Workplace Fatalities: Avoiding Orange as the New Black

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INTRODUCTION

Government agencies like the Occupational Safety and Health Administration (OSHA) are more aggressively pursuing inspections and enforcement actions against companies for alleged safety violations. For companies on the receiving end of OSHA’s probing safety inspections – particularly in fatality and catastrophic injury situations – preparedness is critical to addressing the situation efficiently and effectively. No OSHA inspection is routine, but there are key considerations and common themes to keep in mind that will ensure that you and your company are as prepared as possible for the inspection by OSHA, which will include a review of onsite conditions or records, interviews of witnesses, and perhaps the issuance of a citation with financial penalties.

This paper is divided into two sections, initially providing information on the major components of an OSHA inspection and then providing a review of the information and procedures that can help a company through the unique challenges involved in fatality or catastrophic investigation. Many of these concepts are transferable to responses to other types of incidents and therefore it can be a starting point for those who are new to managing OSHA compliance, and it can serve as a refresher to those who are experienced with agency enforcement activities.

OSHA INSPECTION PROCEDURES

I. Designate Employer Representatives

The most important step to take before an OSHA inspection even occurs is to select at least two company representatives who will be charged with representing the company's interests during an OSHA inspection. The representatives, ideally the Safety Director and someone in upper management, should be well-versed in the OSHA standards applicable to the business, the health and safety conditions of the workplace under inspection, the location of required records to be kept
under the Occupational Safety and Health Act of 1970 (the “OSH Act”), and the company's health and safety program. These representatives should also be familiar with OSHA's own internal procedures for handling an OSHA inspection set forth in the Field Operations Manual.¹

The company representatives should accompany and supervise all aspects of OSHA's inspection. This can be accomplished by asking the OSHA inspector to wait for the arrival of at least one of the designated representatives before starting the inspection. In most cases, OSHA inspectors are willing to wait a reasonable time (up to one hour) before proceeding. Where the inspector refuses to wait or where it is impossible for at least one of the representatives to personally appear, designate a back-up to fill in. The designated representatives can then supervise and monitor the inspection by telephone, giving instructions to the back-up until they arrive onsite.

The company representatives should monitor and supervise the inspection to the maximum extent possible. This includes:

- Attending the opening and closing conferences.
- Accompanying and recording all aspects of the walk-around inspection, including: areas of the workplace inspected, names of all employees and supervisors interviewed and identification of any photographs, measurements and samples taken.
- Photographing all areas of the facility inspected, making certain to take "side-by-side" photographs of all areas photographed or videotaped by OSHA.
- Responding to all document and other information requests by the OSHA inspector (where appropriate, this should be done through consultation with legal counsel).
- Ensuring that non-managerial employees are aware of their rights during an OSHA interview.
- Attending or assisting in all interviews of management employees.
- Keeping the inspection under control. The OSH Act provides that the inspection shall take place at "reasonable times and within reasonable limits." ² Within the exercise of good judgment, the representatives should not allow the inspection to unreasonably interfere with work in progress or run beyond normal working hours. "Partial"
inspections should not be allowed to unnecessarily expand into "wall-to-wall" inspections.

- Never admitting violations or unsafe practices, but correcting observed violations on the spot or as soon as practicable.

- Consulting with the company's legal counsel about difficult or special problems, such as search warrants or subpoenas. As necessary, allow counsel to deal directly with the OSHA inspector.

- Being courteous and polite, but firmly exercising the company's legal rights.

Effective company representatives are essential to the company's success in minimizing liability. What the representatives say or do during an inspection – and what they don't say or do – can have a significant impact on how quickly and smoothly the inspection proceeds and the number and severity of citations issued. Proper documentation of what occurred during the inspection is essential to defending any citation issued. Without proper documentation, especially photographs, the company and its attorneys may have no choice but to rely on OSHA's file and photographs instead.

