



## 307: Top 10 Things Employers Should Know to Survive Their Next OSHA Inspection

**J. Michael Kettle**  
*Vice President and General Counsel*  
Rooms To Go

**Neil H. Wasser**  
*Manging Member*  
Constangy, Brooks & Smith, LLC

## Faculty Biographies

### **J. Michael Kettle**

*Vice President and General Counsel*

Rooms To Go

### **Neil H. Wasser**

Neil Wasser is a partner with Constangy, Brooks & Smith, a law firm representing management, exclusively, in labor and employment matters. Mr. Wasser is based in the firm's Atlanta office, one of 12 offices across nine states. He specializes in assisting companies with OSHA compliance obligations and establishing safety and health programs. He represents client companies during OSHA inspections, defends them against OSHA citations, and is widely regarded as a top national expert in OSHA record keeping training.

Neil Wasser is a member of the Atlanta Bar Association, ABA, and the State Bar of Georgia. He currently serves on the board of directors of the Atlanta Humane Society.

Neil earned his BA from Tulane University and his law degree from the University of Georgia.



## **Session 307**

# **Top Ten Things Employers Should Know to Survive Their Next OSHA Inspection**

**J. Michael Kettle**  
Rooms-To-Go

**Neil H. Wasser**  
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## **Topics**

- 1. "I'm Busy – How Do I Remain Current on OSHA?"**
- 2. Avoiding the Next Complaint Inspection.**
- 3. Preparing for Inspection.**
- 4. "Isn't There a Checklist We Could Use for What Do if OSHA Knocks."**
- 5. "Safety Incentive Programs – What's to Worry About?"**
- 6. Preventing Repeat Violations.**
- 7. Preventing Willful Violations.**
- 8. Your Mail Room Procedures.**
- 9. Temporary Employees.**
- 10. Bloodborne Pathogens Training.**
- 11. Forklift and Child Labor Reminder.**
- 12. Training.**
- 13. Off-the-Job Safety and Health.**

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## Background Statistics

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## OSHA Statistics – Inspections FY 03

- FY 03 – 39,678 Federal Inspections (56,921 state)
  - **Approximately 30,000 safety inspections vs. approximately 9,000 health inspections.**
- Percent of contested cases: 8% in FY 03.
  - **Down from 10% in FY 99.**
- Percent of violations cited as serious in FY 03 – 72%. (Highest rate in OSHA history).
  - **Up from 65% in FY 99.**
- Average number of violations cited per initial inspection in FY 03 – 3.4.
  - **Down from 4.1 in FY 95 and same as 3.4 in FY 00.**

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## Presidents and OSHA Inspections

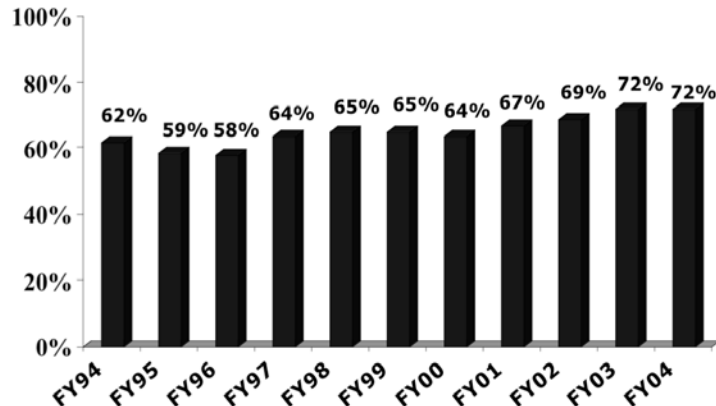
- **Pres. Ford - 1974-1977**
  - Averaged approx. 78,000 inspections per year
- **Pres. Carter - 1977-1981**
  - Averaged approx. 59,000 inspections per year
- **Pres. Reagan - 1981-1989**
  - Averaged approx. 64,000 inspections per year
- **Pres. Bush, I - 1989-1993**
  - Averaged approx. 42,000 inspections per year
- **Pres. Clinton - 1993-2001**
  - Averaged approx. 34,000 inspections per year
- **Pres. Bush, II - 2001 to present**
  - FY 02 – 37,614 inspections
  - FY 03 – 39,678 inspections (56,921 state)
  - Approx. 30,000 safety vs. approx. 9,000 health.

