Gallagher Sharp ATTORNEYS

WORKPLACE ACCIDENTS AND OSHA INVESTIGATIONS
"WHAT YOU DON'T KNOW CAN HURT YOU"

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I. INTRODUCTION

You have just been notified of a severe injury to one of your long time employees out in the manufacturing plant. The emergency squad has been called and the scene has now been secured. Whether you are a risk manager in a manufacturing operation, the owner of a small business, or the liability insurance carrier for one of these businesses, the workplace accident creates a number of potential liabilities for you or your insured. This article will attempt to describe each of those liabilities and offer suggestions for preventing such injuries or minimizing the resulting financial, civil, or criminal liabilities.

For businesses, protecting workers' safety and health is the right thing to do. It saves money and adds value to the organization. When workers stay healthy, businesses will have a lower experience for workers' compensation insurance costs, they will see a reduced level of medical expenditures, and have lower disability income programs. Also, manufacturers will see fewer faulty products, lower costs for job accommodations for injured workers, and increased productivity and worker morale. Simply stated, every employer will benefit when safety and health is a priority at the workplace.

A. Legal Liabilities for Manufacturers and Businesses

Generally, there are three areas of legal liability for manufacturing businesses. Those include liability to your own employees, to third persons, and to the Government. The following will briefly summarize those liabilities.

1. Liability to Employees

a. Workers' Compensation

In Ohio, employers with at least one employee are required to either obtain workers' compensation insurance, or seek permission to be self-insured for

liabilities arising out of work-related accidents and occupational diseases. The Ohio system is an attempt to balance the rights and duties of employers and employees. An employer is obligated to contribute to a state fund by the payment of premiums, but receives immunity from tort actions based upon a work-related injury. The injured employee receives the right to prompt and certain benefits in exchange for surrendering the right to recover damages to the fullest extent of the law for all injuries. The workers' compensation system is a no fault recovery system where the only requirement is that the recovery be caused at work or by an occupational disease. Although beyond the scope of this article, manufacturers and business establishments obviously face liability for workers' compensation benefits and/or increased premiums in the event of a workplace accident.

b. Violation of a Specific Safety Regulation (VSSR)

In addition to basic workers' compensation benefits, an employee can obtain an additional monetary award on top of workers' compensation benefits if the employee can establish that the injury resulted from the employer's failure to comply with a specific safety requirement. The additional award the claimant may receive for a VSSR ranges from 15% to 50% of the maximum benefits to which the employee is entitled as a result of his original workers' compensation claim. The award will be based upon the severity of the injury and the egregiousness of the violation, as determined by the Ohio Industrial Commission.

The specific safety regulation must be one that was enacted by the General Assembly or by an order of the Industrial Commission and it must be a specific requirement, rather than a general safety requirement. It must also be designed to protect the lives, health, or safety of employees. The Industrial Commission has promulgated safety requirements under the Ohio Admin. Code for specific industries, including elevators, construction, work shops and factories, foundries, steel mills, laundry and dry cleaners, rubber and plastics, potteries, window cleaning, electrical supply lines, and firefighting. *See generally*, Ohio Admin. Code §4121:1.

c. Employment Intentional Tort

Although workers' compensation was originally intended to be the exclusive remedy for employees who were injured at work, the Ohio Supreme Court decided in 1982 that an employee may bring a civil action against his employer for what is now known as an "employment intentional tort." *See*, *Blankenship v. Cincinnati Milicron Chemicals, Inc.*, 69 Ohio St.2d 608 (1982). Although the General Assembly has attempted on several occasions

to protect employers from intentional tort claims brought by their employees, the courts have continued to strike that legislation down as unconstitutional. *Brady v. Safety-Kleen Corp.*, 61 Ohio St.2d 624 (1991) and *Johnson v. B.P. Chemicals*, 85 Ohio St.3d 298 (1995).

Most recently, the legislature promulgated Ohio Rev. Code § 2745.01, which became effective April 7, 2005. The legislature expressly intended to supercede the effect of the above-mentioned common law decisions. The new statute now requires the plaintiff to prove by a preponderance of the evidence that the employer acted with substantial certainty. Substantial certainty is now defined to mean that the employer acts with the deliberate intent to cause an employee to suffer injury:

> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
>
> (C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

Ohio Rev. Code § 2745.01

Although this is a facially more stringent legal standard, there have been no cases decided under the new statute, and we would expect another constitutional challenge.