II. Opening Conference

Most OSHA inspections begin with an unannounced visit by a compliance officer (or inspector) and an Opening Conference. The purpose of an Opening Conference is to discuss what will happen during the inspection. The company representatives should use the Opening Conference as an opportunity to start managing the inspection. Here are some tips:

- Ask to see the compliance officer’s official credentials if he or she does not offer them.

- Identify the company representatives (including legal counsel) designated to supervise the inspection. Inform the compliance officer that he or she should coordinate all inspection activities through your representatives, and no one else.

- Employees and representatives of employees have the right to attend the opening conference.
• Do not be afraid to ask questions. For example, ask why your facility or worksite was chosen for inspection (i.e., employee complaint, referral by another agency, etc.). If a written complaint prompted the inspection, ask to see a copy of it.

• Reach an understanding that the inspection will be limited to the areas or conditions listed in the complaint or referral. For example, if an employee files a complaint about defective forklifts in the warehouse, then the inspection should be limited to forklifts in the warehouse, not other areas. The compliance officer will usually investigate other observed violations in "plain view" during the investigation, but politely object if the inspector wants to expand a limited investigation into a lengthy "wall-to-wall" inspection.

• Confirm with the compliance officer what he or she wants to see and do, and how long he or she expects to be at your workplace. Be courteous, but keep the inspection moving toward completion in a timely fashion.

• Discuss any safety issues that may be encountered during the inspection, including personal protective equipment (“PPE”) required by your company. Require that the compliance officer abide by all company safety rules.

• Identify areas in the workplace or documents that might reveal confidential trade secrets and get the compliance officer’s confirmation that photographs of confidential areas or documents will be noted as "trade secret" in OSHA's file. Send a confirming letter or email if necessary.

• Take thorough notes of all matters discussed at the Opening Conference.

III. Walk-around Inspection

The actual inspection of the workplace is widely regarded as the most critical phase of the inspection. In many cases, all of OSHA's evidence as to whether a violation exists, results from the efforts of the compliance officer during the walk-around inspection. Here are some key points to remember when it comes to the walk-around inspection:

• The OSH Act provides that a representative of the employer shall be given an opportunity to accompany the compliance officer during the walk-around. The company should always exercise this right and utilize the designated company representatives discussed above. If the designated representatives are not immediately available when the compliance officer arrives, request that the inspector wait patiently until a representative can arrive to begin the inspection.
• A representative of employees, usually a union representative, has the right to accompany the compliance officer during the walk-around. Generally, the employer has no say in the selection of the employee representative.

• Typically the compliance officer will photograph or videotape the workplace, take critical measurements and conduct environmental samplings, such as air samples or noise measurements, depending on the type of inspection involved. Unless trade secrets are involved, the employer generally has no right to object to this aspect of the walk-around.

• If the compliance officer wishes to inspect areas that are unrelated to the purpose of the inspection, the company’s designated representatives should inquire as to the reason for such an inspection.

• Caution should be exercised if the compliance officer attempts to videotape statements by employer representatives. Politely inform the inspector that employer representatives do not wish to be videotaped.

• The designated employer representatives should take their own photographs and measurements either during or immediately after the OSHA inspection, and take good notes of what the compliance officer does during the inspection.

• The OSH Act gives employees the right to speak privately with OSHA. Inform employees that they have the right to speak or not speak, to OSHA (unless they are subpoenaed). Advise employees to always tell the truth. Conduct a voluntary debriefing of all employees interviewed by OSHA. When informing employees of their rights and/or debriefing them, employers must avoid any pressure, coercion or retaliation. The OSH Act prohibits retaliation or discrimination against an employee participating in an OSHA inspection, including OSHA interviews.

• Unlike non-supervisory employees, the statements and admissions of a supervisor may legally bind the company. The employer's representative (often, legal counsel) has the right to be present for supervisor or management interviews and should always exercise that right. Often the inspector will obtain signed statements from witnesses, but these statements are drafted in the inspector's own words. Legal counsel or the employer representative should make certain that the OSHA statements accurately reflect the witnesses’ statements before the witness is allowed to sign the document.

