



# Civil and Criminal OSHA Liability of Employers and Managers

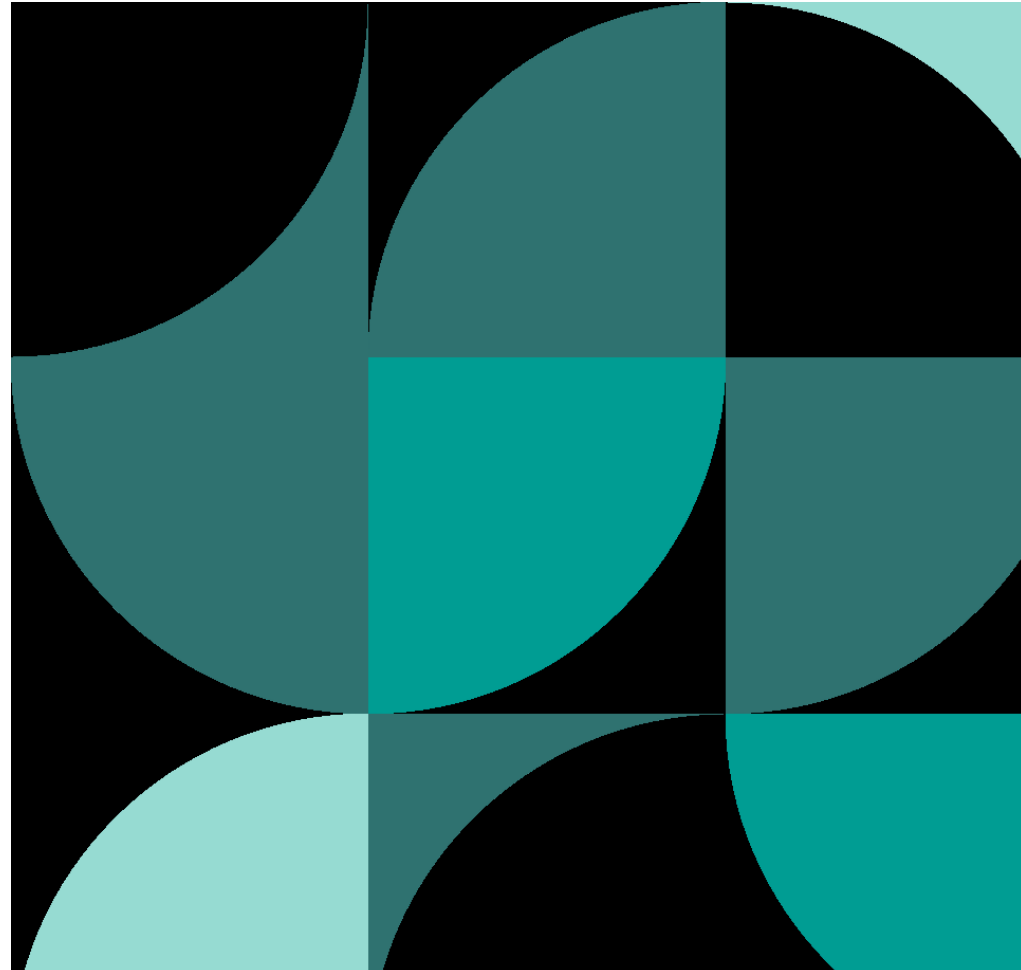
Presented to ASSP

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October 18, 2024

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# Speakers

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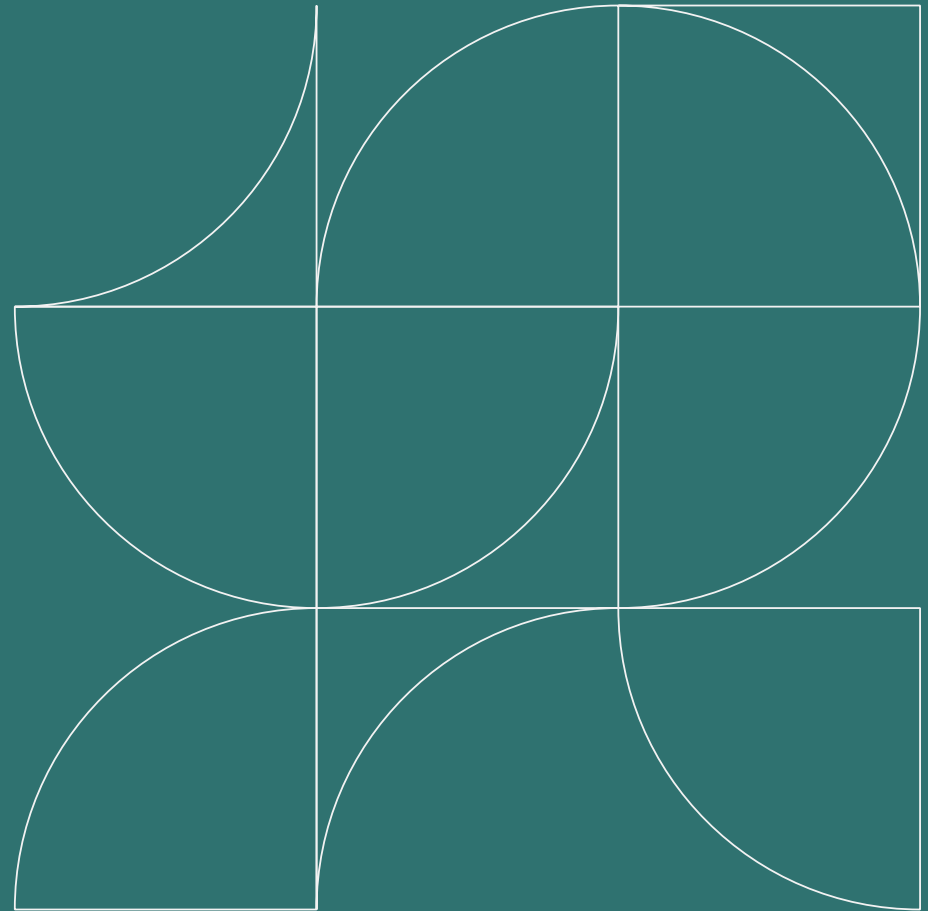
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# Program Objectives

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- Multi-Employer Worksites
- Why OSHA Citations Matter
- OSHA Inspection Management
- OSHA Enforcement Trends
- Answer Your Questions

# OSHA Enforcement Agendas, Defenses and Inspections



## OSHA Liability Basics



- Initially, employer responsible for its own employees
- Employer had to ensure that its employees were protected against:
  - “Recognized Hazards” To Employee Safety and Health (General Duty Clause)
  - Hazards Identified In Specific Regulations (e.g. falls, electrical, lead, silica, etc.)
    - 29 CFR 1926 (Construction)
    - 29 CFR 1910 (General Industry)

## OSHA Liability Basics



- Liability was expanded under “Multi-Employer Workplace Doctrine”
- Now, each Employer is potentially responsible for the safety and health of another Employer’s Employee, if the Employer:
  - Creates the hazard
  - Exposes an Employee to the Hazard
  - Is responsible to correct the hazard, or
  - Is the controlling Employer on the site
- Liability can involve citations (against Employer) and criminal prosecution (against Employer and Management Representatives)

- Host Employer
- General Contractor
- Subcontractors
- Leased/Borrowed Employees
- Temporary Employees
- Consultants
- Key: OSHA is looking at the workplace as a whole – so should you

## Many Different Categories of Employers and Employees On- Site





- Critical Issues:

- Contractual relationship – does it define responsibility for safety and health compliance, employee training, personal protective equipment
- Consider whether you exercise control over “means and methods” of performing work by independent contractor employees or temporary employees if staffing service has on-site supervision
- Imminent Danger – Host employer must stop work immediately if any employee in imminent danger of injury