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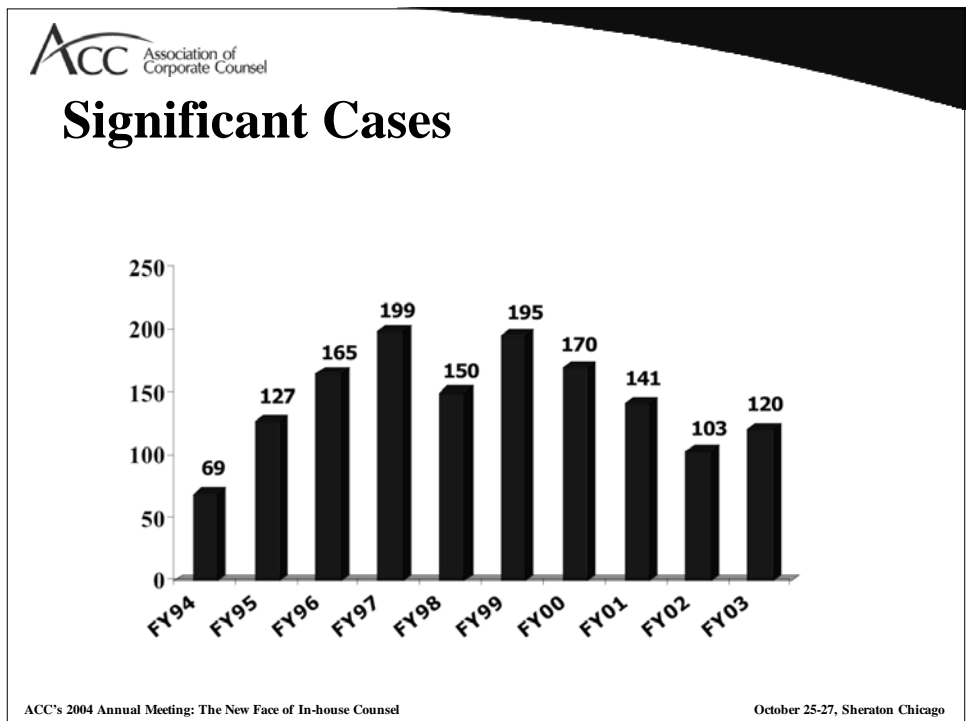
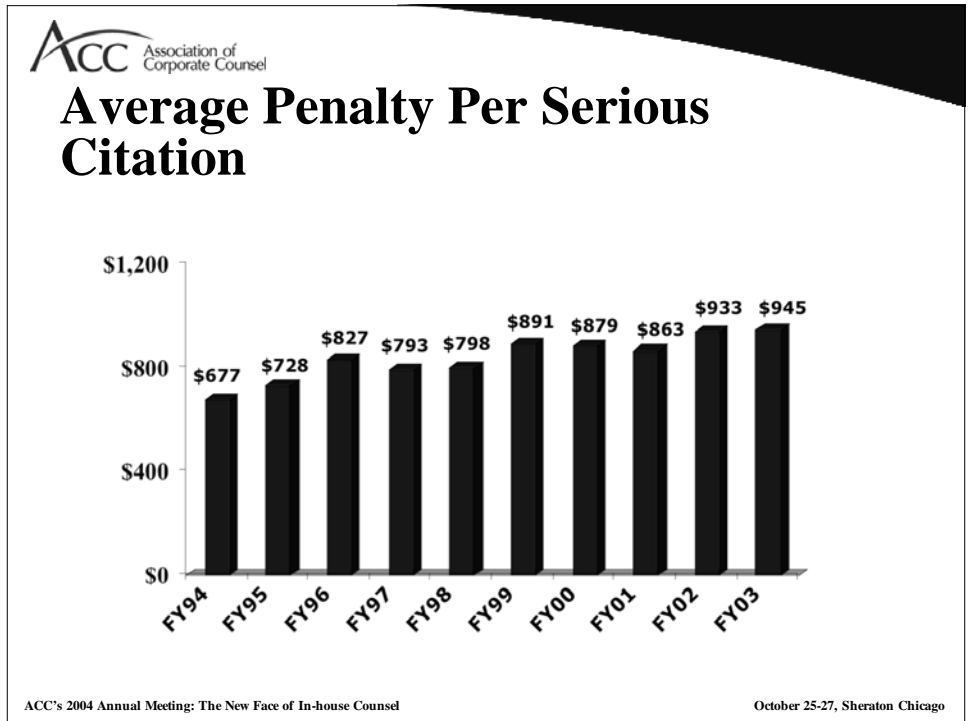


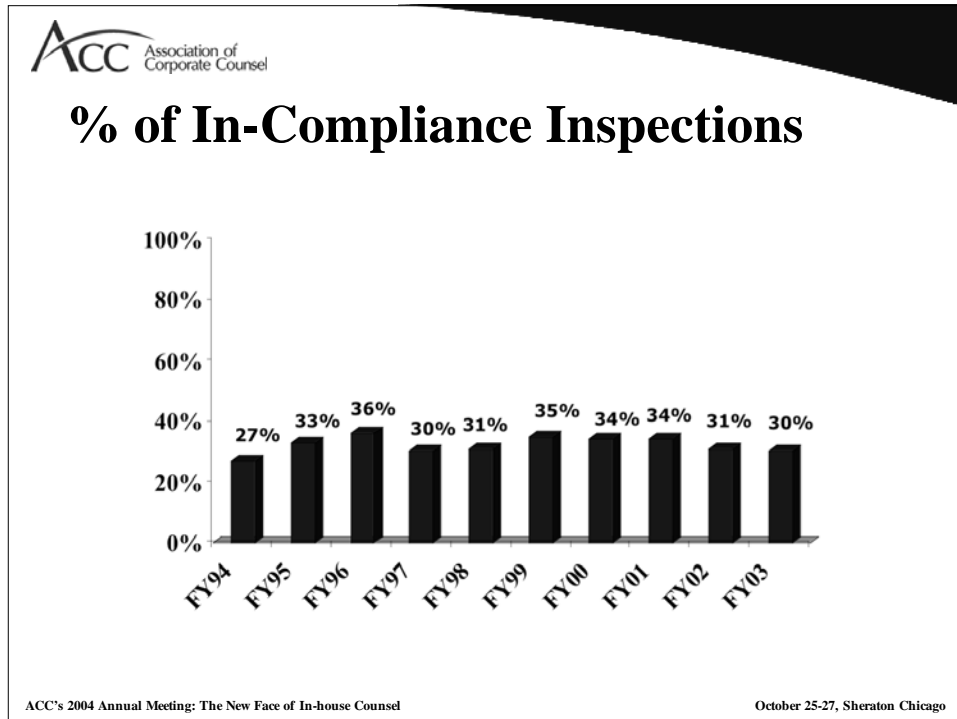
## % of Total Violations Cited As Serious



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## “I’m Busy – How Do I Remain Current on OSHA?”