IV. Closing Conference

At the conclusion of the inspection, the inspector will hold a closing conference to discuss the observed violations. As with the entire inspection, the employer representative should be present during the Closing Conference. Here are some tips for the closing conference:

• DO: Tell the inspector where to send the citations.
• **DO:** Ask questions about which specific standards are being cited, and why? What is the classification (serious, willful, repeat, etc.)? How much is the penalty? Often, the inspector will not commit to the classification or the penalty, claiming that the final determination is up to his or her boss, but it never hurts to ask.

• **DO:** Take good notes at the closing conference.

• **DON’T:** Attempt to argue or settle the citations with the inspector at the closing conference. Instead, the inspector will encourage you to attend an informal settlement conference after receipt of the citations.

• **DON’T:** Admit to violations or recognize alleged hazards. There may be defenses to the citations that you have not considered.

Typically citations are mailed to the employer several days after the closing conference. All citations must be issued, if at all, within six months of the start of the inspection.6

Below are the penalty amounts adjusted for inflation as of Jan. 2, 2018. The type of citation and corresponding penalty are as follows:

<table>
<thead>
<tr>
<th><strong>Type of Violation</strong></th>
<th><strong>Penalty</strong></th>
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<tbody>
<tr>
<td>Serious</td>
<td>$12,934 per violation</td>
</tr>
<tr>
<td>Other-Than-Serious Posting Requirements</td>
<td></td>
</tr>
<tr>
<td>Failure to Abate</td>
<td>$12,934 per day beyond the abatement date</td>
</tr>
<tr>
<td>Willful or Repeated</td>
<td>$129,336 per violation</td>
</tr>
</tbody>
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Upon receipt of the citations, the employer must post a copy at the workplace inspected. If the work is completed, for example at a construction site, then the citations should be posted at the employer's main office. The citations must be posted until the violations are abated, or for three working days, whichever is longer. Failure to observe these posting requirements may result in additional citations.
V. **Adjudication of Citations**

Employers have 15 working days from the receipt of a citation to begin contesting the citation. Prior to that time, the employer may request an informal settlement conference with the OSHA Area Office to negotiate a settlement. In most cases, a reduction of the assessed penalty or a modification of the abatement date can be obtained. It is also possible to have the citation withdrawn or re-categorized to a lesser classification, i.e., from “Serious” to “Other-Than-Serious.”

If the informal conference is unsuccessful, employers may initiate a formal appeal by filing a "Notice of Contest" with the OSHA Area Director within 15 working days of receipt of the citations. An employer may contest the violation, the proposed penalties, the abatement deadline, or all three. The best practice is to contest all three. If a citation is not timely contested, it cannot be appealed, and no extensions of time are available. To avoid default, employers should watch for the citations in the mail following the closing conference and then make certain that the 15-working-day contest deadline is strictly observed.

The filing of a Notice of Contest stops the abatement deadline. The abatement period does not begin to run again until the case is settled or the Federal Occupational Safety & Health Review Commission (OSHRC, or the “Review Commission”) or the Court issues a final order affirming the violation.

Once a Notice of Contest has been filed with the Area Director, OSHA transfers the case to its attorneys in the Solicitor's Office of the U.S. Department of Labor. The case is also sent to OSHRC, a separate federal agency charged with adjudicating contested citations, and then the Review Commission assigns the case to an administrative law judge (“ALJ”). The procedures before OSHRC are similar to those in federal courts, with pleadings, limited discovery, and pre-
hearing motions governed by the Review Commission’s own Rules of Procedures. For small cases, simplified proceedings are available. If the case does not settle, a hearing before the ALJ will usually be held within 9-12 months after the citations are issued. The ALJ issues a written decision affirming or denying the citations and, for affirmed citations, setting the penalty and the abatement date. Thereafter, the ALJ must transmit a copy of the decision to each party and, on the 11th day after transmittal, the ALJ must file the “report” with the Review Commission’s Executive Secretary for docketing. The “report” consists of the record (including the ALJ’s decision), any petitions for discretionary review, and statements in opposition to any petitions.