## Many Different Categories of Employers and Employees On- Site



# Commonly Cited OSHA Standards (2023)

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1. Fall Protection (29 CFR 1926.501)
2. Hazard Communication (29 CFR 1910.1200)
3. Ladders (29 CFR 1926.1053)
4. Scaffolding (29 CFR 1926.451)
5. Powered Industrial Trucks (29 CFR 1910.178)
6. Control of Hazardous Energy (Lockout/Tagout) (29 CFR 1910.147)
7. Respiratory Protection (29 CFR 1910.134)
8. Fall Protection - Training (29 CFR 1926.503)
9. PPE – Eye and Face Protection (29 CFR 1926.102)
10. Machinery and Machine Guarding (29 CFR 1910.212)

# Why Do OSHA Citations Matter?

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- Penalties
- Future Citations
  - Repeat Citations
  - Willful Citations
- Other Liabilities
  - Third Party Litigation
- Business Reputation
  - OSHA Press Releases
  - OSHA Establishment Search
  - Severe Violator Enforcement Program (SVEP)
  - Third Party Tracking Services
  - Response from Customers, Clients, Suppliers, Industry Organizations
- Criminal Liability (Will Discuss More Later)



# Revised Penalty Structure

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- OSHA penalties increased to Consumer Price Index (CPI)
- Increased on January 15, 2024
- Will be revised every following year

	<u>2024</u>
Other Than Serious	\$16,131
Serious	\$16,131
Willful	\$161,323
Repeat	\$161,323
Failure to Abate	\$16,131 per day

# Criminal Law Liability

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## OSHA

- Potential liability if:
  - Fatality
  - Violation of specific regulation
  - Violation was willful, and
  - Violation caused fatality
- Penalty
  - 6 months imprisonment, and/or
  - \$500,000 fine per fatality for employer
  - \$250,000 fine per fatality for individual

**NOTE: No Miranda Warnings Necessary**

# Criminal Law Liability

## OSHA

- Obstruction of justice for interfering with inspection
- Falsification of records
- Lying to federal inspector

## State Law

- Murder
- Manslaughter
- Reckless Endangerment
- Battery
- Liability for Employer and Manager

# General Recommendations For Communicating With OSHA

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**Be  
Truthful**

**Keep  
Responses  
Simple and  
Short**

**Answer  
the  
Question  
Asked**

**Avoid  
Speculation**

**Seek Advice  
from  
Experienced  
OSHA  
Counsel**

# Bases for OSHA Inspections

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- Safety and Health Complaints
  - Letter
- Reports of Serious Injuries / Illnesses / Fatalities
  - Rapid Response Investigation (RRI)
- Emphasis Programs
  - Programmed Inspections
- *Note – OSHA Whistleblower Complaints*
  - *Different OSHA Investigators*





# Inspection Management

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- Increased enforcement and penalties make inspection management more critical than ever.
- The most effective defenses are developed Before and During an OSHA inspection, not after the inspection
  - Why?
- Inspection Plan – Basic Blocking Tackling
  - 1) Point person and backup/weekend person (Murphy's Law is that accidents will happen during the night shift and on weekends).
  - 2) Relevant written OSHA policies and logs should be readily available.
    - ✓ Keep copy in easily accessible binder
      - Update annually or as otherwise required

# Inspection Management

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- When OSHA Arrives:
  - Politely receive the compliance officer.
  - Show compliance officer to trailer or private area.
  - Immediately notify the point person.
  - Point person takes control of the inspection is responsible for all communications with Compliance Officer and shadows Compliance Officer throughout inspection.
  - First impression is important.

# Inspection Management

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- Two Keys to Successful Inspection Management
  - 1) Focus
  - 2) Control
- Determine why OSHA is inspecting
- Types of inspections (identified on prior slide):
  - 1) Fatality/catastrophe
  - 2) Employee complaint
  - 3) Programmed

# Inspection Management

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- The Reason OSHA is Inspecting Drives the Scope of the Inspection
- Once You Determine the Scope, Control Inspection by Limiting it to Only Those Items Within the Scope

Example: Employee is injured by a forklift and Employer is required to report injury to OSHA. OSHA has a legal basis to conduct an on-site inspection but it should be limited to the area where the accident occurred and the hazards associated with the operation and maintenance of the forklift.

