

**American Bar Association
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**Responding to a Catastrophic Accident —
What you Need to Know About an OSHA Investigation**

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THE SCENARIO

Just before a long weekend, your client calls in a panic when a life-threatening injury or fatality has occurred on one of its job sites. Government safety investigators are arriving on the scene. What do you do?

INTRODUCTION

Under its internal procedures, inspections by the Occupational Safety and Health Administration (OSHA) begin nearly immediately following a major accident involving a catastrophe, employee fatality, or other serious employee injuries. Indeed, employers are required to verbally report to the nearest OSHA Area Office, within eight hours of its occurrence, any job-related fatality or an accident requiring the hospitalization of three or more employees.¹ Such a report is virtually certain to trigger an inspection, often within hours thereafter. OSHA's guidelines state that where catastrophic or fatal accident occurs, the inspection should begin as soon as possible, "ideally within one working day."²

Contractors dealing with the immediate aftermath of a tragic and serious accident are often unprepared to cope with such an inspection. Typically, they are overwhelmed with competing demands from numerous sources, such as a variety of government agencies, insurance investigators, other contractors, and the owner. The result may be an OSHA inspection that is intrusive and disruptive of operations, and may result in significant OSHA citations and even a criminal investigation where an employee fatality occurs. Also, the outcome of the OSHA investigation may have an adverse effect on related liability issues, such as damage or personal injury claims.

The best way for a construction contractor to address an OSHA inspection triggered by a catastrophic accident is to prepare for that possibility in advance by anticipating the issues that

arise, and planning to the extent possible how they would be addressed. While every inspection is different, there are certain issues that may be anticipated and planned for.

This presentation offers several guidelines and information for addressing the issues that may be expected to arise in OSHA inspections. This information represents the collective experience of the presenters in advising contractors and industrial employers in federal and state OSHA inspections of major accidents throughout the nation.

Most of the discussion addresses inspections by federal OSHA under the Occupational Safety and Health Act (“the OSH Act”).³ The last portion of this paper addresses states that have their own plans for occupational safety and health enforcement.⁴ Not every guideline or suggestion discussed here is appropriate for all inspections. All have proven effective in a wide variety of inspections, however. Also, this is not intended as a compendium of OSHA law. Rather, we attempt only to highlight the issues most pertinent to inspections.

A. Counsel’s Goal: Manage the OSHA Inspection Process

The inspection process can be managed so as to minimize operational disruptions. The goal usually is allow OSHA to perform its task while minimizing the intrusion created by the inspection. Managing the inspection should begin as soon as possible following a major accident, and is best performed on-site.

Section 9(c) of the OSH Act prohibits the issuance of a citation “after the expiration of six months following the occurrence of any violation.”⁵ Generally, although there are exceptions, the six-month period is treated as starting on the day the agency begins its onsite investigation. This means that, as compared with most litigation, OSHA inspections proceed relatively quickly.

B. The Federal OSHA Inspection

Under the Supreme Court’s decision in *Marshall v. Barlow’s, Inc.*,⁶ an employer may

insist that OSHA obtain a warrant to enter a worksite. Many practitioners advise that this is usually pointless, however, and needlessly risks irritating the inspectors. Clearly, where there has been a major accident, a federal magistrate will almost surely issue a warrant.

Also, under the “plain view” doctrine of constitutional law, and under Section 8(a) of the OSH Act, an OSHA Compliance Officer need not present his credentials to an employer and obtain consent to entry until he physically seeks to enter a jobsite. He may observe and photograph a worksite from a location outside the project, to the same extent as any person may observe the project from off-site.⁷

Consent to an inspection may be given by any competent management official, including a project manager or foreman.⁸ Also, on a multi-employer worksite, a party that has control of the overall worksite, such as a project director, or an owner, can give consent to an OSHA inspection of the site.⁹

1. The Opening Conference

Once a Compliance Officer enters the jobsite, he conducts an Opening Conference. This is typically attended by representatives of all contractors and collective-bargaining representatives, if any, on the site. At such a conference, the Compliance Officer will gather basic information about the employers and unions that are present, and begin collecting facts about any accident that has occurred. He will also begin to explain how the investigation will be conducted.¹⁰ It should be understood that even if an inspection is triggered by an accident, the inspection need not be limited to that issue. Absent a limiting agreement, all OSHA compliance issues are open for inspection.

Often, especially where there have been serious injuries to employees, the OSHA personnel may be impatient to obtain documents, tour the jobsite, and begin employee

interviews. Occasionally, Compliance Officers will threaten to obtain a warrant, or warn darkly that the employer is obstructing a federal investigation. OSHA is obligated under the OSH Act, however, to conduct an inspection "at reasonable times" and in "a reasonable manner."¹¹

Experience teaches that most OSHA Compliance Officers will agree to sensible protocols for the inspection. The contractor's counsel should seek to establish a working relationship with the Compliance Officers, politely but firmly setting "ground rules" for the flow of information and scheduling of interviews.¹² The Compliance Officers need to be persuaded that the contractor intends to cooperate with the investigation, but that the inspection must be structured so that the work of dealing with the consequences of the accident, and resuming construction, can move ahead.

2. *The "Walkaround"*

Compliance Officers have the right to inspect the worksite, including taking photographs and videotape.¹³ Each employer and union (if any) who is involved in the inspection has the right to designate a person to accompany the Compliance Officer, and should do so.¹⁴ So-called "walkaround representatives" should be trained to take their own photos or videos of whatever OSHA photographs, and to make careful notes of what transpires during the inspection. It is usually preferable for contractors to take their own photographs than to rely on informal assurances from Compliance Officers that the agency will share copies with the contractor. Sometimes, these assurances prove to be unreliable.¹⁵

Contractors are also well advised to make clear to Compliance Officers that while they may speak momentarily with employees on the job during the "walkaround," if a lengthy discussion is desired, formal interviews must be scheduled. Also, a contractor's "walkaround" representative should understand that no conversation with an OSHA Compliance Officer can be

considered to be “off the record.” Anything that a representative of the employer says to the Compliance Officer may be “fair game” and relied upon in support of a citation.

In cases where exposure to toxic substances are an issue, OSHA may conduct industrial hygiene monitoring, either by taking air samples of a particular area, or conducting personal monitoring by collecting samples of the air inhaled by individual employees.¹⁶ Employers are well advised to conduct “parallel” monitoring. Otherwise, there usually is no way to obtain data that is contemporaneous with that which OSHA collects.

When a major accident occurs, OSHA may insist on an agreement that controls the disposition of the physical evidence. For example, where a structure has collapsed, the parties involved often will remove the remnants from the jobsite, and arrange for secured storage. Sometimes, OSHA will insist on reviewing and approving such an agreement, and upon having access to the evidence.

OSHA may also request that tests be performed on structural remnants, either non-destructive or destructive. Typically, the arrangements call for such tests to be performed by third-party experts, and are made by the parties on the jobsite. Depending on the circumstances, it may be useful to invite OSHA to review testing protocols, and observe tests as they are performed, even if off-site. These are issues that must be negotiated with OSHA – there are no hard and fast principles.

Occasionally, a contractor may assert that disclosure of information about a design or a structure would reveal information that is a trade secret or “business confidential.” The burden is on the party asserting this point to make certain that information or materials that are given to OSHA are properly labeled or otherwise identified as such. This places OSHA employees on

notice that they may not disclose this information without first notifying the party that provided the material.¹⁷

3. *May OSHA Shut Down a Job?*

Compliance Officers occasionally will threaten to shut down a project, or a portion thereof, unless the contractor modifies a work practice immediately, or does not respond instantly to an investigatory demand. OSHA has no such power, however. Under Section 13(a) of the OSH Act,¹⁸ only a federal district court judge may shut down an employer's operation upon a showing that employees are exposed to an "imminent danger."¹⁹ As a practical matter, OSHA rarely seeks such judicial relief.

Contractors should also be advised that the opinion of a Compliance Officer as to what constitutes compliance with OSHA requirements is by no means the last word on the subject. First, official interpretations of OSHA standard are usually issued by the OSHA national office in form of various informal publications that can be found on OSHA's internet website, www.OSHA.gov. Second, in fairness, Compliance Officers are charged with enforcing standards that cover an enormous range of industrial and construction hazards, and cannot be expected to be expert in each area. Contractors often are concerned that disobeying an order from a Compliance Officer will yield a less favorable outcome in an inspection. While cooperation and good faith are clearly well-advised, there are times when an employer should demur when faced with a Compliance Officer's demand, and check with safety and health professionals, or counsel, to confirm the legitimacy of what is being demanded.