Review of the report by OSHRC is not a matter of right. A Commissioner may, as a matter of discretion, direct review of a report (1) on his or her own motion, or (2) on the petition of a party who is adversely affected by the ALJ’s decision.9 If a Commissioner directs review, OSHRC will conduct a de novo review and issue its own written decision, and that decision becomes the final order of the Review Commission. An appeal of the Review Commission’s decision must be taken directly to the U.S. Court of Appeals in either the circuit in which the violation occurred, the circuit in which the employer has its principal office, or the D.C. Circuit.10

VI. Criminal Enforcement

Since the OSH Act’s implementation, there have been more than 400,000 workplace fatalities, but only 93 cases have been prosecuted under the OSH Act, resulting in a total of 110 months of jail time.11 The main reason that historically so few cases have been prosecuted under the OSH Act is that it is difficult to prove a criminal violation and the penalties are less significant than the penalties for many other white collar crimes.

Section 17(e) of the OSH Act provides that an employer may be subject to a fine of not more than $10,000 or imprisonment for not more than six months, or both, where it willfully
violates any OSHA standard and that violation causes the death of an employee.\(^\text{13}\) Notwithstanding the historic trend to *not* pursue criminal sanctions in OSHA cases, recent trends during President Obama’s administration suggest a shift toward increased referrals for investigation criminal prosecution.

In December 2015, Former Deputy Attorney General Sally Yates announced a Worker Endangerment Initiative that formalizes the trend toward “criminalization” of major environmental and workplace accidents. The Department of Justice (“DOJ”) Memorandum\(^\text{14}\) “shifts authority for the prosecution of workplace safety violations to the Environmental Crimes Section of DOJ’s Environmental and Natural Resources Division, or to any of the 93 U.S. Attorneys’ Offices, and guides all federal prosecutors to leverage environmental criminal statutes and Title 18 along with relevant worker protection statutes, to address workplace safety.”\(^\text{15}\) The accompanying Memorandum of Understanding\(^\text{16}\) with the Department of Labor (“DOL”) “sets forth how these two agencies will cooperate to investigate and prosecute workers endangerment violations, including both information sharing and cross-training of inspectors from the Environmental Protection Agency and OSHA.”\(^\text{17}\)

The December 2015 DOJ Memorandum came on the heels of another DOJ Memorandum by Yates in September 2015 calling for greater accountability for corporate wrongdoing. “Together, these two memoranda signal an important shift in enforcement focus – toward individual culpability in the prosecution of environmental and workplace violations.”\(^\text{18}\) In fiscal year (“FY”) 2016, the DOL referred or assisted with the criminal prosecution of 7 new cases involving worker deaths or injuries compared with 12 cases in FY 2015.\(^\text{19}\) It is unclear whether President Trump’s administration will continue this emphasis through the joint programs on criminal enforcement, but given the high stakes involved, employers must be prepared for the
unique challenges that can accompany workplace catastrophes and fatalities to avoid donning an orange prison jumpsuit as the new “black.”

**WORKPLACE FATALITY OR CATASTROPHIC INJURY**

Agency investigations following a catastrophic injury or fatality involve not only a review of onsite conditions or records, but also a concentrated effort to unearth information from the *past* as well as the present. These investigations can give rise to very serious legal consequences, including costly civil penalties, civil liability, citations, and claims by the victim(s), other employees, or third parties. Even criminal prosecutions are a possibility in extreme circumstances, and you never know what is extreme until the facts are uncovered during an investigation. In those instances, there are some very practical steps that the employer should be prepared to take to control the situation.