- **Quick Takes** – OSHA bi-monthly e-memos describing what’s new. Sign up on the OSHA Home Page. [www.osha.gov](http://www.osha.gov)
- January 2004 – **Quick Start** is announced – a step-by-step guide to help employers in general manufacturing, wholesale and retail industry identify major OSHA requirements and guidance materials. [www.osha.gov/dcsp/compliance\\_assistance/quickstarts/index.html](http://www.osha.gov/dcsp/compliance_assistance/quickstarts/index.html)
- January 2004 – **My OSHA** – Choose content to personalize your own OSHA Web page. [www.osha.gov/pls/myosha/myosha.login](http://www.osha.gov/pls/myosha/myosha.login)

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## Take Advantage of Free Compliance Advice – Recent OSHA Publications

- *Saving Sudden Cardiac Arrest Victims in the Workplace – AEDs* Printed: 2003
- *Model Plans and Programs for the OSHA Bloodborne Pathogens and Hazard Communications Standards* Printed: 2003
- *Permit Required Confined Spaces* Revised: 2004
- *Personal Protective Equipment* Revised: 2004
- *Stairways and Ladders* Revised: 2003

[www.osha.gov/pls/publications/pubindex.list](http://www.osha.gov/pls/publications/pubindex.list)

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## “What Events Will Trigger an OSHA Inspection at My Company?”

- Employee Complaint / Referral
- Site-Specific Targeting
- Fatality / Hospitalization
- OSHA's New Enhanced Enforcement Program
- Special Emphasis Programs

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## Complaint Based Inspections

- Complaint inspections FY 03 = 7,931
  - **Approximately 1/5<sup>th</sup> of all inspections.**
- Remember – In April 2000, OSHA began allowing employees to fill out OSHA complaints on-line. A 19 question form – 10 minutes.
  - **OSHA receives approximately 5,000 electronic complaints per year.**
  - [www.osha.gov/as/opa/spanish/complaintform-sp.html](http://www.osha.gov/as/opa/spanish/complaintform-sp.html)
  - [www.osha.gov/pls/osha7/eComplaintForm.html](http://www.osha.gov/pls/osha7/eComplaintForm.html)
- OSHA's web site receives between 3 and 4 million visits per month.

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## Avoiding The Next Complaint Inspection



- Review your company's procedures for employees to raise safety and health concerns.
  - **Are they well publicized, easy to use, confidential, credible? Is there any fear of reprisal?**
- Are supervisors trained so that they understand "complaints are good?"
- Review your work order system. Are safety issues given priority? Are work orders timely processed? Is feedback provided?

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## Labor Unrest and OSHA Complaints

- General Accounting Office Report, August 2000.
  - **OSHA Inspections at Establishments Experiencing Labor Unrest.** The report found that establishments experiencing labor unrest are approximately 6.5 times more likely to be inspected by OSHA than establishments not experiencing labor unrest.

[www.gao.gov/new.items/00144.pdf](http://www.gao.gov/new.items/00144.pdf)

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## Site-Specific Targeting - 2004

- Based on 2003 Data Initiative (2002 data).
  - **Primary Inspection List:** All worksites with DART rate at or above 15 (was 14 in 2003) or, a DAFWII rate of 10 (was 9 in 2003) or more.
  - **Secondary Inspection List:** All workplaces with DART rate at or above 8 but below 15 or a DAFWII rate of between 4 and 10.
  - 200 workplaces randomly selected for inspection with LWDII rates between 0 and 8.
  - Failed to respond to the 2003 Data Initiative by 3/3/04? Added to the Primary Inspection List.
  - Exception – facilities that received comprehensive S&H inspection within last 24 months.

[www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=3123](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3123)

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## Preparing For Inspection 2003 General Industry v. Your Industry {SIC 5511 – Car Dealers}



- |    |                             |                  |              |
|----|-----------------------------|------------------|--------------|
| 1. | <b>Hazard Communication</b> | <b>1910.1200</b> | <b>{#1}</b>  |
| 2. | <b>Lockout Tagout</b>       | <b>1910.147</b>  |              |
| 3. | <b>PPE</b>                  | <b>1910.134</b>  | <b>{#2}</b>  |
| 4. | <b>Machine Guarding</b>     | <b>1910.212</b>  | <b>{#21}</b> |
| 5. | <b>Wiring Methods</b>       | <b>1910.305</b>  | <b>{#4}</b>  |
| 6. | <b>Powered Ind. Trucks</b>  | <b>1910.178</b>  | <b>{#13}</b> |
| 7. | <b>BBP</b>                  | <b>1910.1030</b> |              |
| 8. | <b>Electrical Systems</b>   | <b>1910.303</b>  | <b>{#7}</b>  |

**How to find the most frequently cited standards for your workplace?**

- **Look up your SIC.** <http://www.osha.gov/pls/imis/establishment.html>
- **Search your industry.** [www.osha.gov/oshstats/std1.html](http://www.osha.gov/oshstats/std1.html)
- **Perform a self-assessment. Utilize effective closure.**

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## Fatalities / Hospitalization

- Notify OSHA within 8 hours of fatality or in-patient hospitalization of 3 or more employees. 29 CFR 1904.39
- 5,524 fatal work injuries in 2002 – a decline of 6.6% from 2001 according to BLS.\*
- 2002 reflected the lowest number of fatalities since BLS began keeping stats in 1992.
  - **Fatal highway accidents (43%)**
  - **Contact with objects and equipment (16%)**
  - **Workplace homicides (15%)**
  - **Falls (13%)**
  - **Exposure to harmful substances or equipment (10%)**
  - **Fires and explosions (3%)**

