA INSPECTIONS – RIGHT TO INSPECT

• The Fourth Amendment of the United States Constitution

• Section 8(A) of the Occupational Safety and Health Act
OSHA INSPECTIONS – RIGHT TO INSPECT

• 4th Amendment
  • Prohibits unreasonable searches and seizures
  • Requires:
    • Warrant to enter the property
    • Warrant to be based on probable cause
    • Warrant to particularly describe the place and things to be searched
OSHA INSPECTIONS – RIGHT TO INSPECT

• 8(A) of the OSH Act

  • Authorizes OSHA to:
    • Enter at reasonable times any workplace
    • Inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and materials therein
OSHA INSPECTIONS – RIGHT TO INSPECT

• Warrant Requirement

  • OSHA is required to obtain an administrative search warrant to enter the premises of an employer.

  • An administrative warrant must be based on:

    • Specific evidence of an existing violation, or

    • General administrative plan for the enforcement of the OSH Act derived from neutral sources

  • OSHA normally does not arrive with a warrant in hand
OSHA INSPECTIONS – REQUIRING A WARRANT

• Risks of Requiring a Warrant
  • Potential retaliation
  • Loss of control over inspection
  • Labor relations
  • Public relations
OSHA INSPECTIONS – CONSENTING

• Benefits of Consenting
  • Appearance of cooperation
  • Opportunity to manage inspection
  • Minimize business interruption
OSHA INSPECTIONS – RISKS OF CONSENTING

• Risks of Consenting
  • The plain view doctrine – scope of inspection expands to other parts of the facility
OSHA INSPECTIONS – CONSENTING

• General Rule
  • Consent in exchange for compliance with reasonable ground rules
OSHA INSPECTIONS – HOW TO PREPARE

• Three Phases of an OSHA inspection
  • Opening conference
  • Walk-around
  • Closing conference
OSHA INSPECTIONS – HOW TO PREPARE

• Opening Conference
  • Where OSHA is supposed to explain:
    • Purpose of the visit
    • The scope of the inspection
    • Records that will be needed to conduct inspection
  • You should:
    • Ask for identification
    • Request copy of complaint if one was made
OSHA INSPECTIONS – HOW TO PREPARE

• Opening Conference – When OSHA Has a Warrant
  • You should:
    • Determine the scope of the inspection by reviewing the warrant
      • Specific area or hazard
      • Wall-to-wall
OSHA INSPECTIONS – HOW TO PREPARE

• Opening Conference
  • You should:
    • Set reasonable ground rules
      • Logistics plan for site inspection
      • Escort
      • Employee interviews
      • Document production
      • Photographs/Videotaping
      • Sampling
      • Walk-around
      • OSHA briefings
OSHA INSPECTIONS – HOW TO PREPARE

• Logistics Plan
  • You should:
    • Designate OSHA entry for inspection
    • Designate OSHA location for inspection
    • Designate location for employee interviews
    • Require OSHA to stay in the designated areas until request for walk-around
OSHA INSPECTIONS – HOW TO PREPARE

• Escort
  • You should:
    • Escort OSHA at all times until a walk-around is requested.
      • This prevents the compliance officer from getting hurt.
      • This allows you to gather information about the direction/focus of the inspection.
OSHA INSPECTIONS – HOW TO PREPARE

• Employee Interviews
  • 8(a)(2) of the OSH Act allows OSHA to question privately hourly employees
    • OSHA will claim that it is the right of the agency.
    • The right belongs to the employee, not OSHA.
OSHA INSPECTIONS – HOW TO PREPARE

• Hourly Employee Interviews
  • You should:
    • Inform employees that they can have a co-worker, management, or counsel present during their interview
    • Inform employees that OSHA has no right to tape-record or videotape their interview
    • Inform employees that OSHA has no right to get a signed statement
    • Inform employees that they can inform OSHA that they waive confidentiality regarding their statements
OSHA INSPECTIONS – HOW TO PREPARE

• Management Employee Interviews
  • You should:
    • Inform management employees that are required to have another management employee or counsel present during their interview
    • Inform management employees that they are to tell OSHA that they do not consent to OSHA tape or video recording their interview
    • Inform management employees not to sign any statement
    • Inform management employees that they are to tell OSHA that they waive confidentiality regarding their statements
OSHA INSPECTIONS – HOW TO PREPARE

- Hourly and Management Employee Interviews
  - You should:
    - Require OSHA to provide reasonable notice of request for employee interviews
      - This limits business interruption
      - Allows you to prep employees for interviews
  - You should:
    - Require OSHA to conduct brief conversations with employees during walk-around
      - Five minute rule
OSHA INSPECTIONS – HOW TO PREPARE

