



**Occupational Safety
and Health Administration**



UNITED STATES DEPARTMENT OF LABOR

Employee Representatives and the OSHA Inspection Process

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OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION

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Objectives

- Discuss types of OSHA inspections
- Opportunities for the union representative during inspection
- Opportunities for the union representative after the inspection
- Explain rights of Employer, Employee Representatives and Employees

Region VI Union Activity During OSHA Inspections

Of the 5,462 inspections, 77 inspections had one or more union representatives participate in the inspection, roughly about 1.5% of the inspections that were conducted.

Employee Workplace Rights

Employees have the right to:

- A safe and healthful workplace
- Know about hazardous chemicals
- Information about injuries and illnesses in your workplace
- Complain or request hazard correction from employer
- Training
- Hazard exposure and medical records
- File a complaint with OSHA
- Participate in an OSHA inspection
- Be free from retaliation for exercising safety and health rights

Your Right as an Employee Representative

- Employee representatives have a right to be present in all phases of the inspection,
- To represent the interests of employees after citations have been issued,
- And to not fear retaliation from the employer as a result of participating in the process as a representative.

Types of Inspections Conducted by OSHA and Priorities

Priority	Category of Inspection
1st	Imminent Danger: <i>Reasonable certainty an immediate danger exists</i>
2nd	Fatality/Catastrophe: <i>Reported to OSHA; inspected ASAP</i>
3rd	Complaints/Referrals: <i>Worker or worker representative can file a complaint about a safety or health hazard</i>
4th	Programmed Inspections: <i>Cover industries and employers with high injury and illness rates, specific hazards, or other exposures.</i>

The Typical Inspection

Opening Conference

- Compliance Safety Health Officer (CSHO) arrives unannounced and presents credentials.
- The CSHO explains why he or she is at the site.
- If employees are represented by a labor organization, a representative is invited to join all parts of the inspection.
- Opening Conference is held. Written programs and OSHA injury/illness log may be reviewed at this time or later.

Opening Conference

- More details provided on reason for inspection
- Employee rights to a private interview are explained to the employer and employee representative(s)
- The use of a camera or other media to document the inspection is explained
- If noise or air monitoring will be a factor, conducting the survey is explained

Possible Scenarios During the Opening Conference

- One joint Opening Conference is held with employer and employee representatives.
- If a joint Opening Conference is not possible because of employer or employee representative resistance, separate meetings are conducted.
- Just as the highest ranking employer official designates their representative, the highest ranking employee representative chooses their representative(s)

Site Survey (the walk-around)

- A site walkthrough is conducted
- Photographs may be taken to document workplace conditions
- Air monitoring for contaminants or a noise survey may be conducted
- Employees will be interviewed confidentially

Employee Representative Participation Walk-Around

- The size of the walk-around group will be at least one employer representative and one employee representative where employees are represented.
- The representatives may change during different phases of the walk-around.
- The size of the group is determined by the compliance officer based on efficiency and the representatives' ability to aid in the inspection.

Employee Representative Participation Walk-Around

- OSHA Regulation 1903.8(b) gives the CSHO the authority to resolve disputes regarding any representatives. The goal is a fair and orderly inspection.
- OSHA Regulation 1903.8(c) allows exceptions to a requirement for employees to be employees of the employer if a third party will aid the inspection.

Employee Interviews

- Employees must be interviewed to gain factual information relevant to the inspection.
- The interview is conducted privately regardless of employer preferences.
- Employees have the right to have an employee representative present or not be included during the interview.

Closing Conference

After the walkthrough inspection is completed, a Closing Conference is held.

- Review of hazards identified & abatement times
- The employer will officially be notified by mail of any OSHA violations via a citation.
 - Note: OSHA has 6 months to issue any citations after the occurrence of a violation
- Explain employer rights and responsibilities
- Explain employee rights under Whistleblower regulations and the OSH Act
- Explain to the employee representatives their rights

Employee Rights in Closing Conference

- One joint Closing Conference is held with employer and employee representatives.
- If a joint Closing Conference is not possible because of employer or employee representative resistance, separate meetings are conducted.