4. *OSHA Requests for Documents and Other Evidence*

Under Section 8(c)(1) of the OSH Act, OSHA has broad power to obtain documents and evidence, especially where there has been an accident.²⁰ Moreover, OSHA may issue administrative subpoenas, enforceable in federal district court, to compel testimony and the production of evidence in connection with inspections and investigations.²¹ There are two categories of records that the Compliance Officers may seek to review: (1) records that are required by law to keep; and (2) records that are not required by law, but that are otherwise related to the inspection.

Employers should be prepared, nonetheless, to persevere and insist that document requests be in writing and submitted to a single management representative. Otherwise, Compliance Officers often will ask anyone they see for copies of documents, and the employer loses the opportunity to review the information that is requested and disclosed, and to maintain a proper document control system. Indeed, the document production process should be managed by counsel as if it were discovery in civil litigation. For example, an employer may be entitled to withhold a record to which an evidentiary privilege applies, such as records prepared in anticipation of litigation.²² Unless conducted under privilege, typical self-critical analyses are not privileged. The most frequent example are employer's self-audits, or insurance underwriters' reports on jobsite conditions.²³

Examples of the types of documents often requested are:

- (1) Design and engineering drawings
- (2) Safety and health program documents
- (3) Ongoing project testing results, such as concrete tests
- (4) Correspondence among parties on the site
- (5) Insurance underwriters' and other inspection reports
- (6) Contracts among the parties on the site
- (7) Photos, videos, industrial hygiene sampling records

5. *OSHA Interviews of Employees*

OSHA has the right to interview employees “privately.”²⁴ In reality, this is not so. First, the employer is entitled to have a management representative present during interviews of managers. The representative may be an attorney or another manager, such as a safety director. This is an important right that an employer should take advantage of, since statements by those in supervision are imputed to the employer, and may be construed as admissions against interest. This is true for any person acting in a supervisory capacity, even a low-level or temporary foreman.

OSHA has not explicitly recognized this point in its inspection directives, but as a practical matter, Compliance Officers rarely object to the presence of employer representatives, including counsel, when members of management are interviewed. Also, one court has implicitly recognized this right.²⁵ The main value of counsel in such interviews is to assure that the Compliance Officers ask questions that witnesses understand, and to gain a sense of what issues are of interest to the investigators.

Where a union is present and a member of the bargaining unit is interviewed, a union representative, such as a steward, will be invited by OSHA to attend the interview. In theory, a non-supervisory employee could request that a member of management be present for an interview. Policies regarding the employer's presence during employee interviews vary widely among OSHA Area Offices and even individual Compliance Officers. Some Compliance Officers allow employer representatives to be present during interviews if the employee affirmatively elects to have the representative present. The large majority of Compliance Officers refuse to allow an employer representative to be present, however, even if the employee

requests it. If the Compliance Officer strongly objects, it may not be worth creating resentment that is likely to result from forcing the issue.

Employees should understand and may be told, however, that their only obligation in an OSHA interview is to answer questions to the best of their ability, and to tell the truth. As noted below, it is a federal crime to lie to or mislead a federal investigator. There is no obligation, however, to allow oneself to be recorded, either by audio or video, or to sign a statement.

A contractor should consider taking the position, as matter of policy, that it will not permit its managers and supervisors to be recorded, or to sign statements prepared by the Compliance Officer or "sign off" on the Compliance Officer's notes of the interview. OSHA Compliance Officers may not be pleased with this, but especially in a case where significant citations are likely, for a contractor's counsel, it is worth considering taking a firm position on this point. OSHA Compliance Officers are unevenly trained as investigators, and their questions often are not well formed. This can lead to misleading and incomplete answers, or truncated written witness statements, all of which may be construed as admissions against the contractor's interests. This can be difficult for employer counsel to deal with if the supervisor who was interviewed testifies in subsequent hearings. If OSHA considers the case to be important enough, it may issue an administrative subpoena, and conduct a sworn administrative deposition before a court reporter, but this is not often done.

Employees may sometimes ask the employer if they are required to appear for an OSHA interview. They are not so required, but if they refuse, OSHA may then issue an administrative subpoena to the employee, which is ultimately enforceable in federal district court. It is better for the employee to appear when asked.

6. *Demonstrations of Work or Processes*

The employer is not required to stage demonstrations for OSHA. OSHA is entitled to observe work as it is being performed, but cannot insist that it be shown how equipment operates, or how particular operations are performed. Sometimes, however, it is to an employer's advantage to stage such demonstrations, as when it is necessary to clarify misunderstandings or simply to impress the Compliance Officers. Be mindful, however, that “Murphy's Law” is operative, and that even the best planned demonstrations sometimes go astray at just the wrong time.

7. *What are an employer's obligations under OSHA?*

(a) *OSHA Standards and the General Duty Clause*

Under Section 5(a)(2) of the OSH Act,²⁶ employers are required to comply with specific OSHA standards that address workplace hazards. Most of the standards applicable to construction work are found in 29 C.F.R. Part 1926.²⁷ Also, some standards applicable to construction are also found in 29 C.F.R. Part 1910. These are standards that are applicable to “general industry,” but which are incorporated by reference in Part 1926. Employers must also comply with certain OSHA regulations, such as those requiring compliance with OSHA's system of recordkeeping for injuries and illnesses.²⁸ Note that this system is not the same as that used for workers' compensation purposes, and that workers compensation records do not constitute compliance with OSHA recordkeeping requirements.

When the OSH Act was enacted, Congress realized that OSHA would not be able to promulgate standards that address every hazard faced by employees in the workplace. Therefore, the Act contains a “catch-all” provision known as the “General Duty Clause.” That provision applies where no specific standard addresses a hazard,²⁹ and requires an employer to

provide his employees with a workplace that is free of “recognized hazards likely to cause serious physical harm or death.”³⁰

It is critical to understand that there need not be an accident for an OSHA violation to occur. An OSHA violation occurs where an employee is exposed to a prohibited hazard, and the other elements of a violation are proven.

(b) Criminal Violations

Under Section 17(e) of the Act, a violation of a standard (but not the General Duty Clause) that is proven to be willful may be a criminal act where the violation was a cause of an employee fatality.³¹ Criminal cases under the Act are brought by the Justice Department and are prosecuted by the United States Attorneys. It is now virtually routine for OSHA to consult with the local U.S. Attorney when a workplace fatality occurs.³² In such cases, an evaluation is made as to whether a criminal investigation may be warranted. Such cases are rare, but they do occur, and employers have been prosecuted and convicted under the OSH Act.³³ The Act also contains other criminal sanctions, such as for making false statements to OSHA investigators and filing false reports.³⁴

B. Post-Inspection Procedures

1. Closing conference

When the investigating OSHA compliance officers have completed their investigation of the accident, they will arrange for the conducting of a closing conference to discuss their investigative findings with representatives of each of the contractors involved. Typically, OSHA conducts a separate closing conference for each contractor, which is entitled to have one or more management representatives present, such as the project manager, a safety director, and/or the company attorney, if desired. If the workers of a contractor are members of a union, OSHA will

provide an authorized employee representative from the union the opportunity to participate in the closing conference.

During the closing conference, the compliance officers typically recite the OSHA standards they believe the contractor violated, and ask the contractor how much time it will need to abate, or fix, the alleged violations. Usually, OSHA will not discuss the classification of the alleged violations (e.g., willful, serious) at a closing conference, or the amount of any proposed penalties. Rather, the compliance officers provide only their preliminary investigative findings. These findings will then be subject to review by their supervisor and the area director, who decide whether OSHA will cite the contractor, and if so, for what specific alleged violations.

2. Issuance of Citations

OSHA issues citations in the form of a document entitled “Citation and Notification of Penalty.” The citation lists the OSHA inspection number, the inspection site, and the address of the OSHA Area Office that conducted the investigation. A citation also alleges specific violations of OSHA standards, regulations, or of the statutory provision known as the “General Duty Clause,” which OSHA may cite when no standard applies to the particular facts and circumstances presented. The citation recites the core provisions of the regulatory or statutory provision that OSHA alleges the contractor violated, and also sets out a factual specification reciting the operative facts that are a component of the alleged violation.

(a) Classifications of Violations and Penalties

Citations are divided into sections of alleged violations called classifications. OSHA typically sets out one or more items of alleged violations together within a classification. For instance, Citation 1 can be classified as “serious” and contain a number of alleged violations or items, and Citation 2 can consist of a grouping of additional violations of another classification.