\*[www.stats.bls.gov/iif/oshwc/efoi/cftb0167.pdf](http://www.stats.bls.gov/iif/oshwc/efoi/cftb0167.pdf)

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## OSHA's New Enhanced Enforcement Policy

- **September 30, 2003**, OSHA issued interim guidelines for implementation of its Enhanced Enforcement Policy. The Policy applies to three types of “priority enforcement cases”:
- **Fatality inspections in which OSHA finds high gravity serious, willful, or repeat violation related to the death;**
- **Inspections that result in three or more willful or repeat violations; and**
- **Inspection that results in two failure-to-abate notices where the underlying violations were classified as high gravity serious.**

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## Enhanced Enforcement (continued)

### Five aspects of enhanced enforcement:

1. On-site **follow-up inspections** at employers who have EECs to confirm abatement and determine whether the Company is committing similar violations.
2. Increased **Corporate Awareness** – OSHA will mail a copy of the citation and penalty to the corporate headquarters and may meet with Company officials and may send a letter from the Assistant Secretary to the Company president and may disseminate “necessary information” about the Company through the OSHA intranet and e-mail.

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## Enhanced Enforcement (continued)

3. OSHA will use its **programmed inspection** SST list to prioritize other facilities under the corporate entity. OSHA may:
  - > **Treat secondary list facilities on SST program as primary list facilities.**
  - > **Conduct follow-up inspections at other sites of the employer.**

### HGV Settlement agreements will:

- > **Require employers to hire consultants to develop a process to change the safety and health culture in the facility.**
- > **Apply the agreement corporate-wide.**
- > **Require employers to submit 300 Logs to OSHA on quarterly basis and consent to inspections on the Logs.**

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## Enhanced Enforcement (continued)

5. 11(b) – OSHA will seek Section **11(b)** summary enforcement orders to enforce citations that have been settled or have otherwise become final orders of the OSHA Review Commission.

Note: 11(b) of the OSH Act allows Secretary of Labor to petition a federal court of appeals to enforce a final order of the OSHA Review Commission. Federal courts have more sanctions to deal with non-compliant employers – contempt of court – fines, court costs, incarceration.  
[www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24649](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24649)

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## “Isn’t There a Checklist We Could Use For What To Do If OSHA Knocks?”

- Checklist provided.
- Practice.

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## Injury and Illness Rates

- 1998 – I/I rate of 6.7 cases per 100 FTEs.
  - LWDII = 3.1
- 1999 – I/I rate of 6.3 cases per 100 FTEs.
  - LWDII = 3.0
- 2000 – I/I rate of 6.1 cases per 100 FTEs.
  - LWDII = 3.0
- 2001 – I/I rate of 5.7 cases per 100 FTEs.
  - LWDII = 2.8
- 2002 – I/I rate of 5.3 cases per 100 FTEs.
  - LWDII = 2.8 (new recordkeeping rules)
- **Each year, these rates reflect the lowest levels since BLS began reporting data.** [www.osha.gov/oshstats/work.html](http://www.osha.gov/oshstats/work.html)

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## Safety Incentives Programs – What's to Worry About?"



- Safety incentive programs. Lawful, but:
  - Impact on OSHA Recordkeeping – Training and Audits.
  - Wage and Hour Considerations.  
[www.dol.gov/dol/allcfr/ESA/Title\\_29/Part\\_778/29CFR778.208.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_778/29CFR778.208.htm)
  - Consider input measures as well as outcome measures.
  - Just Say No to Comedians - Mears v. Nationwide Mutual Insurance Co., (8<sup>th</sup> Cir. 1996) “A contest is announced to create a theme. Here’s what you could win: His and Hers Mercedes. An all expense paid trip for two around the world. Additional prize to be announced. . .”
    - Mears’ winning slogan, “At the top and still climbing.”
    - Company argument – we were just joking about the cars.
    - Court Held: Nationwide owed Mears two of Mercedes-Benz’s least expensive new automobiles.

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## OSHA Recordkeeping

- January 1, 2003 - OSHA 300A Summary must be posted for three months – Feb. 1 to April 30<sup>th</sup>.
  - January 1, 2003 - OSHA 300A Summary must be signed by Company Executive.
  - January 1, 2003 – “clarified” hearing loss rules.
  - **January 1, 2004** - New OSHA 300 Log Form and Supporting Forms:
    - **A hearing loss column is now on the Log.**
    - **Columns K and L of OSHA 300 Log reversed.**
    - **The New OSHA Log forms package.**
- [www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf](http://www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf)

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## OSHA Recordkeeping – Understanding Work Relationship

- Recordkeeping – Work-Relationship
  - Walking down the perfect seamless hall - knee buckles;
  - Walking up staircase to go to a meeting and knee starts to hurt;
  - Sitting at desk and sneezes and back goes out;
  - Bends down to tie shoe and back goes out; and
  - Bends over to pick up tool and back goes out.
- “. . . The activity engaged in by the employee (. . . walking, tripping, climbing, etc.) is an “event” which would trigger the application of the presumption [of work relationship].”

- January 13, 2004 Letter to B. Principe  
[www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24724](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24724)

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## Repeat Violations

- Repeat violation = When a new citation is issued to an employer:
  - who has been previously cited for a substantially similar condition as the new citation; and
  - the new citation must be issued within 3 years of the date of the final order or the final date of abatement (whichever is later) of the previous citation. OSHA Field Inspection Reference Manual, Chapt. III.
- The penalty for a repeat violation is not more than \$70,000 and not less than \$5,000.

