

INTRODUCTION

The primary federal law regulating workplace safety and health is the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, also known as the OSH Act. Although other federal statutes address safety and health issues in the work place to some extent, none is as comprehensive or as far reaching as the OSH Act.

The importance of understanding the OSH Act, however, extends far beyond the question of compliance with its requirements and prohibitions. Although the Act does not purport to create a private right of action against employers by employees for wrongful death or personal injury, many courts and administrative agencies have found OSH Act violations to be evidence of employer negligence in claims brought under state or federal law. Some states have even found an OSH Act violation by an employer to be negligence *per se*.

Evidence of OSH Act violations has even been found to be probative in product liability cases where an employee alleges to have been injured as a result of defective machinery. In strict liability and breach of warranty cases, OSH Act standards have been found to be evidence of the inherent dangers presented by a product. In negligence actions, OSH Act standards have been found to be evidence of the standard of care.

It is not the intent of this paper to provide a comprehensive dissertation on the requirements of the OSH Act or to provide a do-it-yourself guide for compliance with the Act or the adjudication of OSH Act disputes. The paper is likewise not intended to provide legal advice in general or with respect to any particular factual scenario. Any such legal advice should be obtained directly from legal counsel.

Rather, the purpose of the paper is to provide information helpful to a basic understanding of the OSH Act and to provide some helpful hints for protecting the interests of persons affected by the terms of the Act. It is the hope of the authors that employers find the information provided useful in this respect.¹

¹ The original version of this paper, which was published in 2000 on Findlaw.com, was co-authored by Robert G. Chadwick, Jr. and Terry Goltz Greenberg. The paper has been regularly updated since 2000 by Robert G. Chadwick, Jr. All rights are reserved, January 3, 2005 ©

THE PURPOSE AND DESIGN OF THE OSH ACT

The expressed purpose of the OSH Act is to set forth comprehensive ways and means of limiting personal injuries and illnesses and death in the work place. 29 U.S.C. §651(a)

THE STATUTORY SCHEME

The OSH Act includes both civil and criminal provisions. The Act (1) sets forth general requirements and prohibitions for employers covered by the Act, (2) provides for the implementation of new requirements and prohibitions, (3) provides for the civil and criminal enforcement of the Act, (4) outlines the means by which civil enforcement disputes under the Act will be adjudicated, and (5) defines the roles of states and federal agencies in regulating workplace safety and health. The Act also provides for research, experiments and demonstrations relating to occupational safety and health and approaches for dealing with occupational safety and health problems.

AGENCIES AND COURTS RESPONSIBLE FOR ADMINISTRATION OF OSH ACT

The OSH Act is administered by several governmental bodies, three of which, the Occupational Safety and Health Administration ("OSHA"), the Occupational Safety and Health Review Commission ("OSHRC"), and the National Institute of Safety and Health ("NIOSH") were created by or pursuant to the Act.

OSHA: As part of the U.S. Department of Labor, OSHA is the federal agency primarily responsible for the administration of the OSH Act. This responsibility includes the promulgation of occupational safety and health standards, 29 U.S.C. §655(a), the enforcement of these standards and the statutory requirements of the OSH Act through inspections and investigations, 29 U.S.C. §657, the issuance of citations for OSH act violations, 29 U.S.C. §658, and the assessment and collection of civil penalties for such violations. 29 U.S.C. §666

OSHRC. The OSHRC is a quasi-judicial forum which is primarily responsible for the adjudication of enforcement disputes under the OSH Act. The Commission is composed of three commission members who are appointed by the President for six-year terms and employs Administrative Law Judges throughout the country to hear enforcement disputes. The OSHRC is also responsible for promulgating procedural regulations for the adjudication of enforcement disputes. 29 C.F.R. §661(g) The Commission can also assess civil penalties for violations of the OSH Act. 29 U.S.C. §666(j)

Secretary of Labor: Civil legal actions before the OSHRC and federal court are prosecuted in the name of the Secretary of Labor by the Solicitor of Labor. The Solicitor also provides the legal representation through which the OSH Act is enforced before the OSHRC or federal court. 29 U.S.C. §663

Department of Justice: Criminal actions under the OSH Act are prosecuted by the U.S. Department of Justice. The OSH Act also provides that litigation under the Act is subject to the direction and control of the Department of Justice. 29 U.S.C. §663

Federal Courts: The OSH Act provides federal district courts with the authority to issue injunctions to restrain unsafe working conditions and practice. The Act also provides federal appeals courts, including the Supreme Court, with the authority to review final judgments by the OSHRC. Federal courts also provide the forum for criminal prosecutions under the OSH Act. Federal courts also provide the forum for challenging OSHA standards.

NIOSH: This agency was created as part of the Department of Health and Human Services by the OSH Act to develop and promulgate recommended occupational safety and health standards. The agency is also responsible for carrying out the research responsibilities set forth in the OSH Act. 29 U.S.C. §§669, 670 & 671

ADMINISTRATIVE REGULATIONS

Standards and regulations have been promulgated by OSHA and the OSHRC in conjunction with the authority provided by the OSH Act.

OSHA Standards and Regulations: These provisions are codified at 29 C.F.R. §1910.1, *et seq.*, 1915.1, *et seq.*, and 1926.00, *et seq.* These standards and regulations not only define an employer's responsibilities under the OSH Act, they also define OSHA's own responsibilities under the Act. OSHA standards and regulations generally have the same force and effect as the statutory provisions of the OSH Act. 29 U.S.C. §654(a)(2)

OSHRC Regulations: These regulations are codified at 29 C.F.R. §2200. These regulations define how proceedings are conducted before the OSHRC, including the Commission's Rules of Procedure.

RELATIONSHIP OF OSH ACT TO OTHER FEDERAL AND STATE LAWS

The OSH Act is not the only law which purports to have as a policy or purpose the protection of occupational safety and health. The jurisdiction of other federal and state laws even overlaps with the jurisdiction of the OSH Act. Discussion of these other laws in detail is beyond the scope of this paper. The relationship of the OSH Act to these other laws is nevertheless a recurring issue for employers warranting analysis.

OTHER FEDERAL LAWS

Depending upon the circumstances presented, OSH Act jurisdiction may be precluded, concurrent or preemptive where its jurisdiction overlaps with that of another federal law.

Where OSHA Jurisdiction is Precluded: As to other federal laws, the OSH Act provides that the Act does not apply to "working conditions" over which other federal agencies "exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. §653(b)(1) Among the federal agencies which prescribe or enforce such standards are the U.S. Department of Transportation, the Environmental Protection Agency, the Food and Drug Administration and the Mine Safety and Health Administration. A discussion of regulations promulgated and enforced by these federal agencies is beyond the scope of this paper.

Where OSHA Jurisdiction is Concurrent: Both the OSH Act, 29 U.S.C. §660(c)(1), and the National Labor Relations Act ("NLRA"), 29 U.S.C. §147, purport to protect employees from discrimination by an employer for engaging in concerted activity which is related to employee safety. Jurisdiction of such claims is concurrent with OSHA and the National Labor Relations Board ("NLRB"). OSHA and the NLRB have a memorandum of understanding which attempts to resolve the problems of overlap caused by the parallel provisions of the OSH Act and the NLRA.

Where the OSH Act is Preemptive: The OSH Act specifically provides that safety and health standards promulgated under the Walsh-Healey Act, 41 U.S.C. §35, *et seq.*, the Service Contract Act of 1965, 41 U.S.C. §351, *et seq.*, and the National Foundation on Arts and Humanities Act, 20 U.S.C. §951, *et seq.*, are superseded where OSHA promulgates standards determined to be more effective. 29 U.S.C. §653

STATE LAWS REGULATING WORKPLACE SAFETY

Under the OSH Act, a state is generally preempted from "asserting jurisdiction under state law over any occupational safety and health issue with respect to which [a federal OSHA] standard is in effect under the Act." 29 U.S.C. §667(a) Conversely, a state is not prohibited from regulating working conditions for which no safety and health standard has been promulgated by OSHA.

A state may exercise jurisdiction concurrently with OSHA only as part of an OSHA plan specifically approved by the Secretary of Labor. 29 U.S.C. §667(e) Several states and U.S. territories have developed plans for the enforcement of safety standards which have been approved by the Secretary of Labor. As of the date of this paper, 26 states and territories operate OSHA-approved state plans. These states are Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington and Wyoming. The Connecticut, New Jersey and New York plans cover public sector employment only.

STATE TORT AND WORKER'S COMPENSATION LAWS

The OSH Act specifically provides that it does not "supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. §653(b)(4) Suits for personal injury or wrongful death alleging negligence or alleging breach of duty to provide a safe work place would are not preempted by the OSH Act.

STATE OR LOCAL CRIMINAL CODES

The OSH Act does not purport to preempt the prosecution of crimes under state or local law merely because they are committed in the work place or during working time. A tougher issue arises, however, where the basis for criminal prosecution is the failure of the employer or an agent to provide a safe workplace. Although there is a conflict amongst the states regarding the extent to which states may prosecute under state criminal codes for workplace injuries and fatalities resulting from unsafe working conditions, many state courts have held that the prosecution of state criminal codes is not preempted by the OSH Act.

WRONGFUL DISCHARGE UNDER STATE LAW

As discussed in greater detail later in this paper, the OSH Act prohibits certain types of discrimination against employees who exercise such rights under the Act as protesting, or refusing to perform work under, unsafe conditions. 29 U.S.C. §660(c) Many states, including Alaska, Colorado, Connecticut, Oregon and Pennsylvania, have held that wrongful discharge actions which allege similar discrimination are preempted by the OSH Act. Other states, including California, Kansas, Missouri, New York and Ohio, have said that such wrongful discharge actions are not preempted by the OSH Act because they afford employees greater protection against discrimination.

WHO IS COVERED BY THE OSH ACT?

The reach of the OSH Act is exceptionally broad. The OSH Act applies to any "employer" who has employees and is engaged in a business effecting commerce. 29 U.S.C. §652(5) Accordingly, the Act applies to virtually every employer doing business in the United States and territories of the United States. Unless specifically exempted by the Act, no employer should assume that it is beyond the reach of the OSH Act.

EMPLOYERS EXEMPTED

The OSH Act expressly excludes federal and state governments, but not the United States Postal Service, from the definition of employer. 29 U.S.C. §652(5) Municipalities are fully covered by the OSH Act.

As previously noted, the OSH Act also precludes jurisdiction where working conditions of an employer are subject to another federal agency's regulations. 29 U.S.C. §653(b)(1) This preclusion extends only to "the working conditions" themselves. Working conditions which may be affected by this exemption include those at airlines, mines, government contractors, motor carriers and railroads.

Some OSHA standards exempt certain employers who have a small number of employees from some of the OSH Act requirements and penalties.

EMPLOYEES COVERED

The OSH Act requires employees of employers covered by the Act to comply with all occupational safety and health standards which are applicable to his or her own actions and conduct. 29 U.S.C. §654(b) Although the OSH Act provides no mechanism for enforcement of this provision against employees, the provision may be cited by employers as a defense to a citation brought against by OSHA. The scope of this defense is discussed later in this paper.

Employees covered by the OSH Act include all employees of an employer who are employed in a business of the employer which affects commerce. 29 U.S.C. §652 (7) The term includes supervisors, partners, corporate officers, former employees, applicants for employment, and for purposes of the OSH Act's anti-discrimination prohibitions, employees of other employers. 29 C.F.R. §1977.6(b)

OSHA SAFETY AND HEALTH STANDARDS

The OSH Act specifically authorizes OSHA to promulgate occupational safety and health standards. 29 U.S.C. §655 Section 5(a)(2) of the OSH Act, in turn, requires employers to comply with such standards. 29 U.S.C. §652(a)(2) The Act also provides OSHA with the discretion to grant an employer an exemption or variance to a standard under certain conditions. 29 U.S.C. §655(b)(6)(A), 655(d) and 665

OSHA RULEMAKING

The rulemaking procedures which must be followed by OSHA in promulgating standards are specified in the OSH Act, 29 U.S.C. §655, the Administrative Procedure Act, 5 U.S.C. §553, and OSHA regulations on rulemaking. These procedures require that OSHA provide notice to interested parties of issues presented in the proposed rule and opportunities for these parties to offer contrary evidence and arguments. The OSH Act specifically requires OSHA to publish a proposed rule in the Federal Register and to afford interested persons at least thirty days after publication to submit written data or comments. 29 U.S.C. §655(b)(2) The objections to the proposed rule are then addressed at an informal hearing.