B. Liability to Third Parties

Obviously, manufacturers and businesses, like other citizens, must avoid negligence which causes injury or damage to others. Typically, these business protect themselves by the purchase of commercial general liability insurance and specialty insurance programs which will indemnify them for any negligence to third parties. Nonetheless, manufacturers and other businesses must establish policies and procedures which will ensure the protection of third parties, including contractors, visitors to the plant, delivery personnel, other vendors, and also the surrounding community. Consideration of the potential liability to all of these third parties is appropriate when considering the potential liability of the business. Nonetheless, establishing effective safety and health programs for employees will favor the foundation for extending protection to third parties.

C. Liability to the Government - OSHA

Until 1970, no uniform or comprehensive provisions existed to protect against workplace safety and health hazards. Prior to that time, job related accidents accounted for more than 14,000 worker deaths annually. Nearly 2.5 million workers were disabled by workplace accidents and injuries. Ten times as many work days were lost from job-related disabilities as from labor strikes and the estimated new cases of occupational diseases totaled 300,000 annually. In terms of lost productivity and wages, medical expenses, and disability compensation, the burden of the nation's commerce was staggering. The human cost was beyond calculation. *See*, Occupational Safety and Health Administration, U.S. Dep't. of Labor, OSHA 2056-07R, *All About Occupational Safety and Health Administration* (2003).

The Occupational Safety and Health Administration (OSHA) is an agency of the U.S. Department of Labor. On December 29, 1970, President Richard M. Nixon signed legislation establishing OSHA and its sole responsibility to provide workers safety and health protection. 29 U.S.C. § 651 *et seq.* The OSHA Act includes a general duty clause, which requires employers to furnish their employees with a working environment free from recognized hazards. 29 U.S.C. § 654(a)(1). In addition, the OSHA statute requires employers to comply with specific safety and health rules promulgated by the Secretary of Labor. The Act applies to any employment performed in a workplace in any state or territory of the United States that does not have its own OSHA-approved safety and health program. 29 U.S.C. § 653(a).

Since OSHA's creation in 1970, the nation has made substantial progress in occupational safety and health. OSHA and its many partners in the public and private sector have cut work-related fatality rates by 62%; reduced overall injury and illness rates by 42%; and virtually eliminated brown lung disease in the textile industry. At the same time, U.S. employment has doubled and now includes nearly 115 million at 7 million sites. *See*, *OSHA: All About Occupational Safety and Health Administration OSHA,* 2056-07R (2003).

Despite its success, significant hazards and unsafe conditions still exist in the United States. Each year, almost 6,000 Americans die from workplace injuries and perhaps as many as 50,000 workers die from illnesses in which workplace exposures were a contributing factor. *See*, Bureau of Labor Statistics, U.S. Dep't. of Labor, Census of Fatal Occupational Injuries (2003).

OSHA uses three basic strategies authorized by the Occupational Safety and Health Act to help employers and employees reduce injuries, illnesses, and deaths on the job:

- Strong, fair, and effective enforcement;
- Outreach, education and compliance assistance; and
- Partnerships and other cooperative programs.

Using these strategies, OSHA conducts a wide range of programs and activities to promote workplace safety and health.

1. Who is Covered by OSHA?

The OSHA Act covers all private-sector employers and their employees in the 50 states and all territories and jurisdictions under federal authority. The OSHA Act covers employers, regardless of size either directly through the Federal OSHA Program or through an OSHA-approved state program. Although Ohio has an Occupational Safety and Health Act (*see* Ohio Rev. Code § 4167), enforcement of federal OSHA standards is still conducted by the federal compliance officers. All employers are covered by the general industry standards found at 29 C.F.R. §1910 unless there is some specific exception or exclusion. Sometimes, general industry standards will apply to only a portion of a specific type of employment. For instance, shipbuilding employees are covered by their own specific standards (29 C.F.R. Chapter 1915), but general industry standards do apply to persons employed in the shipbuilding industry. With regard to the construction industry, there are specific standards that address the hazards that are unique to that industry. These standards can be found at 29 C.F.R. Chapter 1926. They include regulations for environmental controls, personal protective equipment (PPE), welding and cutting, fall protection, cranes, excavations, concrete and masonry construction, steel erection, blasting, and ladders. It should be noted that these construction industry standards will extend to general industries where maintenance workers are performing construction activities.

