

OSHA 101

1:30 – 2:30 – Session 4

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Today's Approach.

We're not doing a generic "OSHA Update" or "What's Coming."

- We're going to discuss specific OSHA Enforcement Trends and how to analyze your organizations' exposure and actions to improve.
- Better understand your legal role in defending against OSHA Citations.
- Discuss managing OSHA Inspections for different types of organizations.
- Analyze common OSHA Injury and Illness Recordkeeping questions.
- Recognize increasing non-OSHA legal, employee, and image problems associated with safety.

OSHA's Top 10 Most Cited Violations – Fiscal Year 2021(all Industries).

1. Fall Protection, General Requirements (1926.501)
2. Respiratory Protection (1910.134)
3. Ladders (1926.1053)
4. Scaffolding (1926.451)
5. Hazard Communication (1910.1200)
6. Lockout/Tagout (1910.147)
7. Fall Protection (1926.503)
8. PPE – Eye and Face Protection (1926.102)
9. Powered Industrial Trucks (1910.178)
10. Machine Guarding (1910.212)

Major OSHA Compliance Challenges, Especially Manufacturing.



Lock Out.

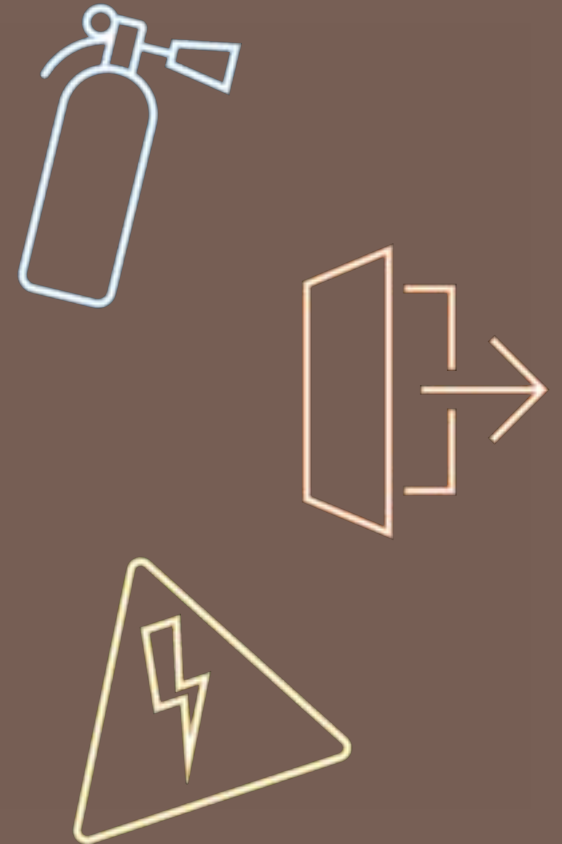
- Training.
- Authorized employees.
- Annual evaluations.
- Group LOTO.
- LOTO violations/jammed, etc.
- Maintenance/Miscoordination.
- Confusion over minor servicing exception.

Manufacturing (and other settings).

- Guarding.
 - Guards inappropriately removed.
 - Test 1 – why would employees need to remove a guard?
 - Test 2 - can a “foolish” person expose a body part even with a guard?
 - Test 3 – would employees be exposed in the reasonable course of their work?
 - Tough questions about exposure and effectiveness.
- Falls.
 - Guard Rails (top/mid rail), damage, Ladders, Cages, Gates, Skylights, ladders.
 - Excavation and trenching, concrete and steel erection, framing, roofing, scaffolds, lifts.
- Contractors working onsite.
 - Construction contractors versus individual/small crew-maintenance/technical.
 - Multiemployer site management.

Distribution, Logistics, Retail, and Other Settings.

- Exits/Pathways/Signage.
- Blocked Fire Extinguishers/electric panels/exits.
- Training to use Fire Extinguishers.
- Powered Industrial Trucks (PITs) (“forklifts”).
 - “Documented” Operator Training/certification.
 - Training after accident or discipline.
 - “Documented” evaluations.
 - Approved modifications to PITs and forks/attachments.



All Industries.

- Damaged/unsecured racks.
- Electrical.
 - Damaged cabinets/receptacles, holes, missing/unlabeled switches.
 - Damaged cords, temporary cords used for permanent connections, power strips.
- PPE
- Hazard Communication
 - SDS/availability
 - Training/PPE/Eye Wash

OSHA Penalties and How They Cost You.



