

# HOW TO CONTEST AND REDUCE OSHA CITATIONS



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# Presenter



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- Gary defends employers nationally in federal and state OSHA cases with the majority of his cases being for construction companies.
- He is general counsel for the National Insulation Association, the Midwest Insulation Contractors Association, the National Frame Builders Association, and the Midwest Roofing Contractors Association.
- He is a frequent speaker on Occupational Safety and Health covering topics from compliance to litigation. Gary has presented papers on OSHA topics at the International Roofing Expo, the Ohio Self-Insurers Association, and many others.
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# OSHA TOP 10

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1. Fall Protection 1926.501
2. Hazard Communication 1910.1200
3. Scaffolding 1926.451
4. Respiratory Protection 1910.134
5. Lockout/Tagout 1910.147
6. Powered Industrial Trucks 1910.178
7. Ladders 1926.1053
8. Electrical Wiring 1910.305
9. Machine Guarding 1910.212
10. Electrical General Requirements 1910.303

# GENERAL DUTY CLAUSE



Section 5(a)(1) of Occupational Safety and Health Act of 1970

Each employer is required to provide its employees with a workplace free of recognized hazards that are causing or likely to cause death or serious physical harm.

# CITATIONS



Willful	\$12,740 - \$127,400
Repeat	\$0 - \$127,400
Serious	\$0 - \$12,740
Other Than Serious	\$0-\$12,740
Failure to Abate	Up to \$12,740/day

# April 22, 2010 FOM Changes



## Penalty Calculation

History – Expand covered period from three to five years.

- No serious, willful, repeat or failure to abate – 10% reduction
- High gravity serious, willful, repeat, or failure to abate – 10% increase

# GRAVITY BASED PENALTIES



<u>Severity</u>	<u>Probability</u>	<u>GBP</u>	<u>Gravity</u>
High	Greater	\$12,740	High
Medium	Greater	\$10,500	Moderate
Low	Greater	\$9,000	Moderate
High	Lesser	\$9,000	Moderate
Medium	Lesser	\$6,000	Moderate
Low	Lesser	\$5,000	Low

# PENALTY REDUCTIONS FOR SIZE



<u>Employees</u>	<u>Was</u>	<u>Is</u>
1 – 25	60%	40%
26 – 100	40%	30%
101 – 250	20%	10%
250 or more	0	0



# PENALTY REDUCTIONS FOR GOOD FAITH



- Retain up to 15% of reduction for good faith effort to maintain an effective safety and health management plan.
- Program must be in place to get reduction.
- Penalty reduction of 10% if strategic partnership agreement is eliminated.

# PROCESS TO REDUCE AND/OR CONTEST CITATIONS



## OSHA Citations Issued

- Evaluation

## Informal Conference

- Settlement

## Notice of Contest (NOC)

- Simplified Proceedings
- Regular Proceedings
- Continued Negotiations with Area Director
- Settlement

# WHAT IS YOUR GOAL?



1. Vacate Citation
2. Reduce Penalty
3. Change standard cited
4. Avoid admission against interest
5. Avoid future repeat citation

# EVALUATING OSHA CITATIONS



- Get your OSHA attorney involved.
- Carefully review standards cited and claims made in citation.
- Determine liability.
- Determine course of action.
  - Informal conference
  - Move directly to NOC

# INFORMAL CONFERENCE



- Meet with Area Director
- Always have a game plan
- Used primarily to lower penalty
- New FOM guidelines

# COURSE OF ACTION



- Informal Conference
  - Accept informal settlement offer received
  - Proceed directly to NOC

# STATE OSHA



Procedure will vary state to state

- Contact head of department (construction or general industry)
- Contact head of state OSHA
- Contact state attorney general's office

# STATE OSHA PROGRAMS



Alaska

Arizona

California

Connecticut

Hawaii

Indiana

Iowa

Kentucky

Maryland

Michigan

Minnesota

Nevada

New Mexico

North Carolina

Oregon

South Carolina

Tennessee

Utah

Vermont

Virginia

Washington

Wyoming



# PARTIAL STATE OSHA STATES



Connecticut

Illinois

Maine

New Jersey

New York

# NOTICE OF CONTEST



- S/L – 15 working days from receipt by employer of citations
- Filed with Area Director
- Area Director sends file to Review Commission.
- Chief Judge determines status.

