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How to Survive a MIOSHA Inspection

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Today's Agenda

- Inspections: Reasons/Types
- Phases of a MIOSHA Inspection
- Steps employers can take during an inspection to limit their potential liability
- Best Practices
- MIOSHA citations
- Citation appeals process

Why Do We Have MIOSHA and Not OSHA?

- Federal Law: Occupational Safety and Health Act
 - Federal Agency: Occupational Safety and Health Administration (OSHA)
 - Federal law allows states to adopt and administer their own occupational safety and health laws – with OSHA's approval
 - 22 states have their own plans for both public and private employers
 - Examples: MI, IN, KY, TN, IA, MN, CA...
 - 7 states have their own plans for public sector employees only
 - Examples: NY, IL, NJ...
 - Remaining states are federal OSHA states: OH, WI, PA, FL, GA...
 - State Law: Michigan Occupational Safety and Health Act
 - State Agency: Michigan Occupational Safety and Health Administration (MIOSHA)

Inspections

Reasons For Inspections

1. Programmed Inspections

- Industry specific, job specific, national/state/local emphasis programs
 - Current emphasis programs: Heat illness, fall protection
 - Wall-to-wall or focused

2. Unprogrammed Inspections

- Complaint by employee
 - Please do not fire employees for reporting you to MIOSHA
- Accident report
 - The more severe the injury, the more likely MIOSHA will inspect you
- Fatality/Catastrophic (FAT-CAT)
 - Fatality or hospitalization of 3 or more workers
 - Must be reported within 8 hours

2. Unprogrammed Inspections (Cont.)

- 2. Unprogrammed Inspections (Cont.)
- Imminent danger
 - Immediate risk of death or serious physical harm
- Referrals
 - Media coverage, other government agencies, physicians, federal OSHA
- Follow-up (re-inspections)/monitoring
- Visual activity/Dodge reports (construction)



Phases of a MIOSHA Inspection

Phases of a MIOSHA Inspection

1. Arrival at site and initial entry to facility/worksite
2. Opening conference
3. Inspection “walk around”
4. Closing conference



1. Arrival and Initial Entry

- Inspector will arrive and present credentials/business card
- Are you entitled to advance notice of any inspection?
 - No – and you usually do not receive advance notice, but sometimes you will be given advance notice
 - After hours inspection, management representatives may not be present onsite
- Can you refuse entry?
 - Yes, but MIOSHA will return with a warrant and a police officer – this may buy you time, but it will make things worse
- Inspector must reach inspection site within 60 minutes
 - We can make the inspector wait up to 60 minutes

Best Practices for Arrival and Initial Entry

- Designate several management representatives as the go to contacts for handling MIOSHA inspections
- Make sure your reception area personnel know to contact these designated management representatives
- Contact the designated management representatives immediately
- Ask inspector to wait in the reception area or in a private conference room while management is contacted
- Be nice



2. Opening Conference

- Employers are entitled to an opening conference
- Management representatives and an employee representative (in union facility) are present
- You will be given a copy of the written complaint
- You can ask questions
- You can ask for abatement advice
- Inspector will seek consent to photograph and videotape in your facility
- Select a management representative to accompany the inspector during the walk-around



2. Opening Conference (Cont.)

- Inspector may ask to see your 300 logs, 300A summaries, and 301 injury reports
- Inspector may ask to see your written safety programs, accident prevention program (construction)
- Inspector may ask for other written safety policies, equipment inspection records, and/or other documentation

Best Practices for An Opening Conference

- Always have an opening conference
- Use that time to determine exactly what the inspector wants to see
 - Then show the inspector only what he/she wants to see
- During the opening conference, have someone walk through the facility and look for obvious safety hazards – and fix them immediately (employees not wearing PPE, trip hazards, blocked emergency equipment and doors, etc)
 - Last Minute “House Cleaning” – contact managers, let them know MIOSHA is inspecting, and ask them to fix any potential safety issues immediately
- You can make the inspector wait for up to 60 minutes while you prepare to take him/her on the inspection – use that time to your benefit – but be reasonable

3. Walk-Around Inspection

- Employer has the right to accompany inspector
 - Inspector should never be unaccompanied
 - Employer representative may not be disruptive or interfere with the inspection
 - Show inspector only what he/she wants to see and “plan” route accordingly
 - Example: Complaint was about stamping machine 5 – take the inspector directly to stamping machine 5 – do not give him/her a tour of the factory floor
- Inspector will take photos and/or video
 - When inspector takes a picture, so should the employer