- OSHA classifies most violations as “**Serious**,” and rarely cites an alleged violation as “Other-than-Serious.”
- Federal-OSHA penalties are adjusted for inflation each year. A Serious (or Other-than-Serious) penalty can be up to **\$14,502**.
- Some states, such as CA, TN, NC, SC, KY, VA, IN, NV, AZ, WA, OR, MN, MD, and IA, run their own OSHA programs and their penalties are often different.

Repeat Penalty Exposure. Big problem for multilocation companies.

- A **Repeat** Penalty can be up to **\$145,027** each.
- It's EASY for OSHA to establish a Repeat violation!
 - Same Standard + any location + within five years.
- Get certain violation combinations and you end up on the Severe Violators Enforcement Programs (SVEP) List.
- Get enough Repeats and you can be subject to **Willful** or even "Item-by-Item" citations.

OSHA FOM VII. Repeated Violations.

Federal and State Plan Violations. An employer can be cited for a repeated violation if that employer has been cited previously for the same or a substantially similar condition or hazard and Prior citations by State Plan states cannot be used as a basis for Federal OSHA repeated violations.

Identical Standards.

Generally, similar workplace conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated, but there are exceptions....

Different Standards.

In some circumstances, similar conditions or hazards can be demonstrated even when different standards are violated.

NOTE: There is no requirement that the previous and current violations occur at the same workplace or under the same supervisor.

Repeat OSHA Citations Can Devastate Good Companies with Many Locations.

August 15, 2022 - OSHA Press Release - **Profits over people: Federal safety inspectors find 3 more XYZ stores habitually disregarding workplace safety, risking employees' lives**

Company faces \$1.2M in penalties after recent inspections, \$6.5M in penalties since 2017

ATLANTA – When federal workplace safety inspectors visited three XYZ stores in Georgia earlier this year, they found exit routes obstructed, boxes of merchandise stacked unsafely and electrical panels hard to access, violations often cited at XYZ locations.

The U.S. Department of Labor's Occupational Safety and Health Administration **has proposed more than \$6.5 million in penalties after 78 inspections at XYZ locations nationwide**, including more than \$450,000 in penalties as a result of three inspections in Georgia since 2017. OSHA inspectors frequently find unsafe conditions that put workers at risk and that could lead to disaster for employees and customers in an emergency.

Damaging US DOL/OSHA Press Release (cont.)

Inspections at XYZ stores in 2022 in Pembroke in February, and Hogansville and Smyrna in March identified four willful and seven repeat violations. Specifically, OSHA cited the company for failing to keep receiving areas clean and orderly and for stacking materials in an unsafe manner. These hazards exposed workers to slips, trips and being struck by objects. OSHA also issued citations for exposing workers to fire and entrapment hazards by failing to keep exit routes and electrical panels clear and unobstructed.

As a result of the three latest inspections, OSHA has proposed \$1,292,783 in penalties.

"XYZ continues to demonstrate a willful pattern of ignoring hazardous working conditions and a disregard for the well-being of its employees," said Assistant Secretary for Occupational Safety and Health Doug Parker. "Despite similar citations and sizable penalties in more than 70 inspections, the company refuses to change its business practices. OSHA will take all necessary enforcement actions and pursue all available remedies against XYZ until it fixes the disconnect between its business model and worker safety."

XYZ's pattern of disregarding worker safety was apparent at five other Southeast locations. In February 2022, OSHA proposed \$1,048,309 in penalties after inspections at three locations in Mobile, Alabama, and one in Dalton, Georgia, found similar hazards. At another Mobile location, a December 2021 inspection led OSHA to propose \$321,827 in penalties for exposing workers to slip and trip hazards and not keeping the main storeroom orderly to allow a safe exit during an emergency.

"XYZ continues to make it obvious that profit means more to them than the safety of their employees," Parker added. "The U.S. Department of Labor will make every effort to hold them accountable for their failures."

New Changes to OSHA's Severe Violators Enforcement Program (SVEP).

- On September 15, 2022, OSHA announced that it was expanding its criteria for entering employers into its Severe Violator Enforcement Program ("SVEP"). The updated SVEP directive is available [here](#).
- Previously, entry into the program was limited to cases involving fatalities, three or more hospitalizations, high-emphasis hazards, the potential release of a highly hazardous chemical, and enforcement actions classified as egregious.
- **Now, an employer can be entered into the program in cases involving only two or more willful, repeat, or failure-to-abate violations, regardless of the hazard involved.**
- They will continue to be subject to entry in the program in certain cases involving fatalities, three or more hospitalizations, and enforcement actions classified as egregious.