Citations also include proposed penalties for each of the alleged violations. The following are the most common classifications of OSHA violations, along with the amounts of the penalties OSHA can assess for violations in each classification:

(1) Other than Serious

Alleged violations of lesser significance are classified as “other than serious,” which is sometimes referred to as “non-serious.” A violation is properly classified as other than serious when, if you assume an accident occurs as a result of the violation, it is unlikely that death or serious physical injury will result from the accident.³⁵ An example of a possible other than serious violation would be a minor violation that OSHA discovers during its investigation of a major jobsite accident that is unrelated to the accident, such as when OSHA cites a contractor for failing to ensure that a six-inch deep hole on a walking or working surface is covered during its investigation of a workplace fatality resulting from the collapse of a structure under construction. OSHA has the statutory authority to set the penalty for an other than serious violation at up to \$7,000.³⁶ Typically, however, the agency sets the proposed penalty for this type of violation in the range of \$0 - \$1,500.

(2) Serious

If you assume that an accident occurs as a result of a violation, and it is likely that death or serious physical injury will result from that accident, the violation is properly classified as “serious.”³⁷ An example of a possible serious violation is when a contractor fails to ensure the use of fall protection when its employees are exposed to a fall of 10 feet. OSHA can assess a penalty for a serious violation at up to \$7,000.³⁸ The agency computes a gravity-based penalty by weighing the gravity of the violation against the probability that an accident will result from the violation,³⁹ and can reduce the amount resulting from that computation by several statutory

factors, such as the size of the contractor, the contractor's good faith efforts (e.g. having a written and implemented safety and health program), and its past compliance history, in arriving at the amount of the final penalty to be proposed for the alleged violation.⁴⁰

(3) Willful

When OSHA finds that a contractor has committed a violation with plain indifference to employee safety and health or with a conscious disregard for the requirements of an OSHA rule, and typically where the violation is connected with a major jobsite accident, the agency can classify the alleged violation as "willful."⁴¹ An example of a possible willful violation is when a contractor is fully aware that it must use a protective system to prevent a trench of more than five feet in depth from caving in, but makes the conscious decision to have its employees perform work in an unprotected 10-foot trench in order to save time and costs. Penalties for willful violations can be up to \$70,000 each,⁴² with separate penalties set out for similar egregious instances of the same violation.⁴³ For example, if a contractor willfully fails to provide a protective system, such as shoring, stepping, or a trench box, in several deep trenches at a jobsite, and a death occurs due to the lack of such a protective system, OSHA could propose a \$70,000 penalty for each trench for which the contractor failed to provide the required protective system.

(4) Repeat

If OSHA finds that a contractor committed a violation that is substantially similar to a violation the contractor committed, and which became a final order within the prior three years, OSHA can classify the latest alleged violation as "repeat."⁴⁴ A later violation of the same standard, even if it involves different facts, can be deemed to present a *prima facie* case of a repeat violation.⁴⁵ An example of a possible repeat violation is when a contractor fails to ensure

that its employees wear steel-toe footwear, when one year before the contractor entered into a settlement agreement with OSHA affirming a violation for failing to require its employees to wear protective footwear on another jobsite. Repeat violations do not have to be connected with a major jobsite accident. Penalties for repeat violations can be up to \$70,000 each,⁴⁶ but for a first repeat, OSHA will typically charge five times what the penalty would have been but for the repeat classification.⁴⁷

Additionally, when OSHA has cited a contractor resulting in a final order, the rights to petition for review or appeal have expired, and the contractor has failed to abate the violation, OSHA can issue additional violations classified as “failure to abate,”⁴⁸ which can be accompanied by penalties of up to \$7,000 per day in which such failure continues.⁴⁹

(b) Abatement

When a citation alleges a violation of a particular OSHA standard or regulation, OSHA typically will not specify in the citation the steps the contractor must take in order to abate the alleged violation. The agency will, however, specify the time by which the violation must be corrected. On the other hand, for violations of the General Duty Clause, OSHA is required to specify one or more feasible means of abatement, although sometimes a contractor can select a means for abatement that differs from what OSHA sets out in the citation. Unless the compliance officers witness sufficient abatement action taken by a contractor, the contractor is generally required to submit a certification to OSHA that it has, in fact, abated the violation.⁵⁰

3. Procedures for Evaluating and Contesting Citations

When an OSHA investigation of a major jobsite accident results in the agency issuing a citation to a contractor, typically the contractor will assign a qualified employee or its attorney to analyze the citation to determine whether it could be subject to a successful challenge. Part of

that analysis involves evaluating whether OSHA will be able to meet its burden of proof to establish the violation by a preponderance of the evidence.⁵¹

a) Elements of an OSHA Violation

(1) Violation of an OSHA Standard

To establish a violation of an OSHA standard, typically OSHA must establish: (a) the cited standard applies; (b) the terms of the cited standard were violated; (c) there was employee exposure to the violative condition or work practice; and (d) the contractor had actual or constructive knowledge of the circumstances giving rise to the violation.⁵² In certain jurisdictions, such as California, employer knowledge is an element of whether a violation is properly classified as serious, rather than being an element of OSHA's *prima facie* case to establish the violation.⁵³

(2) Violation of the General Duty Clause

To establish a violation of the General Duty Clause, OSHA must establish: (a) a condition or practice on the jobsite presented a hazard to employees; (b) the contractor or its industry recognized the hazard; (c) the hazard is likely to cause death or serious physical harm; and (d) feasible means exist to eliminate or materially reduce the hazard.⁵⁴ If a specific OSHA standard covers the violative situation, OSHA is preempted from issuing a citation alleging a violation of the General Duty Clause.⁵⁵

(b) Defenses

Where OSHA successfully establishes a violation, a contractor can nevertheless be excused from the violation if it can carry its burden of proof in establishing an affirmative defense by a preponderance of the evidence.⁵⁶ The following are among the defenses to OSHA citations that may be available to contractors:

(1) Unpreventable Employee Misconduct

A contractor can establish this defense if it shows: it had a work rule designed to prevent the violation; the work rule was adequately communicated to its employees; adequate steps were taken to discover violations; and the rule was effectively enforced when violations were discovered.⁵⁷ This is among the most commonly used defenses to OSHA citations.

(2) Infeasibility

This defense rests upon a contractor establishing that literal compliance with the cited standard is infeasible, and an alternative protective measure was used or there was no feasible alternative measure.⁵⁸ In certain jurisdictions, again, such as California, the defense of infeasibility is generally not recognized.⁵⁹ As an alternative, in appropriate circumstances, a contractor can file a variance application to be excused from compliance with the standard, resulting in an administrative proceeding in which the contractor would need to establish that the measures it would take to protect its employees would provide the same level of protection as would compliance with the standard.⁶⁰

(3) Greater Hazard

To establish this defense, a contractor must prove that the hazards of compliance with a particular standard are greater than the hazards of noncompliance, alternative means of protecting employees are unavailable, and a variance is either unavailable or inappropriate.⁶¹ This defense is not often used, typically because of the difficulty in establishing the final element.

(4) Statute of Limitations

As mentioned above, a contractor establishes this defense if it shows that OSHA failed to issue citations within six months of learning that a violation occurred. In certain circumstances,

OSHA can rebut this defense by establishing that the violation was continuing in nature,⁶² or that the contractor concealed facts constituting the violation.⁶³

(5) Vindictive Prosecution

To establish this defense, a contractor must show that OSHA issued the citation to punish the contractor for exercising its legal rights in the absence of justification for such issuance, and the circumstances demonstrate actual, or give rise to a presumption of, vindictiveness.⁶⁴

Alternatively, a contractor can seek to establish that exercise of its protected rights generated animus or a retaliatory motive on the part of OSHA, resulting in the issuance of a citation where such issuance otherwise was unreasonable. This defense can be difficult to prove as a legal matter, but given the right set of facts, interposing the defense can help a contractor achieve a favorable settlement of a citation.

(6) Multi-Employer

Traditionally, a contractor could establish the multi-employer defense by showing that it neither created nor controlled the conditions constituting the violation, and took realistic alternative measures to protect its employees who were exposed to the hazard addressed by the cited standard.⁶⁵ The utility of this defense was minimized, however, when OSHA issued its Multi-Employer Citation Policy, which sets out when OSHA will issue citations to “controlling,” “exposing,” “creating,” and “correcting” employers at multi-employer jobsites.⁶⁶ In a recent decision, the U.S. Occupational Safety and Health Review Commission (“Review Commission” or “Commission”) in turn limited the reach of the above-cited OSHA policy, holding that, at a multi-employer jobsite, OSHA is not empowered to cite a “controlling” general contractor who had no employees who were exposed to a violation.⁶⁷

(c) Informal Conference

Generally, after the expiration of 15 working days from a contractor's receipt of a citation, the citation becomes a "final order" that is subject to no further review unless the contractor files a notice of contest to challenge the citation.⁶⁸ The 15-working day period is jurisdictional in nature, so if the contractor misses the deadline for taking action with respect to the citation, it needs to have an extremely compelling explanation in order to be relieved from its mistake or neglect.⁶⁹ Upon receipt of a citation, the contractor can do the following: nothing, thereby accepting the terms of the citation; contest the citation, giving rise to a legal proceeding before the Review Commission; or participate in an informal conference, generally at the office of the OSHA official who issued the citation, in an effort to reach a resolution of the citation.