2. Who is Not Covered

Public employers are expressly excluded from the scope of OSHA's coverage. 29 U.S.C. § 652(5). Typically, however, federal and state employees are covered by separate state or federal occupational safety and health programs. *See*, *e.g.*, Ohio Rev. Code § 4167, which applies to Ohio public employees.

Some employers are exempt from OSHA's coverage. Self employed individuals, for instance, are exempt. Similarly, family farms are exempt, although there are specific safety standards applicable to farm workers regarding matters such as agricultural equipment and general environmental controls. *See*, *e.g.*, 29 C.F.R. Chapter 1928. Domestic servants are also exempt provided they do not fit into any of the other categories of work (maintenance, construction, agriculture, etc.).

Regardless of the exempt status, all employers must notify OSHA of any workplace incident that results in a fatality or the hospitalization of three or more employees. 29 C.F.R. § 1904.39.

3. Record Keeping Requirements

a. Who Must Keep Records of Injuries and Illnesses?

The purpose of the record keeping requirements contained in the OSHA Act are intended to assist OSHA in enforcing the Act and preventing future accidents and illnesses. Even if the industry is regulated by a different set of health and safety laws, OSHA imposes its record keeping requirements on an industry in order to advance the mission of generating a pool of data which will aid in researching the cause and prevention of industrial injuries and illnesses. *See*, *Consolidated Rail Corporation*, 10 OSHC (BNA) 1706 (1982).

b. Fatalities and Catastrophic Injuries

An employer must make an oral report to the nearest area director of OSHA within eight hours of the death of any employee from a work-related incident. 29 C.F.R. § 1904.39(a). Thereafter, the employer must provide written notification of the fatality within 48 hours of learning of the fatality. Similarly, an employer must report work-related incidents that result in the inpatient hospitalization of three or more employees.

c. OSHA 300 Log

An employer must record each fatality, injury, and illness that is work related. (See, *e.g.*, 29 C.F.R. § 1904.5, regarding the determination of work relatedness.)

Work relatedness is presumed for injuries and illnesses from events or exposures occurring in the work environment, and an employer considers an injury or illness to be work related if an event or exposure in the work environment either causes or contributes to the condition by significantly aggravating a pre-existing injury or illness. 29 C.F.R. § 1904.5(a). Generally speaking, an injury is work related if it is a new case, and results in days away from work, restrictions on activities, medical treatment beyond first aid or illness, loss of consciousness, or injury diagnosed by a physician. *See*, 29 C.F.R. §§ 1904.6 to 1904.7. The information must be recorded on the OSHA 300 log and OSHA 301 incident report within seven calendar days of receiving the information that a recordable injury or illness has occurred. 29 C.F.R. § 1904.29(b)(3).

Employers must also complete a more comprehensive report on OSHA Form 301 for each incident that is recordable on the OSHA 300 log. 29 C.F.R. § 1904.29(b)(2). Annually, employers are then required to review the OSHA

300 log for completeness and accuracy, and to correct any deficiencies, create a summary, certify the summary, and post the summary in a conspicuous place in the establishment. *See*, 29 C.F.R. §1904.32.

Finally, there are some special OSHA recording requirements when reports must be made. (*See*, *e.g.*, Needle Sticks and Other Sharp Objects Contaminated With Blood, Bodily Fluids, or Other Materials Infected with HIV or Hepatitis B, 29 C.F.R. § 1904.8). Also, effective January 1, 2003, employers have been required to record hearing loss in a separate column on the OSHA 300 log. There is a presumption that hearing loss is work related if noise in the workplace is at a certain decibel level. That presumption can be rebutted by the opinion of a doctor. 29 C.F.R. § 1904.10.

d. Who is Exempt From Record Keeping Requirements?

OSHA exempts small employers and low-hazard industries from its record keeping requirements. If the company had 10 or fewer employees in the past calendar year, they do not need to maintain records.