Emergency Temporary Standards: OSHA can promulgate an emergency temporary standard without notice and comment if it determines that (1) employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful from new standards, and (2) such emergency standard is necessary to protect employees from this danger. 29 U.S.C. §655(c)

Judicial Review: A person adversely affected by an OSHA Standard may seek judicial review of the standard in an appropriate federal court of appeals. The OSH Act provides a limited window of sixty days from the date of the promulgation of the OSHA standard to seek judicial review. 29 U.S.C. §655(f)

OSHA Directives: OSHA Directives do not have the force of law and therefore are not subject to the rulemaking requirements. OSHA Directives are not even generally published for use by employers.

GENERAL INDUSTRY STANDARDS

In accordance with the authority granted by the OSH Act, OSHA has promulgated general industry safety and health standards, which apply to nearly all employers covered by the Act. The sheer volume of these standards precludes an in-depth analysis in this paper of each of the general industry standards.

INDUSTRY SPECIFIC STANDARDS

OSHA has also adopted specific safety standards applicable to certain industries. These industries include the construction industry, maritime industries and agricultural operations. Although the general industry standards apply to such industries, the specific standards take precedence. To the extent the specific standards are silent regarding a particular safety issue, the general industry standards govern.

APPLICATION OF STANDARDS

Unlike the general duty clause, standards promulgated by OSHA are not limited in application to hazards that are causing or are likely to cause death or serious physical harm to an employer's employees. A violation of a standard generally occurs when an employer knows of the unlawful condition or could have known of such condition with reasonable diligence.

TEMPORARY VARIANCES

OSHA permits an employer to apply for temporary variance of up to two years (one year plus one year renewal) from a newly promulgated standard. In order to receive a temporary variance, an employer must show that he (1) is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because its facilities cannot be altered in time; (2) is taking all available steps to safeguard his employees against the hazards covered by the standard; and (3) has an effective program for coming into compliance with the standard as quickly as practicable. The procedures for obtaining a temporary variance are complex and should not be pursued without assistance of legal counsel. 29 U.S.C. §655(b)(6)

PERMANENT VARIANCES

A permanent variance may be granted, upon application, to an employer that is able to prove that its method of protecting employees from safety and health hazards is as effective as the OSHA standard. The procedures for obtaining a permanent variance are complex and should not be pursued without legal counsel. 29 U.S.C. §655(d)

THE GENERAL DUTY CLAUSE

Section 5(a)(1) of the OSH Act (the "general duty" clause) obligates an employer to furnish " . . . employment and a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. §654(a)(1) The general duty clause is a residual clause designed to protect employees who are working under circumstances for which no OSHA standard has been adopted. Accordingly, an employer may still be in violation of the OSH Act even if it is in compliance with all applicable OSHA standards.

Where a specific OSHA standard is applicable, however, the general duty clause does not generally provide the basis for a citation under the OSH Act. At least one court, however, has held that if "an employer knows that a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address . . . he has a duty under Section 5(a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard." *See UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 976 (1987).

FREE FROM HAZARDS

Despite its breadth, the general duty clause does not require an employer to guarantee to its employees a workplace free from all hazards. Rather, the clause applies only to hazards which are preventable, or capable of being reduced, by a feasible means of abatement.

RECOGNIZED HAZARDS

The general duty clause covers only "recognized hazards." A condition is a recognized hazard within the meaning of the OSH Act if it is either known to be a hazard by the employer or, because the condition is generally known in the relevant industry as being hazardous, should have been known to be a hazard by the employer. Evidence that an industry recognizes a hazard can be any safety recommendations adopted by an applicable industry group.

LIKELY TO CAUSE DEATH OR SERIOUS PHYSICAL HARM

This element of the general duty clause focuses not on the likelihood that an accident will occur or that an employee will contract an illness, but rather on the likelihood that any accident or illness will be serious in nature or that such will result in death to an employee. The element has been construed broadly by judicial authority. The relevant test is whether "a practice could eventuate in [death or] serious physical harm upon other than a freakish or utterly implausible concurrence of circumstances."

REPORTING, POSTING AND RECORD KEEPING

In addition to safety standards, the OSH Act also requires employers to comply with reporting, posting and record keeping rules set forth in the Act itself and OSHA regulations.

REPORTING ACCIDENTS

An employer must report to OSHA within 8 hours the occurrence of an accident which is fatal to one or more employees, or which results in the hospitalization of three or more employees. 29 C.F.R. §1904.39

Information Required: An employer must provide OSHA with (1) the establishment name, (2) the location of the incident, (3) the time of the incident, (4) the number of fatalities or hospitalized employees, (5) the names of any injured employees, (6) the employer's contact person and phone number, and (7) a brief description of the incident.

Nature of Report: The report must be made orally by telephone to the Area Office that is nearest to the incident. If the Area Office is closed, an employer must call the OSHA toll-free central telephone number, 1-800-321-6742.

DOCUMENTS REQUIRED TO BE POSTED

Employers are required to post notices furnished by OSHA that inform employees of the existence of the Act and their rights thereunder. 29 U.S.C. §657(c)(1) These notices must be posted in conspicuous places at each establishment where notices to employees are customarily posted.

Citations: Employers are required to prominently post citations issued by OSHA. 29 U.S.C. §658(b) Notices of *de minimis* violations, as well as the portion of the citation containing the proposed penalties need not be posted.

Time Period. The citation must be posted immediately upon receipt. The citation must remain posted for 3 days or until the violation is abated, whichever is longer. 29 C.F.R. §1903.16(b)

Place. Citations must be posted "at or near each place a violation referred to in the citation occurred." 29 U.S.C. §658(b) If the nature of the employer's business makes it impractical to post the citation at or near the place of the alleged violation, the citation must be posted in a prominent place where it will be observable by all affected employees. 29 C.F.R. §1903.16(a) When an employer has many work sites and employees do not work or report to a single location, the citation may be posted at a place from which the employees carry out their activities. 29 C.F.R. §1903.16(a)

Petitions for Modification of Abatement Periods: Such petitions must also be posted for ten working days under the same rules applicable to citations. 29 C.F.R. §1903.14a(c)(1)

Occupational Illnesses and Injuries: Employers are also required to post records on workplace injuries and illnesses required to be maintained by the OSH Act. 29 U.S.C. §657(c)

Settlement Agreements: Settlement agreements regarding citations issued by OSHA must be posted at the employer's establishment.

RECORDS OF ILLNESSES AND INJURIES

Employers must make and maintain at each establishment certain records of injuries and illnesses as prescribed by OSHA. 29 C.F.R. §657(c)(2) Employers are specifically required to make and maintain (1) a log of work-related injuries and illnesses (OSHA Form 300), (2) an incident report for each injury and illness (OSHA Form 301), and (3) an Annual Summary of work-related injuries and illnesses (OSHA Form 300A).

Partial Exemptions: OSHA regulations provide for two limited exemptions from the record keeping requirements.

Small Employers. An employer that employs ten or fewer employees during the calendar year need not keep injury and illness records unless informed in writing to do so by OSHA or the Bureau of Labor Statistics ("BLS"). 29 C.F.R. § 1904.1

Low Hazard Industries. A business establishment that is classified in specific low hazard retail, service, finance, insurance or real estate industries need not keep injury and illness records unless informed to do so by OSHA or the BLS. The partial exemption does not apply to employers who have any business establishment that is not partially exempted. 29 C.F.R. § 1904.2 OSHA has listed specific industries covered by the partial exemption.

Recordable Occupational injuries and Illnesses: Employers must record all occupational injuries and illnesses which result in the following:

1. Death;
2. Loss of consciousness;
3. Days away from work;
4. Restricted work activity or job transfer;
5. Medical treatment beyond first aid;
6. A needle stick injury or cut from a sharp object that is contaminated with another person's blood or other potentially infectious material;
7. Hearing loss as determined by an audiogram;
8. Medical removal under the medical surveillance requirements of an OSHA standard (i.e., lead, cadmium, methyl chloride, formaldehyde, benzene, etc.)

9. Tuberculosis infection as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional after exposure to a known case of active tuberculosis;
10. Musculoskeletal disorder; and
11. Cancer, chronic irreversible disease, a fractured or cracked bone, or a punctured ear drum.

29 C.F.R. §§ 1904.7 - 1904.12

Establishment: The records must be maintained by the employer at each establishment that is expected to be in operation for one year or longer. 29 C.F.R. § 1904.30

Short-Term Establishments. Only one OSHA 300 Log need be maintained for all of an employer's short term establishments expected to be in operation for less than one year.

Single Location. An establishment is a single location where business is conducted or where services or industrial operations are performed. (For example: A factory, mill, store, hotel, restaurant, movie theater, farm, ranch, bank, sales office, warehouse, or central administrative office) Where distinctly separate activities are performed at a single location (such as contract construction activities operated from the same physical location) each activity shall be treated as a separate establishment. 29 C.F.R. §1904.46

Physically Dispersed Activities. For activities where employees do not work at a single location, such as construction, transportation, communications, electric, gas and sanitary services, the establishment is represented by main or branch offices, terminals, stations, etc. that either supervise such activities or are the base from which the personnel carry out these activities. 29 C.F.R. §1904.46

Traveling Employees. Records for personnel who do not primarily report or work at a single establishment, and who are generally unsupervised in their daily work, such as traveling salesmen, technicians, engineers, etc., shall be maintained at the location from which they are paid or the base from which the personnel operate to carry out their activities.

Maintenance Away from Establishment. An employer may maintain the log of work-related injuries and illnesses at a central location or by means of data-processing equipment, or both, only under the following circumstances: (1) the employer can transmit information to the central location within 7 days of receiving information that a recordable case has occurred; and (2) the employer can send the records from the central location to each establishment within the short time frames required by the OSHA regulations for production of the records.

Change in Ownership. Where an establishment has changed ownership, the employer shall be responsible for maintaining records only for that period of the year during which he owned the establishment. However, in the case of any change of ownership, the employer shall preserve those records, if any, of the prior ownership which are required to be maintained. 29 C.F.R. §1904.34

Log of Work-Related Illnesses and Injuries (OSHA Form 300): An employer must enter and maintain at each establishment all recordable injuries and illnesses on OSHA Form 300. 29 C.F.R. § 1904.29

Information Required. The OSHA Form 300 must be completed in the detail described in the instruction accompanying OSHA Form 300. An employer may use a substitute form as long as it provides all of the information required by OSHA Form 300.

Time of Recording. An employer must record each recordable injury or illness as early as practicable but no later than 7 days after learning that such an injury or illness has occurred.

Incident Report (OSHA Form 301): For each recordable injury or illness, an employer must complete an injury and illness report or OSHA Form 301.

Time for Recording. An employer must complete the supplemental record within 7 days after receiving information that a recordable case has occurred.

Information Required. The supplemental record must be completed in the detail described in the instructions accompanying OSHA Form 301. Employers may use a substitute form as long as it sets forth all of the information required by OSHA Form 301.

Duty to Investigate. Although the duty to investigate a work-related injury or occupational illness is not expressly provided by the OSH Act, such an investigation is necessary to complete OSHA Form 301. An employer must answer specific questions which include the following:

1. What was the employee doing just before the incident occurred?
2. What happened?
3. What was the injury or illness?
4. What object or substance directly harmed the employee?

Annual Summary (OSHA Form 300A): For each calendar year, an employer must complete, certify and post at each establishment an annual summary of work-related injuries and illnesses. 29 C.F.R. § 1904.29

Information Required. The annual summary must be completed in the detail described in the instructions accompanying OSHA Form 300A. Employers may use a substitute form as long as it sets forth all of the information required by OSHA Form 300A.

Time for Posting. After each calendar year, OSHA Form 300A must be posted from February 1 through April 30. 29 C.F.R. § 1904.32 The annual summary must be posted in the same location as other notices required by the OSH Act to be posted at each establishment of the employer. For employees who do not primarily report or work at a single establishment, or who do not report to any fixed establishment on a regular basis, employers must satisfy the posting requirement by presenting or mailing a copy of the annual summary during the month of February of the following year to each such employee who receives pay during such month.

Certification. The certification must certify that the annual summary of occupational injuries and illnesses is true and correct.