I. **Unique Challenges Surrounding Fatality or Catastrophe Investigations**

A. **Deal with the Incident.**
   - Address the medical response, including first responders at the site and notify local emergency rescue personnel.
   - If necessary, contact law enforcement and fire protection personnel.
   - Ensure the immediate safety of all other employees and other third parties.

B. **Notify the appropriate corporate officers and departments of the emergency:**
   - Corporate Safety.
   - Legal Department.
   - Human Resources.
   - Management personnel responsible for the site and/or project.

C. **Involve legal counsel, preferably on-site if possible.**

D. **Ensure proper reporting to OSHA within the required timeframe.**
• Fatalities must be reported within 8 hours.

• The hospitalization of one or more employees, amputation, or loss of an eye or eyes must be reported within 24 hours.

• Methods for reporting:
  
  o Call OSHA’s free and confidential number at 1-800-321-OSHA (6742).

  o Call your closest Area Office during normal business hours.

• If the fatality, in-patient hospitalization, amputation, or loss of an eye resulted from a motor vehicle accident that occurred in a construction work zone on a public street or highway, then you must report it to OSHA. If the motor vehicle accident occurred on a public street or highway, but not in a construction work zone, then you do not have to report the fatality, in-patient hospitalization, amputation, or loss of an eye to OSHA. However, you must record the event on your OSHA injury and illness records, if you are required to keep OSHA injury and illness records.

E. Fatality or catastrophic injury investigations require additional considerations. OSHA has a specific compliance directive, CPL 02-00-137 (4/14/05) which governs the investigation procedures.

• Fatality and catastrophe cases have increased involvement by the OSHA Area Director to ensure that the case has been properly developed and documented and to ensure proper reporting.

F. The investigation will begin quickly. OSHA’s directive is that the investigation should be initiated as soon as possible after receiving report of the incident, ideally within one working day. Employers should expect to see an investigator within hours.

• Ascertain the identities of all individuals involved in the accident or who may have witnessed the accident.

• Begin identifying, locating, and reviewing relevant documents promptly. Documents may include:
  
  o Current and previous OSHA Form 300 Logs and OSHA Form 300A Annual Summaries.

  o Personnel documentation for the involved employee(s).

  o Safety training on the processes and/or equipment at issue, including
sign-in sheets verifying employee attendance.

- Disciplinary documentation demonstrating enforcement of safety standards.
- Methods for employees to use to make safety complaints and guidelines for the company’s response to same.
- If contractors are involved, applicable contracts governing scope and nature of work and safety training.

G. The investigation may involve multiple follow-up visits from OSHA. Critical personnel, internal subject matter experts, and counsel should be present to the extent needed and possible.

H. In addition to OSHA, you may have to deal with paramedics/EMTs, police, coroner’s office, the district attorney, news media, and the family of the worker(s) in the accident.

I. OSHA will also likely interview first responders, police officers, and medical responders with first-hand knowledge of the incident.

J. Be prepared to isolate involved equipment in a secure location. The period of preservation will likely be longer than other workplace injury incidents given ongoing inspections by OSHA and law enforcement, as well as the potential for civil and criminal liability.

K. Expect that you may receive requests from third parties, such as equipment manufacturers, contractors, property owners, vendors and attorneys representing the injured or deceased employees.

L. You need to consider all these possibilities before the event occurs, so you already have a plan to follow. Don’t let any of the other participants detour you off your planned path.

M. Never write or record anything that you would not want to see on the front page of the newspaper.

II. Internal Accident Reports

A. There are excellent practical reasons for wanting to prepare an accident report, such as understanding the factors that contributed to the accident so that future accidents can be avoided. Many employers also have a form accident report. However, there is also substantial risk in preparing an accident report too soon and before the employer fully understands what happened (assuming that is even possible).
B. Speculative or premature causation factors are very dangerous, so it may be wise to delay preparation of an internal accident report until you can perform your own confidential and thorough investigation and causation analysis – possibly including the use of outside experts.