OSHA also exempts employers in certain low-hazard industries from its record keeping requirements. Industries such as real estate agencies, clothing stores, medical and dental labs, schools, colleges, libraries, insurance carriers, and legal service providers are typically exempt. If the establishment is classified in the Standard Industrial Classification (SIC) Codes as one of the low-hazard industries, they are exempt. *See*, 29 C.F.R. § 1904.2, Appendix A. A few exempt employers, however, will have to maintain records if OSHA or the Bureau of Labor Statistics selects them to participate in a mandatory data collection. The agency will notify these employers in advance and supply them with the necessary forms and instructions. This allows the government to sample these industries and determine if they continue to be low hazard.

4. What Constitutes a Violation of OSHA Standards**?**

As mentioned above, OSHA has promulgated a series of specific standards applicable to general industry and construction. Employers are required to "comply with the Occupational Safety and Health standards promulgated under this Act." 29 U.S.C. § 654(a)(2). An employer is deemed to know the existence of the specific standards through initial publication in the federal register and subsequent codification in the Code of Federal Regulations. *Savina Homes Industries, Inc. v. Sec. of Labor*, 594 F.2d 1358 (10th Cir. 1979). Employers are permitted to deviate from the prescribed standards under specific conditions where the employer applies for a variance by demonstrating that alternative measures can be used which will

provide places of employment which are as safe as those which would prevail if they comply with the standard.

a. OSHA Citation

Cases involving violations of OSHA standards are initiated by the issuance of a citation. The Department of Labor issues the citation through OSHA's compliance officers. The citation notifies the employer of the nature of the violation in the employer's workplace and states the period within which the violation must be corrected or abated. 29 C.F.R. § 1903.14(h). The citations must be posted so that employees may see them. 29 U.S.C. § 1903.16(a). A notice of the proposed penalty will accompany the citation.

b. The General Duty Clause

In addition to the violation of specific standards, OSHA's general duty clause requires that each employer: "furnish to each of his employees ... a place of employment which [is] free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees . . ." 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary of Labor must prove:

i. The employer failed to render its workplace free of a hazard;
ii. The hazard was recognized;
iii. The hazard caused or was likely to cause death or serious harm; and
iv. The hazard was preventable.

Getty Oil v. OSHRC, 530 F.2d 1143 (5th Cir. 1976).

A "recognized hazard" is one that the employer has actual knowledge or should have known about based upon the standard of knowledge in the relevant industry. Thus, if the industry standard is published, for example, an ANSI standard, the employer will be responsible for knowing that standard. Of course, there must be some feasible means of abatement which the employer failed to institute. Feasible means for abating a hazard need not be based upon the relevant industry standards, but rather may be based upon the opinion of health or safety experts familiar with the relevant industry. *General Dynamics Corp. v. OSHRC*, 599 F.2d 453 (1st Cir. 1979); *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257 (1974).

5. OSHA Inspections

OSHA is authorized by 29 U.S.C. §§ 657 and 658 to inspect and issue citations. The authority to inspect is also set forth at 29 C.F.R. § 1903.3, and the authority to issue citations is set forth at 29 C.F.R. § 1903.14. Essentially, the OSHA Act authorizes OSHA compliance officers to inspect at reasonable times, in a reasonable manner, and within reasonable time limits. This means that they may enter any factory, plant, establishment, construction site, or other areas of the workplace or environment where work is being performed. They may also privately question any employer, owner, operator, agents, or employee during an inspection or investigation. Generally, these inspections are conducted without advance notice. Obviously, OSHA cannot inspect all 7 million workplaces covered by the OSH Act every year. Thus, the most hazardous workplaces will get OSHA's primary attention. OSHA has established a system of inspection priorities in order to make the most positive impact on occupational safety and health. Generally, the agency inspects under the following conditions:

a. Imminent Danger

A condition where there is a reasonable certainty that a danger exists that can be expected to cause death or serious physical harm immediately or before the danger can be eliminated through normal enforcement procedures. This is OSHA's top priority situation.

b. Fatality/Catastrophe

OHSA will investigate any report of a fatality or a catastrophic event. Employers are required by law to report any accident involving a fatality or the hospitalization of three or more employees within eight hours of its occurrence. 29 C.F.R. § 1904.8(a). Also, often the local police authority or hospital will notify OSHA in the event of a serious workplace catastrophe or fatality. Inspections following the report of a fatality or catastrophic injury will usually occur within 24 hours of the report.