Retention of Records: The records described above must be retained for a minimum of five years. 29 C.F.R. §1904.32

Access to Records: The employer must provide access to the records required to be maintained by the OSH Act and OSHA regulation. The employer must provide the records upon request by OSHA within four hours. 29 C.F.R. §1904.40 The employer must also provide the OSHA Forms 300, 300A and 301 to any employee, former employee or employee representative upon request by the end of the following business day. 29 C.F.R. §1904.35

Citations: OSHA has developed the following policies which govern the issuance of citations for the failure of an employer to comply with the foregoing record keeping requirements. OSHA Instruction CPL 2.111

Injuries or Illnesses. Where no records are maintained and there have been recordable injuries or illnesses, a citation for failure to maintain records will normally be issued.

No Injuries or Illnesses. Where no records have been maintained and there have been no injuries or illnesses, a citation shall not be issued.

No Entry for Illness or Injury. Where the records are maintained but no entry is made for a specific recordable injury or illness, a citation for failure to record the event will normally be issued.

Inaccurate or Incomplete Records. When the required records are maintained but have not been completed with the detail required by the regulation, or the records contain minor inaccuracies, the records will be reviewed to determine if there are deficiencies that materially impair OSHA's ability to understand the nature of hazards, injuries and illnesses in the workplace. If the records are defective to this degree, a citation will normally be issued.

Other Cases. In all other cases, the employer shall be provided information on maintaining the records for the employer's analysis of workplace injury trends and on the means to maintain the records accurately. The employer's promised actions to correct the deficiencies shall be recorded and no citation shall be issued.

Civil Penalties: OSHA has also developed policies which govern the assessment of penalties for violations of the foregoing record keeping requirements. Where citations are issued for failing to abide by the requirements, penalties will be assessed where (1) OSHA can document that the employer was previously informed of the requirements to keep records; or (2) the employer's deliberate decision to deviate from the record keeping requirements, or the employer's plain indifference to the requirements can be documented.

WRITTEN PLANS AND CERTIFICATIONS

Certain OSHA standards require employers to maintain written plans or certifications which comply with the requirements of the standard.

Selected OSHA Standards Which Require Written Plans or Certifications:

Respiratory Protection. This standard requires that employers subject to the standard establish and maintain a respiratory protective program which includes written standard operating procedures governing the selection and use of respirators. 29 C.F.R. §1910.134

Lockout/Tagout. This standard requires that employers subject to the standard (1) develop and document detailed procedures for the control of potentially hazardous energy, (2) document inspections of machines or equipment utilizing the energy control procedures, (3) document employee training in the energy control procedures. 29 C.F.R. §1910.147

Personal Protective Equipment. This standard requires that employers perform an assessment of workplace hazards to determine which hazards, if any, require personal protective equipment, and complete documentary certification of this assessment. 29 C.F.R. §1910.132

Confined Spaces. This standard requires that employers perform an evaluation of the workplace to determine whether there are any confined spaces subject to the confined spaces standard and to complete documentary certification of this evaluation. 29 C.F.R. §1910.146

Blood Borne Pathogens. This standard requires that employers subject to the requirements of the standard develop and maintain written and detailed exposure control plans to eliminate or minimize employee exposure to blood borne pathogens. 29 C.F.R. §1910.1030

Hazard Communication. The hazard communication standards require that employers assess the hazards of chemicals used in the workplace and provide information to their employees about the hazardous chemicals to which they are exposed by means of a hazard communication program,

labels and other forms of warning, material safety data sheets and information and training. 29 C.F.R. §§1910.1200 and 1926.59

Employers evaluating chemicals must describe in writing the procedures they use to determine the hazards of the chemicals they evaluate. This description may be incorporated into the employer's written hazard communication program.

Employers which use chemicals must develop, implement and maintain at the workplace a written hazard communication program which, at the very least, describes how the employer will meet the standards requirements regarding labels and other forms of warning, material safety data sheets and the provision of employee information and training. The employer must make the written hazard communication program available, upon request, to employees, their designated representatives and OSHA.

A Material Safety Data Sheet ("MSDS") is a document regarding a particular chemical which lists detailed information about the chemical and its hazards. The employer must maintain copies of the required MSDS for each hazardous chemical used in the workplace, and must assure that they are readily assessable during each work shift to employees when they are in their work areas. Where employees must travel between workplaces during a work shift, the MSDS may be maintained at a central location at the primary workplace facility.

Citations: OSHA has promulgated the following policies which govern the issuance of citations for the failure of an employer to fully comply with an OSHA standard requiring a written plan or certification. OSHA Instruction CPL 2.111

Failure to Follow Protective Measures. When the employer has failed or is likely to fail to follow protective measures required by the standard in a manner that is related to the deficiency in the plan, so that employees are exposed to a risk of serious harm, a citation for a serious violation of the standard with a penalty will normally be issued.

Protective Measures Followed. When the employer has followed the protective measures required by a standard, and it is unlikely that the deficiency in the plan will result in failure to follow proper practices in the future, an other-than-serious citation with no penalty will be issued.

Failure to Perform Evaluation. When a standard requires an evaluation of a potential hazard in the workplace, and the employer has failed to conduct the evaluation, but no such hazard exists or could reasonably be anticipated in the future in the employer's workplace, or the hazard could not be present at a level to present a risk to employees, no citation will be issued.

Failure to Make Written Certification. When the employer has complied fully with a requirement in a standard (e.g., for taking particular protective measures, for an evaluation, or for

training), except that the employer has failed to make a required written certification that the action was taken, no citation shall be issued.

Deficient Plan. When an employer's written plan is deficient, it will ordinarily be appropriate to issue one citation for all of the deficiencies.

EMPLOYEE EXPOSURE RECORDS

The OSHA Act provides that OSHA shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful agents which are required to be monitored by OSHA standards. 29 U.S.C. §657(c)(3)

Requirements that Records Be Made: Certain OSHA standards require that employee exposure to noise and toxic substances or harmful physical agents not only be monitored, but that records of the exposure be made and maintained. An employee exposure record is one which includes any of the following information, 29 C.F.R. §1910.20(c)(5):

Environmental Monitoring or Measuring. Environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to interpretation of the results obtained.

Biological Monitoring Results. Biological monitoring results which directly assess the absorption of a toxic substance or harmful physical agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.) but not including results which assess the biological effect of a substance or agent or which assess an employee's use of alcohol or drugs.

MSDS. MSDS indicating that the material may pose a hazard to human health.

Chemical Inventory. In the absence of the above, a chemical inventory or any other record which reveals where and when used and the identity of a toxic substance or harmful physical agent.

Retention of Records: Unless a specific OSHA standard provides a different period of time, OSHA requires that employee exposure records and analyses using employee exposure records made voluntarily or pursuant to an OSHA standard be maintained for a specified period of at least thirty (30) years. 29 C.F.R. §1910.20(d)

Access to Records: The employer must provide an employee access to the employee's exposure records. The employer must provide the records upon request by OSHA. 29 C.F.R. §1910.20(e) The employer must also, upon request, provide to an employee or designated representative employee exposure records. 29 C.F.R. §1910.20(e) An employer may, under specific circumstances, delete from records requested trade secret data which discloses manufacturing processes or discloses the percentage of a chemical substance in mixture. 29 C.F.R. §1910.20(f)

MEDICAL RECORDS

Certain OSHA standards require that employee medical records be made and maintained. A medical record means a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel or technician, including (1) medical and employment questionnaire or histories, (3) the results of medical examinations and laboratory tests, medical opinions, diagnoses, progress notes, and recommendations, (4) first aid records, (5) descriptions of treatments and prescriptions, and (6) employee medical complaints. 29 C.F.R. §1910.20(c)(6)

Retention of Records: Unless a specific OSHA standard provides a different period of time, OSHA requires that employee medical records made voluntarily or pursuant to an OSHA standard be maintained for at least the duration of employment plus thirty (30) years. 29 C.F.R. §1910.20(d)

Unless a specific OSHA standard provides a different period of time, OSHA requires that analyses using employee medical records made voluntarily or pursuant to an OSHA standard be maintained for at least thirty (30) years. 29 C.F.R. §1910.20(d)

Access to Records: The employer must provide access to the employee medical records. The employer must provide the records upon request by OSHA. 29 C.F.R. §1910.20(e) As set forth below in the discussion regarding OSHA inspections, when OSHA may request individual medical records, however, is governed by detailed procedures and protections.

The employer must also, upon request, provide to an employee or designated representative employee medical records. 29 C.F.R. §1910.20(e) An employer may, under specific circumstances, delete from records requested trade secret data which discloses manufacturing processes or discloses the percentage of a chemical substance in mixture. 29 C.F.R. §1910.20(f)

DISCRIMINATION PROHIBITED BY THE OSH ACT

Section 11(c) of the OSH Act provides:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this [Act]."

APPLICATION

Section 11(c) applies to any person. The prohibition against discrimination extends not only to employers but also to unions, employment agencies and other persons.

Furthermore, the protections of Section 11(c) extend to all forms of discrimination. In addition to discriminatory discharges, Section 11(c) also makes it illegal for an employer to discipline, demote, fail to promote, fail to hire, reassign or harass any person because he exercised a right protected by the OSH Act.

PARTICIPATION IN AGENCY PROCEEDINGS

Although Section 11(c) expressly prohibits discrimination against employees who have filed complaints with OSHA or participated in an OSHA proceeding, the protections of the provision have been interpreted broadly to include other activities. These activities include participating in an OSHA inspection, either by acting as the employee walk-around representative or by providing information or any kind to a CSHO.

OPPOSITION TO UNLAWFUL PRACTICES

The anti-retaliation protection of Section 11(c) prohibits a person from discriminating against an employee who, in good faith, complains to the employer about safety or health conditions. 29 C.F.R. §1977.9(c) A federal court also found an employer to have violated Section 11(c) when it discharged an employee who had communicated concerns about workplace hazards to the press. *Donovan v. R.D. Anderson Construction Co.*, 10 OSHC 2025 (D.Kan. 1982)

REFUSAL TO WORK FOR SAFETY REASONS

The OSH Act does not expressly permit employees to refuse to perform work where to do so would expose the employee to a hazardous condition. In fact, OSHA regulations acknowledge that, as a general rule, an employee is not entitled to walk off the job but is rather obligated to report the hazardous condition to his employer or to request an OSHA inspection. 29 C.F.R. §1977.12(b)(1)

OSHA has implemented a regulation, however, which recognizes that "occasions might arise when an employee is faced with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition in the work place. 29 C.F.R. §1977.12(b)(2) The regulation provides that if the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against discrimination under Section 11(c). *Id.* The condition causing the employee's apprehension must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory channels. *Id.*

The U.S. Supreme Court unanimously rejected an employer's challenge to the OSHA regulation cited in the previous paragraph in *Whirlpool v. Marshall*, 445 U.S. 1 (1980) The Supreme did hold, however, that Section 11(c) does not require an employee to be paid for any time in which he refused to work. The Court also held that an employee has no right, even under the circumstances set forth in the OSHA regulation, to refuse alternative work when directed by the employer.

OTHER RIGHTS PROTECTED

OSHA regulations also prohibit an employer from discriminating against an employee for reporting a work-related fatality, injury or illness or for requesting access to an employer's OSHA Form 300, 300A or 301. 29 C.F.R. § 1904.36

NO PRIVATE RIGHT OF ACTION

An employee who believes that he or she has been discriminated against for engaging in conduct protected by the OSH Act must file a complaint of discrimination with OSHA within 30 days. 29 U.S.C. §660(c)(2) OSHA then investigates the charge. If OSHA determines that there has been unlawful retaliation which the employer does not remedy, the agency may bring an action in its name in federal court. The employee has no private cause of action if OSHA concludes that there was no retaliation.

OSHA INSPECTIONS AND INVESTIGATIONS

The OSH Act provides OSHA with the authority to police the Act through inspections of work places and other forms of investigation.

FORMS OF INVESTIGATION

OSHA employs several forms of investigation to determine whether an employer is in compliance with the OSH Act or OSHA standards.