C. If company policy and practice requires preparation of a report even before reaching any conclusions, you should do so with great caution and you should strongly consider review by outside counsel to minimize the chances of making any statements that would suggest causation factors that may not be accurate.

D. It may be acceptable to prepare a preliminary or inclusive report listing possible factors.

E. Remember that anything may be potentially disclosed at any time, so reports and statements should be based on solid, indisputable facts and carefully worded to avoid speculation, opinions, and admissions that may be premature or inaccurate. It is also prudent to never write anything you would not want OSHA to see or be publicly disclosed through print, social, or other media.

F. For a more comprehensive analysis, you should also be conducting a detailed and thorough analysis directed by counsel to preserve confidentiality. This investigation and analysis is a separate process from the employer’s customary internal workplace accident report discussed above.

III. Dealing With Co-Workers, Family, Media, And Law-Enforcement

A. Co-Workers

- Demonstrate understanding and concern.

- Provide on-site services for employees:
  
  - Support and counseling services, in addition to Employee Assistance Program contact information.
  
  - Space and food/beverages while waiting to participate in the investigation.

- You may want to send a memorandum to all employees urging cooperation.

- Convey funeral information and funeral attendance policy and accommodate attendance where possible.

- Create and support activities that re-establish a sense of control, such as:
  
  - Structured meetings to share information.
- Developing internal and external communication strategies.
- Allowing employees to provide input regarding the work environment.
- Encourage employees to be a support system for each other.

- For management employees, emphasize the need to limit communications, particularly in writing.
  - Encourage the valid use of attorney-client privileged communications.
  - Consult with counsel regarding the proper language to include on communications and distribute it to the appropriate employees.
  - The attorney-client privilege will not attach if counsel is merely carbon-copied on the communications.

B. News Media

- Have a generic news media response prepared in advance:
  - Sorry to learn today of a death/serious accident.
  - At this time, cause is still unknown.
  - We are investigating the accident and will cooperate fully with others.
  - We will take any steps necessary to determine what happened.
  - As further information is discovered, we will make it available as appropriate.

- Be prepared to resist a persistent reporter
  - Stand firm, simply say we are in the process of investigating and we are trying to find out what happened.
  - “Company will not start speculating or guessing.”
  - Don’t be bullied, and don’t be pressured into thinking you have to say anything more – you don’t.
  - Appeal to the reporter’s sense of decency – this was a serious accident; please let us try to find out what happened.
o Last ditch option – if they won’t take no for an answer: say you have nothing more to add at this time, say goodbye and hang up, or politely ask them to leave.

• OSHA’s contact with the media

  o OSHA’s public information policy regarding response to fatalities and catastrophes is to explain federal presence to the new media, not to issue periodic updates on the progress of the investigation.

C. Families of Victims

• Keep lines of communication open.

• Assign a primary point of contact for the company and provide that individual’s contact information to the family.

• Make sure financial details are addressed promptly, so family does not have to worry about them (workers’ compensation, funeral expenses, etc.).

• Return personal items promptly.

• Try to provide enough information that the family isn’t driven to engage an attorney just to find out what happened.

D. OSHA’s Dealings with the Family

• Keep in mind that in a fatality investigation, OSHA will be in contact with the family at each step of the investigation.

• OSHA will typically use a “three-phase” approach to its communications with the family: an initial communication; follow-up communications throughout the inspection; and, post-inspection communications.

• OSHA will generally contact family members of employees involved in fatal or catastrophic occupational accidents or illnesses at an early point in the investigation and give them an opportunity to discuss the circumstances of the accident or illness. Statements may be taken from the families.

• OSHA will maintain follow-up contact with family members so that they can be kept up-to-date on the status of the investigation. Family members or their legal representatives will be provided with a copy of all citations, subsequent settlement agreements or Review Commission decisions as these are issued.

• The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed.
If a contest is filed, the case file will not be made available until after the litigation is complete. Additionally, if a criminal referral is under consideration or has been made, the case file cannot be released to the family.