If the contractor opts to participate in an informal conference, representatives of the contractor, including its attorney if desired, and OSHA can agree to matters such as:

- the withdrawal of citation items
- changes in the classification of items
- reduction of the proposed penalties
- extension of abatement dates
- changes in the factual specifications of the citation items
- collateral promises, such as agreements to review and enhance the contractor's safety program, retain a safety consultant, etc.
- other matters to be included in an Informal Settlement Agreement, such as a suitably robust non-admissions clause

Many contractors believe there is little, if any, down-side to participating in an OSHA informal conference. Successfully resolving a citation at an informal conference can obviate the need for litigation of a contested citation, thereby freeing up resources for other activities.

Participating in an informal conference provides an opportunity for the contractor to underscore its commitment to jobsite safety and health with OSHA, which can help contribute to an ongoing positive relationship between the contractor and the agency. That can be of particular importance when the contractor is likely to engage in future work within the jurisdiction of the subject OSHA area office. On the other hand, a contractor may decide that participating in an informal conference is not worthwhile when it is unlikely that such a conference will result in a resolution of the citation through direct discussions with OSHA area office officials. In appropriate cases, however, it may be possible to interest higher ranking OSHA officials in weighing in on certain issues to be discussed in an informal conference, which can increase the likelihood that the conference will result in a successful resolution of the citation.

(d) Notice of Contest

When an informal conference has failed to result in an acceptable resolution of a citation, and the contractor is unwilling to accept the terms of the citation, or the contractor has decided that it wishes to forgo an informal conference and proceed directly to litigation, the contractor must file a notice of contest with the OSHA area director who issued the citation.⁷⁰ The notice of contest can be in the form of a simple letter stating that the contractor contests each citation item, the classification of the items, the proposed penalties, and the abatement dates and methods. It should also identify and provide contact information for the person who will serve as the representative of the contractor in the legal proceeding to result from the filing of the notice of contest. As stressed above, it is critical for the contractor to ensure that it files the notice of contest with the OSHA area director within 15 working days of the contractor's receipt of the citation.

(e) Litigation of OSHA Citations

Once the OSHA area director has received a contractor's notice of contest, OSHA forwards case documents to the Review Commission's offices in Washington, D.C., where the case is docketed. Proceedings before the Review Commission are conducted pursuant to regulations issued by the Commission.⁷¹ Attorneys from the Office of the Solicitor in the U.S. Department of Labor file a Complaint on behalf of the Secretary of Labor, and the representative of the contractor files an Answer responding to the allegations in the Complaint, pleading any applicable affirmative defenses. The parties then have the opportunity to engage in discovery, and the assigned administrative law judge schedules the case for a hearing. At any time during the course of proceedings before the Review Commission, the parties are free to engage in settlement discussions. A contractor is typically represented by an attorney in a contested case before the Review Commission, although representation by a lay person in these proceedings is permitted.⁷²

At the hearing, the Secretary of Labor puts on her case first, which typically consists of offering the testimony of witnesses and documents into evidence. The contractor then puts on its case, offering witnesses and exhibits. When the contractor's employees are represented by a union, an authorized employee representative is afforded the opportunity to participate in the legal proceedings.⁷³ The judge rules on evidentiary and other matters arising during the course of the hearing, and generally helps ensure the orderly trial of the case. At the close of the hearing, the judge typically provides the parties with the opportunity to submit written briefs containing legal arguments along with citations to the transcript of the hearing. After the parties have submitted their briefs, the judge then weighs the evidence to arrive at a decision. Once the judge makes a determination, he enters a written decision ruling on the issues raised in the case.⁷⁴

In appropriate simple cases, the Chief Judge of the Review Commission can enter an order early in the case setting the matter on the Simplified Proceedings docket.⁷⁵ When a case is placed on that docket, it suspends the requirements for filing a Complaint and Answer, the parties have limited opportunities for discovery, and the proceedings are otherwise expedited, often resulting in a faster and less expensive adjudication of the case.⁷⁶

Any party aggrieved by the decision of a judge is entitled to file a Petition for Discretionary Review with the Review Commission.⁷⁷ Any sitting commissioner can issue a Direction for Review, taking the case before the Commissioners for review of the judge's decision.⁷⁸ Review by the full Commission is discretionary in nature. When no Direction for Review is issued, or after the Commission issues its decision of the case on review, a party aggrieved by an order of the Commission is entitled to file an appeal with an appropriate United States Court of Appeals.⁷⁹

Contractors typically consider a number of factors in deciding whether to contest and litigate an OSHA citation. For all but the smallest of contractors, with the possible exception of major enforcement actions where the contractor faces significant penalties, OSHA penalties typically are not high enough to be the determining factor on whether a contractor contests a citation. For instance, a penalty in the amount of \$7,500 is less likely to spark a contest and litigation before the Review Commission than would a \$650,000 penalty.

An important factor to consider in deciding whether to contest and litigate a citation is the effect, if any, having the citation become a final order would have on the contractor's ongoing operations. When a contractor would be required to change how it performs work at considerable detriment to its competitive advantage, or with significant operational difficulty, or where

abatement would otherwise be problematic or significantly costly, a contractor is more likely to opt for contest and litigation.

A frequent concern that comes into play in the decision to contest or litigate a citation is the increased potential for repeat violations that arises once a citation becomes a final order. This is of particular concern for contractors who have jobsites in numerous locations falling under the jurisdiction of Federal OSHA, in which a contractor's compliance record can serve as the basis for future repeat violations. This factor often prompts litigation when the citation alleges the violation of a standard that applies frequently to the contractor's operations, and the contractor has concluded that it has a good chance of prevailing on the merits in a contested case.

Increasingly, owners and other entities in a position to award work consider a contractor's OSHA compliance history in deciding whether to grant the contractor work. A contractor with little to no history of OSHA violations can be at a distinct competitive advantage in being awarded work over a contractor that has a record of OSHA violations. However, generally, entities awarding work are primarily concerned with a history of serious, repeat, and willful violations on a contractor's record. This increases the incentive for a contractor, for instance, to contest a case and go deeper into the litigation process, if necessary, to have a serious violation reduced in classification to other than serious, either through case settlement or final adjudication by a Review Commission judge. Willful and repeat violations on a contractor's record can be of particular concern, and can relegate that contractor to competing for less desirable work, unless those classifications are reduced or the underlying violations vacated, which also provides a strong incentive for the contractor to litigate the citation aggressively.

The potential for civil lawsuits can also impact the decision to contest and litigate a related OSHA citation. For instance, in many states, workers' compensation benefits are an

employee's sole remedy for a work-related injury. The law in a significant number of states, however, has loosened this workers' compensation bar to civil actions for monetary awards for such injuries. In Texas, for instance, the legal representative of a fatally injured employee can bring a civil action for monetary damages against the employer when the employer's gross negligence resulted in the death.⁸⁰ West Virginia and Ohio, among other states, have statutes that prescribe in detail when civil actions can be brought for work-related injuries.⁸¹ Settlements, jury verdicts, and judgments in these cases can be very costly for contractors.

Where OSHA has investigated a work-related accident that resulted in a serious injury, and issued one or more citations that are connected to the accident, the plaintiff in a civil action can be expected to use those OSHA citations in an effort to bolster his case. Where this potential is present, it provides great incentive for a contractor to vigorously litigate an OSHA citation, even if the monetary penalty of the citation itself is not particularly significant. Moreover, settlement of these OSHA cases often requires OSHA and the contractor to reach agreement on the terms of a robust non-admissions clause, which may not be available until the parties get beyond the informal conference stage of a case.

The time, expense, and burden of litigation also can be a factor in whether a contractor decides to litigate. Where this is a concern, the contractor typically will weigh that factor against one or more of the factors discussed above in deciding whether litigating a citation proves to be a prudent course of action.