Field Inspections and Investigations: The front line method employed by OSHA to enforce the OSH Act is the field inspection and investigation conducted by certified safety and health officers ("CSHOs"). Indeed, the OSH Act requires OSHA to do so. 29 U.S.C. §657

Employee Complaint Investigations: An informal investigation may be initiated by a complaint made by an employee or employee representative to OSHA which is in writing and which specifies with particularity the location and nature of the alleged violation. 29 U.S.C. §657(f) Although OSHA is empowered to initiate an inspection to investigate an employee complaint, the agency may deem it appropriate to use less formal means to investigate when the complaint is of a working condition that does not appear to threaten physical harm. Under these circumstances, OSHA will send a letter notifying the employer of the complaint and the particular standard alleged to have been violated. The letter will advise the employer to take immediate corrective action and to submit a written response within a specified period of time. 29 C.F.R. §1903.12(b)

Subpoena Power: OSHA has the power to subpoena witnesses, documents and physical materials in conducting inspections and investigations. 29 U.S.C. §657(b)

Surveys: To enforce the requirements regarding record keeping, OSHA sends out an Annual Survey Form to certain employers. Upon receipt, the employer must report to OSHA the number of hours worked by its employees for periods designated in the Survey Form and such information as OSHA may request from records required to be created or maintained under 29 C.F.R. §1904. Survey reports must be sent to OSHA within 30 calendar days or the time stated in the Survey Form, whichever is longer. 29 C.F.R. §1904.17

AUTHORITY FOR FIELD INSPECTIONS

The authority provided by the OSH Act to conduct field inspections and investigations is two-fold upon the presentation of credentials by the CSHO.

Entry: The OSH Act authorizes a CSHO to "enter without delay and at reasonable times, any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer." 29 U.S.C. §657(a)(1)

Inspection and Investigation: The OSH Act also authorizes CSHOs to inspect and investigate, during regular working hours and at other reasonable times, any place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any employer, owner, operator, agent or employee, provides such is done within reasonable limits and in a reasonable manner. 29 U.S.C. §657(a)

Authority to Refuse Entry Without Search Warrant: The U.S. Supreme Court has held that the Fourth Amendment to the United States Constitution, which protects against unreasonable searches and seizures, authorizes employers to refuse entry by a CSHO in the absence of a search warrant. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)

Exceptions to Authority: Several exceptions have been recognized to the authority of an employer to refuse entry to OSHA in the absence of a search warrant:

Emergency. OSHA may enter a premises where emergency conditions exist which do not allow time to obtain a search warrant. *Camara v. Municipal Court*, 387 U.S. 523 (1967). *See also Michigan v. Tyler*, 436 U.S. 499 (1978)

Open Violation. A search warrant is not necessary to inspect hazardous conditions which are observable to the public, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), or in plain view of inspectors already on the premises. *See Michigan v. Tyler*, 436 U.S. 499 (1978)

Authority of Another. An employer may not refuse entry to OSHA where entry has already been authorized by an agent of the employer or a third party with control over the premises. *Donovan v. Dewey*, 452 U.S. 594 (1981)

Search Warrants: A search warrant must be obtained from a federal judge for the district in which the establishment sought to be inspected is located. A search warrant may be obtained by OSHA *ex parte* without hearing from the employer. To obtain a search warrant, OSHA must show to the satisfaction of the judge that legitimate grounds exist for inspection. The grounds typically sustained by federal judges are outlined below.

THE DECISION-MAKING PROCESS BY OSHA REGARDING INSPECTIONS

Several policies govern the determinations by OSHA as to which employers will be subject to an inspection, whether to obtain a search warrant in advance of the inspection and whether to give the employer advance notice of the inspection.

Grounds for Inspection: There are several grounds which will justify an inspection of an employer's premises by OSHA. These justifications have generally been found to be grounds for a search warrant.

Employee Complaint. The OSH Act grants employees and employee representatives the right to file a complaint with OSHA requesting an inspection where there is a reasonable belief that a violation of a safety or health standard exists that threatens physical harm or presents an imminent danger. Such a complaint must be in writing and specify with particularity the location and nature of the alleged violation. 29 U.S.C. §657(f)

Referral. OSHA may conduct inspections based upon a referral from a source other than an employee or employee representative of a violation of a safety or health standard that threatens physical harm or presents an imminent danger.

Fatality or Catastrophe. Although the employer is required to report fatalities and catastrophic accidents to OSHA within 8 hours, OSHA need not await such notification to conduct the inspection. Indeed, OSHA may often learn of such incidents through the media or an employee complaint and arrives at the work site for an inspection within 8 hours.

Follow Up Inspections. OSHA inspections are often conducted to ensure that the employer has abated violations discovered during a previous inspection.

Unprogrammed-Related. OSHA may conduct investigations of an employer's other work sites after an inspection of one work site prompted by a complaint, referral or accident.

Programmed. Programmed inspections are conducted for certain categories of employers according to a regular inspection schedule for which targeted employers are randomly selected. General programmed inspections target employers which OSHA has determined warrant periodic inspections because of their industry categories or because of their rates of lost work time injury or illnesses. Special or local emphasis programmed inspections target employers because they are of a particular industry or type which has been determined warrant special emphasis. To obtain a search warrant for a programmed inspection, OSHA must generally show to the satisfaction of the judge that the establishment was chosen objectively and in a neutral manner as part of a particular program.

Programmed Related. OSHA may conduct investigations of an employer's other work sites in conjunction after an inspection of one work site conducted under an OSHA program.

Inspection Priorities: OSHA has established the following priorities for allocating the agency's resources in conducting inspections.

Imminent Dangers. Top inspection priority is given to imminent danger situations. In such a situation, OSHA is required to conduct an immediate inspection.

Fatalities and Catastrophes. Second priority is afforded to investigations of fatalities or catastrophic accidents resulting in the hospitalization of five or more employees. The OSHA Field Inspection Reference Manual directs CSHOs to inspect accidents which receive significant publicity.

Employee Complaints and Referrals. Third priority is provided to complaints received by employees regarding unsafe working conditions which do not present an imminent danger.

Programmed Inspections. The fourth priority is given to programmed inspections.

Inspection Exemptions: As a general rule, all employers are subject to inspections by OSHA. There are exemptions which protect certain employers from certain types of inspections.

Small Employers. An employer with 10 or fewer employees on the date of the inspection of within the preceding 12 month period, is exempt from certain inspections if it is in an industry that has a lost workday rate lower than the national average rate.

Safety and Health Achievement Recognition Program. An employer may be exempt from a general programmed inspection for one year if is a participant in this program. An employer who has requested and received an on-site consultation visit by OSHA can, upon request, be exempt if the visit covers all conditions and operations related to occupational safety and health and the employer (1) corrects all hazards that have been identified during the visit within the established time frames; (2) posts notice of the correction of the hazards upon completion; (3) demonstrates to the consultant that certain core elements of an effective safety program are in effect, and that the remaining elements will be implemented within a reasonable time, and (4) agrees to request an on-site consultation if major changes in working conditions or work processes occur which may introduce new hazards. An employer must post a notice of its participation in the inspection exemption program.

Voluntary Protection Programs. An employer may be removed from general inspection schedule lists if its workplace safety and health program is recognized by OSHA as exemplary in that it goes beyond OSHA standards in providing a safe and healthy work place for its employees.

Obtaining a Search Warrant in Advance of Inspection: As a general rule, OSHA shows up at an establishment without a search warrant. OSHA regulations specify three circumstances in which it may be desirable or necessary to obtain a search warrant in advance of an inspection.

Employer History. OSHA will obtain a warrant in advance of an inspection when the employer's conduct has put OSHA on notice that a warrantless inspection will not be allowed. 29 C.F.R. §1903.4(b)(1)

Travel Distance. OSHA will obtain a warrant in advance of an inspection when the travel distance between the OSHA Area Office is so far that obtaining a warrant ahead of time would avoid the expenditure of significant time and resources, in the event the employer refused entry. 29 C.F.R. §1903.4(b)(2)

Need for Special Equipment and Experts. OSHA will obtain a warrant in advance of an inspection when the inspection requires hiring special equipment or expert personnel such that obtaining a warrant ahead of time would avoid the expenditure of significant time and resources, in the event the employer refused entry. 29 C.F.R. §1903.4(b)(3)

Advance Notice of Inspection: As a general rule, OSHA does not and cannot provide advance notice of an inspection to the employer and merely shows up at the employer's establishment. 29 U.S.C. §666(f) OSHA regulations specify three circumstances in which advance notice of an inspection may be given.

Imminent Danger. In cases of apparent imminent danger, advance notice may be given to the employer to enable it to abate the danger as quickly as possible. 29 C.F.R. §1903.6(a)(1)

After Hours. In circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection, advance notice may be given to the employer. 29 C.F.R. §1903.6(a)(2)

Attendance of Necessary Personnel. Where necessary to assure the presence of representatives of the employer and employees or the appropriate personnel need to aid in the inspection, advance notice may be given to the employer. 29 C.F.R. §1903.6(a)(3)

Other Circumstances. In other circumstances where OSHA determines that the giving of advance notice would enhance the probability of an effective and thorough inspection, advance notice may be given to the employer. 29 C.F.R. §1903.6(a)(4)

PREPARING FOR AN OSHA INSPECTION

Employers can avoid many of the problems which can arise from an OSHA inspection by simply planning ahead.

Avoiding Inspections: Although an employer can never avoid an OSHA inspection altogether, it can take steps to minimize the likelihood of an inspection.

Programmed Inspections. An employer which falls under one of the exemptions previously enumerated can avoid a programmed inspection under the circumstances enumerated.

Unprogrammed Inspections. Inspections conducted because of employee complaints account for a large number of OSHA unprogrammed inspections. Such complaints can be avoided by an effective safety and health program which encourages employees to report unsafe work conditions or practices to the employer without fear of reprisal and which provides for prompt abatement of unsafe working conditions or practices.

Designation of Responsibilities for Inspection: To prepare for an inspection, an employer should designate various responsibilities for dealing with an inspection to qualified personnel.

Training Employer Representatives. In order to minimize the legal risks to the employer from an OSHA inspection, the person(s) with responsibility for dealing with OSHA on the employer's behalf should be familiar with the mechanics of an OSHA inspection as well as the dos and don'ts listed in later in this paper.

Designation of Person(s) With Authority to Permit Entry. To avoid OSHA being allowed entry onto an employer's premises by employees who may have the apparent, but not actual, authority to permit entry, the employer should designate a management representative or a group of management representatives who have the exclusive authority to decide whether or not to permit OSHA entry onto the premises. All other employees should be instructed that only the designated management representative or group of management representative has the authority to permit entry.

Designation of Employer Representative. To avoid having persons deal with OSHA who are unqualified to do so, the employer should designate a management representative who has the exclusive responsibility to interact with the CSHO on behalf of the employer during the course of the OSHA inspection. All other management personnel should be instructed that only the designated management representative shall have the authority to interact with the CSHO during the inspection.

Retention of Attorney. To avoid the logistical problems of retaining an attorney upon the arrival of OSHA for an inspection, the employer should have an attorney already retained who is versed in the OSH Act and who will be readily accessible to provide legal advice regarding the questions of entry and the course and scope of the inspection.

Designation of Employee Representative. If there is no designated employee representative, OSHA regulations permit the CSHO to speak with a reasonable number of employees concerning matters of safety and health in the work place. To avoid the inherent risks and inconvenience of multiple employee interviews, an employee representative selected by the employees, preferably an employee member of a safety and health committee, should be designated by the time of an OSHA inspection.

Designation of Trade Secrets: To prepare for an inspection, an employer should designate any trade secrets which need to be protected in the event of an inspection. The OSH Act provides for the confidentiality of an employer's trade secrets reported to or obtained by OSHA in connection with an inspection. 29 U.S.C. §664 OSHA regulations define a trade secret as follows:

Any confidential formula, pattern, process, list, blueprint, device or compilation of information used in the employer's business which gives him an advantage over competitors who do not know or use it. It is known only to the employer and those employees to whom it is necessary.

Since a CSHO does not have knowledge of what is or is not considered a trade secret, it is up to the employer to inform the CSHO of the areas in the establishment which contain or which might

reveal a trade secret. If an employer does not designate a trade secret during the inspection, it risks disclosure by OSHA.

OSHA regulations allow an employer to restrict access to an area containing trade secrets to an employee representative who is an employee in that area or an employee authorized to enter that area. Otherwise, OSHA may consult with a reasonable number of employees who work in that area. 29 C.F.R. §1903.9(d) To avoid the risks and inconvenience of multiple employee interviews, the employer should make sure either that the designated employee representative is authorized to be in the restricted area or that another employee representative is available for the restricted area.

