A GENERAL OVERVIEW OF OSHA CITATIONS

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I. The Boring Stuff

1. The Statutory and Regulatory Scheme

a. The Occupational Safety & Health Act was passed by Congress in 1970 (the "Act")

b. The Occupational Safety and Health Administration ("OSHA") under the Act seeks to assure that "every working man and woman in the Nation [has] safe and healthful working conditions." See Reich v. Trinity Indus., Inc., 16 F.3d 1149, 1151 (11th Cir. 1994) (quoting 29 U.S.C. § 651(b)).

c. It has been long-established that OSHA does not impose absolute (or strict) liability on employers for harmful workplace conditions; instead, it focuses liability where harm can, in fact, be prevented. See, e.g., Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n, 576 F.2d 620, 623 (5th Cir. 1978).

d. To implement its statutory purpose, Congress imposed dual obligations on employers.

i. Employers must first comply with the "general duty" to free the workplace of all recognized hazards. 29 U.S.C. § 654(a)(1).

ii. Employers also have a "special duty" to comply with all mandatory health and safety standards. Id. at § 654(a)(2).

1. With respect to the latter, Congress provided for the promulgation and enforcement of the mandatory standards through a regulatory scheme that divides responsibilities between two federal agencies. See generally New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 103–04 (2d Cir.1996) (discussing the regulatory scheme).

i. The Secretary of Labor has rulemaking power and establishes the safety standards; investigates the employers to ensure compliance; and issues citations and assesses monetary penalties for violations. See *id.* at 103 (citing 29 U.S.C. §§ 655 and 657–59).

ii. The OSHA Review Commission has adjudicative power and serves as a "neutral arbiter" between the Secretary and cited employers. *Id.* (quoting Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3, 7, 106 S.Ct. 286, 288, 88 L.Ed.2d 2 (1985).

2. The Regulations

a. 29 CFR 1910- General Industry

b. 29 CFR 1926- Construction

c. 29 CFR 1915, 197, and 1918- Maritime and Longshoring

d. 29 CFR 1928- Agriculture

II. The Better Stuff

1. The Inspection Process

a. An OSHA Compliance Officer performs the inspection.

b. Inspections can be programed, random, due to an accident, or a complaint.

c. A search warrant can be required for inspections on private property.

d. The Compliance Officer is required to show identification and the employer is allowed a "reasonable" amount of time to obtain the attendance of management.

e. The Compliance Officer will interview employees without management being present. OSHA Compliance Officers will intimidate your employees, intentionally or otherwise.

Practice Tip

Train employees in advance of an inspection regarding what to expect, how to behave, and how to answer the Compliance Officer's questions.

2. The Citations

a. Violation of safety regulations will be identified and a citation and penalty will be issued within 6 months of inspection.

b. The penalty categories

i. "Other than serious" or "*de minimis*"

1. Probability of death or serious physical injury resulting from the violative condition does not exist.

ii. "Serious"

1. A violation is serious if it is likely to cause death or serious physical harm.

iii. "Repeat "

1. A violation that may be serious or other-than-serious based on a previous violation of the same or a substantially similar standard and hazard. The previous citation must be a final order.

iv. "Willful"

1. A violation committed with intentional or reckless disregard or "plain indifference" to the safety and health of employees.

3. Penalties

a. "Willful":

i. The **maximum penalty for willful violations is $70,000**.

ii. Willful violations carry a minimum penalty of $5,000 for small employers with fewer than 11 employees who have not been cited for a serious, willful or repeat violation for the past three years and willful violations that are not serious.

b. "Repeat":

i. Employers with 250 employees or fewer with prior willful, serious or other-than-serious penalty:

1. Original penalty **multiplied by two for first repeat** violation, **five for second violation** and **up to 10 for third repeat** violation.