Rights and Responsibilities

Closing Conference – Main Points

Employer

- Right to contest or settle informally all or parts of citation
 - Classification
 - Penalty Amount
 - Abatement Period
- Must post citation and any notice of informal conference, correct hazards, provide written documentation of corrections, pay penalties
- Must NOT retaliate against employees for involvement in inspection

Employee Representative

- Right to participate in informal conference
- Right to contest the abatement date(s) with Review Commission or,
- Right to elect “Party Status” before Review Commission if Employer contests citation(s)
- No employee retaliation from inspection

Delivery of Citation and Informal Conference

Employer

- Citation(s) received from OSHA
- **15 federal workdays** to accept citation, participate in an informal conference OR contest any part or all of the citation components
- Must post citation and notification of informal conference for employees if one is requested.
- Separate informal conferences may be held if necessary (Area Director discretion)
- May attend an informal conference that is requested by employee / employee representative

Employee Representative

- Copy of citation(s) sent **after confirmation** that citation was delivered to employer
- May attend informal conference that is requested by employer
- Can request an informal conference **within employer's 15 federal workday period** to discuss any aspect of inspection
- Separate informal conferences may be held if necessary (Area Director discretion)

Potential Outcomes of Informal Conference

Employer

- The classification, penalty amount, or abatement time may change
- Informal settlement agreement developed
- Payment plan may be structured
- OR, citations may be contested (up to the 15th day)

Employee Representative

- Participation to discuss issues of the inspection and the citation, especially abatement, may benefit employees
- OR, the abatement time may be contested (up to the employer's 15th day)

What is **SO** Important About the 15th Day?

- If the 15th federal workday elapses without the employer or employee representative having an informal conference OR exercising their rights to contest aspects of the citation, **it becomes a FINAL RULE** and no changes can be made!
 - NOTE: A federal workday excludes weekend days and Federal holidays

Contested Cases

Off to the Review
Commission We Go!

Contested Citation(s)

Employer

- Must clearly and specifically state what is being contested
- Must be received by OSHA within 15 days
- Any aspects of citations NOT contested must be promptly abated and penalties must be paid
- No abatement is required when the citation is contested until it is resolved

Employee representative

- Right of contest is limited to abatement times thought to be unreasonable.
- Must be received by OSHA within employer's 15 day count
- No abatement is required when the citation is contested until it is resolved

Key Terms

- Affected Employee – Employee who is exposed to a hazard
- Authorized Employee Representative – Labor organization / union, but could also be an affected employee(s) where a union is not present
- Secretary of Labor – Head of the Department of Labor. This is the name for OSHA in matters of the Review Commission
- Abatement Period – Time to correct a violation
- Party – Secretary of Labor, employer who files notice of contest, or union or affected employee(s) who elects party status
 - If the union contests the abatement period, the employer can elect party status
- Party Status - Party who has the authority to participate fully in the formal appeal process of the Review Commission
- Solicitor – Governmental term for attorney

Post-Inspection Options for Affected Employees or Employee Representatives

- If the employer **does not** contest the citations affected employees/representative **may contest** the **abatement period** as unreasonable
 - The time period allowed will continue to expose workers to safety and health hazards
- If the employer contests all or parts of the citation(s) the **employee representative may elect party status** to participate in the proceedings

Employee Contested Citations (Remember It's Over Abatement Time)

- Contest the abatement to the OSHA office using employer's 15 day working period deadline
- OSHA forwards the case to the independent adjudicatory agency, the Occupational Safety and Health "Review Commission". Case is assigned a docket number
- Secretary of Labor (OSHA) must file reasons abatement is reasonable within 10 days to the judge
- Employer may elect party status at least 10 days prior to the hearing

Employee Contested Citations (Remember It's Over Abatement Time)

- Judge must respond within 10 days, but also may have a pre-hearing conference
- Judge promptly schedules hearing
- Judge promptly renders a decision
- The decision can be appealed to the Review Commission and then to the U.S. Court of Appeals
- **Seems straight forward, but...**

Points to Consider about Employee Contested Abatement

- Case is expedited with firm action timeline requirements, but time to resolution can still be lengthy due to
 - Scheduling challenges
 - Appeals, and note,
 - There is no timeline on “promptly” or on appeals
- May be able to accomplish reasonable abatement with employee request for informal conference at Area Office level (remember within employer’s 15 workday period)

Employer Contested Citations

- Once a Notice of Contest is received OSHA forwards the case to the independent adjudicatory agency - the Occupational Safety and Health “Review Commission”.
- All actions to settle the case at the area office level come to a halt because the contested portion is in litigation
- Any further correspondence / actions with the parties continue through the Regional Solicitor – including settling the case

Employer Contested Citations

- The Review Commission assigns the case a docket number and sends the employer the number.
- A pre-printed card is also sent that the employer returns to the Review Commission for the purpose of informing the Review Commission that affected employees have been notified that the citation has been contested
- The docket number is important because it will identify the case on all actions that are taken during the contest period.
- The Review Commission assigns the case to an administrative law judge and the judge schedules a hearing in a public place close to the workplace

Scenario

- The employer has contested the entire citation packet – everything
- It has gone to the Review Commission and a docket number has been assigned to the case
- What is the option of the affected employee or employee representative?
 - Wait and see how the employer's contested case pans out or,
 - Elect Party Status

What Does Electing Party Status Mean?