Finally, a contractor may have concerns that contesting and litigating a citation could somehow negatively affect its ongoing relationship with OSHA, and prompt the agency to treat the contractor more harshly during future inspections. OSHA is a busy agency, however, having fewer resources than many believe necessary to accomplish its mission. Furthermore, over the

years of OSHA's existence, the agency has become familiar with contractors exercising their legal rights. If enforcement personnel in an OSHA office behaved in a vindictive manner in retaliation for a contractor exercising its rights to contest and litigate a citation, OSHA's reputation could be negatively affected; a result that higher officials within OSHA are not likely to knowingly permit. For these and perhaps other reasons, many contractors would agree that their efforts are better spent trying to eliminate or minimize the hazards their employees are exposed to on their jobsites, and when, despite such efforts, OSHA issues citations, the decision regarding whether to contest and litigate such citations in good faith should be made without undue concern for OSHA's possible reaction to that course of action.

OSHA State Plans

1) Introduction

Congress passed the federal OSHA statute in the early 1970's. The federal OSHA statute allows states the opportunity to enforce workplace safety laws, rather than have the United States Department of Labor do so. States that have elected to enforce workplace safety standards – and have received federal approval to do so – are called “state plan” states. Twenty-two states have OSHA approved state plans. This section of the seminar materials addresses state plans.

2) The Occupational Safety and Health Act and State Plans

When OSHA was first implemented, there was legislative debate whether and to what degree the states should be allowed to individually shape and enforce OSHA. Many OSHA proponents wanted only a uniform federal system of worker protections.⁸² They argued that individual state plans would be inadequate because they would be:

- (a) less effective;
- (b) underfunded/understaffed;

- (c) inefficiently and ineffectively enforced; and
- (d) more susceptible to local political influence.⁸³

Meanwhile, proponents of state plans (i.e., business leaders, the Nixon administration, state-rights supporters) argued that state plans were more desirable because they would be:

- (a) more efficient;
- (b) more fairly enforced;
- (c) better adapted to local needs; and
- (d) more along the lines of traditional state regulation of safety and health matters.⁸⁴

A compromise was reached in the Occupational Safety and Health Act of 1970 (“OSHA”) whereby: (1) individual states were allowed to enforce workplace safety standards, (2) the federal OSHA standards theoretically acted as a “floor” of protections for workers, and (3) states were allowed to create “state plans” to replace federal enforcement. These state plans, in theory, must add more protections or enforcement authority. Despite this ideal, there are provisions in the enabling legislation of OSHA for state plans that make it possible for states to be *less* stringent. For example, states are *not* required to include a “general duty clause,” a catch-all federal plan requirement that employers “shall furnish to each of his employees employment and place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”⁸⁵ As states are not required to have a general duty clause in their plans, enforcement of workplace safety laws under state plans could be less stringent than federal enforcement.⁸⁶

States are not required to have state plans; if a state does not choose to have a plan, then the federal government enforces the standard federal OSHA requirements. If a state chooses to

have a plan, it must administer the plan itself. Section 18 of OSHA (29 U.S.C. 667, Section 18) states in part that:

(a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.⁸⁷

State plans must be approved by the United States Secretary of Labor.⁸⁸ The Secretary must approve the plan if, in the Secretary's opinion, it complies with the following paraphrased requirements:

(1) the plan designates a State agency or agencies as being responsible for administering the state plan;

(2) the plan provides for the development and enforcement of safety and health standards, and:

- The standards will be at least as effective in providing safe and healthful employment and places of employment as the federal standards,
- The enforcement of the standards will be as effective as the federal standards,
- The standards are required by compelling local conditions and do not unduly burden interstate commerce;

(3) the plan provides for a right of workplace entry and inspection that is (a) at least as effective as the federal right, and (b) includes a prohibition on advance notice of inspections;

(4) the plan contains "satisfactory assurances" that the administering state agency(ies) have the legal authority and qualified personnel necessary for enforcement;

(5) the plan gives "satisfactory assurances" that such State will devote adequate funds to the administration and enforcement of its standards;

(6) the plan contains "satisfactory assurances" that such State will, to the extent permitted by its law, establish and maintain an OSHA program applicable to all

state public employees, which program must be as effective as the standards contained in an approved plan;

(7) the plan requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect; and

(8) the plan provides that the State agency will make such reports to the Secretary in such form and containing such information as the Secretary requires.⁸⁹

If the Secretary approves a state plan, there is a period of joint federal-state jurisdiction as the state takes over implementation of the OSHA program through its own plan.⁹⁰ The Secretary must oversee the state's implementation of its plan. The Secretary also provides on-going oversight by reviewing the OSHA-required periodic reports to the Secretary. Should the Secretary determine, after notice and a hearing to the state, that the state is not complying with its own plan requirements, then the Secretary may withdraw approval from the state plan. The state may appeal withdrawal of its plan to the federal Court of Appeals for its circuit. Similarly, a state may choose to withdraw its state plan and have the federal government take over OSHA enforcement.

The following states and territories have approved "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

States followed by an asterisk in the table above have state plans covering public employees only.

3) Significant differences between state plans

Because state plans must be “at least as effective” as the federal plan, and must accomplish the same goals, state plans often look the same as the federal plan in many respects. State plans also may strongly resemble one another. But the federal regulations accord significant flexibility to the states to put in their own modifications, leading to some innovations that distinguish various state plans from one another. As long as these modifications are deemed reasonable by the Secretary, they may be part of the plan.

One common difference between state plans and the federal plan is that the federal plan does not cover boiler standards or elevator standards, whereas state plans often do.⁹¹ State plans also may govern state government and local government, while the federal plan may not.⁹² State plans can provide for state agencies to “red tag” – i.e., immediately shut down a job site for a short time – while the federal plan may not (unless a temporary restraining order is obtained from a federal court).⁹³

While these are some common differences between state plans and between the state and federal plans, the differences can be myriad, both minor and major. Set forth below are just a few examples:

- In Oregon, the state plan provides, for example: 1) a private right of action for an employee who files a discrimination complaint for protected safety and health activities in any circuit court in Oregon under certain circumstances;⁹⁴ 2) OR-OSHA may prohibit use of a machine, equipment or place of employment and impose a civil penalty up to \$5,000 against any person who violates state OSHA;⁹⁵ 3) loss control programs (all insurers for workers' compensation must provide free safety and health loss control consultative services);⁹⁶ and 4) self-audits (permitting employers to withhold from OR-OSHA certain voluntary safety and health consultation reports).⁹⁷
- Some states have implemented innovative twists on the standard OSHA plan, many of which are noted and discussed on the federal OSHA website.⁹⁸ For instance, in Oregon, OR-OSHA has created a “Joint Emphasis Program” (“JEP”) wherein the local construction industry and OR-OSHA work together to design and implement joint safety training sessions.⁹⁹
- Similarly, in Michigan, the MIOSHA program, a number of labor organizations, and the Michigan Department of Transportation reportedly collaborated to develop contract specifications regarding worker health and safety, going beyond what is required by the current MIOSHA rules, on a bridge refurbishing project.¹⁰⁰ MIOSHA may use this project as a model for the future if it is successful in improving workplace safety.
- In contrast, Minnesota has put in place a Workplace Accident and Injury Reduction (AWAIR) program. This program requires employers in certain North American Industrial Classification System (NAICS) codes to create and implement a comprehensive written safety and health program. The NAICS list includes

industries with an incidence rate or a severity rate above the Minnesota average. The list is revised every two years.¹⁰¹

- Industry-state discussions and collaboration are a frequent feature of many states' plans.
- Virginia reportedly has a "Safety Network" program designed to link large businesses with small businesses to promote workplace safety through shared expertise and resources.¹⁰²
- Kentucky organized a similar Safety and Health Network with participants representing business, labor, government and academia.¹⁰³
- Meanwhile, Tennessee reportedly utilizes Industry-TOSHA discussion groups when new standards and requirements are proposed so as to obtain feedback on those standards. Tennessee also offers free "Consultative services" wherein a TOSHA expert gives feedback on an employer's potential safety and health hazards so that the employer may better protect itself and come into compliance with OSHA.¹⁰⁴
- Some states have offered financial incentives for employers who reduce workplace safety incidents. For example, Wyoming gives employers a 75 percent penalty reduction if they successfully reduce their workers' compensation claims by 25 percent over a 12 month period.¹⁰⁵ Wyoming also offers employers a 50 percent penalty reduction if they fix hazards the same day.¹⁰⁶ A recent innovative option is to waive all penalties if the employer agrees to a consultation visit and a follow-up enforcement inspection 12 months later.¹⁰⁷ Any repeat violations found during the follow-up will cost at least two to five times more than the original penalty.¹⁰⁸

Given the substantial differences that may exist between any given state OSHA plan and the federal OSHA plan, it is extremely important for any employer to look carefully into a given state's plan before operating in that state.