Records Required to be Kept by OSH Act and OSHA Standards : In preparation for an inspection, these records should be compiled in a way that will prevent problems in the event of an OSHA inspection. To avoid a citation for records which are being maintained but are not accessible at the time of the inspection, the records should be readily accessible in the event of an OSHA inspection. To avoid the disclosure of information to which OSHA is not entitled, records required to be maintained by the OSH Act and OSHA standards should be segregated from other records.

Postings Required by OSH Act and OSHA Standards: In preparation for an inspection, these postings should be placed in the establishment in the place required by the Act or standard.

Develop a Comprehensive Health and Safety Program: An effective comprehensive health and safety program can reduce the penalties for certain OSH Act violations. CSHOs use six elements to evaluate the effectiveness of a health and safety program.

Leadership and Employee Participation. An effective program will provide for visible management leadership, employee participation and implementation tools.

Proactive Workplace Analysis. An effective program will identify hazards with a comprehensive survey and hazard analysis for jobs and changes in conditions; regular site inspections; and a hazard reporting system for employees.

Accident and Record Analysis. An effective program will provide for investigation of accidents and "near miss" incidents, and will analyze injury and illness records for indications of sources, locations, and jobs that experience higher numbers of injuries.

Hazard Control. Workplace exposure to all current and potential hazards should be controlled by using engineering controls wherever feasible and appropriate; work practice and administrative controls and personal protective equipment; by a program for facility and equipment maintenance; and, where needed, by providing an appropriate medical program.

Emergency Response. There should be appropriate planning and equipment for response to emergencies; and first aid/emergency care should be readily available.

Safety and Health Training and Education. Safety and health training should cover the responsibilities of all personnel who work at the site or affect its operations. It is most effective when incorporated into other training about performance requirements and job practices. It should include all subjects and areas necessary to address the hazards at the site.

On-Site Consultation: In preparation for an inspection, an employer can have its establishment inspected by a consultant in order to identify hazards that need to be abated.

By OSHA. As previously noted, OSHA itself provides on-site consultations which follow a format similar to enforcement inspections. At the conclusion of the consultation, a written report will be prepared which (1) describes the working conditions examined, (2) evaluates the employer's health and safety program and provides recommendations for making the program more effective, (3) identifies specific hazards, including references to the OSHA standards being violated, (4) identifies the seriousness of the hazards, (5) to the extent possible, includes suggested means or approaches to correcting the hazards, and (6) sets abatement dates for imminent dangers and serious hazards. Citations cannot be issued during an on-site consultation nor may enforcement activity be initiated as a result of an on-site consultation. An employer must nevertheless abate imminent danger and serious hazards within the abatement date prescribed by the consultant or the consultant will have a legal obligation to report the hazard for enforcement activity by OSHA. The benefits of an OSHA on-site consultation are the absence of any cost to the employer and an exemption, upon request, from programmed exemptions for one year. The downside of an OSHA on-site investigation is that the obligations which a consultant has to report unabated hazards.

By Private Consultants. Private safety and health consultants also provide consultation visits to employers. The benefit of hiring a private consultant is that he/she does not have the legal obligation to report a hazardous activity to OSHA under any circumstances. However, employer should be aware that private consultation reports may be discoverable in future litigation.

Accident Investigations: Where an OSHA inspection is imminent or anticipated as a result of an accident or injury, the employer should immediately begin its own investigation. This investigation should include witness interviews and statements, photographs and videos and the preservation of physical evidence.

LIMITATIONS ON INSPECTIONS

OSHA's authority to conduct inspections is not without limitations, but must be done at reasonable times, within reasonable limits and in a reasonable manner. 29 U.S.C. §657(a)

Reasonable Times: OSHA is limited in the times which it may conduct an inspection of an employer's establishment to regular work hours and other times which are reasonable.

Reasonable Limits: OSHA is authorized to inspect any place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials and records. OSHA regulations nevertheless provide that any inspection must be done within reasonable limits.

Inspections conducted in response to an employee complaint, for example, can be limited to the area which is the subject of the employee complaint. *Sarasota Concrete Co.*, OSHRC Docket No. 78-5264 (1981) Similarly, inspections conducted in response to an accident may, under certain circumstances, be limited to the area where the accident occurred. A CSHO can, however, seek to expand the scope of his investigation by search warrant is necessary based upon observations made during an inspection. *Donovan v. Burlington Northern*, 521 F.Supp. 99 (D. Mont. 1981), *rev'd on other grounds*, 694 F.2d 1213 (9th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983)

Programmed inspections, on the other hand, are generally permitted for the entire establishment of an employer. *Synkote Paint and KDK Upset Forging Co.*, 12 OSHC 2036 (1986). *See also Martin v. International Matex Tank Terminals-Bayonne*, 928 F.2d 614 (3d Cir. 1991)

Reasonable Manner: OSHA regulations provide that an inspection must be conducted in a reasonable manner. The conduct of the inspection shall be such as to preclude unreasonable disruption of the employer's establishment.

PERMITTING OR DENYING ENTRY

The first decision which an employer must make when a CSHO appears for an inspection at its establishment is whether or not to permit entry.

Presentation of Credentials: The OSH Act and OSHA regulations require the CSHO to present his/her credentials to the employer. A person who does not present his/her OSHA credentials should not be permitted entry. 29 U.S.C. §657(a)

When OSHA Appears With a Search Warrant: OSHA may appear with a search warrant either because it has obtained a warrant in advance of the inspection or because the employer has previously denied entry. Under such circumstances, the decision to permit or deny entry is dependent upon the validity of the search warrant and whether the search warrant is presented in accordance with the OSH Act and OSHA regulations.

Accuracy of Warrant. Since most search warrants are obtained *ex parte* without notice to the employer, a search warrant may have errors. Such errors may affect the validity of the search warrant. Before permitting entry, a search warrant should thus be inspected and reviewed for errors with legal counsel. Generally, technical errors will not affect the validity of a warrant where the warrant is supported by probable cause to believe that unlawful conditions exist. *Secretary v. Sterling Plumbing, Inc.*, OSHRC No. 95580, 3/11/97. Moreover, it is not enough to attack a warrant based upon an inaccurate employee complaint. An employer must be able to allege and offer proof that the employee complaint is based upon a deliberate falsehood or a reckless disregard for the

truth. *In the Matter of Kelly Springfield Tire Co.*, 808 F.Supp. 657 (N.D.Ill.), *aff'd* 13 F.3d 1160 (7th Cir. 1992)

Scope of Warrant. A search warrant should also describe a scope of places or things which OSHA is authorized to inspect (which exceeds what has been justified by the probable cause showing for the warrant). A search may be challenged as being overly broad. Before permitting entry, a search warrant should thus be inspected and reviewed with legal counsel to determine whether or not to challenge its breadth.

Methods Authorized by Warrant. A search warrant may also describe methods authorized in connection with the inspection. If those methods will cause a disruption of the employer's operations, the search warrant may be challenged as being contrary to the requirement that the methods used by OSHA during an inspection be reasonable. Before permitting entry, a search warrant should thus be inspected and reviewed with legal counsel to determine whether or not to challenge the methods authorized therein.

Reasonable Time. A search warrant which authorizes inspection or which is served at a time other than regular working hours or another reasonable time may be refused or challenged as being contrary to the requirement that OSHA inspections be conducted at reasonable times.

Exemption. A search warrant may be challenged if contrary to an exemption enjoyed by the employer.

Although an employer may seek to challenge a search warrant, it risks civil contempt for refusing to honor the search warrant.

When OSHA Appears Without a Search Warrant: OSHA will more often appear at an employer's establishment without a search warrant. Under such circumstances, the decision of whether to permit entry or deny entry should consider the following:

Avoidance of Inspection. Requirement of a search warrant will generally not avoid an inspection altogether, especially if the circumstances require an inspection. Certainly, requiring a warrant will create delay. Although there may be instances in which OSHA will not return with a search warrant, such instances are rare.

Scope of Inspection. OSHA regulations require the CSHO to inform the employer as to the scope of the inspection sought at the outset of the inspection. If the scope of the inspection sought by the CSHO is unreasonable, the rationale for requiring a warrant is more compelling. Similarly, if the

CSHO seeks a comprehensive inspection of the employer's entire establishment, the rationale for requiring a warrant is more compelling than it would be if the CSHO only seeks a partial inspection

which is restricted to certain operations, areas or conditions, or if the CSHO seeks only to inspect the employer's injury and/or illness records and safety programs (which is rare).

Validity of Purpose of Inspection. OSHA regulations require the CSHO to explain the nature and purpose of the inspection at the outset of the inspection. If there is a question as to the validity of the basis for the inspection, the rationale for requiring a search warrant would be compelling. As an example, if the inspection is based upon an employee complaint which does not meet all of the requirements of 29 U.S.C. §657(f), the inspection is not warranted and a warrant should be required.

Purpose of Inspection Itself. The purpose of the inspection may also be a factor in and of itself in determining whether or not to permit entry. As an example, if the inspection is prompted by a fatality or catastrophe, it will be advisable for legal counsel to review the risks of an OSHA inspection to threatened or anticipated litigation by those killed or injured before permitting entry. Requirement of a search warrant may be necessary to give legal counsel time to conduct this review.

Willingness to Negotiate Inspection Agreement. There may be circumstances in which OSHA's Area Director is authorized to agree to limit the scope of an investigation and the methods used during the investigation in order to avoid the inconvenience of seeking a search warrant and in which it is advisable for the employer to enter into such an agreement. As an example, to avoid a search warrant which authorizes a comprehensive inspection prompted by an employee complaint, it could be advisable for the employer to agree to a partial inspection of the work area and conditions which are the subject of the employee complaint.

Timing of OSHA's Appearance. There may be circumstances where OSHA appears for an inspection at an unreasonable time or at a time in which an inspection which would disrupt a special project or event requirement of a search warrant may be necessary if OSHA is unwilling to reschedule the inspection. It should be noted that OSHA can obtain a warrant promptly and will likely appear for an inspection the following day.

Future Inspections. An approach which requires a search warrant for every OSHA inspection will only alert OSHA that it needs to obtain a search warrant in advance of any inspection. Under such circumstances, an employer would not have the greater options which would be available to it when OSHA arrives without a search warrant.

Search Warrant Hearing: OSHA may obtain a search warrant *ex parte* before the judge - without hearing from the employer. To the extent feasible, the employer should request the opportunity to and participate in the hearing. Such a course of action could avoid the risks associated with refusing the search warrant later in the event there are grounds for challenging the search warrant, which, as set forth above, include being held in civil contempt. A judge is also more likely to hear objections to a search warrant before it is issued than after it is issued.

THE INSPECTION ITSELF

OSHA inspections follow a structured format set forth in OSHA regulations and the OSHA Field Operations Manual which must be followed by the CSHO.

Opening Conference: After presenting their credentials, the compliance officers will have an opening conference with the employer and employee representative to discuss preliminary matters.

Inspection of Search Warrant. If a search warrant is presented by the CSHO, the opening conference provides the opportunity for the employer and CSHO to review the search warrant.

Purpose of Inspection. During the opening conference, the CSHO will explain the nature and purpose of the inspection. If the inspection is prompted by an employee complaint, the employer has the right to review the employee complaint. The name of the employee who filed the complaint, however, may be deleted if requested by the employee. 29 U.S.C. §657(f)(1)

Scope of Inspection. The CSHO will also indicate generally the scope of the inspection, including private interviews, physical inspection of the premises and the records that he/she may wish to review. The CSHO will advise of the right of employer and employee representatives to accompany him/her during the physical inspection.

Coverage and Exemptions. At the opening conference, the CSHO will ask questions regarding the employer's business to make sure that the business is engaged in commerce and thereby covered by the OSHA. The opening conference also is the time to discuss any exemptions or limitations to which the employer is entitled.

Trade Secrets. At the opening conference, the CSHO will ask whether there are any trade secrets the employer wishes to protect. The trade secrets, if any, will then be reviewed by the CSHO.

Independent Contractors. At the opening conference, the CSHO will ask whether there are any persons working on the premises who are not employees, i.e., independent contractors.

Employee Representative. At the opening conference the CSHO will ask whether any of the employees are represented by a union. If not, the employer will be asked to identify whether any authorized employee representative has been chosen by the employees to accompany the CSHO during the inspection. The employee representative identified may be asked to participate in the opening conference.

