

# After the Inspection: OSHA Violations and Appeals

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**A**lleged workplace safety violations can lead to an Occupational Safety and Health Administration (OSHA) inspector visiting a work site. If this happens to you as an employer, here's the general process: There will first be an inspection process, and after the inspection closing conference, the compliance officer will report his or her findings to the OSHA area director. It is the area director who determines whether he or she will issue citations and/or propose penalties as a result of the findings submitted. In the meantime, things will generally return to normal in your workplace while you wait for the area office to determine if any safety citations — and proposed penalties — will be issued. This process can take 45–60 days, and you will always receive the results via certified mail. There are various possible outcomes of the inspection as well as options that are available to both you and your employees.

### Citations and Contentions

OSHA has up to six months to send a Notice of Penalty with the results of the inspection. Once received, you have 15 working days to file an intention to contest OSHA citations and/



or to request an informal conference with the area director to discuss any citations issued. The latter is always recommended as time well spent. The law requires that OSHA citations for safety and health standards violations issued must include:

1. A description of the alleged violation;
2. The proposed penalty, if any;
3. The date by which the hazard must be corrected.

Common causes to dispute citations include:

- The citation is incorrect (i.e., it is not an accurate representation);

- The citation's dollar penalty is excessive;
- You disagree with the citation's contention that the danger was real, serious, and that an accident was likely to occur;
- You don't believe that you are responsible for causing the unsafe conditions (and can contend that).

Citations will inform you and your employees of the regulations and standards alleged to have been violated and of the proposed length of time set to correct alleged hazards. Regardless of your opinion of the citation, you must post a copy of each citation at or near the place where a violation occurred for three days or until the violation is abated, whichever is longer.

The following are the types of violations that may be cited and the penalties that may be proposed by OSHA:

- **Other-Than-Serious Violation:** This is a violation that has a direct relationship to job safety and health but probably would not cause

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death or serious physical harm. OSHA may assess a penalty from \$0 to \$1,000 for each Other-Than-Serious Violation, but the agency may decrease a penalty by as much as 95 percent, depending on your good faith (demonstrated efforts to comply with the Act), history of previous violations, and size of business. The latter generally has the biggest impact.

- **Serious Violation:** This is a violation where there is a substantial probability that death or serious physical harm could result. OSHA assesses the penalty for a serious violation from \$1,500 to \$7,000, depending on the gravity of the violation. OSHA may decrease a penalty for a Serious Violation as stated in the Other-Than-Serious Violation.

- **Willful Violation:** This is a violation that you as the employer intentionally and knowingly commit. You are aware that a hazardous condition exists, know that the condition violates a standard or other obligation of the Act, and make no reasonable effort to eliminate it. The minimum willful penalty is \$5,000 for each willful violation, but OSHA may propose penalties of up to \$70,000 for each. An employer who is convicted in a criminal proceeding of a willful violation of a standard that has resulted in the death of an employee may be fined up to \$250,000 (or \$500,000 if the employer is a corporation) or imprisoned up to 6 months, or both. A second conviction doubles the possible term of imprisonment.
- **Repeated Violation:** This is a

violation of any standard, regulation, rule, or order where, upon re-inspection, a substantially similar violation is found and the original citation has become a final order. Repeated Violations can bring a fine or up to \$70,000 for each such violation within the previous 3 years. To calculate repeated violations, OSHA adjusts the initial penalty for the size and then multiplies by a factor of 2, 5, or 10, depending on the size of the business.

- **Failure-to-Abate Violation:** Failure to correct a prior violation may bring a civil penalty of up to \$7,000 for each day that the violation continues beyond the prescribed abatement date.

## WORK IT SAFE

The Occupational Safety and Health Administration (OSHA) Training Institute (OTI) Education Centers are a national network of nonprofit organizations authorized by OSHA to deliver occupational safety and health training to private and public sector workers, supervisors, and employers. These organizations are selected through a competitive process based upon their occupational safety and health training experience, and they receive no funding from OSHA. The OTI Education Centers offer courses and seminars on a variety of safety and health topics, including Confined Space Entry, Fall Arrest Systems, Hazardous Materials, Oil & Gas Exploration & Production, Recordkeeping, Respiratory Protection, Industrial Hygiene, and Cranes in Construction. The centers support the OSHA training mission through other safety and health programs, including community outreach efforts, courses offered in Spanish, and various youth initiatives.