c. Employee Complaints

OSHA may investigate employee complaints if they involve imminent danger or they threaten death or serious physical harm. If an employee telephones OSHA with a complaint of one or more perceived safety violations, OSHA may conduct an on site inspection. *See*, 29 C.F.R. § 1903.11(a). Alternatively, OSHA may send a letter to the employer listing the specific items complained of by the employee and will request that the employer respond to the specific items within five working days. *See*, Field Inspection

Reference Manual ("FIRM"), Section 5, Chapter 1, Paragraph C (7). This letter may be faxed to the employer and is sometimes known as a "phone/fax investigation." This enables the agency to concentrate its resources on the most serious workplace hazards. If the response is not satisfactory, the employer may face an on-site inspection. *See*, FIRM, Section 5, Chapter 1, Subparagraph C.

If the OSHA Area Director determines that there are no reasonable grounds to believe that a violation or danger exists with respect to an employee complaint, he shall notify the employee in writing of this determination. The complaining party can appeal that decision to the Assistant Regional Director. 29 C.F.R. § 1903.12.

d. National/Regional Emphasis Program

OSHA also identifies certain industries or types of industrial activities which result in a high number of accidents or fatalities. *See*, *e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321, n. 17 (1978). The northeast Ohio region, headquartered in Cleveland, is currently conducting national emphasis programs on the subjects of amputation injuries, and silica and lead exposure hazards. If the establishment is in a specific industry classification where such work is performed, it is a candidate for inspection. More information about current national or local emphasis programs can be found on OSHA's website at: http://www.osha.gov/dcp/neps/nep-programs.html.

e. Referral Inspection

Any individual can report a safety or health concern regarding an employer business to OSHA. These referrals can be provided by a past or present employee, a representative of the employee such as a union official, a concerned citizen, or even by a media report. *See*, FIRM, Section 5, Chapter I.C.2.a-b. The identity of the complainant shall be kept confidential unless otherwise requested by the complainant and no information shall be given to the employers which would allow them to identify the complainant. FIRM, Section 5, Chapter IC.3. In some areas, the Department of Health or other state or local government agencies have an obligation to make referrals to OSHA. In northern Ohio, for instance, if a hospital measures a workers' blood lead levels above 30, they will make a referral report to the local Area Director and an inspection will occur at the employers facility.

f. Unscheduled Inspection

Occasionally, an OSHA compliance officer may be driving by an industry or construction site and observe a safety violation in progress. In these events, the compliance officer will stop and contact the area director for permission to conduct an inspection. FIRM, Section 5, Chapter I.C.7.10. Probable cause is still necessary to conduct an inspection. *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978).

6. Conduct and Scope of the Inspection

Inspections, either programmed or unprogrammed, fall into one of two categories depending upon the scope of the inspection:

a. Comprehensive

A comprehensive inspection is a substantially complete inspection or "wall-to-wall" inspection of all of the potentially high hazard areas of the establishment. FIRM, Chapter II.A.1.a.

b. Partial

An inspection whose focus is limited to certain potentially hazardous areas, operations, conditions, or practices at the establishment. A partial inspection may be expanded based upon information gathered by the compliance officer during the inspection process. FIRM, Chapter II.A.1.b.

c. Procedure for Inspection

Upon initially entering the business establishment, the compliance officer is required to locate an owner, representative, agent, operator, or, in the case of a construction site, a representative of the general contractor. The compliance officer's credentials must be displayed. FIRM, Section 6, Chapter II.A.1.b.1. If the responsible person is not available, the compliance officer may be asked to wait for a reasonable amount of time. According to the Field Inspection Reference Manual, "this delay should normally not exceed one hour." FIRM, Section 6, Chapter II.A.1.b.2.

The employer does have the right to demand a search warrant from the compliance officer before the employer will consent to the inspection. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Of course, the tone set by demanding a warrant may result in increased citations. Nonetheless, OSHA is required to show probable cause before they may proceed to conduct a

safety or health compliance inspection. Probable cause can usually be shown by hard evidence of a safety or health violation, a written or signed employee complaint, or if the establishment falls within a national/regional emphasis inspection program. Also, if the loss work-day injury index is above the national average, probably cause can be established. *Marshall v. Barlow's, Inc.*, *supra*, and *Gilbert v. Bennett Mfg. Co.*, 589 F.2d 1343 (1979).