- You as an affected employee or as an authorized employee representative becomes another party (entity) in matters of the case, along with the employer and OSHA to represent the interest of employees.
 - Employees have much to offer because of THEIR knowledge of the workplace and hazards
- When an authorized employee representative elects party status affected employees can no longer separately elect party status

What Does Electing Party Status Do for Your Interest in the Case?

- Gain the opportunity for input during any formal settlement negotiations (most cases do not go to hearing)
- Will receive copies of papers filed by other parties, the judge, or Review Commission
- Your party status entitles you to Discovery, the process one party uses to get information from another party prior to the hearing.

What Does Electing Party Status Do for Your Interest in the Case?

- Can participate in any pre-hearing conference that a judge decides to hold
- Can have input into settlements (remember, many of these cases settle before the hearing)
- If the case goes to hearing, you may participate by presenting and questioning witnesses and also introducing evidence. You may also cross-examine other witnesses called by the other parties

What Does Electing Party Status Do for Your Interest in the Case?

- May file a brief to the judge after the hearing to re-state arguments made in writing
- Gains review and appeal rights to the Review Commission (not the deciding judge) if the decision is not favorable. Also, may petition a U.S. Court of Appeals if the Review Commission decision is not favorable

How to Elect Party Status

- Get the Docket number from the employer
- Send a letter to the Review Commission judge (if one has been assigned) and send a copy to the other parties. Include:
 - Case name
 - Docket number
 - Address of the affected employee or authorized employee representative electing party status
 - A statement that you are electing party status
- Must also include a Certificate of Service for the notice to the other parties

How to Elect Party Status

- Must notify the Review Commission **NO LATER** than 10 days before the hearing.
 - The best strategy is to elect party status **As Soon As Possible** because:
 - You will have more time to prepare your case, review documents, prepare witnesses, etc.
 - Good cause for not filing the election would have to be very convincing because the Commission language considers late filing ineffective

Example Letter

From the “Employee Guide to Review Commission Procedures”, May 2005

Appendix 3A--Letter Electing Party Status by Authorized Employee Representative (Union)

Workers Union, Local 101

123 Street

City, State Zip Code

June 10, 2005

Executive Secretary

Occupational Safety and Health Review Commission

1120 20th Street, N.W., 9th Floor

Washington, D.C. 20036-3419

Dear Sir or Madam:

Local 101 of the Workers Union, the authorized employee representative for affected employees of QRS, Inc. of City, State, elects party status in OSHRC Docket No. 99-9999. We request that copies of documents and correspondence in this case be sent to us at the address above. We are also interested in participating in settlement discussions.

Sincerely,

LMN

President, Local 101

The Hearing

- Settling the case between the is an option up to the start of the hearing.
- This is an administrative trial
 - Note: Though it is not required to have an attorney.....the other groups will
- The parties present their cases to the judge

Post-Hearing Participation

The parties may file a brief with the judge after the hearing, but before the decision, to state their arguments in writing

Review of an Administrative Law Judge's Decision and Onward

- If the decision of the judge is not favorable to a party, it can request a review with the full Commission (filing a petition for discretionary review of the judge's decision)
 - Party files a brief for the full Commission (located in Washington DC) if,
 - It believes judge made decision not supported by evidence
 - Believes judge's decision is contrary to law
 - Substantial question of law is involved or abuse of discretion
 - Prejudicial error committed
- If the party is not happy with the Commission's decision it's off to the U.S Court of Appeals

Conclusions

- OSHA's regulations ensures that employees have an opportunity to participate with an active voice, free of retaliation, in OSHA inspections
 - Train your stewards what to do if an inspector shows up for an inspection
 - Encourage employees to promote their own safe work area by participating in OSHA employee interviews
- Contested cases get complicated quickly once they go to the Review Commission
 - If the employer contests any or all of the citations, decide on your option to elect Party Status as soon as possible

Conclusions

The Area Office informal conference is an excellent and economical forum for employee representatives as well as the employer to express your interests in abating hazards

Participate in these conferences!

Remember, You know the workplace well and can be effective in correcting hazards!

References

- OSHA Field Operations Manual **CPL 02-00-159**
 - http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf
- Occupational Safety and Health Review Commission
 - <http://www.oshrc.gov/>
- Employee Guide to Review Commission Procedures
 - http://www.oshrc.gov/publications/employeeguide/employeeguide_supp.html
- Guide to Simplified Proceedings
 - <http://www.oshrc.gov/publications/proceedings.html>
- And Don't Forget: www.OSHA.gov





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