Other Preliminary Matters. At the opening conference, the CSHO may request certain information relevant to the inspection, such as plant layouts. The CSHO also must provide the employer with certain OSHA literature.

Records Review: During the course of the physical inspection or prior to starting it, the CSHO will likely conduct an inspection of records and documents in the employer's possession which are required to be kept by the OSH Act and OSHA standards.

Injury and Illness Records. OSHA must be provided with unlimited access to records of injuries and illnesses required to be made and kept by employers.

Employee Medical Records. OSHA must be provided with unlimited access to medical opinions and employee medical records which are mandated by an OSHA standard. 29 C.F.R. §1910.20(c)(3); 29 C.F.R. §1913.10(b)(4). Otherwise, OSHA must have a need to gain access for OSHA enforcement purposes. Even then, OSHA is entitled to personally identifiable employee medical information only upon presentation of a written access approved by the Assistant Secretary of Labor. 29 C.F.R. §1910.20(e)(3); 29 C.F.R. §1913.10(d). Under special circumstances, medical opinions and employee medical records may be obtained upon (a) obtaining the specific written consent of the employee to whom the medical opinion relates, and (b) consulting with the employer's physician. 29 C.F.R. §1910.20(e)(2)(I); 29 C.F.R. §1913.10(d)(4)

Posting Requirements. OSHA will also determine whether the employer is in compliance with all applicable posting requirements.

Safety and Health Programs: OSHA will also review existing safety programs to determine their adequacy.

Physical Inspection: After the opening conference and records review are completed, the CSHO will conduct a physical inspection of the employer's establishment.

Walk-Around. A representative of an employer and a representative authorized by his employees - usually a union representative - must be given an opportunity to accompany OSHA personnel during the physical inspection of any workplace.

Photographs, Samples and Monitoring. During the inspection, the CSHO has the authority to take environmental samples, to take photographs and videotapes related to the inspection, and to employ other reasonable investigative techniques, including the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges, and similar devices to employees to monitor their exposures.

Violations. During the physical inspection, the CSHO may point out violations of OSHA standards which can be immediately abated by the employer or abated before the closing conference.

Follow Up Inspections. The CSHO may not complete his physical inspection at one time. It may be necessary to schedule certain aspects of the inspections, such as air tests, for another time. A follow up inspection may also be necessary to inspect a hazard which has been immediately abated by the employer.

Expansion of Scope of Inspection. During the course of the physical inspection, the CSHO may ask to expand the scope of the inspection to include areas which are in plain view or areas addressed by the employer's records.

Interviews of employees: During the course of the physical inspection or thereafter, the CSHO may conduct employee interviews. OSHA regulations provide that a CSHO may privately question anyone involved with the business undergoing inspection - whether owner, employer, employee, or agent. If an employee cannot reasonably be removed from his workstation, the employer need not do so. Any employee interviews must not cause an unreasonable disruption of the employer's operations.

Closing Conference: At the conclusion of the physical inspection, the CSHO will have a closing conference with the employer and employee representative. The closing conference may not necessarily occur on the same date of the completion of the physical inspection, but more often does occur on the same day.

Report of Violations. At the closing conference, the CSHO advise the employer of any apparent safety or health violations disclosed by the inspection. The CSHO also explains that, in the event of a citation, a follow up inspection may be required to verify that the citation has been posted and that the abatement dates set forth in the citation have been met.

Employer Response. At the closing conference, the employer is given the opportunity to bring to the attention of the CSHO any pertinent information regarding conditions in the work place.

Other Matters. Other matters which may be reviewed during a closing conference are the OSH Act's prohibition against retaliating against an employee for providing an interview, the availability of consulting services, and failure to abate penalties.

DOS AND DON'TS

There are several dos which an employer should keep in mind during the course of the inspection.

Dos:

Consult an Attorney. It is always advisable to consult an attorney at the outset of the inspection and during the course of the inspection if issues arise as to the scope of the inspection and

the methods being used by the CSHO. For certain inspections, such as those prompted by a fatality or catastrophe, it is even advisable for an attorney to be present throughout the inspection to protect the employer's interest in threatened or anticipated litigation.

Protect Trade Secrets. An employer should make sure to review with the CSHO during the opening conference all trade secrets which require confidential treatment. Otherwise, the protection afforded by the OSH Act may be lost.

Take Notes. The employer should record or take meticulous notes of everything discussed during the opening and closing conferences. The employer representative should also videotape or take notes of everything the CSHO says, looks at or does during the walk-around inspection. Although notes and recordings may be discoverable by OSHA in the event a citation is contested by the employer, the information is more often than not more helpful to the employer than to OSHA.

Take Photographs, Samples, Tests and Monitoring. For every photograph, measurement, test or sample taken by the CSHO, the employer representative should also take a photograph, measurement, test and sample on behalf of the employer. Although photographs, measurements and samples may be discoverable by OSHA in the event a citation is contested by the employer, the information is more often than not more helpful to the employer than to OSHA.

Object to Short Abatement Dates. During the closing conference, the employer should note any violations cited by the CSHO which cannot be abated within a short period. Otherwise, the CSHO may impose an unreasonable abatement date in the citation. The employer should note to the CSHO that its objection to a short-term abatement date is being made subject to its right to contest the citation and is not an admission that a violation of any OSHA standard has occurred.

Attend Employee Interviews Upon Request. OSHA generally requires that non-management employees be interviewed in private. An employee can nevertheless request that the employer's representative or legal counsel be present during the interview. An employee can be informed of this right before any interview by OSHA, as long as it is not done in an intimidating manner. If the employee requests the presence of legal counsel or an employee representative during the interview, the request should be obliged.

Limit Employee Interviews. For employees who are working, private employee interviews should be scheduled at a time and in a manner, including time limits, which results in the least disruption of the employer's operations. The employer representative should closely monitor the length of the employee interview.

Require Safety Gear. OSHA regulations require that the CSHO comply with all employer safety and health rules and practices at the establishment being inspected. It is recommended that the CSHO be advised of all necessary precautions which must be taken during the walk-around inspection, including the use of safety glasses and other equipment. Otherwise, the extent to which the employer actually follows its own safety and health rules will be questioned.

Correct Wrong Information Acquired by CSHO. Any incorrect information acquired by the CSHO should be corrected during the closing conference. If the CSHO is not convinced, the basis for the error should be immediately investigated by the employer to determine how the CSHO erred.

Conduct Follow-Up Investigation. An employer should conduct its own investigation of an accident even after OSHA has left the premises. This internal investigation should include witness interviews and statements, photographs and videos and samples.

Don'ts:

Volunteer Information. Volunteering information to a CSHO during the walk-around inspection will only give the CSHO more questions to ask and more information for a possible citation. The employer representative should only answer direct questions asked by the CSHO.

Make Any Demonstrations. Explaining or demonstrating any processes or operation of machinery during the walk-around inspection will only give the CSHO more questions to ask and more information for a possible citation. The employer representative should refrain from any demonstrations or explanations.

Permit Access to Unauthorized Areas. During the walk-around inspection, the employer representative should not give the CSHO access to any area of the establishment not included within a search warrant or within the scope of inspection articulated during the opening conference. The CSHO is obligated to cite an employer for safety and health violations learned during an inspection even if not within the scope of the inspection. If the CSHO requests such access, the opening conference should be reconvened to discuss the reasons for the request.

Admit to Violations. During the inspection and the closing conference, employer representatives should refrain from any admission that a violation of any OSHA standard has occurred. Such an admission could be used against the employer in the event it contests the citation.

Intimidate Employees. The employer should refrain from any conduct which can be perceived as intimidation of an employee who has given or is about to give a private interview to the CSHO. As previously noted, such intimidation tactics are prohibited by the OSH Act, and at the very least, could expose the employer to possible litigation if the employee is later terminated.

Employee Medical Information. The employer should not provide access to personally identifiable employee medical information unless OSHA has shown the authority to such access by a specifically applicable OSHA standard or by written confirmation of the authority provided by OSHA regulations, as discussed above.

CIVIL ENFORCEMENT

OSHA enforces the obligations placed upon employers by the OSH Act. These obligations include the health and safety standards established by OSHA.

CITATIONS

After an inspection is completed, the CSHO will take the inspection findings back to OSHA's area office, discuss them with supervisors, and issue citations where appropriate. If the CSHO identifies more than one condition or practice falling below OSHA standards, separate citations will issue for each condition or practice. A citation may be withdrawn by OSHA at any time.

Contents of Citation: Each OSHA citation must be in writing and must describe with reasonable particularity the nature of the violation, including a reference to the provision of OSHA Standard or Regulation supposedly violated. It must also fix a reasonable time for abating the alleged violation and assess a monetary penalty. A citation may be amended by OSHA at any time before a notice of contest is filed by the employer.

Posting: As discussed earlier, an employer must post an OSHA citation upon receipt.

Time Period for Issuing Citation: According to OSHA, the citation must be issued with reasonable promptness. The only specific time limitation set out in the statute is the requirement that the citation not be issued more than six months after the occurrence of any violation.

Notice of *De Minimis* Violation: The OSH Act authorizes OSHA to issue a notice in lieu of a citation with respect to *de minimis* violations which have no direct or immediate relationship to safety or death. 29 U.S.C. §658(a) *See also Trinity Industries, Inc. v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994); OSHRC Docket Nos. 88-1545, 88-1547(A violation is *de minimis* "when the infraction has no more than a negligible relationship to employee safety or health.")

CIVIL VIOLATIONS AND PENALTIES

Under the OSH Act, civil violations of the act and OSHA Safety and Health Standards, are classified as willful, repeated, serious, other-than-serious, failure to abate or violation of posting requirements. These classifications are important in determining the amount of penalties which may be assessed and in determining the time period for abatement.

Serious Violations: An employer commits a serious violation of OSHA if there is a substantial probability that death or serious physical harm could result from existing work conditions in its workplace. Furthermore, a serious violation exists if there is a substantial probability that death or serious harm could result from workplace operations or procedures utilized in the workplace. 29

U.S.C. § 666(k) Whether a violation is serious depends on the probability that the harm resulting from an accident would be death or serious physical harm, not upon the probability that an accident might occur. *Brown & Root, Inc.*, OSHRC Docket No. 763942 (1980) An employer may be assessed a civil penalty of up to \$7,000.00 for each serious violation. 29 U.S.C. § 666(b)

Repeat Violations: To be a repeat violation, the infraction must occur within three years of the date of the original violation became a final order or within three years of the final abatement

date, whichever is later. The repeat violation must be substantially similar to the prior one in both hazard and condition. An employer may be assessed a civil penalty of up to \$70,000 for each repeated violation. 29 U.S.C. § 666(a)

Willful Violations: A violation is willful if it results from an act that is intentional and knowing - with intentional disregard of the requirements of the act or with plain indifference to those requirements. *R.D. Anderson Constr. Co.*, OSHRC Docket No. 81-1469 (1986) A violation is not willful if the employer has a good faith belief concerning a factual matter critical to the existence of the violation. *Id.* An employer may be assessed a civil penalty of up to \$70,000 for each willful violation, but not less than \$5,000.00 for each willful violation. 29 U.S.C. § 666(a)

Other-than-Serious Violations: OSHA will issue other-than-serious citations in situations where the condition would probably not cause death or serious harm, but would have a direct or immediate effect on employee's safety and health. An employer may be assessed a civil penalty of up to \$7,000.00 for each other-than-serious violation. 29 U.S.C. § 666(c)

De Minimis Violations: No penalties are proposed for *de minimis* violations. 29 C.F.R. §1903.15(c)

Failure to Abate Violations: An employer who has failed to abate a violation for which citation has been issued within the time period provided by the citation may be assessed a civil penalty of up to \$7,000.00 for each day during which such failure or violation continues.

Posting Requirement Violations: An employer who violates the posting requirements of the OSH Act shall be assessed a penalty of up to \$7,000.00 for each violation. 29 U.S.C. § 666(i)

Mandatory Penalties: For serious violations and posting violations, OSHA must impose a civil penalty against the employer. For willful violations, OSHA must impose a penalty of not less than \$5,000 for each violation.

Discretionary Penalties: For nonserious violations, OSHA has the discretion not to assess a penalty against the employer. Indeed, OSHA has defined certain circumstances where no penalty will be assessed for a nonserious violation. OSHA has the same discretion for repeated violations and failure to correct violations, but, as a practical matter, will almost always impose a civil penalty.