- The estate may attempt to seek party status in future OSHA proceedings as an employee representative.

E. Law Enforcement

- Be cooperative, but careful—it may be considered an admission.
- Be prepared for law enforcement agencies to request employer documents, such as internal investigation or testing reports.
- Agencies may impound subject equipment pending investigation.

F. Other Potential Individuals Involved

- In dealing with incidents involving fatality and catastrophic accidents, it is likely that the employer will have to handle requests from third parties, such as equipment manufacturers, contractors, property owners, vendors and attorneys representing the injured or deceased employees.
- It is critical to effectively deal with these third parties because they represent potential financial and legal liability to the company.

IV. How to Analyze Potential General Liability and Exposure

A. Potential areas for litigation, charges, or claims may include the following:

- OSHA citations, fines or criminal charges.
- Civil actions for negligent hiring, retention or supervision.
- Workers’ compensation claims.
- Third-party negligence claims for damages.
- Requests for leave under the Family and Medical Leave Act or state family and medical leave laws.
- Claims resulting from mental injuries/impairments under the Americans with Disabilities Act.
- It is critical to effectively deal with requests for information or documentation from third parties, such as equipment manufacturers, contractors, property
owners, vendors and attorneys representing the injured or deceased employees, as they represent potential financial and legal liability to the company. While you will not want to provide preliminary or speculative information, a failure to respond can drive a party to file litigation as well.

- Be conscious of multi-employer issues when a fatality or catastrophic injury involves contract employees. Proper handling of these concerns can result in the avoidance of citations and other liability, even if the contracting employer does not. Address multi-employer obligations, including:
  
  o How you advise onsite contractors’ employees of your emergency and safety rules and make sure they are complying;
  
  o How you protect them from hazards created by you or other contractors;
  
  o How you control the exposure of other employees to any such hazards; and
  
  o How you determine that contractors’ employees are able to comply with OSHA standards while they perform their own work.

B. Potential Criminal Violations

(See the first section of this article, “VI. Criminal Enforcement”).

V. Expert Analyses and Reports

A. Internal Subject Matter Experts

- For incidents involving potential equipment malfunction, have an internal company subject matter expert on the functioning and maintenance of the equipment available for consult.

- This internal expert should be present for any inspection or testing of the equipment at issue.

- Counsel will work with this expert prior to the inspection/testing to discuss key areas of inquiries and the proper approach for responding to questions by OSHA and/or the police department.

- Any internal experts should be prepared for a request from law enforcement or OSHA for a copy of any testing data or reports he/she has or will prepare for the company regarding the subject equipment.

B. External Experts
• Experts in certain technical fields are crucial to assist the company when working through a crisis.

• A workplace accident may require engineers with expertise in fires and explosions, mechanical, electrical, materials, chemical, process safety and other specialized fields.

• External experts on data recovery and preservation may need to be retained to provide additional support to continue business operations.

• Outside counsel should retain these experts to conduct the investigation so as to preserve privilege with respect to their findings and communications.

• Focus on the specific qualifications of the individual before engaging any expert. Industry-specific experience and reputation are crucial to credibility.

• Expert-finding services can be very helpful in your identification and selection of an expert, but you should also make sure the person is well-known in your industry or area.

• Recent industry conferences and conventions can be an excellent source of expert referrals. You should also reach out to the leadership of leading industry associations to which you belong.

• Experts, like other human beings, are prone to speculation and premature opinions. So, it is very important to challenge their analyses, underlying assumptions, and conclusions. This is one of the best reasons for engaging any experts through outside counsel – to scrutinize and vet expert analyses and reports that you may later need for OSHA or other purposes. The reports must be strong and able to withstand attack from the government or other parties when necessary.

VI. Managing Expectations and Outcomes

One of the most important initial determinations is what you should expect from an OSHA fatality or catastrophic accident investigation.

A. General Recommendations

• Never proceed with any investigation without a clear understanding and a plan for what is about to take place.