# HEARING PROCEDURE



- Heard by Federal Administrative Law Judge (in state may be a referee – can be a less than desirable)
- Federal or state rules of evidence apply.
- Not the time to skimp on costs.
  - Call all necessary witnesses
  - Call & use expert, if necessary
  - Take the time to properly prepare all witnesses

# SIMPLIFIED PROCEEDINGS



- Chief Judge assigns Administrative Law Judge.
- DOL attorney has limited time to send investigation file info to employer or its attorney.
- Judge assigned to case sets date and time for prehearing conference call and for hearing.
- Either party may object to simplified proceedings designation.

# SIMPLIFIED PROCEEDINGS



- No formal discovery (depositions or interrogatories)
- Prehearing conference call
  - Narrow issues
  - Agreement on as many facts as possible
  - Statement of defenses by employer
  - List of witnesses and exhibits
- Eliminates or at least minimizes motions

# SIMPLIFIED PROCEEDINGS



Not available:

- In cases involving a fatality or willful or repeat citations
- In cases with proposed penalties greater than \$30,000
- When hearing is expected to last longer than 2 days

# STANDARD PROCEEDINGS



- DOL attorney is given fixed period of time to file a complaint.
- Upon receipt employer attorney files answer.
- Should also file discovery requests at same time
- No evidence received from OSHA without a discovery request.
- An answer must state affirmative defenses.

# STANDARD PROCEEDINGS



- Judge sets prehearing conference call and hearing date and time.
- Discovery is permitted.
- Post hearing briefs are accepted.



# POST HEARING PROCEDURES



After receipt of Judge's decision, the employer may:

- Accept decision
- File petition for discretionary review to Review Commission.

If case is not directed for review, Judge's decision becomes final unless a Petition for Review is filed in Court of Appeals.

# APPEAL TO FEDERAL APPELLATE COURT



1. Circuit within which inspection was conducted.
2. Circuit within which company headquarters are located.
3. D.C. Circuit Court of Appeals.
4. Can be expensive.

# TYPICAL DEFENSES TO OSHA CITATION



1. Standard does not apply.
2. We (employees) did not violate standard.
3. Not a recognized hazard.
4. Not causing or likely to cause.
5. We (employer) were not aware of violation.
6. Unpreventable misconduct.

# COMPONENTS OF UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE



1. Employer was not aware of violation.
2. Have safety program/rule prohibiting conduct observed, which was violation of OSHA standard.
3. Communicate (train) employees in rule.
4. Program to enforce safety rules and safety program.
5. Enforce program.
6. For supervisors – show higher standard.

# SAFETY PROGRAM



In addition to basics, you **MUST** train employees in hazard recognition and avoidance.

Need clearly defined steps

# ENFORCEMENT



- Progressive discipline
- Do what fits for your company
- Must be consistent
- No exceptions
- Document

# ALTERNATIVES



- 3-step programs.
- 5-step programs.
  - (two written warnings)
- Discipline by severity of hazard.
  - (3, 4, or 5-step program depending on severity of hazard to which employee is exposed.)

But, how do the different progressions work together?

# SUPERVISOR'S MISCONDUCT



OSHA holds supervisors to a higher standard.

You need to have a different disciplinary progression for supervisors.

3-step process rather than 4-step process.

1. written warning
2. 3-day suspension
3. termination



# IF YOU GET A CITATION

## Summary



1. Note date you received/signed for citation.
2. Post.
3. Consult with someone knowledgeable about OSHA.
  - Your attorney (if they know OSHA), Gary Auman, Michael Kwart (ICAA)
4. Gather information surrounding OSHA inspection.

CITATION RECEIVED

Reduce penalty or reclassify

All others -

Vacate  
Reclassify alleged violation  
Change standard

Informal conference

Notice of Contest

Settlement

Further negotiations directly with A.D.

Further negotiations with DOL Atty

Determined by Chief Judge

Simplified Proceedings

Standard Proceedings

Remove from simplified

Receive OSHA file

Standard pretrial procedures

About 90 days

Can be up to 12 months

Settle

Litigate

Litigate