OSHA Penalties Are Only Part of the Cost.

Harm to Reputation.

- Biden Administration focus on Social Responsibility.
- Customer demands.
- Union and other third-parties increasingly use safety to attack companies.
- *Amazon, Tesla, Hyatt, Walmart, etc.*
- Combined with discrimination, environmental, wage claims.

Harm to Culture.

- Safety can be the most destructive wedge between employees and management.
- COVID changed employees and made them more concerned about safety and willing to complain.
- Quiet Quitting/Lack of Engagement.

How OSHA Proves a Violation.

Focus on the Elements that OSHA has the “*burden*” to prove for every Citation Item:

- Hazard.
- Employee exposed or would have been in the normal course of work.
- Applicable Standard or 5(a)(1) theory.
- Employee knew or *should have known of the hazard with the exercise of due diligence.*

Proving the Employer Should have Known of the Violation with the Exercise of Due Diligence.

To establish constructive knowledge of the hazard. “The test is whether the Secretary established that [Jacobs] could have discovered the violative condition through the exercise of reasonable diligence.”

- ALJs closely scrutinize whether you maintained explicit rules and procedures, whether you followed them, and their effectiveness.
- Site Safety Plan, applicable programs, JHAs;
- Site- and Job-specific training; onboarding/periodic/recertification training;
- Self-audits and inspections, and proof of correction;
- Near Miss or other Reporting/Observation programs;
- Documented safety-related Discipline;
- Safety Committees and other employee involvement;

Affirmative Defense of Unpreventable Employee Misconduct.

To establish this defense in most jurisdictions, employers must show all the following elements:

- A work rule adequate to prevent the violation;
- Effective communication of the rule to employees;
- Methods for discovering violations of work rules; and
- Effective enforcement of rules when violations are discovered.

Also called Isolated Instance or Individual Act.

Role of the Affirmative Defense of Unpreventable Employee Defense.

- OSHA ALJs, the OSHRC, and Courts dislike this Affirmative Defense.
- The Employer,, not OSHA, has the burden to prove.
- Refocus on challenging OSHA's ability to prove that *"the employer knew or should have known of the hazard with the exercise of due diligence."*
- Due Diligence is established by maintaining effective safety processes - a further motivator to maintain an effective safety program at every site!
- Under Cal-OSHA, an inadequate IIPP harms the defense of Individual Act.

Elements of a General Duty Clause 5(a)(1) Citation.

1. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
3. The hazard was recognized;
4. The hazard was causing or was likely to cause death or serious physical harm; and
5. There was a feasible and useful method to correct the hazard.
6. A general duty citation must involve *both* the presence of a serious hazard and exposure of the *cited employer's own employees*.