ABATEMENT

Deadline for Abatement: Each citation issued by OSHA must contain a reasonable time for the abatement of the violation. 29 U.S.C. §658(a) OSHA directs its CSHOs to require abatement within the shortest interval within which the employer can reasonably be expected to correct the violation. Employers may seek and generally are granted an opportunity to submit an abatement plan which includes suggested abatement dates at the closing conference of the inspection.

Report of Abatement: OSHA requires a cited employer to certify and verify in writing that the hazards for which it was cited are abated. The employer is also expected to inform affected employees of the abatement. The certification/verification must be submitted within 10 days of the abatement date set forth in the citation. If the abatement period is greater than 90 days, the employer must also submit to OSHA a plan of abatement as well progress reports. 29 C.F.R. §1903.19

Effect of Employer Contest: If an employer contests a citation in good faith, and not solely for delay or the avoidance of penalties assessed by OSHA, the period permitted by the citation for abatement shall not begin to run until a final order of the OSHRC is issued or until a settlement is reached with respect to the citation.

Modification of Abatement Date: When an employer has made a good faith attempt to comply with an abatement date, but abatement has not been achieved due to factors beyond its control, the employer may file a petition for modification of the abatement date with OSHA.

Content of Petition. The petition must be in writing and must include the following information: (1) the steps taken by the employer to achieve compliance during the abatement period and the dates those steps were taken, (2) the additional time needed to complete abatement, (3) the reasons such additional time is necessary (e.g., unavailability of materials, technical personnel or time for construction), (4) the interim steps being taken to safeguard the employees against the cited hazard during the abatement period, and (5) a certification that a copy of the petition has been posted and, if appropriate, served on the representative of affected employees, and a certification of the date upon which posting and service was made. 29 C.F.R. §1903.14

Posting and Service. As discussed earlier in this paper, a petition for modification of abatement date must be posted by the employer. Where affected employees are represented by an authorized representative such as a union, the representative must be served (regular mail is sufficient) with a copy of the petition. 29 C.F.R. §1903.14a(c)(1)

Objections. Affected employees and their representatives have ten days from the date the petition is posted to file objections with the OSHA Area Director. 29 C.F.R. §1903.14a(c)(2)

Review. After fifteen days have passed since the petition for modification was posed, the Secretary may approve or disapprove the petition. 29 C.F.R. §1903.14a(c)(3) All objections shall be forwarded to the OSHRC within three working days of the fifteen-day deadline.

Contempt: The failure of an employer to correct a hazardous condition may result in a final order of the OSHRC enforceable by contempt action in the U.S. Court of Appeals. 29 U.S.C §660(b)

ASSESSING CIVIL PENALTIES

The OSH Act provides that penalties shall be assessed on the basis of four factors: (1) the gravity of the violation, (2) the size of the business, (3) the good faith of the employer, and (4) the history of previous violations. 29 U.S.C. §666(j)

Egregious Case Penalty Policy: In 1986, OSHA began a new penalty policy for single hazards which exposes many employees to a risk of serious injury or illness. This policy, known as the "egregious case policy" considers the exposure of each employee to the hazard as a separate violation and hence, multiplies the amount of the penalty by a factor equal to the number of exposed workers. The resulting penalties in many cases can be staggering and often reach millions of dollars.

OSHA's Settlement Authority: OSHA has the authority to settle any proposed penalty provided the reasons therefor are stated in the Federal Register. 29 U.S.C. §655(e) *See also* 31 U.S.C. § 951-53. It is not necessary that an employer contest a citation issued by OSHA; a settlement can be reached with OSHA's Area Director within the time period allowed for the employer to file a notice of contest to the citation. A penalty proposed by OSHA can be reduced up to 50% as part of a settlement. Employers considering settlement as an option, however, should first seek the advice of legal counsel in order to fully assess and/or minimize the potential impact of any settlement on (1) related civil litigation, (2) citations arising from future inspections, and (3), in the case of a willful violation resulting in the death of an employee, potential criminal prosecution.

CONTESTING A CITATION

The OSH Act provides procedures whereby a citation may be contested by the employer and reviewed by the Occupational Safety and Health Review Commission and in federal court.

Notice of Contest: An employer has 15 working days from the day a citation is received to notify OSHA in writing that it intends to contest the citation and/or proposed penalty. The notice of contest must specify whether it is directed to the citation, the proposed penalty or both. 29 C.F.R. §1903.17(a) Within 20 days of the notice of contest, the Secretary of Labor must file a complaint with the OSHRC seeking affirmation of the citation. The employer must then file an answer. After discovery (unless E-Z procedures are assigned or requested) and evidentiary hearing, an administrative law judge will issue findings of fact and conclusions of law. 29 U.S.C. §661(j)

Petition for Review: Either party may petition the OSHRC to review a decision by an administrative law judge. The OSHRC may either grant or deny a petition of review. If the OSHRC fails to act on the petition within 30 days after the docketing of administrative law judge's decision, the petition is deemed denied. After granting a petition for review, the OSHRC then may either affirm, reverse and/or remand the decision of the administrative law judge.

Federal Court: Once a decision by the OSHRC becomes final either by the denial of a petition for review or by a decision, an aggrieved party may, within 60 days, seek review in a federal

court of appeals. In theory, party may appeal a court of appeals decision to the U.S. Supreme Court.

PRIVATE RIGHT OF ACTION

The OSH Act does not provide for a private right of action by any employee affected by a violation of the Act. If OSHA or the Secretary of Labor arbitrarily or capriciously fails to seek relief authorized by the OSH Act, however, an employee who may be injured as a result of such inaction, or his employee representative, may bring an action in federal district court and present a writ of mandamus seeking to compel appropriate action. 29 U.S.C. § 662(d)

REVIEW OF INVESTIGATION

If an OSHA Area Director, upon investigation of an employee complaint, determines that there are no reasonable grounds to believe that a violation or danger exists, the person who filed the complaint is notified in writing of the determination. This determination may then be challenged by the employee or employee representative through an informal review process. 29 C.F.R. §1903.12

Written Statements of Position: The complaining party may obtain informal review by submitting a written statement of position to Assistant Regional Director and providing a copy to the employer. The employer may then submit its own written statement with a copy to the complaining party. 29 C.F.R. §1903.12(a)

Informal Conference: Upon request by the complaining party or the employer, the Assistant Regional Director may, at his discretion, hold an informal conference to hear the views of the parties. Upon hearing the opposing views, the Assistant Regional Director will either affirm or reverse the decision of the Area Director. This decision is generally not subject to further review.

INJUNCTIONS

Upon inspection, OSHA may seek and obtain an injunction from a U.S. district court restraining any work conditions or practices upon a showing that "a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by" the OSH Act. 29 U.S.C. § 662(a) Injunctions are rarely sought by OSHA.

DEFENSES TO AN OSHA CIVIL CITATION

Predictably, not all civil citations are upheld by the OSHRC. Indeed, there are several defenses which may be raised by an employer to a civil citation.

FAILURE OF SECRETARY TO MEET BURDEN OF PROOF

In a civil case, it is the Secretary of Labor's burden to prove all of the elements of a violation of the OSH Act by a preponderance of the evidence.

The General Duty Clause: To prove a violation of the general duty clause, it is the Secretary's burden to show each of the elements which are that a hazard (1) existed on the employer's premises, (2) was preventable or capable of being reduced by a feasible abatement, (3) was a hazard recognized by the employer or the employer's industry, and (4) was causing or was likely to cause death or serious physical harm.

OSHA Standards: To prove a violation of an OSHA standard, it is the Secretary's burden to show that (1) the standard is applicable, (2) the standard was violated, (3) the violation presented a risk to the employer's employees, and (4) the employer knew or should have know of the condition with reasonable diligence.

Failure to Abate: To prove that a hazard has not been abated, it is the Secretary's burden to show not only that a OSH Act violation occurred but also that (1) the abatement date set forth in a citation was reasonable and (2) the employer failed to abate the hazard by the date set forth in the citation.

EMPLOYER'S REBUTTAL

If the Secretary of Labor or Department of Justice is unable to prove any element of a violation of the general duty clause or a specific OSHA standard, the citation is dismissed on its merits. An employer has the opportunity to rebut any showing made by the Secretary by attacking the Secretary's evidence, by providing its own evidence or by arguing that the interpretation advanced by the Secretary of the OSHA standard alleged to have been violated is an incorrect interpretation.

Attacking Evidence: Evidence may be attacked as being faulty, incomplete or without credibility. For example, a citation may be based upon an interview of an employee who is shown to lack credibility. The credibility of the CSHO may even be attacked as being biased.

Employer's Evidence: The employer may come forward with evidence showing that no violation has occurred either because the hazard does not exist or because all of the requirements of

the OSH Act have been met. As an example, for a citation for violating the general duty clause, the employer can come forward with expert testimony discounting the risk of death or serious physical harm. For an employer which gathered information side-by-side during the OSHA inspection, such information can also be used if it shows, contrary to the Secretary of Labor's evidence, that no violation occurred.

Interpretation of OSHA Standard: The employer can also attack the interpretation given by OSHA to a particular standard, and thereby the allegation that it has violated the standard, by

arguing that it is inapplicable to the employer or that it does not regulate the alleged hazard cited by the Secretary or Labor or Department of Justice.

SUBSTANTIVE AFFIRMATIVE DEFENSES

An employer can also raise certain substantive affirmative defenses which avoid civil liability for the violation cited by OSHA, regardless of the ability of the Secretary to meet its burden of proof.

Substantive defenses are affirmative defenses which avoid liability based upon the merits of the citation.

Raising Substantive Affirmative Defenses: Substantive affirmative defenses must generally be raised in the answer to the Secretary's complaint before the OSHRC. The answer may be amended to raise a substantive defense through the trial only with leave of the OSHRC.

Employer's Burden of Proof: The employer generally bears the burden of proving a substantive affirmative defense by a preponderance of the evidence.

Recognized Exception: If an exception to the requirements of an OSHA standard is recognized within the standard itself or otherwise, an employer may certainly challenge a citation on the grounds that the exception precludes enforcement of the OSHA standard.

Greater Hazard: An OSHA standard will generally not be enforced in a situation where such enforcement would defeat the purpose of the OSH Act. Accordingly, an employer is excused from compliance with an OSHA standard where and only to the extent such compliance would create a greater hazard to its employees than noncompliance.

An employer seeking to avoid a citation on such grounds, however, must show more than the prospect of a greater hazard. The employer must also show that (1) alternative means of protection were either in use or were unavailable, and (2) a variance application under the OSH Act is inappropriate.

Impossibility of Compliance: Federal courts have said that the OSH Act imposes only obligations which can be achieved. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C.Cir. 1973) Accordingly, an employer may defend a citation by arguing that it is impossible to comply with the standard and remain in business.

To avail itself of this defense, an employer must show that compliance with the OSHA standard was infeasible or would preclude performance of the employer's work; it is insufficient to show that compliance is merely impractical, inconvenient, expensive or difficult. *Duncan Par Engineered Form Co.*, 12 OSHC 1949 (Rev.Comm'n 1986), *rev'd*, 843 F.2d 1135 (8th Cir 1988) Economic infeasibility can nonetheless be demonstrated if it can be shown that the expense of compliance would jeopardize the employer's existence. The employer must also show that alternative means of protection were being used or were infeasible. *Id.*

Arbitrary and Capricious OSHA Standard: Ordinarily, an OSHA standard properly promulgated by the agency may be challenged only through the judicial review procedures specifically provided by the OSH Act. An employer can nevertheless challenge an OSHA standard which forms the basis for a civil citation as arbitrary and capricious. Although this affirmative defense is often raised by employers and heard by the OSHRC, it rarely ever forms the basis for the dismissal of a citation.

Employee Misconduct: As previously noted, one element of the Secretary's burden or proof is to show that the employer knew of the hazardous condition or should of known of the condition with reasonable diligence. Under this burden, unpreventable employee misconduct should not result in a citation.

Some decisions, however, view unpreventable employee misconduct as a substantive affirmative defense which must be proven by the employer to avoid a citation. *Brock v. L.E. Myers Co.*, 818 F.2d 1270 (6th Cir. 1987) Under the affirmative defense, the employer bears the burden of showing that the violation occurred even though it (1) established work rules designed to prevent the violation which are as stringent as the requirements of the OSHA standard, (2) effectively communicated the work rule to its employees through training, (3) took steps to discover violations, and (4) uniformly and effectively enforced its work rules against violators.