# Inspection Management

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## OSHA rights during inspection

- To access worksite if have underlying legal basis
- Right to request documents that Employer required to maintain
- Right to conduct walkaround inspection, area should be limited to hazard that is basis for inspection
- Right to conduct employee interviews but employee can decline and employee not required to provide reason'
- No right to require employee to sign statement, tape record interview or photograph employee without employee consent

# Inspection Management

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- Plain View Doctrine
  - Compliance officer can issue citations for any violations in “plain view.”
  - If Compliance Officer doesn’t see it he/she can’t cite you for it.
  - Note use of drones at construction sites
- Admissions
  - Based on statements from managers, supervisors, foreman and lead men that they were aware of hazard
  - Never admit to a violation (“I’ll check into that”).
  - Never admit you don’t have something (“let me get back to you on that”).

# Inspection Management

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- Immediately Correct Unsafe Conditions Identified by The Compliance Officer Without Admitting That The Condition Constitutes a Violation
  - May avoid the citation
  - May lessen the classification or penalty of a citation
  - OSHA must give employer credit for a “quick fix” of a potential hazard
- Employee Interviews
  - Non-Management Interviews
    - Explain employee rights
    - Conduct your own investigation

# Inspection Management

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- Management Interview
  - Right To Counsel
  - Binding Admissions
  - Avoid the “casual” interview
  - Remember: Everything is on the record. Do not engage in idle conversation concerning safety issues.
- Document Control Is Important
  - No Such Thing As A “Safety Program”
    - Ask Compliance Officer which specific program he/she is looking for.
  - Only Provide OSHA with Documents That Are Within The Scope Of The Inspection.
  - OSHA Can Issue Citations For Violations Relating To Any Document The Employer Gives To Them.
  - General Rule Of Thumb: Less Is More



## Biden Admin.

- No Assistant Secretary Throughout Trump Administration
  - Director of Enforcement also Empty for an Extended Period
- Increased Recordkeeping / Records Used in Enforcement
- More Egregious Cases
- Policy
  - General Duty Clause
  - Heat Stress
  - Workplace Violence

***“Every OSHA press release achieves as much compliance as 210 inspections.”***

Dr. David Michaels, Former OSHA Assistant Secretary  
October 23, 2020 Tweet

# Aggressive Enforcement

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- Use of interpreters
- Emphasis on repeat citations
- Cautionary tale:
  - Use of knowledge of previous inspection to justify willful citation
- Requests for Root Cause analysis and company insurance audits
- Severe Violator Enforcement Program
- Fall Protection – Walking/Working Surfaces
- Crystalline Silica

# Aggressive Enforcement

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- Employee by Employee Citations
  - PPE Standard – each employee failure to use personal protective equipment
  - Fall Protection – each instance of failure to use fall protection
- Enhanced Use of General Duty Clause
  - Workplace Violence
  - Arc Flash – Arc Blast
  - Heat Illness – Cold Exposure

# Specialty Contractor Defense

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- An employer may reasonably rely on a specialty contractor to perform work in its area of specialization in compliance with OSHA regulations.
- What makes reliance on a subcontractor reasonable?
  - subcontractor knowledge and experience
  - employer's experience and history with subcontractor
  - terms of the contract, scope of the work
  - no actual knowledge of onsite non-compliance / safety issues
  - no constructive knowledge due to reasonable quality assurance

# Elements of an OSHA Citation (Not Strict Liability)

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1. Applicable OSHA standard
2. Hazard existed (instance of violation of the OSHA standard)
3. Employee exposure to a hazard
  - Employee exposure must be reasonably foreseeable
  - OSH Act not designed to prevent intentional act by an employee
4. Employer knowledge of the alleged violation
  - Employer knew or should have known of alleged violation
  - “Employer” means a supervisor or member of management
  - “Lead” or “foreman” could be a manager