3. Walk-Around Inspection (Cont.)

- Inspector will want to see required postings (breakroom)
- Inspector may wish to interview employees
 - A management representative is normally entitled to sit-in on interviews with managers/supervisors as they are agents of the employer
 - A management representative normally is not entitled to sit-in on an employee interview unless the employee asks for a third party to be present in the interview (Union representative)
 - An employee has the right to refuse to be interviewed by the inspector, and he/she has the right to have a representative with him/her

New MIOSHA Guidance on “Private” Interviews – October 17, 2022

- Employer has no right to attend a private interview with a non-management employee
 - If non-management employee voluntarily requests that a member of management be present – then SO must make a reasonable effort to honor that request
- Guidance does not say the Employer has the right to be present in interviews with management employees
 - If the managerial employee requests that a member of management be present, then SO must make a reasonable effort to honor the request (Some SO’s are refusing to let the employer sit in on manager interviews).
 - Tell all management employees to request that another member of management be present with them in an interview

Inspector and Employees

- Inspector does not have right to see operations not being performed or to ask for demonstrations of how we use our equipment or machines
- MIOSH Act gives an employee representative the right to participate in an inspection
 - Always happens in union facility; almost never happens in non-union companies
 - Union steward will probably accompany you and the inspector throughout the process
 - Union representative may wish to participate in employee interviews
 - This gives the employer the right to sit-in as well

Abatement

- Inspector may offer abatement assistance during inspection
 - Best Practice – Pay attention to what the inspector says regarding abatement
- Immediate abatement may result in lower classification or penalty – or the inspector might not even cite you for it
 - Best Practice – If you can immediately fix something during the inspection, fix it, and then let the inspector know you fixed it before he/she leaves

4. Closing Conference

- Closing conference often is not held the day of the inspection – time delay between inspection and closing conference
- May be done by telephone or in person
 - In person is generally more effective
 - Closing conferences regarding exposure testing almost always done over phone
- Employee representative (if any) should be included in closing conference
 - Employer may request separate closing conferences – if so, the closing conference involving the employee's representative will be held first
- Inspector will review proposed violations and means of abatement

Tips For Surviving A MIOSHA Inspections

1. Separate the Adversarial from the Non-Adversarial

- Inspections can be educational; inspectors may indicate more effective or efficient safety practices – listen.
- Do not argue with the inspector, but do not hesitate to politely correct incorrect facts or assumptions
- Inspections are conducted to issue citations – do not offer up examples of other safety issues that we are “aware of” and are “working to fix” – it is usually better to listen than to talk



2. Ask Questions & Document

- Ask questions
 - Especially during the closing conference
 - Understand the basis for a citation, ask for information, provide additional information at the closing conference – it may be possible to talk your way out of a citation if the inspector was unclear or mistaken about something
 - Preserve potential evidence to defend yourself – photographs, video footage (turn off auto delete), witness statements, documentation
- Document the visit as soon as possible
 - Conduct your own interviews, if you have not done so already
- Obtain copy of MIOSHA's inspection file (FOIA)(takes time)

Best Practices

Safety and Health Program

- The best way to reduce your potential liability is to adopt and administer an effective workplace Safety and Health Program
 - Construction employers – required to have an “Accident Prevention Program”
 - When an effective Safety and Health Program is in place – there are fewer injuries, fewer MIOSHA inspections, employees are more engaged, less down time, WC costs decrease, ultimately saves you money
 - This program should be memorialized in writing

Safety and Health Program – 7 Core Elements

1. Management commitment and leadership

- Communicate company commitment to employee safety and health, and it should be signed by top management
- Define program goals
- Allocate resources toward safety goals – Budget for safety
- Expect performance – Identify frontline leaders and track progress toward safety goals

2. Employee involvement

- Employee participation – Safety committees
- Employees report safety issues
- Employees are regularly provided safety and health information

Safety and Health Program – 7 Core Elements (Cont.)

3. Hazard Identification and Assessment

- Collect information about workplace hazards – injury reports, talk to workers
- Inspect the workplace for safety and health hazards
- Incident investigations

4. Hazard Prevention and Control

- Identify control options – eliminate hazard, change tools or equipment, change the way people work, new PPE
- Select and implement the control options
- Monitor to make sure control options are effective

Safety and Health Program – 7 Core Elements (Cont.)