The OTI Education Centers help to ensure safe and healthful working conditions for working men and women by providing training on hazard recognition and avoidance to workers, employers, and other safety professionals.

### PROGRAM GROWTH

OSHA continues to add new organizations to the program to increase the availability of OSHA training for the private sector. There are currently 27 OTI Education Centers, comprised of 41 member organizations located throughout the country, including at least one in each OSHA region. The program features permanent training locations in 24 of the 49 most densely populated major metropolitan areas in the

United States. The number of participants trained through the OTI Education Centers has increased every year since the program's inception. Between fiscal year (FY) 2004 and FY2013, more than 305,000 participants were trained through the OTI Education Centers.

### WHO SHOULD ATTEND COURSES?

OTI Education Centers offer training courses designed for workers, employers, supervisors, and managers. Training is offered through an open enrollment format and on a contract basis for organizations within OSHA's jurisdiction. Program benefits include:

- Participants receive training on safety and health hazard recognition and abatement.
- OSHA-authorized safety and health training is available at convenient locations nationwide.
- OTI Education Centers offer customized training schedules and formats.
- Contract training courses can be delivered at off-site locations and/or with an industry-specific focus.
- Some courses offer professional development opportunities, including Continuing Education Units (CEUs) and/or Certification Maintenance (CM) points.

### HOW DO I FIND THIS TRAINING?

A complete list of all OTI Education Centers, course descriptions, prerequisites, and a searchable course schedule that includes training locations and fees can be found online. For more information, contact: OSHA, [www.osha.gov/otiec](http://www.osha.gov/otiec)

Additional violations for which OSHA may issue citations and proposed penalties.

- Falsifying records, reports, or applications, which can, upon conviction, bring a criminal fine of \$10,000 or up to 6 months in jail, or both;
- Violating posting requirements, which may bring a civil penalty of \$7,000;
- Assaulting a compliance officer or otherwise resisting, opposing, intimidating, or interfering with a compliance officer in the performance of his or her duties, which is a criminal offense and is subject to a fine of not more than \$5,000 and imprisonment for not more than 3 years.

Citations and penalty procedures may differ somewhat in states with their own occupational safety and health programs (i.e., State Plans). Your state should know which plan applies to your operations.

### Multi-Employer Worksite Policy

On multi-employer worksites, where there are multiple contractors and/or subcontractors or a general contractor managing a series of contractors, more than one employer may be citable for a hazardous condition that violates an OSHA standard. In determining whether more than one employer may be cited, the inspector follows a two-step process.

The first step is to determine whether the employer is a creating,

**Table 1. The Top 10 Most Frequently Cited OSHA Standards Violated in FY2014**

Rank	Standard	Citation
1	Fall Protection	29 CFR 1926.501
2	Hazard Communication	29 CFR 1910.1200
3	Scaffolding – General Requirements	29 CFR 1926.451
4	Respiratory Protection	29 CFR 1910.134
5	Electrical Wiring – Components & Equipment	29 CFR 1910.305
6	Powered Industrial Trucks	29 CFR 1910.178
7	Ladders	29 CFR 1926.1053
8	Control of Hazardous Energy (Lockout/Tagout)	29 CFR 1910.147
9	Electrical Systems – Design	29 CFR 1910.303
10	Machinery & Machine Guarding	29 CFR 1910.212

Note: FY2014 covers October 1, 2013 through September 30, 2014. The citation referencing 1910 represents General Industry and that referencing 1926 represents the Construction Industry.

exposing, correcting, or controlling employer (see definitions). Remember that an employer may have multiple roles. Once the role of the employer is determined, the second step is for the inspector to verify whether a citation is appropriate or not. The inspector must determine if your actions as the employer were sufficient to meet those obligations. The extent of the actions required varies based on which category applies. The extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees. Note: Only exposing employers can be cited for General Duty Clause (5.a.1.) violations.

For each type of employer, the

two-step process will help the inspector determine whether an action is required.