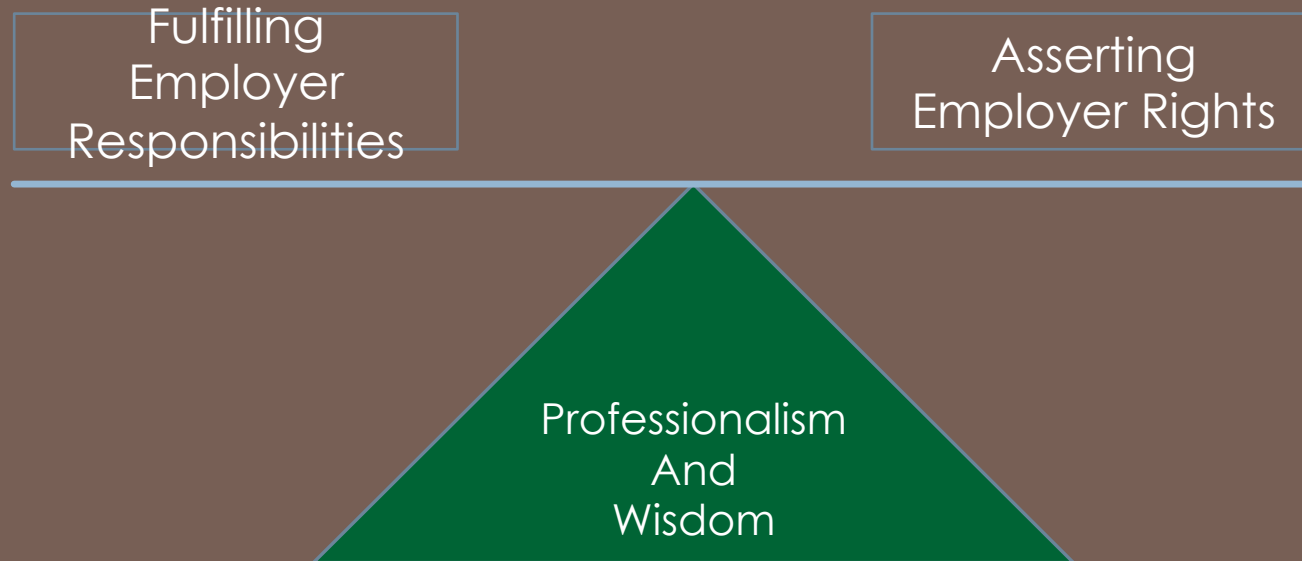
Common 5(a)(1) Citation Applications

- Combustible Dust
- Struck-bys
- Workplace Violence
- Ergonomics
- Certain Forklift issues
- Infectious Disease
- Heat Illness
- COVID-19

Effectively Handling An OSHA Inspection: How To Legally Protect Your Rights



Managing OSHA Inspections is a Balancing Act



Common Errors in OSHA Inspection Management.

- No Opening Conference/poor contractor coordination/CSHOs come onsite without checking in.
- Assuming inspection will be routine.
- No efforts to define and limit inspection scope.
- Allow OSHA to rush or intimidate you, such as with document demands.
- Not digging/being creative in searching for documentation or materials.
- No prep of supervisors before formal interviews.
- Prematurely done RCA or Accident report or not prepared under legal protection.
- Poor coordination with Corporate.

Handling OSHA Informal Complaints (Rapid Response Investigation)

- Need to do it right or you may have an onsite inspection
- Recommend against using OSHA's rapid response form, but track questions in your responses.
- Do your own investigation, determine whether to share the Report or summarize findings.
- Avoid making admissions.
- Emphasis on corrective actions and going forward
- Have supporting documentation with response letter
- Posting and certification

Common OSHA Injury and Illness Recordkeeping Issues.

Workers Comp vs. OSHA.

Q: I have had several workers compensation claims this year. I appealed a few of them and won, therefore the claims were denied. Because they were denied, do I need to document these claims on my OSHA 300 form?

A: Workers' Compensation determinations do not impact OSHA recordability. The employer must evaluate each case using the OSHA recording criteria to determine if a case is recordable on the OSHA Form 300. FAQ ID: 269

Q: Are "denied" claims to be logged on the OSHA 300 log of occupational illnesses and injuries?

A: Many cases that are recorded in the OSHA system are also compensable under the State workers' compensation system, but many others are not. When an injury or illness occurs to an employee, the employer must independently analyze the case in light of both the OSHA recording criteria and the requirements of the State workers' compensation system to determine whether the case is recordable or compensable, or both. Your case must be judged by the criteria of the OSHA recordkeeping rule to determine if it should be placed on the 300 Log. Workers Compensation is not a consideration of whether the case is OSHA recordable or not.

FAQ ID: 105

Does a Positive Drug Test Make an Injury Nonrecordable?

Q: Our company has experienced two minor injuries that resulted in a positive drug screen following our post accident testing program. Does the positive result have any bearing on the recordability of the injury?

A: No, the results of the drug test do not have a bearing on recordability of the case. A work-related injury or illness that meets one or more of the general recording criteria must be recorded appropriately on the log. There is no exception to work relationship for alcohol or drug impairment under 1904.5(b)(2). FAQ ID: 304

Is the injury or illness work-related?

Determination of Work-Relatedness [1904.5]

- Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment unless an exception specifically applies.
- A case is presumed work-related if, and only if, an event or exposure in the work environment is a discernable cause of the injury or illness or of a significant aggravation to a pre-existing condition.

Role of Preexisting Conditions.

Q: An employee is walking into work and collapses as a result of a heart attack. Is this a recordable case?

A: If the employee has a preexisting condition (heart issues), the employer needs to make a determination on whether there was an event or exposure in the work environment that may have aggravated this illness. If it is determined the heart attack is solely the result of a non-work-related condition the case need not be recorded on the OSHA Log. FAQ ID: 568

Q: If an employee, while at work, aggravates a pre-existing condition/injury that was not received in the workplace and receives steroid shots for the pain, even though the employee was already receiving steroid shots for the pre-existing injury, is this a recordable injury?