5. Education and Training

- Train managers and employees about the Safety Program itself
- Train managers and employees about their roles in the program
- Train managers and employees about specific hazards and how to control them

6. Program Evaluation and Improvement

- Periodically evaluate safety program, identify shortcomings, and fix them

7. Communication and Coordination with Staffing Agency Employees

- Communicate with an make sure temps are involved in safety program – joint responsibility – mainly host employer

Tips for Preventing Injuries

- Periodic workplace hazard assessments – Every 6 months or so.
- Regular safety meetings with employees and Safety Manager.
- Initial employee safety training – and periodic retraining (annual or when processes change).
- Periodic equipment and job evaluations – Can employees change the way they work so they expose themselves to fewer hazards? Can we put a different guard on the machine that protects workers better, but does not hinder production?

Tips for Preventing Injuries

- Devote Company resources to safety.
- Get a Safety and Health Plan.
- Definitely devote your resources to the most serious safety hazards that are likely to result in death or serious physical injury.
 - Death = Falls, Struck by/run over by vehicle/equipment
 - Serious injury = LOTO, PPE, Hi-Los, Machine guarding

Could Company Have Avoided All Citations In This Situation?

- Probably not.
- Thousands and thousands of MIOSHA standards.
 - I guarantee all of our employers are violating some MIOSHA standards right now.
- Take safety seriously – Safety and Health Plan.
- Definitely devote resources to the most serious safety hazards that are likely to result in death or serious physical injury.
 - Death = Falls, Struck by/run over by vehicle/equipment
 - Serious injury = LOTO, PPE, Hi-Lo, Machine guarding

MIOSHA Citations

Types of MIOSHA Citations and Monetary Penalties

- Serious –\$7,000/violation maximum fine – “likely to cause serious physical harm or death”
 - Federal OSHA - \$15,625*
- Other than serious (“OTS”) - \$7,000/violation maximum fine – but always much less
- Failure to abate - \$7,000/day for every day past the abatement date
 - Federal OSHA - \$15,625/day*
- Willful or Repeat –\$5,000-\$70,000/violation
 - Willful = knowing failed to comply/plain indifference to employee safety
 - Federal OSHA - \$156,259*
- De minimis – no penalty; no abatement requirement
 - *MIOSHA fines are less than OSHA fines

Most Common MIOSHA Citations

- 1. Fall Protection** – Fail to properly protect against falls; failure to train; GI = 4 feet; Construction = 6 feet
- 2. Hazard Communication** – Failure to properly inform employees about hazardous materials in the workplace
- 3. Respiratory Protection** – Failure to provide proper respiratory PPE or administer program correctly

Most Common MIOSHA Citations (Cont.)

4. **Ladders** – Improper use
5. **Scaffolding** – Improper use
6. **Lockout – Tagout**
7. **Powered Industrial Trucks** – Forklift-related hazards
8. **PPE** – Inadequate personal protective equipment
9. **Machine Guarding** – Inadequate guarding at pinch/operation points

Handling MIOSHA Citations

- “We’ve received a proposed citation. Now what do we do?”
 - Act quickly – first appeal must be filed within 15 working days from when you receive citations
 - Do not let MIOSHA citations sit around a while before you deal with them
 - First step – Determine whether you should appeal or settle
 - Information learned during inspection and closing conference can be used to evaluate decision to appeal or settle

Appeal or Settle?

Appeal or Settle?

- MIOSHA must prove the following:
 - There is an applicable standard (or the general duty clause)
 - A hazard existed in violation of the standard
 - An employee was exposed to the hazard
 - The employer knew or should have known about the hazard
 - If MIOSHA cannot prove all of these elements, you may want to appeal
- Are the penalties justified?
 - Monetary penalty calculated correctly?
 - Classified correctly?
- Do we want this on our record?
 - Construction employers – Too many serious violations can cost you jobs – OSHA online search = 5 year history of your citations

Appeal or Settle? (Cont.)