4) Minnesota as an Example

Because of space limitations, it is impossible to give a summary of each of the 22 state plans. The following section analyzes the Minnesota state plan as an example of the differences and similarities between federal OSHA and state plans.

a) History and Background

Minnesota enacted the Minnesota Occupational Health and Safety Act in 1973 and received final federal approval in 1985.¹⁰⁹ The state agency responsible for administering Minnesota's OSHA plan (MnOSHA) is the Minnesota Department of Labor and Industry. Two divisions of the Department of Labor and Industry play key roles in MnOSHA. The Occupational Safety and Health Division (OSH) is responsible for traditional administration and enforcement activities. The Workplace Safety Consultation (WSC) division provides consultation services aimed at prevention of accidents and also operates various employer assistance programs.

b) Jurisdiction

One of the most critical distinctions between MnOSHA and federal OSHA is the scope of each respective plan's jurisdiction. Federal OSHA has jurisdiction over most private employers. But federal, state, and local governments are specifically excepted from the federal law.¹¹⁰ MnOSHA, however, has jurisdiction over nearly all public and private employers in the state, except for federal agencies and certain property under federal jurisdiction, such as some Indian reservations.¹¹¹

c) The MnOSHA Inspection

The inspection process in Minnesota will be familiar to practitioners who have experience under federal OSHA as outlined in the first two sections of the materials. In Minnesota, MnOSHA inspections are conducted by an investigator from OSH. Investigators are required by statute to present their official credentials and ask to meet with an appropriate employer representative. Thus, employers should always make sure to check the investigator's credentials as the presentation of credentials is a statutory requirement.¹¹²

i) The Opening Conference

Once an investigator arrives, the investigator will hold an opening conference with the employer representative(s) and explain the purpose of the investigation and its intended scope of coverage. The investigator will also make a determination regarding other MnOSHA activities, including identifying any ongoing OSHA-funded consultations or enforcement activities.

The investigator may also ask to review employer records to ensure compliance with MnOSHA's posting and recordkeeping requirements. These include compliance with Minnesota's "A Workplace Accident and Injury Reduction (AWAIR) Act", which requires many employers to establish written safety and health programs.¹¹³

ii) The "Walkaround"

After the opening conference, the investigator and employee representatives will tour and inspect the job site. The investigator will determine the route and duration of the inspection. Depending on the nature of the investigation, investigators will observe general safety and health conditions and practices; consult with employees privately; take photos, videos and/or instrument readings; examine records, collect air samples, measure noise levels and survey existing engineering controls; and monitor employee exposure to toxic fumes, gases and dusts.

iii) Unlike Federal OSHA, MnOSHA Has Authority to Shut Down a Job Without Seeking Prior Court Approval

As discussed in the federal materials, federal OSHA officials do not have the direct authority to shut down a job. They must seek this relief from a judge. MnOSHA inspectors, however, have significantly more authority if they identify "any condition or practice in any place of employment which presents a substantial probability that the condition or practice could result in death or serious physical harm."¹¹⁴ If such a condition is identified, the investigator will ask the employer to voluntarily eliminate the hazard and to remove the endangered employees from exposure. If the employer fails to do this, MnOSHA may "red tag" the equipment or job site for 72 hours pursuant to its statutory authority.

MnOSHA may also petition a state court judge to obtain a temporary restraining order extending the "red tag" shut down period.¹¹⁵ MnOSHA also has the ability to petition the court to take affirmative steps, in the nature of a mandatory injunction, to correct the allegedly hazardous situation.

iv) MnOSHA Requests for Documents and Other Evidence

Like federal OSHA, MnOSHA has similarly-broad investigatory powers. MnOSHA has subpoena power for documents and other records, may take depositions, and may compel witnesses to testify.¹¹⁶ Failure to comply with MnOSHA's orders subjects the employer witnesses to liability for contempt in state court proceedings. MnOSHA also contains specific protections for information the employer believes may constitute trade secrets under Minnesota law.¹¹⁷ These protections dovetail with Minnesota's government data privacy laws – Minnesota's version of the Federal Freedom of Information Act.¹¹⁸

v) OSHA Interviews of Employees

MnOSHA also has the ability to "privately" interview non-management employees outside the presence of management and legal counsel.¹¹⁹

d) What are an employer's obligations under OSHA?

i) OSHA Standards and the General Duty Clause

MnOSHA incorporates by reference the main federal OSHA standards, including most of the standards applicable to construction work (29 C.F.R. Part 1926) and more general standards, some of which are applicable to construction (29 C.F.R. Part 1910).¹²⁰ Thus, MnOSHA citations will usually cite directly to the federal OSHA regulation in the C.F.R. that was allegedly violated.

Although state plans are not required to adhere to the federal "general duty clause", MnOSHA specifically incorporates the federal general duty standard by statute so Minnesota employers have the same "general duty" requirement found in federal OSHA states.¹²¹

ii) Criminal Violations

MnOSHA, like federal OSHA, also has criminal liability provisions.¹²² MnOSHA's criminal liability provisions are broader in scope than federal OSHA and may result from willful and/or repeated violations of MnOSHA regulations. And, unlike the federal OSHA, MnOSHA can impose criminal liability for violation of the "general duty clause."¹²³

e) Post-Inspection Procedures

(1) Closing conference

MnOSHA follows the familiar federal OSHA process in post-inspection proceedings. The investigator will hold a closing conference with the employer/employee representatives at the conclusion of the inspection. The investigator will discuss all unsafe or unhealthful

conditions observed during the inspection and indicate violations for which a citation and penalty may be issued. The investigator may, but is not required to, explain the basis for penalty calculation. Specific penalties will not be disclosed. The investigator will also discuss possible abatement methods, the length of time needed for abatement of each item, and a reasonable amount of time for such abatement. The investigator will also explain various rights to appeal a citation or extend abatement deadlines.

(2) Issuance of Citations

MnOSHA issues citations (“Citation and Notification of Penalty”) by certified mail within six months of concluding an investigation.¹²⁴ The citation will, among other things, identify each MnOSHA standard that is alleged to have been violated along with the penalties for each.

(3) Classifications of Violations and Penalties

MnOSHA has a citation classification scheme based on federal OSHA, where the category depends in large part on the nature of the violation, accident, or (or where the accident investigation broadens into a more generalized investigation of workplace safety), the expected injury. Maximum penalties are also tied to the classification.

1. Nonserious

The most minor classification of violations is “nonserious.” The nonserious classification of violations does not, however, have a separate statutory definition. Instead, it is defined as a violation that is not a “serious” violation.¹²⁵ Generally, nonserious violations are those instances where only a minor injury or illness has resulted or would reasonably be expected to result from an employee's exposure to a violation of a standard. Penalties for nonserious violations generally range from \$0 to \$1,000, although the law allows for up to \$7,000 to be assessed.¹²⁶

2. Serious

A violation is classified as serious in two circumstances. First, a violation is “serious” if it is the proximate cause of an employee fatality. Second, a “serious” violation occurs when the violation creates a substantial probability that death or serious physical harm could result.¹²⁷ Penalties for serious violations generally range from \$1,500 to \$5,000, although the law allows for up to \$7,000 to be assessed. If a fatality results, the maximum penalty is \$25,000.¹²⁸

3. Willful

A willful violation is not specifically defined by the statute but typically is assessed when the violation is intentional and knowing.¹²⁹ The employer’s awareness of the hazardous condition, knowledge that the condition violates a standard or other obligation of the Act, and failure to make a reasonable effort to eliminate the violation are crucial to establishing a willful violation. The minimum penalty for a willful violation is \$5,000, but penalties of up to \$70,000 may be levied for each willful violation.¹³⁰

4. Repeat

Repeated violations are treated the same as willful violations under MnOSHA.¹³¹

5. Failure to abate

Failure to abate a prior violation within the correction period may bring an additional penalty of up to \$7,000 for each day the violation continues beyond the prescribed abatement date.¹³²

6. Fatality penalty

If any serious, willful, repeated or failure-to-abate violation causes or contributes to the death of an employee, the statutory minimum total nonnegotiable fine that must be assessed for all citations connected to the death of an employee is \$50,000 if there is a willful or repeated violation, or \$25,000 if there is no willful or repeated violation.¹³³ There is an exception for

violations of the general duty clause, which carry a maximum penalty of \$25,000.¹³⁴ Employers with fewer than 50 employees may receive a fine reduction from MnOSHA if they have no willful or repeated violations.¹³⁵ Specifically, these employers may be eligible for a four-year extended payment plan and possible waiver of \$20,000 of the \$25,000 penalty. Additionally, the fine may be waived entirely if the fatality victim owned or had a controlling interest in the business or enterprise.¹³⁶

(4) Procedures for Contesting Citations

The process for contesting MnOSHA citations is rigidly procedural and requires strict attention to a variety of specific notices, filings, and postings as part of the process. Failure to meet deadlines lead to default and the inability to contest citations.