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## Preventing Repeat Violations



- Repeat violation prevention:
  - Review your **Company's** past citations and ensure that all cited items have been abated and have remained abated.
  - Examine **other equipment** and **other facilities**.
  - How to check your Company's enforcement history. [www.osha.gov/cgi-bin/est/est1](http://www.osha.gov/cgi-bin/est/est1)

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## Preventing Willful Violations



- Willful violation = Awareness of a violation or plain indifference to a known hazardous condition. (Supervisor Knowledge = Your Knowledge).
  - **Penalty of not more than \$70,000 and not less than \$5,000.**
- Willful violation prevention:
  - **Verify that all internal and external audits / inspections have been closed out. (For example, workers' compensation carrier audits, workplace inspections, fire safety audits.)**

[www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=FEDERAL\\_REGISTER&p\\_id=16434&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=16434&p_text_version=FALSE)

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## Lessons Learned from Recent Court, ALJ, OSHA Review Commission Decisions and Potential OSHA Legislation.

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## OSHA Review Commission

- Notice of Contest.
- 29 USC §659(a) provides that employers have **15 working days** (from citation receipt) to file a **Notice of Contest**. Failure to file within such time means that “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.”

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## An Untimely NOC Case



- Sec. of Labor v. Well Rise Fashion (March 4, 2004) - Employer argued that its untimely Notice of Contest should be excused due to its failure to understand English. ALJ rejected the argument finding that this did not constitute excusable neglect. [www.oshrc.gov/decisions/html\\_2004/03-1363.html](http://www.oshrc.gov/decisions/html_2004/03-1363.html)
- Congress Responds - Occ. S&H Small Business Day in Court Act – if passed, would give OSHA R.C. flexibility in excusing small employers for missing 15-day filing deadline.
  - **Do you have orderly mailroom procedures for handling important mail – are they communicated and enforced?**

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## Secretary of Labor v. Cargill

- August 4, 2003 – LOTO violation - employer argued unpreventable employee misconduct.
  - **Established work rules to prevent the violation**
  - **Adequate communication of rules to employees**
  - **Steps taken to discover violations of the rules**
  - **Effective enforcement of rules.** BST Behavioral Safety Program.
  - **“ . . . Observation part of BST program is voluntary . . . the name of the observed employee is not recorded, which means that there are not going to be any repercussions.”**
- ALJ Decision held: “the voluntary observations, which lacked a disciplinary component, failed to meet the last element of Cargill’s asserted defense . . .”

[www.oshrc.gov/decisions/html\\_2003/02-1071.htm](http://www.oshrc.gov/decisions/html_2003/02-1071.htm)

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## **Secretary of Labor v. Froedtert Memorial Lutheran Hospital**

- Hospital failed to comply with the BBP, HAZCOM, and Recordkeeping rules regarding temporary housekeepers from a temp agency.
- January 15, 2004 Rev. Comm. held that the Hospital violated the Act. Factors considered included:
  - **Host employer's right to control manner and means by which product is accomplished;**
  - **Skill required;**
  - **Source of tools;**
  - **Whether host can assign additional projects; and**
  - **Extent of hired party's discretion over when and how long to work.**

[www.oshrc.gov/decisions/html\\_2004/97-1839.html](http://www.oshrc.gov/decisions/html_2004/97-1839.html)

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## **LOTO Interpretation Letter**

- **Lockout / Tagout OSHA Interpretive Letter – March 9, 2004.**
- **Addresses periodic inspections of energy control procedures under §1910.147(c)(6).**
  - 3/9/04 Letter to T. Civic

[www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATION&p\\_id=24764](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATION&p_id=24764)

- See also 9/19/95 Letter to L. Halprin

[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=21936](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21936)

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## Bloodborne Pathogens Training Interpretation Letter

- 1910.1030(g)(2)(vii)(N) of the Bloodborne Pathogens standard requires “An opportunity for interactive questions and answers with the person conducting the training session.”
- ‘. . .the requirement for "interactive" questions and answers . . . mean[s] that employees must have direct access to a qualified trainer **during** the training session. The use of an electronic mail . . . would not be considered direct access to a qualified trainer, unless the trainer is available to answer e-mailed questions **at the time the questions arise.**’

- 6/26/03 ltr. to J. Mateus

[www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24726](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24726)

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## Forklift and Child Labor Reminder

- October 2, 2003 – OSHA and Wage Hour issue a joint statement to inform employers that the Fair Labor Standards Act prohibits workers under the age of 18 from operating forklifts for non-agricultural operations.
- See, 29 CFR 570.58 - Occupations involved in the operation of power-driven hoisting apparatus. (Order 7.)
- Child Labor Provisions of the FLSA for Nonagricultural Occupations.  
[www.dol.gov/esa/regs/compliance/whd/whdfs43.htm](http://www.dol.gov/esa/regs/compliance/whd/whdfs43.htm)

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## Potential Legislation -

- Section 17(e) of OSH Act – Conviction of a willful violation of standard that causes . . .death . . . – punishable “by a fine of not more than \$10,000 or by imprisonment for not more than six months or both.”
- April 2004, Sen. Edward Kennedy (D-Mass.) and Sen. Jon Corzine (D-N.J.) announced plans to introduce the **Protecting America’s Worker’s Act.**
  - The bill would amend the OSH Act to increase the maximum criminal penalty for employers who cause the death of an employee by willful violation from 6 months to 10 years and provide a minimum penalty of \$50,000.
  - Require employers to pay for all PPE.