- Is abatement reasonable?
 - Too expensive; not enough time
 - You can also simply request additional time to abate the hazard
- Do we have an affirmative defense?
 - Unavoidable employee misconduct (more later)
 - Timeliness – 90 days after the completion of the physical inspection or investigation (closing conference)
 - Improper inspection – some portion of the inspection was unreasonable and it prejudiced the employer
 - Infeasibility – compliance is impossible and other appropriate measures have been taken to protect employees
 - Creation of greater hazard – complying with the standard would be more dangerous than not complying with it

Appeal or Settle – Employee Misconduct

- An employee doing something that he/she was not supposed to be doing – or just generally doing something dumb – often leads to workplace injuries and MIOSHA citations
 - Most of the time, this does not give rise to a legitimate unavoidable employee misconduct defense
 - Employer must show:
 - Clear work rule, and if followed, it would have prevented the violation
 - Rule was effectively communicated to employees (documentation)
 - Procedures were in place to discover violations of this work rule
 - When the rule has been violated in the past, employees are consistently disciplined
 - Employees do dumb things at work – but this defense is more difficult than it appears

Options

- Weigh all of your options – and then determine if you want to appeal the citations or settle/pay the fine
- For most citations, the employer violated the standard, and MIOSHA can prove its case
- No appeal? Make sure the problem is fixed, and periodically monitor the issue – Avoid a repeat citation

Penalty Reduction Agreement

- If you do not want to contest the citation, then consider the online Penalty Reduction Agreement (PRA) process
- PRA
 - Employer accepts all citations
 - Employer agrees to abate all hazards by the date on the citation
 - Fine is automatically reduced by 50%
 - A PRA must be applied for online between 5-15 working days after the citation is received
 - Not all citations qualify for a PRA
 - Fatalities
 - Employer is in the Severe Violator Enforcement Program
 - Willful violations
 - Unabated Construction Division investigations

MIOSHA Appeal Process

Steps to a MIOSHA Appeal

1. Informal conference
2. Employer 1st Appeal
3. MIOSHA determination
4. Employer 2nd Appeal
5. Pre-hearing settlement conference
6. Hearing before MOAHR ALJ
7. ALJ Decision
8. Adopted or modified by the Board of Health and Safety Compliance and Appeals
9. Circuit Court, Court of Appeals, Michigan Supreme Court

1. Informal Conference

- An informal conference can be held at request of employer
- Often (almost always) done by phone
- BEWARE – An informal conference does not stop or affect the deadlines for making a formal appeal or executing a PRA
- Most of the time – these do not accomplish much
 - *Different for federal OSHA citations (more later)

2. Employer 1st Appeal

- Must be filed within 15 working days of receiving proposed citation(s)
 - Deadlines matter to MIOSHA
- Can be a very specific statement of why you disagree with citations or very broad and general statement
 - Strategic choice
 - Beware of limiting yourself later
- MIOSHA will respond in writing
- MIOSHA might modify the citation or penalty at the 1st Appeal (25% chance)

3. MIOSHA Determination

- MIOSHA will respond in writing
- MIOSHA might modify the citation or penalty at the 1st Appeal (25% chance)

4. Employer 2nd Appeal

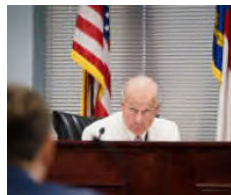
- Must be filed within 15 working days of receiving MIOSHA decision on 1st Appeal
- Again, 2nd Appeal can be a very specific statement of why you disagree with citations or very broad and general statement
- Upon receipt, MIOHSA will schedule a pre-hearing conference
- Do not waste a lot of time on a 2nd Appeal – MIOSHA will not modify anything based on your 2nd Appeal
 - Any modification will come after the Pre-Hearing conference

5. Pre-Hearing Conference

- Purpose of pre-hearing conference is to settle the citations
- MIOSHA represented by Appeals Division and enforcement division
- Opportunity for both parties to present and discuss their case
- MIOSHA will generally make a settlement proposal at the end of the conference or via email after the conference ends
- All conducted via telephone
- Provide supporting evidence beforehand, and discuss during the pre-hearing – good, reasonable process

6-7. Formal Hearings & Decisions

- Usually held in Lansing before Administrative Law Judge
- A formal hearing is a trial
 - Discovery
 - Witnesses
 - Briefs
 - ALJ Decision
- Board of Health and Safety Compliance Appeals, Circuit Court, Court of Appeals, and Michigan Supreme Court



Federal OSHA Appeals

- Federal OSHA citations have a similar appeal process
- One important difference:
 - In the federal system, you can ask for an informal conference with the District Director (or his/her representative) within the first 15 days – and you will receive one – and you can potentially receive reduced fines and citations
 - I recommend that you ask for an initial informal settlement conference for all federal OSHA citations



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