There are situations, however, where demanding a search warrant is advisable if the compliance officer does not appear to have probable cause for the inspection and/or if the employer wishes to try and control the scope of the inspection.

d. Consent

In the event that the employer consents to the inspection, a warrant is not required. *Donovan v. Metal Bank of America*, 516 F.Supp. 674 (E.D. PA 1981).

e. Employer Interference

Where entry has been allowed but the employer interferes with or limits an important aspect of the inspection, the compliance officer shall determine whether or not to consider this action as a "refusal." Examples of interference are refusal to permit the walk around, refusal to permit the examination of records essential to the inspection, refusal to permit the taking of photographs or videotapes, or refusal to allow employee interviews. FIRM, Section 6, Chapter II, Subparagraph 2. If the compliance officer determines there has been a refusal to permit a full inspection, he will terminate the inspection and seek compulsory process. 29 C.F.R. § 1903.4.

Even though the inspection is limited to the areas that the compliance officer has probable cause to conduct an inspection, employers should be aware that the compliance officer may also conduct inspections for anything he observes within "plain view" while conducting a "limited inspection." For these reasons, the employer should escort the compliance officer to the area in which he or she has the right to conduct their inspection by the most direct and expeditious route possible.

f. Interviews

The employer has the right to accompany the compliance officer during the entire inspection and has the right to participate in interviews of management employees, so long as the employee does not object. *Donovan , supra*. The employer may not participate in confidential interviews with the non-supervisory or non-managerial employees. *Trinity Industries, Inc. v. Martin*, 963 F.2d 795 (5th Cir. 1992). Of course, refusing to permit interviews can be considered a refusal to permit the inspection as mentioned above. Employee representatives, or union representatives, may also accompany the compliance officer during the inspection. 29 C.F.R. § 1903.8(a).

Often the compliance officer will write out statements and ask the witness to sign the handwritten document. There is no obligation to execute such documents, but many employees will choose to do so. For this reason, the employer's responsible person should write down all of the questions and answers during interviews they are permitted to attend. Exit interviews should be sought for non-management employees who are privately interviewed.

7. Civil Penalties

There are four basic types of citations which can be issued by a compliance officer. In addition to the four basic types of violations, an employer can be cited for the failure to abate a violation, or the failure to comply with posting requirements. The basic four penalties are as follows:

a. Wilful Violations

A wilful violation occurs when the employer intentionally violates the OSHA Act or acts in reckless disregard of whether or not a violation occurs. *Martin v. OSHRC*, 941 F.2d 1051 (10th Cir. 1991). The maximum penalty for a wilful violation is $70,000 for each violation, and the minimum is $5,000 for each violation. 29 U.S.C. § 666(a); FIRM, Section 8, Chapter IV, C.2.b.

b. Repeated Violations

A repeated violation will be cited when the same conditions as a prior violation are repeated in the same establishment by the same employer. *Tod Shipyards Corp. v. Sec. of Labor*, 566 F.2d 1327 (9th Cir. 1977). The maximum penalty is $70,000 for each violation. 29 U.S.C. § 66(a). These violations require that there must be a commission final order against the same employer for a substantially similar violation. Under OSHA's policy,

a violation is "repeated" if it is issued within three years of the final order of the previous citation or the citation is issued within three years of the final abatement date of the citation, whichever is later. *See*, FIRM, Section 7, Chapter III.C.2.f. Always do an establishment search to determine if the employer has been previously inspected within the past three years.

c. Serious Violations

Violations in which there is a substantial probability that death or serious physical harm could result from the violation, unless the employer did not know of the violation and could not have known of the violation with the exercise of reasonable diligence. Penalties can be up to $7,000 per violation.

d. Non-Serious Violations

For violations which are not wilful, serious, or repeated, but in which the probability of death or serious physical harm does not exist, a non-serious or other violation can be assessed. The maximum penalty of $7,000 can be assessed. 29 U.S.C. § 666(c). Typically, these penalties are much less than that amount. As mentioned above, however, if the employer fails to correct a violation that has become a final order, daily penalties may be assessed of up to $7,000 per day during which the violation continues beyond the final abatement date. 29 U.S.C. § 666(d). As noted, citations and settlement agreements must be posted at the employer's work site for specified time frames. A violation of the posting requirements can result in a penalty of up to $7,000 for each violation. 29 U.S.C. § 666(h)(I).