• Always know what is at stake.

• Maintain confidentiality of your investigation findings.
• Remember that anything may potentially be disclosed at any time, so reports and statements should be based on solid, indisputable facts and carefully worded to present the truth unambiguously, while speculation, opinions and admissions should be avoided as they may be premature or inaccurate.

• Never allow your company to be outmatched by an experienced government investigator.

B. In almost all cases, it is unrealistic to expect OSHA will not issue a citation. Remember, OSHA will likely conduct a comprehensive investigation to find some violation – even if unrelated to the accident!

C. OSHA compliance officers and leadership seem to start every investigation with the assumption that the employer must have done or failed to do something that was either a root or contributing cause.

D. Be on the lookout for signs that all is not going well.

• Subpoenas from OSHA rather than just requests;
• Desire to take sworn statements from managers, rather than just interviewing them;
• OSHA wants to bring its own experts into the workplace to the accident site;
• A different OSHA investigation team takes over the investigation; or
• The local district attorney is sending attorneys and investigators.

E. Resist the urge to immediately start arguing “employee misconduct” to the compliance officer. It is best to develop the underlying evidence and let him or her reach that conclusion. They seem to hear it in every case, so let the evidence speak for itself – if you can, of course!

F. In many industries, avoiding serious citations has become critical. For example, in the construction industry, you can lose business for having a record of serious violations. As a result, many companies draw a hard line and will not negotiate a serious violation during OSHA’s investigation. However, the underlying evidence is the primary driver of whether you can avoid a serious citation.

G. Before an accident ever occurs, you should make sure you have the four key elements of a defensible and effective safety program. Sometimes your best defense is that you did everything you could and the accident still happened.

H. The four key elements are:
1. Safety Program – your written general safety policies, reporting procedures, and specific policies and procedures for key functions

   a. California will always start with the *Injury and Illness Prevention Program.*

2. Training – must be recurring, updated, and specific to the most dangerous activities in which your employees engage.

3. Adherence to Work Rules – perhaps the weakest element for many employers – you must have a strong, documented record of disciplining employees and supervisors for failing to follow the safety program and training.

4. Auditing – if you are already periodically performing safety audits, congratulations! If you announced them in advance or perform them on regular, predictable intervals, you may want to rethink this approach. Although OSHA has a policy regarding protection of internal self-audits, it is not ironclad. Therefore, you must address any issues that you discover and anticipate possible disclosure of the report.

I. Document, document, document! A company can have a defensible and effective safety program; however, the company will be starting from square one if it cannot objectively prove it is in place. Memories are much less reliable than documentation.

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3 29 U.S.C. §657(e).


5 29 U.S.C. §660(c).


7 See OSHA Penalties at [https://www.osha.gov/penalties/](https://www.osha.gov/penalties/)

8 29 U.S.C. §659(a), (b).


12 The “willful” requirement in Section 17(e) refers to “a deliberate action taken either with knowledge of the OSH Act’s requirements or with plain indifference to those requirements.” Gregory N. Dale, P. Matthew Shudtz, *Occupational Safety and Health Law*, 328 (3d ed. 2013).

13 29 U.S.C. §666(e). Employers can also face criminal sanctions for (1) providing advance notice of an OSHA inspection (see 29 U.S.C. §666(f) providing that upon conviction, employer will be punished by a fine of not more than $1,000 or by imprisonment of not more than six months, or by both); (2) falsifying OSHA documents (see 29 U.S.C. §666(g) providing that upon conviction, employer will be punished by a fine of not more than $10,000 or by imprisonment of not more than six months, or by both); (3) violation of state criminal laws, such as manslaughter or negligent homicide; and, if the workplace incident impacts the environment, the employer is subject to criminal sanctions under a host of federal environmental statutes that typically include broader criminal provisions than the OSH Act.


OSHA Instruction, Multi-Employer Citation Policy, CPL 2-0.124, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024.