- **The Creating Employer:** This is the employer that caused a hazardous condition that violates an OSHA standard. Because employers must not create volatile conditions, an employer that does so is citable, even if the only employees exposed are those of other employers at the site.
- **The Exposing Employer:** This is an employer whose own employees are exposed to the hazard. If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it: (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative

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protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

- **The Correcting Employer:** This is an employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices. The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.
- **The Controlling Employer:** An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them, is a controlling employer. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

## The Appeals Process

Both you as the employer and your employees are authorized to appeal the inspection process. There is criteria and timing for both parties.

**Employers:** If you decide to contest a citation, you must submit a

written objection to the area OSHA office within 15 working days of receiving a citation. The OSHA area director forwards the objection to the Occupational Safety and Health Review Commission (OSHRC), which operates independently of OSHA.

Another option would be to request an informal meeting with OSHA's area director to discuss the case, if you receive a citation and notice of proposed penalty. The area director may be able to provide more information, and he or she is authorized to enter into settlement agreements that revise citations and penalties to avoid prolonged legal disputes and result in speedier hazard abatement.

If you receive a citation, you must correct the cited hazard by the abatement date unless you contest the citation or abatement date. However, factors beyond your control may prevent the completion of corrections by that date. In such a situation, if you have made a good-faith effort to comply, you may file a petition to modify the abatement date.

The written petition must specify the steps you will take to achieve compliance, the additional time needed to comply, the reasons additional time is needed, and interim steps taken to safeguard employees against the cited hazard during the intervening period. However, you must still certify that you have posted a copy of the petition in a conspicuous place at or near each place where a violation occurred and that the employee representative received a copy of the petition.

**Employees:** If an employee complaint initiates an inspection, the employee or authorized employee representative may request an informal review of any decision not to issue a citation. An active employee involvement program will go a long way to prevent this type of intervention.

Employees may not contest citations, amendments to citations, proposed penalties, or lack of penalties. However, they may contest the time

allowed for abatement of a hazardous condition. They also may contest an employer's Petition for Modification of Abatement, which requests an extension of the proposed abatement period. They must contest the petition within 10 working days of its posting or within 10 working days after an authorized employee representative receives a copy. Further, they may request an informal conference with OSHA to discuss any issues raised by an inspection, citation, notice of proposed penalty, or employer's notice of intention to contest.

## Notice of Contest

As stated, if you as the employer decide to contest the citation, the abatement period, or the proposed penalty, you have 15 working days from the time the citation and proposed penalty are received to notify the OSHA area director in writing. Failure to do so results in the citation and proposed penalty becoming final without further appeal options. This written notification is called a "Notice of Contest."

There is no specific format for the Notice of Contest. It must clearly identify the basis for filing: the citation, notice of proposed penalty, abatement period, or notification of failure to correct violations.

You must provide a copy of the Notice of Contest to the employees' authorized representative. If a recognized bargaining agent does not represent any affected employees, you must post a copy of the notice in a prominent location in the workplace, or give it personally to each unrepresented employee.

If you file a written Notice of Contest within the required 15 working days, the OSHA area director forwards the case to OSHRC. The commission is an independent agency not associated with OSHA or the Department of Labor. The commission assigns the case to an administrative law judge. OSHRC may

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schedule a hearing at a public place near the employer's workplace. Both you and your employees have the right to participate in this hearing.

Once the administrative law judge has ruled, any party to the case may request a further review by OSHRC. Either party can appeal commission rulings to the appropriate U.S. Court of Appeals.

Finally, contesting may not relieve you completely of a penalty, but it may help you negotiate a lesser fine. Contesting is usually a good idea. OSHA typically negotiates with employers, which may result in a lesser penalty amount based on the criteria listed in this article.

### Be Prepared

There is really no way to avoid an OSHA compliance inspection, much like there is no way to avoid having an

Internal Revenue Service (IRS) audit. But those similarities aside, employers can decrease the pain by being well prepared and by fully understanding the process.

Your preparation should include ensuring that you have a comprehensive safety and health program that includes all of your operations and all of your employees, contractors, and visitors. The program should include provisions for frequent worksite analysis for hazards, a corrective action plan for reducing or eliminating the hazards identified, training, and communications and opportunities for both management and employee participation. That alone will guarantee you are trying to do the right things to protect your employees' safety while they are working. I believe that is always a "win-win" situation for everyone involved. **CP**

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*For more information on what to expect of the inspection process, check out Jack Fearing's article called "OSHA Inspector at Your Front Door" in CoatingsPro's January 2014 issue.*