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## Argument for Increased Penalties

- Did You Know that the penalty for:
  - knowingly and for profit reproducing the character “Smokey Bear” - (18 USC §711);
  - knowingly and for profit reproducing the character “Woodsy Owl” or the slogan “Give a Hoot, Don’t Pollute” (18 USC §711a);
  - using an aircraft or motor vehicle to hunt, for the purpose of capturing or killing, any wild, unbranded . . . burro running at large on any public land (18 USC §47); and
  - wearing the 4-H Club logo with intent to defraud for the purpose of inducing belief that one is a member of the 4-H Club (18 USC §707).
- Is a fine and/or “imprisoned for not more than six months.”

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## Potential Legislation -

- Rep. Charlie Norwood (R-Ga.) – proposed the **Occupational Safety and Health Fairness Act (2003)**. Components reported out of Committee in May 2004.
  - OSH Rev. Commission would have flexibility to make exceptions to the 15 day filing deadline.
  - Would increase OSHRC from 3 to 5 members.
  - Small employers would be awarded attorneys' fees / costs when they contested OSHA citations and prevailed.
- Proposed legislation by Rep. Todd Tiahrt (R-Kan.) - **OSHA and Employer Cooperation Act of 2004**.
  - Would require OSHA to issue citations within 30 days of an inspection and give employers 30 days to appeal.

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## Training

- Our ugly secret.
- Training Classes:
  - **Make them memorable.**
  - **Emphasize what's important – handouts, slides.**
  - **Present information in an organized / meaningful manner.**
  - **Repetition. Repetition. Repetition.**
  - **Address language barriers to effective learning.**
  - **Get feedback from employees about training.**
- **Training Requirements in OSHA Standards.**

[/www.osha.gov/Publications/osha2254.pdf](http://www.osha.gov/Publications/osha2254.pdf)

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## Off-the-Job Safety and Health and Your Company's Employees

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October 25-27, Sheraton Chicago

*The in-house bar association.™*



ACC Association of Corporate Counsel

## Off-the-Job Safety and Health

- National Safety Council Survey released October 2003: 60% of corporate safety and health professionals believe that the cost of injuries that occur away from work are **equal to or greater than** the cost of work-related injuries.
- 45% of respondents, however, said that their companies offered no off-the-job safety information to employees of any kind.

[www.nsc.org/news/nr100203.htm](http://www.nsc.org/news/nr100203.htm)

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## Off-the-Job Safety and Health

- 1996 U.S. Surgeon General's Report – a **moderate amount of daily physical activity** (e.g., 30 minutes of brisk walking) - reduces risk of coronary heart disease, high blood pressure, colon cancer, and diabetes, and reduces symptoms of anxiety and depression and foster improvements in mood and feelings of well-being.  
[www.cdc.gov/nccdphp/sgr/adults.htm](http://www.cdc.gov/nccdphp/sgr/adults.htm)
- However, only **31.3% of adults engage in regular physical activity** (30 minutes of light-moderate physical activity 5 days a week, or 20 minutes of vigorous physical activity 3 days per week) in their leisure time. CDC – Health Behaviors of Adults: United States 1999-2001. [www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_219.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_219.pdf)

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## Off-the-Job Safety - Auto Accidents

- 42,815 people died in motor vehicle accidents in 2002. The leading cause of death among Americans age 1-34.  
[www.highwaysafety.org/safety\\_facts/fatality\\_facts/general.htm](http://www.highwaysafety.org/safety_facts/fatality_facts/general.htm)
- Before you buy your next car or your company adds a car to its fleet list – check crash tests. [www.nhtsa.gov/cars/testing/ncap/](http://www.nhtsa.gov/cars/testing/ncap/)

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## Off-the-Job Safety - Drunk Driving

- Alcohol was involved in **41 percent of fatal crashes** in 2002—an average of one alcohol-related fatality every 30 minutes.
- An estimated 258,000 people suffered injuries in crashes in which police reported alcohol present—an average of one person injured every two minutes.

[www.dol.gov/asp/programs/drugs/workingpartners/sp\\_iss/safetyfacts.asp](http://www.dol.gov/asp/programs/drugs/workingpartners/sp_iss/safetyfacts.asp)

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## Off-the-Job Safety – Home Related Fatalities

- Approximately 20,000 Americans die each year from accidents at home. Another 2 million seek medical attention. **U.S.A. Today, Oct. 17, 2003.**
- The leading fatal events in the home, according to the National Safety Council, are **poisonings, falls, suffocation by ingested object, and fires, flames and smoke.**
  - National Safety Council [Report on Injuries in America, 2002.](http://www.nsc.org/library/report_injury_usa.htm#home)

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**SPECIFIC PROCEDURES FOR DURING AND AFTER AN OSHA INSPECTION**  
**Presented by Neil H. Wasser, Constangy, Brooks & Smith, LLC [www.constang.com](http://www.constang.com)**

**1. Purpose**

To establish uniform procedures to coordinate management involvement at every location in the event of an OSHA inspection.