Multi employer Worksite: Special issues arise when employees of more than one employer occupy one worksite, most typically a construction work site.

Lack of Control. One issue is the extent to which an employer should be liable to its own employees for hazards over which it had no control. In response to this issue, the OSHRC has said that each employer has responsibility for the safety of its own employees even if another employer is contractually responsible for eliminating hazards. *Anning-Johnson Co.* 4 OSHC 1193 (Rev. Comm'n 1976); *Grossman Steel & Aluminum Corp.*, 4 OSHC 1185 (Rev. Comm'n 1976) The Commission, however, said that such an employer could avoid liability by showing either that it took whatever steps were reasonable under the circumstances or that it lacked the expertise to recognize the hazardous nature of the condition.

Exposure of Nonemployees. Another issue is the extent to which an employer should be liable for violations to which employees of other employers are exposed. In response to this issue, the OSHRC and the courts have said that an employer is liable for hazards which it controls or creates even if its own employees are not exposed to the hazard. Accordingly, it is not a substantive defense to an OSHA citation that the employer's own employees were not exposed to the hazard.

Other Substantive Defenses: The foregoing is not intended to be an exhaustive list of all substantive defenses which may be raised by an employer to an OSHA citation. Defenses such as ignorance of an OSHA standard or the mistaken impression that a standard did not apply, however, have traditionally been rejected.

PROCEDURAL AFFIRMATIVE DEFENSES

An employer can raise certain procedural affirmative defenses which avoid civil liability for the violation cited by OSHA, regardless of the ability of the Secretary to meet its burden of proof. Procedural defenses are affirmative defenses which arise from the manner in which the citation has been brought rather than the substance of the violation alleged therein. A procedural defense generally alleges that OSHA has failed to adhere to the requirements of the OSH Act or its own rules in bringing a citation.

Raising Procedural Affirmative Defenses: Procedural defenses must generally be raised in the answer to the Secretary's complaint before the OSHRC. The answer may be amended to raise a procedural defense through the trial only with leave of the OSHRC.

Employer's Burden of Proof: The employer generally bears the burden of proving a procedural affirmative defense by a preponderance of the evidence.

Procedural Violation. The employer must show that a procedural requirement of the OSH Act or OSHA regulations has been violated. The procedural rules which can form the basis for procedural defense are outlined below.

Employer Prejudice. Where the Secretary's Complaint fails to meet the statute of limitations specified by the OSH Act, is based upon a standard which violates established rulemaking procedures, or exceeds the coverage of the OSH Act, the employer need not prove that it has been prejudiced by the untimeliness of the Secretary's Complaint. For other procedural defenses, the employer must show that it has suffered prejudice as a proximate result of the procedural violation.

Right of Accompaniment: The OSH Act provides that an employer and an employee representative shall be given an opportunity to accompany an inspection for the purpose of aiding the inspection. 29 U.S.C. §657(e) To prevail on a defense based upon the failure of OSHA to permit accompaniment, the employer must show a lack of substantial compliance with the accompaniment right and must also show prejudice.

Statute of Limitations: The OSH Act provides that a citation may not be issued by OSHA more than six months after the violation cited therein. 29 U.S.C. §658(c) The statute of limitations prevents OSHA or the Secretary from issuing a citation for a violation not previously cited more than six months after the violation. The statute of limitations does not necessarily prevent OSHA or the Secretary from amending a citation to correct an error.

Failure to Issue Citation With Reasonable Promptness: The OSH Act also requires that a citation be issued by OSHA with reasonable promptness. 29 U.S.C. §658(a) The Act also requires that OSHA issue a citation within a reasonable time after the termination of its investigation or inspection. 29 U.S.C. §659(a)

Relationship to Statute of Limitations. The "reasonable promptness" requirement is separate and apart from the statute of limitations. A citation issued within six months does not necessarily satisfy the reasonable promptness requirement.

Employer Prejudice. The fact that substantial time has elapsed between the citation and alleged violation is only one consideration in determining whether the employer has been prejudiced by the failure of OSHA to issue the citation with reasonable promptness. Other considerations include the unavailability of witnesses, documents and equipment and other prejudicial circumstances occasioned by the delay.

Improper Service of Citation: The OSH Act also requires that an employer be notified of the violation and penalty by certified mail. 29 U.S.C. §659(a) OSHA must provide the employer with notice which is reasonably calculated to provide it with knowledge of the citation and proposed penalty and an opportunity to abate or contest within 15 days. The only prejudice which will avoid a citation is the lack of any opportunity to abate or contest the citation.

Failure of Citation to State Alleged Violation With Particularity: The OSH Act requires that a citation describe with reasonable particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation or order alleged to have been violated. 29 U.S.C. §658(a)

Standard. The test of particularity is whether the citation provides fair notice of the alleged violation. In determining whether fair notice has been afforded, consideration may be given to factors external to the citation, such as the nature of the alleged violation, the circumstances of the inspection, and the employer's knowledge of its own business.

Employer Prejudice. Mere vagueness in the language of the citation is insufficient to have a citation be dismissed for failure to describe the alleged violation with reasonable particularity. The employer must show some prejudice proximately caused by the vagueness, such as the inability to prepare a proper defense.

Amendment. A vague citation may be cured by amendment to describe with more particularity the violation alleged therein.

Vague Standard: An OSHA standard may be challenged as unconstitutionally vague if the standard fails to provide employers with fair notice of the prohibited work condition. Such a challenge will be upheld only if a reasonable person is left to guess as to its meaning and differ as to its application. *Allis-Chalmers v. OSHRC*, 542 F.2d 27 (7th Cir. 1976)

Citation Under General Duty Clause: Cases construing the general duty clause have generally held that an employer cannot be cited thereunder when a specific OSHA standard applies.

A procedural defense which may be raised to a citation under the general duty clause is that it should be dismissed because a specific OSHA standard applies under the circumstances. At least one court has held, however, that if "an employer knows that a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address . . . he has a duty under Section 5(a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard." *See UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 976 (1987)

Failure of OSHA to Follow Rulemaking Procedures: To the extent that OSHA fails to follow the rulemaking procedure for a standard sought to be enforced against an employer, the employer has a procedural defense to the enforcement of the standard. To the extent an employer is cited for a violation which can only be supported by the OSHA Directive and not the rule which the OSHA Directive purports to construe, the employer has a procedural defense based upon the failure of OSHA to follow its rulemaking procedures.

Coverage: As set forth above, the OSH Act precludes jurisdiction where working conditions of an employer are subject to another federal agency's regulations. 29 U.S.C. §653(b)(1) Where the working conditions cited are subject to another agency's regulations, a procedural defense is available to the employer to enforcement of the citation.

Moreover, if an employer can show that it is not an employer at all or that it only employs independent contractors, a citation should be dismissed.

Other Procedural Defenses: The foregoing is not an exhaustive list of all procedural defenses which may be submitted by an employer. Many procedural defenses which are available in civil litigation are also available in OSHRC proceedings. For example, an employer can certainly argue that a citation be dismissed under equitable doctrines such as waiver and estoppel.

PROCEDURAL EVIDENTIARY EXCLUSIONS

An employer may also move to suppress or exclude certain evidence which is critical to establishing the burden of proof borne by the Secretary of Labor. Procedural evidentiary exclusions are those which arise from the manner in which the evidence has been obtained by OSHA. A procedural evidentiary exclusion is generally based upon the failure of OSHA to adhere to the requirements of the OSH Act or its own rules in conducting an inspection or investigation. An evidentiary exclusion only affects the evidence which has been improperly obtained and, in this sense, is different from a procedural defense which avoids liability altogether.

Raising Procedural Evidentiary Exclusion Issues: Procedural evidentiary exclusion issues are generally raised by a motion to suppress or exclude the evidence which has been allegedly improperly obtained.

Standard: Generally, the OSHRC only looks to whether the evidence was obtained improperly in determining whether it should be excluded. Some courts have suggested, however,

that evidence improperly obtained may nevertheless be admissible if obtained in good faith. *See United States v. Leon*, 468 U.S. 897 (1984)

Exempt Employer: An argument for the exclusion of evidence may be made if the evidence was obtained by OSHA during an inspection from which the employer was exempt. This would be the case if the employer was a small employer or a participant in the inspection exemption program.

Violation by OSHA of OSH Act or OSHA Regulation: An argument for the exclusion of evidence may be made if the evidence was obtained by OSHA in violation of the restrictions of the OSH Act or OSHA regulations regarding the conduct of inspections and investigations. This would be the case if the inspection was conducted at an unreasonable time, beyond reasonable limits or in an unreasonable manner.

Validity of Search Warrant: Evidence may be excluded if obtained by OSHA pursuant to a search warrant which has not been properly obtained.

Compliance with Limitations of Search Warrant: Evidence may be excluded if obtained by OSHA beyond the scope of the search warrant and corresponding exceptions discussed earlier in the article.

CRIMINAL VIOLATIONS AND ENFORCEMENT

The OSH Act also contains provisions by which certain conduct is criminalized and pursuant to which criminal violations are prosecuted.

CRIMINAL PROHIBITIONS AND PENALTIES

The OSH Act makes certain conduct by an employer a criminal violation of the Act subject to criminal penalties and/or imprisonment.

Willful Death: An employer who causes an employee's death by willfully violating any OSHA Safety and Health Standard is subject to criminal prosecution and, upon conviction, may be punished by a fine of up to \$10,000, by imprisonment for up to six months, or both. If twice convicted, the maximum fine is raised to \$20,000 and the potential term of imprisonment is one year. 29 U.S.C. §666(e) Since the OSH Act limits its applicability to violations of OSHA standards, criminal liability cannot be based upon a violation of the OSH Act's general duty clause.

Tipping Off Employer: It is a criminal violation of the OSH Act to give advance notice of an inspection to be conducted under OSHA unless OSHA is permission is secured. 29 U.S.C. §666(f) This crime may, if proven, be punished by a fine of not more than \$1,000.00 or imprisonment for not more than six months, or by both. 29 U.S.C. §666(f)

Falsification of Records: Anyone who makes a false statement in any document that must be filed or maintained under the OSH Act is subject to criminal prosecution and upon conviction, may be punished by a fine of not more than \$10,000.00 or imprisonment for not more than six months, or by both. 29 U.S.C. §666(g)

CRIMINAL PROSECUTIONS

The enforcement scheme of the OSH Act is essentially civil in nature. The enforcement scheme differs dramatically when a possible criminal violation of the Act is involved.

Role of OSHA: Criminal penalties may not be imposed by OSHA or the OSHRC. In situations where there is reason to believe that a violation may involve a crime, OSHA refers the matter to the appropriate federal agency, such as the Department of Justice or the U.S. Attorney's office, for further action.

Role of Other Federal Agencies: Once a possible criminal violation has been referred to a federal agency charged with criminal enforcement of federal laws, it is then up to that agency to determine whether or not to seek an indictment and prosecute the violation as a crime.

Federal Court: The forum for a prosecution of an alleged criminal violation of the OSH Act is federal court. Once in federal court, the case proceeds as any criminal case with the entire rights attendant to a criminal prosecution.

Burden of Proof: In a criminal case, it is the prosecutor's burden to prove each element of the OSH Act violation beyond a reasonable doubt.

CRIMINAL PROCEDURAL DEFENSES

An employer can raise certain procedural defenses which avoid criminal liability for the violation cited by OSHA, regardless of the ability of the prosecutor to meet its burden of proof.

Defenses Which are Unavailable: Certain defenses are unavailable in criminal proceedings under the OSH Act.

Miranda Warnings. CSHOs do not have the authority to arrest individuals and thereby do not have to give *Miranda* warnings. The failure to be provided a *Miranda* warning, therefore, is not a defense to criminal prosecution under the OSH Act.

Self Incrimination. A corporation is not protected by the Fifth Amendment protection against self incrimination.

Defenses Which are Available:

Statute of Limitations: Criminal charges under the OSH Act may be brought up to five (5) years after the violation. 18 U.S.C. §3282 Criminal complaints not brought within this five year period are subject to dismissal as being untimely.

Other Defenses: Other defenses which are available to criminal defendants in criminal prosecutions are generally available in criminal prosecutions under the OSH Act. For example, the double jeopardy defense would be available to a criminal defendant under the OSH Act.