# Unavoidable Employee Misconduct

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- More important than ever to establish strong *unavoidable* employee misconduct defense.
- All four elements required
  - 1) Safety Rule addressing the hazard (written program)
  - 2) Employee training (sign-offs and computer modules)
  - 3) Supervision (safety audits)
  - 4) Enforcement (disciplinary records)

# Unavoidable Employee Misconduct

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- How do we establish this defense?
  - A good hazard assessment
  - Training—there may be a cultural, literacy or language barrier.
  - Need to use translators, interpreters.
  - Need enforcement – this is where most employers fail.
  - Maintain records of enforcement/discipline.

# How to Reduce the Risk of OSHA Citations

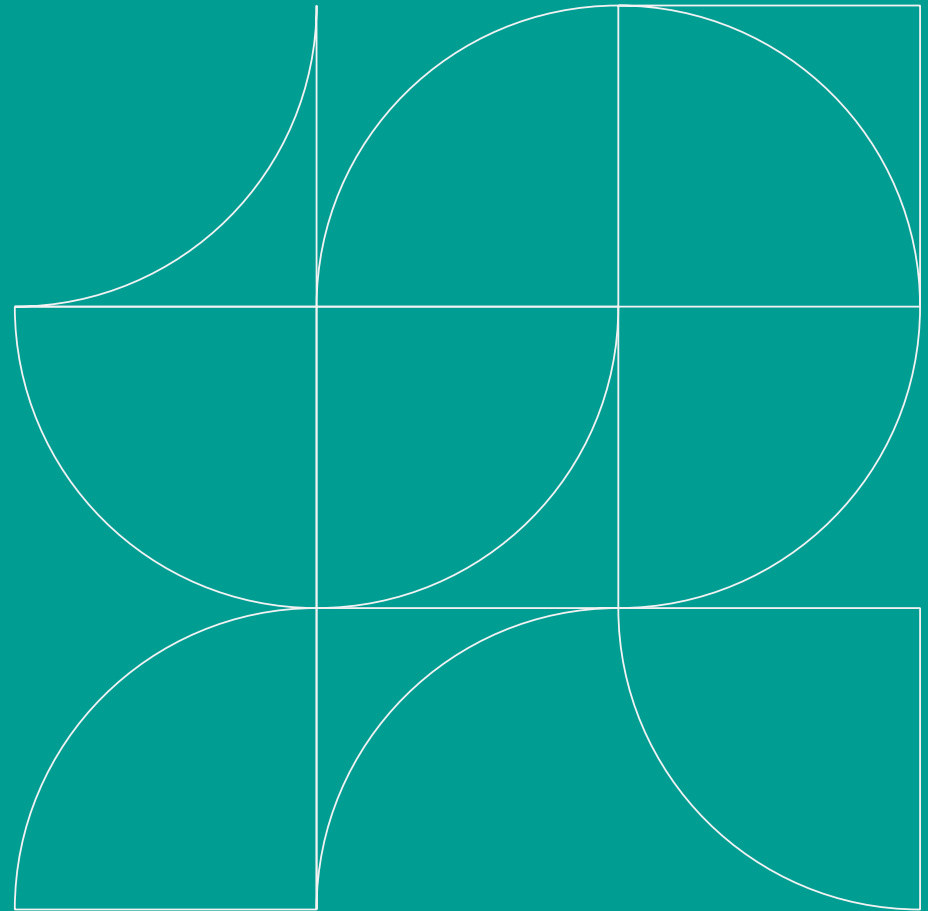
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- Focus on hazards that are at core of your business.
- Focus on hazards that are driving your OSHA recordables.
- Report fatalities and serious injuries where required by law.





# Any Questions?



thank  
you

## CONTACT INFORMATION

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