e. Penalty Assessment and Reductions

It is within the discretion of the Area Director to assess penalties based on four factors: the gravity of the violation, the size of the business, the good faith of the employer, and the employer's history of violations. It is important to note that gravity-based penalties can be reduced by as much as 95% depending on the last three factors. Up to 60% reduction is permitted depending on the number of employees working at the workplace; up to 25% reduction for good faith; and, a 10% reduction for employers without a violation within the past three years. FIRM, Section 8, Chapter IV, C.2.c.

8. How to Prepare for OSHA Inspection and Prevent Liabilities

As noted above, OSHA Inspections can occur for a variety of reasons. Preparing for an inspection can effectively reduce potential liability and may actually prevent an unfortunate accident to a valued employee. Whether you are a risk manager, business

owner, safety officer or insurer of the business, there are several steps that can be taken to minimize potential liabilities:

a. Ensure Compliance with Safety and Health Regulations.

Although it should go without saying, employers must carefully review the specific safety and health regulations promulgated by OSHA and consider how they apply to their business or industry. All of the current regulations, standards, letters of interpretation and other useful information is available directly from OSHA either in printed form or by visiting their website: www.osha.gov. Retain an appropriate consultant to review applicable regulations and advise how they apply to your industry. Since OSHA standards are only a minimum standard, research other industry specific standards, consensus standards and state or local laws or ordinances that may apply to your organization. Consider inviting your liability or property insurance carrier to conduct an underwriting loss control survey to assess compliance with regulations and standards.

b. Conduct a Hazard Assessment.

Armed with the knowledge of applicable law and regulation, the best policy is to conduct a thorough inspection and hazard assessment of all working areas of the plant or business. Identify all safety and health issues and formulate a plan to correct deficiencies. Regularly audit compliance and re-assess the work areas on a routine basis. Retain necessary outside consultants or counsel to assist in the process. The cost of doing so before an accident will pay off later in the form of reduced liabilities, lower insurance premiums and a healthier and more productive work force.

c. Ensure Required Safety Programs and Records are Maintained.

Determine which written safety and health programs are required to be maintained by OSHA and be sure to have them available for inspection by employees and any compliance officers who may inspect the workplace. Keep OSHA 300 logs up to date and available for inspection. These records must be maintained for five years after the end of the calendar year they cover. 29 C.F.R. § 1904.33. Record keeping failures are a common item cited during OSHA inspections.

d. Conduct OSHA Required Training.

Conduct all OSHA required training of employees. Moreover, strive to provide specific and tailored training, rather than generic off-the-shelf

training programs. Make use of accidents or near-miss incidents as a trigger to provide effective training to employees and seek their input to create effective and interesting training programs. Consider utilizing the services of OSHA's Outreach Trainers to provide authorized 10-hour and 30-hour training programs. Another option is to use the services of OSHA's Compliance Assistance Specialists to provide audit services or outreach training. See: http://www.osha.gov/dcsp/compliance_assistance/index.html.

e. Ensure Effective Discipline.

One effective defense to many OSHA enforcement actions is the defense of "unforeseeable employee misconduct." *Brock v. L.E. Myers Company*, 818 F.2d 1270 (6th Cir. 1987); *Metric Constructors*, OSHRC No. 92-1983, 1993 OSAHRC LEXIS 157 (1993). To establish this affirmative defense, the employer generally has to prove that it (1) had established work rules designed to prevent the violations; (2) that it had adequately communicated the rules to its employees; (3) had taken steps to discover violations of its rules; and, (4) has effectively enforced the rules when violations are discovered.

This defense is usually difficult to establish, primarily due to a failure of the fourth element. Documentation of discipline is often lacking and many times there is a lack of severity in the consequences meted out for repeated violations of a safety rule. Even if an employee is given an oral warning, there is no systematic way of recording that warning and enforcing more severe penalties for later violations of the same rule. Without some documented proof of effective enforcement, this defense is an uphill battle.

f. Review Safety Plan at Least Annually.