1. Notice of Contest

If an employer wants to contest a MnOSHA citation, it must serve a notice of contest on the MnOSHA prescribed form within 20 days of its receipt of the Notice of Citation and Penalty.¹³⁷ Failure to file a notice of contest results in the Notice of Citation and Penalty becoming a final order with no right of appeal to any court or agency.¹³⁸

The MnOSHA Notice of Citation and Penalty, along with the notice of contest, must be posted at the employer's principal office and the work site. Copies of the notice of contest and the citation also must be sent to affected employee representatives.¹³⁹

2. Litigation of OSHA Citations

Once the notice of contest is received, MnOSHA has three options. It must either (1) resolve the matter by settlement agreement, (2) petition the MnOSHA Review Board (a three member panel appointed by the governor) for a decision based on stipulated facts, or (3) refer the matter to an administrative law judge for a hearing in accordance with Minnesota's Administrative Procedures Act.¹⁴⁰

If MnOSHA elects to pursue litigation through the administrative law judge, it must serve a complaint no later than 90 days after receiving the employer's notice of contest.¹⁴¹

f) Other Differences Between MnOSHA and Federal OSHA

There are other more specific differences between MnOSHA and Federal OSHA that are representative of the nature of differences between state plans and Federal OSHA generally. The following are some of the key distinctions not otherwise noted above:

- (1) Workplace Accident and Injury Reduction (AWAIR) program (Minnesota Statutes §182.653 subd. 8; Minnesota Rules 5208.1500)

Under Minnesota's "AWAIR" program, employers in certain North American Industrial Classification System (NAICS) codes are required to create and implement a comprehensive written safety and health program.

- (2) Employee right-to-know (Minnesota Rules Chapter 5206) -- This rule is enforced by Minnesota OSHA, instead of the federal OSHA Hazard Communication Standard (29 CFR 1910.1200).

Minnesota's "Employee Right-To-Know" law covers harmful physical agents and infectious agents, as well as hazardous substances, and requires annual employee refresher training in addition to initial training. The rule covers employees in general industry, construction, maritime operations and mining, as well as farming operations with more than 10 employees or a temporary labor camp.

- (3) Employer-paid personal protective equipment (PPE) (Minnesota Statutes §182.655 subd. 10a)

Employers must provide and pay for all PPE required for employees to perform their jobs safely. PPE should only be used when all feasible engineering controls, work practices and administrative controls have been implemented, but are not enough to adequately protect employees.

(4) Safety Committees (Minnesota Statutes §182.676)

Certain employers are required to establish and administer a joint labor-management safety committee, including every public or private employer (1) with more than 25 employees; (2) a lost workday cases incidence rate in the top 10 percent of all rates for employers in the same industry; (3) or a workers' compensation premium classification assigned to the greatest portion of the payroll for the employer.¹⁴²

(5) Recordkeeping requirements

All employers with 11 or more full or part-time employees must comply with the MnOSHA recordkeeping requirements (OSHA 300 Log).¹⁴³

(6) Confined spaces (29 CFR 1910.146 and Minnesota Rules 5207.0300-0304)

MnOSHA adopted its own confined spaces standards for both general industry and construction.¹⁴⁴ In addition, employers engaged in shipyard employment are to follow 29 CFR 1915.7-1915.16.

Conclusion

Before beginning work in any of the 22 “state plan” states, an employer should become familiar with state-specific OSHA and workplace safety requirements.

¹ 29 C.F.R. § 1904.39(a). The term “hospitalization” has been interpreted to mean in-patient status and does not include emergency room or other outpatient treatment. *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 590 (D.C. Cir. 1985).

² OSHA has published a directive to guide such inspections. CPL 02-00-137, Fatality/Catastrophe Investigation Procedure (2005). The directive is available on the OSHA internet website, www.OSHA.gov.

³ 29 U.S.C. § 651, *et seq.*

⁴ The states that have their own occupational safety and health regulatory programs are listed on OSHA’s internet home page at www.OSHA.gov.

⁵ 29 U.S.C. § 658(c); 29 C.F.R. § 1903.14(a).

⁶ 436 U.S. 307 (1978).

⁷ *Accu-Namics v. OSHRC*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *Ackerman Enter., Inc.*, 10 BNA OSHC 1709 (1982); *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235 (4th Cir. 1998)(approving videotaping worksite from roof of adjacent hotel)

⁸ *Stephenson Enter. v. Marshall*, 578 F.2d 1021, 1024 (5th Cir. 1978); *Dorey Electric v. OSHRC*, 553 F.2d 357 (4th Cir. 1977).

⁹ *A.A. Biero Construction v. OSHRC*, 746 F.2d 894 (D.C. Cir. 1984); *National Eng'g & Contracting Co. v. OSHA*, 928 F.2d 762 (6th Cir. 1991); *National Eng'g & Contracting Co. v. OSHA*, 647 F. Supp. 1219 (S.D. Ohio 1988), *aff'd*, 902 F.2d 34 (6th Cir. 1990)(table) (U.S. Army Corps of Engineers gave consent on multi-employer worksite).

¹⁰ OSHA Field Inspection Reference Manual, CPL 2.103, Ch. II-A.3 ("FIRM"). This Manual is available on the OSHA internet website, www.OSHA.gov.

¹¹ 29 U.S.C. § 657(a).

¹² *Urick Foundry Co. v. Donovan*, 542 F. Supp. 82 (W.D. Pa. 1982)(work time interviews of employees permissible so long as they do not create a risk of injury or disrupt production).

¹³ 29 C.F.R. § 1903.7(b); *In Re Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d 1160 (7th Cir. 1994).

¹⁴ 29 U.S.C. § 657(e).

¹⁵ Such evidence may be subpoenaed, however, to prove a violation. *Wheeling-Pittsburgh Steel Corp.*, 4 BNA OSHC 1578 (1976).

¹⁶ 29 C.F.R. § 1903.7(b).

¹⁷ See 18 U.S.C. § 2905; FIRM Ch. II-A.4.g.

¹⁸ 29 U.S.C. § 662(a).

¹⁹ See generally *Usery v. Whirlpool Corp.*, 416 F. Supp. 30 (N.D. Ohio 1976).

²⁰ 29 U.S.C. § 657(c)(1). An OSHA regulation authorizes compliance officers to request access to "records which are directly related to the purpose of the inspection." 29 C.F.R. § 1903.3.

²¹ 29 U.S.C. § 657(b).

²² *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252 (3d Cir. 1993)(denying access to "exposure records" that had been generated specifically to provide the employer with internal information related to the OSHA inspection).

²³ *Martin v. Hammermill Paper Div. of Int'l Paper*, 796 F.2d 1474 (S.D. Ala. 1992).

²⁴ 29 C.F.R. § 1903.7(b).

²⁵ *Reich v. Muth*, 34 F.3d 240, 245-46 (4th Cir. 1994).

²⁶ 29 U.S.C. § 654(a)(2).

²⁷ The term "construction work" is defined to mean not only original construction, but "work for construction, alteration and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b).

²⁸ See generally, 29 C.F.R. Part 1904. OSHA's arcane but important requirements for injury and illness recordkeeping are stated in CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*.

²⁹ See, e.g., *Usery v. Marquette Cement Mfg Co.*, 568 F.2d 902, 905 n. 5 (2d Cir. 1977).

³⁰ Section 5(a)(1), 29 U.S.C. § 654(a)(1). The elements of a general duty violation are stated in the seminal case of *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

³¹ 29 U.S.C. § 666(e).

³² FIRM Ch. III-C.2.e(2)(d).

³³ See, e.g., *United States v. Pitt-Des Moines, Inc.* 168 F.3d 976 (7th Cir. 1999); *United States v. Dye Construction*, 510 F.2d 78 (10th Cir. 1975). It is to be noted that criminal prosecutions may also be brought under state law.

³⁴ 29 U.S.C. § 666(g).

³⁵ *Zemon Concrete Corp. v. Occupational Safety & Health Review Com.*, 683 F.2d 176 (7th Cir. 1982).