**2. Presentation of Credentials and Opening Conference**

- a. When an individual arrives at a facility and presents credentials as an OSHA Compliance Safety and Health Officer, the Company guard or receptionist should direct or escort the Compliance Officer to an appropriate waiting area. The Compliance Officer should be treated courteously at all times. First impressions by the Compliance Officer often dictate the course of the inspection and the characterization of the citations, if any, that result.
- b. The guard or receptionist should immediately contact the Plant Manager and Safety Coordinator/Manager and notify them of the presence of the Compliance Officer at the facility.
- c. The Plant Manager or Safety Coordinator/Manager should then advise the Corporate Safety Department and the General Counsel's Office that there is an OSHA Compliance Officer at the facility. Under no circumstances should the Compliance Officer be kept waiting more than a brief period of time while these persons are being notified.
- d. The Compliance Officer should then be invited to the Plant Manager's office, or another suitable meeting room, to meet with the Plant Manager and the Safety Coordinator/Manager. If the Compliance Officer does not do so on his own, the Plant Manager or Safety Coordinator/Manager should request that the Compliance Officer present his or her credentials. If there is any question about the Compliance Officer's credentials, the Plant Manager may wish to contact the OSHA Area Office for verification.

**3. Opening Conference**

- a. After the presentation of credentials to the Plant Manager, but before an inspection is actually conducted, the Compliance Officer will conduct an informal opening conference. During the opening conference, the Compliance Officer should explain whether the inspection is being conducted:
  - (1) pursuant to a general administrative enforcement plan;
  - (2) in response to a specific safety and/or health complaint by an employee or representative of employees (*e.g.*, labor organization);
  - (3) in response to a specific referral by a non-employee (*e.g.*, an official of another government agency, a member of the media, etc.);

- (4) in response to a fatality or serious accident; or
- (5) to investigate an employee complaint of employer retaliation against employees for their involvement in safety and health-related activities protected by law (*e.g.*, complaining to company management, OSHA or other government agencies about safety and/or health concerns, refusing to be exposed to an imminent danger of death or serious injury, etc.). OSHA normally begins its investigation of such complaints by providing the employer written notice of the retaliation allegations and requesting that the employer submit a position statement in response. Any on-site visits by OSHA investigators are normally scheduled with employers in advance and usually occur after OSHA has reviewed the employer's position statement. If the OSHA officer has arrived without prior notice to conduct a retaliation investigation, the Plant Manager should consult with the Corporate Safety Director and the Director of Human Resources before allowing the on-site investigation to begin.

The opening conference normally will be held jointly with both the employer and, if the employees are represented, an employee representative in attendance. If employees are not represented, the Compliance Officer will typically conduct the inspection without an employee representative.

- b. Generally, the Compliance Officer will explain the purpose of the visit and will outline the scope of the inspection, including the scope of the physical inspection of the facility, the records to be reviewed, and whether management and/or private employee interviews will be conducted.
- c. The Compliance Officer will also indicate during the opening conference whether the inspection will be primarily safety oriented or health oriented. If it is primarily a health inspection, the Compliance Officer will probably be an industrial hygienist, who will likely seek to review the facility's exposure monitoring records and will typically conduct some form of sampling of workplace environmental conditions. To the extent that it is practical and feasible to do so, it is beneficial in such a situation for the facility to take samples alongside the OSHA industrial hygienist. This ensures that the employer is not unjustly cited because of erroneous laboratory analysis or results which are not representative of actual conditions.
- d. If the proposed inspection is in response to a specific complaint or referral, the Company should seek to limit the scope of the inspection to the cited condition identified in the complaint/referral. Although the identity of the complainant employee is confidential, the Compliance Officer will provide an expurgated copy of the complaint, upon request. The Compliance Officer, however, may decline to provide a copy of a referral.
- e. Even if the inspection starts out being limited to the scope of the complaint/referral, it can be broadened if the Compliance Officer sees or hears about any other hazardous conditions during the course of the inspection.

- f. At the beginning of the opening conference, the Plant Manager should identify the company representatives present at the opening conference and offer a brief explanation of why each individual has been asked to attend. Generally, the Compliance Officer will inquire about the Company's safety program. It is essential that those in attendance at the conference have a working knowledge of the facility's safety and health procedures. Specifically, all attendees should have an appreciation of the written programs in effect, how safety and health training programs are implemented, and an understanding of how accidents at the facility are investigated.
- g. If the Company has trade secrets that might be revealed during the inspection, these areas should be identified at the opening conference. Any information obtained by the Compliance Officer in these designated areas will be labeled "confidential-trade secret" and cannot be disclosed outside the proceedings to which the information is relevant.

#### **4. Warrant Requirement**

Although the U.S. Supreme Court has held that OSHA must obtain a warrant to gain entry to the premises of a company to conduct a general inspection when the employer does not consent to the inspection, it is not difficult to obtain such a warrant. From a practical standpoint, unless there is a known condition that the employer can correct while OSHA is applying for the warrant, consent should be given. While this advice is given as a general proposition, there may well be particular circumstances that would justify requiring OSHA to get a warrant. The decision whether to require OSHA to obtain a search warrant depends on the specific situation presented at the time the Compliance Officer appears at the facility to conduct an inspection. If you think the particular circumstances presented may justify requiring OSHA to obtain a warrant or if you have any questions, contact the Corporate Safety Department and/or the General Counsel's Office for guidance. As a general rule, consideration should be given to requiring a warrant when the Compliance Officer indicates during the opening conference that, although the inspection is complaint/referral-based, he intends to expand the scope of the inspection beyond the areas identified in the complaint/referral.

If the Compliance Officer presents an inspection warrant upon his arrival at the facility, photocopy the warrant and any supporting documentation and contact the Corporate Safety Department and/or General Counsel's Office for guidance. The warrant should include the exact facility and entity to be inspected as well as the scope of the inspection.