As with manufacturing technology, a prudent business owner must keep up to date on workplace safety and health. All safety programs and policies should be reviewed by upper management and updated at least annually. All too often safety plans are created and then literally put on a shelf, never to be touched again until OSHA comes knocking. Making safety and health a real part of the business operation can truly minimize potential liabilities and increase productivity and worker morale.

If your organization or insured does find an OSHA compliance officer in your reception area[1], following the suggestions outlined above will go a long way

[1] Attached is an *OSHA Investigation Checklist* provided by the author to assist an employer in the event that an OSHA compliance officer arrives to inspect your facility.

toward making the experience as painless as possible. While it cannot prevent all citations, it can certainly put the employer in the best possible position to defend or successfully negotiate a favorable outcome.

OSHA INVESTIGATION CHECKLIST

1. When OSHA compliance officers arrive, have them wait in a conference room or other office area until designated responsible party arrives. (Having them wait 20 or 30 minutes would usually be acceptable). Ask for their identification and business cards. Notify union representation, if applicable

2. Have supervisors or area managers immediately inspect areas for obvious housekeeping and safety items. Have copies of all safety plans or programs required by OSHA standards available for review by the compliance officer during the inspection. Be sure your hazard communication program and OSHA 300 log are readily accessible to employees.

3. Ask the nature of the OSHA compliance officer's visit - is it based upon a complaint(?) or is it a routine inspection(?). If based on a complaint, ask to see the complaint; avoid allowing the officer access to unnecessary areas of the facility, but only to the area where the complaint arose.

4. Accompany the compliance officer at all times while they are at the facility or work site. An employee or union representative may also accompany if they request.

5. Take photographs "over the shoulder" of those taken by the OSHA compliance officer. Duplicate any measurements or samples taken by the officer.

6. Keep casual conversation to a minimum. Do not volunteer information to the compliance officer and maintain only one point of contact.

7. Respond to questions by the compliance officer directly and do not become involved in any arguments with the officer. Avoid long answers when a simple response is appropriate and sufficient. Provide all documentation requested immediately.

8. Participate in interviews of management employees and take notes of the questions asked and answers given. Management may not be permitted to participate in non-management employee interviews, but you should conduct exit interviews of those employees if possible

9. During the closing conference, listen carefully to the compliance officer and do not admit to any violations which the officer may allege. Avoid agreeing to any specific abatement date suggested by the officer.

10. If obvious safety hazards exist or are discovered during the inspection, take immediate action to abate the hazard if possible. You will likely be cited, but the severity of the citation and the amount of the penalty may be determined based on the action taken immediately after the safety hazard is first observed.

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OSHA's Top 10 Violations for 2005

Every year, OSHA compiles statistics on violations to its standards. During 2005, there were 105,817 violations to standards under federal OSHA jurisdiction, with adjusted penalties of nearly $34 million.

The following table lists the top 10 most frequently violated regulations for Part 1910, General Industry. These are federal violations that occurred in states that are regulated by federal OSHA. Citations for states that operate their own occupational safety are not included in these statistics.

Top 10 General Industry Violations by Subparagraph
January 1, 2005 through December 31, 2005

	Subject	Standard	Total Violations	$ Initial Penalty	$ Adjusted Penalty
1	Hazard communication-Written program	1910.1200(e)(1)	2,395	$1,110,276	$427,951
2	Machine guarding-Types of guarding	1910.212(a)(1)	1,587	3,066,794	972,789
3	Hazard communication-Employer must provide hazard information and training	1910.1200(h)(1)	1,124	256,272	90,687
4	Machine guarding-Point of operation guarding	1910.212(a)(3)(ii)	811	1,869,156	704,841
5	First aid-Eye wash/emergency shower facilities not in near proximity to employees	1910.151(c)	784	904,354	345,566
6	Guarding floor openings, platforms, and runways	1910.23(c)(1)	744	1,303,417	401,865
7	Lockout/tagout-Establish an energy control program	1910.147(c)(1)	732	842,465	286,927
8	Abrasive wheel machinery-Exposure adjustment/safety guards	1910.215(b)(9)	729	285,041	99,502

9	Hazard communication-MSDS available for each hazardous chemical	1910.1200(g)(1)	718	98,975	37,093
10	Lockout/tagout-Written energy control procedures	1910.147(c)(4)(I)	700	1,203,548	393,020