• Hourly and Management Employee Interviews
  • You should:
    • Prepare employees for interviews
      • This will help employees know what to expect and feel comfortable during the interview
    • Most hourly employees will agree to prep session
      • Programs, procedures, policies
      • Training
      • Prior incidents
      • Existing hazards
OSHA INSPECTIONS – HOW TO PREPARE

• Hourly and Management Employee Interviews
  • You should:
    • Tell employees nothing they tell OSHA will result in any adverse job changes
    • Tell the employees to (1) tell the truth, (2) provide facts based on first-hand knowledge, (3) do not guess or speculate, (4) listen carefully to the question, and (5) answer only questions asked
OSHA INSPECTIONS – HOW TO PREPARE

• Hourly and Management Employee Interviews
  • You should:
    • Debrief employees after interviews
      • You can tell the employees that you are trying to determine whether
        you are preparing them sufficiently.
      • This allows you to gather information about the direction/focus of
        the inspection.
OSHA INSPECTIONS – HOW TO PREPARE

- Document Production
  - You should:
    - Have the documents ready beforehand
      - General Safety – Lockout/Tagout, Emergency Action Plan, etc.
      - Specific Documents – Look at the National or Local Emphasis program document
    - Quick turnaround gives compliance officers favorable impression of safety and health program
    - Quick turnaround also minimizes time compliance officers are at the site
OSHA INSPECTIONS – HOW TO PREPARE

• Document Production
  • You should:
    • Require OSHA’s requests for documents to be in writing and directed to one employee
      • This enables you to control the flow of information
      • You are not required to answer interrogatories or create documents
    • Ask that the request be re-written if unclear
    • Have an attorney respond if you receive a subpoena
OSHA INSPECTIONS – HOW TO PREPARE

- Document Production
  - You should:
    - Review documents before producing
      - This ensures responses are not over or under-inclusive
      - Preserves confidentiality of Trade Secrets
    - Stamp documents (including photos) being produced as trade secret to preserve confidentiality
      - OSHA is required to maintain confidentiality of Trade Secrets under Section 15 of the OSH Act
    - Bates stamp documents being produced
OSHA INSPECTIONS – HOW TO PREPARE

• Document Production
  • You should:
    • Maintain log with bates stamps
    • Maintain a shadow copy
    • Respond in writing
OSHA INSPECTIONS – HOW TO PREPARE

- Photographs and Videotaping
  - You should:
    - Take shadow photographs and videotape
    - Ask OSHA to designate photos and/or videotape as trade secrets where appropriate
    - Be mindful that the audio of OSHA’s videorecorder may be turned on during the videotaping
OSHA INSPECTIONS – HOW TO PREPARE

• Sampling
  • You should:
    • Require OSHA to provide 24 hours notice prior to any sampling
      • This allows time to arrange parallel samples
      • This ensures proper methodology for sampling
OSHA INSPECTIONS – HOW TO PREPARE

• Walk-Around
  • 8(e) of the OSH Act authorizes the employer and the exclusive bargaining representative to accompany OSHA during the walk-around
OSHA INSPECTIONS – HOW TO PREPARE

• Walk-Around
  • You should:
    • Require OSHA to provide reasonable notice for the walk-around
    • Determine route to area needed to be inspected
    • Audit route before OSHA inspects
OSHA INSPECTIONS – HOW TO PREPARE

• Walk-Around
  • You should:
    • Require OSHA to stay in designated route
    • Take notes during walk-around
    • Debrief walk-around representative
OSHA INSPECTIONS – HOW TO PREPARE

• Walk-Around
  • You should not:
    • Demonstrate how to operate a machine that is not in use
    • Turn off a machine if OSHA asks
OSHA INSPECTIONS – HOW TO PREPARE

• OSHA Briefings
  • You should:
    • Require a daily briefing with OSHA at the end of each day
      • This allows you to ask about concerns/focus of inspection.
      • This allows you to ask about scheduling for next day.
OSHA INSPECTIONS – HOW TO PREPARE

• Closing Conference
  • May be conducted on-site or by telephone
  • Findings of compliance officer
  • Chance to shed light on any issue in dispute
OSHA INSPECTIONS – HOW TO PREPARE

• Internal OSHA Inspection Team
  • You should:
    • Assemble a team;
    • Equip the team;
    • Train the team; and
    • Audit the team.
QUESTIONS?