## 5. Walkaround Inspection

- a. Both the Occupational Safety and Health Act and OSHA's regulations provide that a representative of the employer shall be given the opportunity to accompany the Compliance Officer during the inspection. The Plant Manager and/or such persons as the Plant Manager shall designate should accompany the Compliance Officer during the inspection. Depending on the scope of the inspection, a maintenance person (preferably a manager) should be asked to join the designated management representative in order to correct on the spot any minor repair or housekeeping items noted by the Compliance Officer. Regardless of the inspection's scope, at least two Company representatives should accompany the Compliance Officer at all times. The Company representatives should be professional and cordial to the Compliance Officer throughout the inspection.
- b. The Company's walkaround representatives should take notes during the inspection, documenting everything about which the Compliance Officer is concerned, including pertinent statements made during the inspection. The walkaround representatives should take the same photographs or measurements that the Compliance Officer takes during the inspection as well as identifying what was measured, the method of measurement, how many samples or measurements were taken, and the duration of the samples and measurements. To be prepared for an OSHA inspection, the Company should have a videotape camera and a still camera with an adequate supply of videotape and film ready for immediate use.
- c. During the course of the inspection, the Compliance Officer may conduct private interviews with as many employees as is deemed necessary. The Company representative should make available a place for the Compliance Officer to conduct the interviews. If management employees are to be interviewed, the Company has a right to have a Company representative present during such interviews. A Compliance Officer cannot audiotape or videotape the interviews unless the employee being interviewed consents. Similarly, there is no legal obligation for an employee to sign a written statement prepared by a Compliance Officer.
- d. The Compliance Officer may also inspect records required to be maintained under the Occupational Safety and Health Act. The Compliance Officer will typically request that the Company produce its OSHA 300 Log and OSHA Form 301s (or their equivalent), its written Hazard Communication Program, the written Lockout/Tagout Program, exposure monitoring data, and documentation of the training required by various OSHA standards. Except for compliance audit reports, all of the records should be made available to the Compliance Officer upon request. Do not refer to plant audits, and if asked for audit reports contact the Corporate Safety Department or the General Counsel's Office before providing them for review or copying. The facility should keep a list of all records shown to OSHA during the inspection, specifying which records were copied.

- e. During the walkaround inspection, Company representatives and the Compliance Officer will use the following personal protective safety equipment as necessary - hearing protection, safety glasses or goggles, hard hat, respirator.
- f. In the event that violations such as blocked aisles, unsafe floor surfaces, hazardous projections, or other such deficiencies are pointed out by the Compliance Officer, the Company representatives (preferably including a maintenance manager) should take immediate action to correct the violations where immediate correction can be easily accomplished and where such action is appropriate.

## **6. Closing Conference**

- a. After the inspection is concluded, the Compliance Officer will hold a closing conference with the Company during which any safety or health violations that have been observed will be reviewed. Generally, the Compliance Officer will identify the standards that have been violated. The Compliance Officer typically will not reveal, however, which of these items, if any, will result in the issuance of citations or penalties. Statements made at the conference do not bar the Compliance Officer from subsequently issuing a citation for a violation that the Officer did not specifically raise at the closing conference. Statements made by Company representatives during the closing conference may affect the decision whether to issue a citation, the characterization of the citation, as well as the extent of the proposed penalty. It is, therefore, important to maintain a professional and courteous demeanor throughout the closing conference, even if there is strong disagreement with the Compliance Officer's findings and conclusions.
- b. It is sometimes helpful to abate non-controversial violations immediately (during the inspection, if possible) as a demonstration of good faith. Caution should be used in estimating the time necessary to correct more complex violations because the Company's estimate is likely to become the abatement date required in the citation.
- c. The Company representatives in attendance should not admit to any violations, and should not offer any suggestions about how long it would take to complete abatement. If absolutely forced to give an estimate, it should be remembered that OSHA may later require the Company to adhere to that time estimate.
  - d. The Plant Manager should promptly advise the Corporate Safety Department and General Counsel's Office about the matters discussed during the closing conference.

## 7. **Post-Inspection Procedures**

Immediately after the Compliance Officer leaves the plant site, the Plant Manager should meet with all appropriate management representatives concerned with the inspection to discuss both the OSHA inspection and the Compliance Officer's observations and findings. The Plant Manager is responsible for formulating a plan to respond to the Compliance Officer's observations and findings.

## 8. **The Decision Whether To Contest The Citation**

Upon receipt of a citation, the Company has fifteen (15) working days within which to notify OSHA in writing that it wishes to contest the citation and/or proposed notification of penalty. If the Company does not agree with the citation, OSHA encourages employers to ask for an informal conference, usually with the OSHA Area Director, during this fifteen (15) working day period. This is almost always a good idea. It provides an opportunity for further discussion with the Compliance Officer and his or her supervisor, and the amount of penalty is often reduced as a result of these informal conferences. It is important to remember that the informal conference does not extend the fifteen (15) working day requirement for the filing of a written notice of contest.

If the outcome of the informal conference is not satisfactory, the Company may still want to contest the citation. The Company can contest all or any part of the alleged violations (including their characterization as willful, repeat, serious, or other-than-serious), the proposed assessment of penalties, the proposed abatement periods, or the entire citation. If a notice of contest is filed contesting an alleged violation, then as long as the allegedly violative condition is under contest, there is no duty to correct the condition. If the citation and/or penalty is not contested within fifteen (15) working days from receipt, the citation and assessment become a final order of the Occupational Safety and Health Review Commission which cannot later be reviewed by any court or agency.

Although sometimes there is no question that a hazardous condition exists and that it can be corrected without the expenditure of substantial sums of money, the Company should be aware that once a citation becomes a final order, it may be used as the basis for a repeat or willful violation. Thus, in determining the cost of whether or not to contest a citation, the implications of being cited for a repeat violation sometime in the future also should be considered.