³⁶ 29 U.S.C. § 666(c)

³⁷ 29 U.S.C. § 666(k)

³⁸ 29 U.S.C. § 666(b)

³⁹ OSHA Field Inspection Reference Manual, CPL 2.103, Ch. IV § 8 C.2.d

⁴⁰ 29 U.S.C. § 666(j)

⁴¹ *Bianchi Trison Corp. v. Chao*, 409 F.3d 196 (3rd Cir. 2005)

⁴² 29 U.S.C. § 666(e)

⁴³ *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2170 (No. 87-922, 1993) (quoting OSHA Instruction CPL 2.45A, Field Operations Manual, Ch. VI § A.2.i (4))

⁴⁴ 29 U.S.C. § 666(a); *D&S Grading Co. v. Secretary of Labor*, 899 F.2d 1145, 1147 (11th Cir. 1990); OSHA Field Inspection Reference Manual, CPL 2.103, Ch. 3 § 7 C.2.f

⁴⁵ *Sec'y of Labor v. Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807,1994)

⁴⁶ 29 U.S.C. § 666(a)

⁴⁷ OSHA Field Inspection Reference Manual, CPL 2.103, Ch. IV § 8 C.2.1 (2)(b)

⁴⁸ 29 U.S.C. § 666(d)

⁴⁹ *Id.*

⁵⁰ 29 C.F.R. § 1903.19

⁵¹ *Olin Constr. Co. v. OSHRC*, 525 F.2d 464 (2nd Cir. 1975) (Secretary of Labor bears burden on each element of violation of a standard by a preponderance of the evidence)

⁵² *N&N Contrs., Inc. v. OSHRC*, 255 F.3d 122, 126 (4th Cir. 2001)

⁵³ California Division of Occupational Safety & Health Policies and Procedures Manual, P&P C-1B, § H.2(b)

⁵⁴ *Nelson Tree Serv., Inc. v. OSHRC*, 60 F.3d 1207 (6th Cir. 1995)

⁵⁵ 29 C.F.R. § 1910.5(f); (e.g., *Caterpillar, Inc.* 15 BNA OSHC 2153 (No. 87-922, 1993))

⁵⁶ *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1276 (6th Cir. 1987)

⁵⁷ *John Carlo, Inc.*, 21 BNA OSHC 1670 (No. 04-1405, 2005)

⁵⁸ *Andrew Catapano Enterp.*, 17 BNA OSHC 1776, 1785 (No. 90-0050, 1996)

⁵⁹ *See Schwartz & Lindheim, Inc.*, 2000 CA OSHA App. Bd. LEXIS 70, at *20 n.5 (May 15, 2000)

⁶⁰ *See California Division of Occupational Safety & Health Policies and Procedures Manual*, P&P C-18, § A.1.d(1)

⁶¹ *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1204 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994).

⁶² *Reich v. Manganas*, 70 F.3d 434 (6th Cir. 1995)

⁶³ *Sun Ship, Inc.*, 12 BNA OSHC 1185 (No. 80-3192, 1985)

⁶⁴ *See Cleveland Constr., Inc. v. OSHRC*, 18 BNA OSHC 2028 (6th Cir. 1999)

⁶⁵ *Central of G.R. Co. v. Occupational Safety & Health Review Com.*, 576 F.2d 620, 624 (5th Cir. 1978)

⁶⁶ OSHA Field Inspection Reference Manual, CPL 2.124, Multi-Employer Citation Policy (December 10, 1999)

⁶⁷ *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (No. 03-1622, 2007)

⁶⁸ 29 U.S.C. § 659(a)

⁶⁹ *See Elmer Construction Corp.*, 12 BNA OSHC 1002 (No. 83-040, 1984) (delay in contesting citation excused when OSHA representative incorrectly speculated time had passed to contest citation)

⁷⁰ 29 C.F.R. § 1903.17(a)

⁷¹ 29 C.F.R. § 2200.2

⁷² 29 C.F.R. § 2200.22(a)

⁷³ 29 C.F.R. § 2200.20(a)

⁷⁴ 29 C.F.R. § 2200.90(a)

⁷⁵ 29 C.F.R. § 2200.203

⁷⁶ 29 C.F.R. § 2200.205; 29 C.F.R. § 2200.207-209

⁷⁷ 29 C.F.R. § 2200.91(b)

⁷⁸ 29 C.F.R. § 2200.92(b)

⁷⁹ 29 U.S.C. § 660

⁸⁰ Texas Lab. Code § 408.001

⁸¹ W. Va. Code § 23-4-1; ORC Ann. § 4123.01

⁸² Mark Rothstein, *Occupational Safety and Health Law* 49-50 (Thompson-West, 2007).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 29 U.S.C. § 654(a)(1) (1970).

⁸⁶ Gary J. Simpson, *The Occupational Safety and Health Act of 1970: State Plans and the General Duty Clause*, 34 Ohio St.L.J. 599, 603-5 (1973).

⁸⁷ 29 U.S.C. § 667(a), (b).

⁸⁸ 29 U.S.C. § 667(c).

⁸⁹ *Id.*

⁹⁰ 29 U.S.C. § 667(e).

⁹¹ *See, e.g.*, Ariz. Stat. §§ 23-471 et. al., 23-491 et. al.

⁹² 29 U.S.C. § 652(5).

⁹³ 29 U.S.C. § 662(b); *cf.* O.R.S. § 654.086(g).

⁹⁴ O.R.S. § 654.062(5)(b), 6(a).

⁹⁵ O.R.S. § 654.086(g).

96 O.R.S. § 654.097.
97 O.R.S. § 654.101.
98 <http://www.osha.gov/dcsp/osp/innovations.html#innovations>.
99 See <http://www.cbs.state.or.us/osha/educate/jep.html> for details on this program.
100 <http://www.osha.gov/dcsp/osp/innovations.html#innovations>.
101 Minn. Stat. §182.653 subd. 8; Minn. R. 5208.1500.
102 <http://www.osha.gov/dcsp/osp/innovations.html#innovations>.
103 See <http://www.kshn.net/> for details on this network.
104 See <http://www.state.tn.us/labor-wfd/toshcons.html>.
105 A description of Wyoming’s “75/25 plan” can be found on Wyoming’s Worker’s Safety Division website
at <http://wydoe.state.wy.us/does.asp?ID=89>.
106 *Id.*
107 OSHA website description, at <http://www.osha.gov/dcsp/osp/innovations.html#innovations>.
108 *Id.*
109 Minn. Stat. § 182.65, subd. 1 (2006); 29 C.F.R. § 1952.205.
110 29 U.S.C. § 652(5) (excluding the United States, states, and their political subdivisions from definition of OSHA
“employer”).
111 Minn. Stat. § 182.651, subd. 7 (2006).
112 Minn. Stat. § 182.659, subd. 1 (2006).
113 Minn. Stat. § 182.653, subd. 8 (2006).
114 Minn. Stat. § 182.662, subd. 2 (2006).
115 Minn. Stat. § 182.662 (2006).
116 Minn. Stat. § 182.659, subd. 2 (2006).
117 Minn. Stat. § 182.668 (2006).
118 Minn. Stat. § 13.01, et seq. is known as the Minnesota Government Data Practices Act.
119 Minn. Stat. § 182.659, subd. 1 (2006).
120 Minn. R. 5205.0010.
121 Minn Stat. §182.653, subd. 2.
122 Minn. Stat. § 182.667 (2006).
123 Minn. Stat. § 182.667, subd. 2 (2006).
124 Minn. Stat. § 182.66, subd. 1 (2006).
125 Minn. Stat. § 182.666, subd. 3 (2006); see also Minn. Stat. § 182.651 (2006) (defining only “serious”, but not
“nonserious”).
126 *Id.*
127 Minn. Stat. § 182.651, subd. 12 (2006).
128 Minn. Stat. § 182.666, subd. 2 (2006).
129 *Id.*, subd. 1.
130 *Id.*
131 *Id.*
132 *Id.*, subd. 4.
133 *Id.*, subd. 2a.
134 *Id.*, subd. 2a(a).
135 *Id.*, subd. 2a(b).
136 *Id.*, subd. 2a(c).
137 Minn. Stat. § 182.661, subd. 1 (2006).
138 *Id.*, subds. 3a & 3b.
139 *Id.*, subd. 3.
140 *Id.*
141 *Id.*, subd. 6.
142 Minn. Stat. § 182.676 (2006).
143 Minn. R. 5205.0010, subp. 1a.
144 Minn. R. 5207.0300-0304.