A: A preexisting injury or illness has been significantly aggravated, for purposes of OSHA injury and illness recordkeeping, when an event or exposure in the work environment results in a change in medical treatment. If the employee would have received the steroid shot regardless of the aggravation, the case is not recordable. On the other hand, if the employee received the steroid shot because of the aggravation, the case is recordable. FAQ ID: 184

Is the injury or illness work-related? Exceptions [1904.5]

- Present as a member of the general public
- Symptoms arising in work environment are solely due to non-work-related events or exposure (regardless of where signs or symptoms surface, a case is work-related only if work event or exposure is discernable cause of injury or illness or of significant aggravation to pre-existing condition.
- Voluntary participation in wellness program, medical, fitness or recreational
- Eating, drinking or preparing food or drink for personal consumption
- Personal tasks outside assigned working hours
- Personal grooming, self-medication for non-work-related condition, or intentionally self-inflicted
- Motor vehicle accident in parking lot/access road during commute
- Common cold or flu (COVID-19 pandemic is covered – See OSHA guidance documents)

Is the injury or illness work-related? Exceptions [1904.5]

- Mental illness, unless employee voluntarily provides a medical opinion from a physician or licensed health care professional (PLHCP) having appropriate qualifications and experience that affirms work-relatedness
- An injury or illness occurring while employee is on travel status is work-related if it occurred while employee was engaged in work activities in the interest of the employer
- Home away from home
- Detour for personal reasons is not work-related
- Not recordable if employee is out of U.S. & injury or illness occurs

Is the injury or illness work-related?

Work At Home [1904.5]

Injury and illnesses that occur while an employee is working at home are work-related if they:

- Occur while the employee is performing work for pay or compensation in the home, and
- Are directly related to the performance of work rather than the general home environment.

Q: How do I decide if a case is work-related when the employee is working at home?

A: Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting. For example, if an employee drops a set of work documents and injures his or her foot, the case is considered work-related. If an employer's fingernail is punctured by a needle from a sewing machine used to perform garment work at home, becomes infected and requires medical treatment, the injury is considered work-related. If an employee is injured because he or she trips on the family dog while rushing to answer a work phone call, the case is not considered work-related. If an employee working at home is electrocuted because of faulty home wiring, the injury is not considered work-related. FAQ ID: 409

Restricted Work Cases [1904.7(b)(4)]

Restricted work activity exists if the employee is:

- Unable to work the full workday he or she would otherwise have been scheduled to work; or
- Unable to perform one or more routine job functions

An employee's routine job functions are those activities the employee regularly performs at least once per week.

Not recordable under 1904.7(b)(4) as a restricted work case if:

- Employee experiences minor musculoskeletal discomfort,
- Healthcare professional determines employee is fully able to perform all of his or her routine job functions, and
- Employer assigns work restriction to employee for the purpose of preventing a more serious condition from developing.

Job Transfer [1904.7(b)(4)]

Job transfer

- An injured or ill employee is assigned to a job other than his or her regular job for part of the day
- A case is recordable if the injured or ill employee performs his or her routine
- job duties for part of a day and is assigned to another job for the rest of the day

Medical Treatment vs. First Aid [1904.7(b)(5)]

Medical treatment is the management and care of a patient to combat disease or disorder. It does not include:

- Visits to a PLHCP solely for observation or counseling
- Diagnostic procedures
- First aid

First Aid ONLY includes the 11 specific activities listed in

Not First Aid.

Q: Are surgical glues used to treat lacerations considered "first aid?"

A: No, surgical glue is a wound closing device. All wound closing devices except for butterfly and steri strips are by definition "medical treatment," because they are not included on the first aid list. FAQ ID: 358

Q: Does the use of a TENS device constitute medical treatment for record keeping purposes?

A: Treatments listed under 1904.7(b)(5)(ii) is a complete list of treatments considered first aid for recordkeeping purposes. Transcutaneous Electrical Nerve Stimulation (TENS) does not fit in any of the treatment categories of the first aid list and is considered medical treatment for recordkeeping purposes. FAQ ID: 553

Q: A corporation pays a licensed professional to offer massage on-site as an employee benefit. The employee chooses by their own to see the on-site professional. Because the work the employee does is physical, he benefits from the soft tissue therapy and uses the service as needed. When should an employee's condition be categorized as recordable upon receipt of the massage?

A: Massage therapy is considered first aid and is included as item M in the rule's first aid list. Massage therapy does not make a case recordable. FAQ ID: 322

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immigration law and related litigation.

**THESE MATERIALS AND THE INFORMATION PROVIDED DURING THE PROGRAM
SHOULD NOT BE CONSTRUED AS LEGAL ADVICE OR AS CRITICAL OF THE CURRENT
OR PAST ADMINISTRATIONS.**



Thank You

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