2. Reductions available.

ii. Employers with 251 or more employees:

1. Original penalty **multiplied by five for first repeat violation** and **10 for second repeat violation**.

2. No reductions are available. Maximum for either is $70,000.

c. "Other-than-serious" without previous penalty.

i. $200 for the first repeat violation, $500 for the second and $1,000 for the third.

d. "Serious" or "Other-Than-Serious":

i. The maximum allowable penalty for these types of citations is $7,000.

ii. A serious citation must always be accompanied by a monetary penalty.

iii. Penalties for other-than-serious violations are not mandatory.

e. "Failure to Abate"

i. $7,000 per day.

4. **Wilful + Death = A Bad Day**

   a. If an employer is convicted of a willful violation of a standard that has resulted in the death of an employee, **the offense is punishable by a court-imposed fine or by imprisonment for up to six months, or both. A fine of up to $250,000 for an individual, or $500,000 for a corporation, may be imposed for a criminal conviction.**

5. **Adjudication of Citations**

   a. Employer has 15 work days from receipt of citation to serve a Notice of Contest, or the citation and penalty are final.

   b. OSHA encourages resolution at an Informal Conference.

      i. *cavete vobis dico*- a $7,000 penalty settled for $5,000 can easily be the basis for a $70,000 Repeat Citation.

Practice Tip
Do not automatically accept the low-ball offer at the Informal Conference.

Practice Tip
Settle those with low risk of repeats and those that can be managed through better practices. Fight if high risk of repeat, willful, or death.

   c. An employer contesting a citation is entitled to an evidentiary hearing before an Administrative Law Judge ("ALJ"), at which the Secretary bears the burden of proof. See 29 U.S.C. § 659(c); Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 446, 97 S.Ct. 1261, 1264, 51 L.Ed.2d 464 (1977).

Practice Tip
Most ALJ's are former OSHA Prosecutors and the deck is stacked in OSHA's favor.

d. Secty must make out prima facie case by showing:

   i. that the regulation applied;

   ii. that it was violated;

   iii. that an employee was exposed to the hazard that was created; and

   iv. that the employer "knowingly disregarded" the Act's requirements. See See Cleveland Consolidated, Inc. v. Occupational Safety & Health Review Comm'n, 649 F.2d 1160, 1165 (5th Cir. 1981).

e. The ALJ will make findings of fact and conclusions of law, and issue an order affirming, modifying, or vacating the citation. See New York State Elec. & Gas Corp., 88 F.3d at 103 (citing 29 U.S.C. § 659(c)).

f. A party affected or aggrieved by the ALJ's decision petitions the Commission for discretionary review, 29 C.F.R. § 2200.91, and a Commission member requests that the case be reviewed by the full Commission. See 29 U.S.C. § 661(j).

g. Appeals from final decisions of the Commission are reviewed directly by the Courts of Appeals. See 29 U.S.C. § 660(a).

h. The Commission and its ALJs are bound to follow the law of the circuit to which the case would most likely be appealed. See, e.g., Secretary of Labor v. Interstate Brands Corp., 20 O.S.H. Cas. (BNA) 1102, at *2 n. 7 (2003)

6. Defenses

a. Affirmative defenses normally fall into three categories: coverage, substantive, and procedural

   i. Coverage refers to those businesses that are included in OSHA's jurisdiction by the OSH Act and regulations. Defenses arise when the Secretary of Labor cites a business on which OSHA imposes no duties, such as a citation to an engineering firm that participated in the design of the project but has no actual on-site supervisory authority.

ii. Substantive defenses deal with the merits of the Secretary of Labor charge. For example, by claiming it could not feasibly comply with a specific standard, an employer would be raising a substantive defense.

iii. Employers can raise procedural defenses when the Secretary of Labor failed to follow the requirements in conducting an inspection or issuing a citation.

b. Common Defenses

i. Lack of employer knowledge

1. The Secretary can prove employer knowledge of the violation in one of two ways.
   a. First, where the Secretary shows that a supervisor had either actual or constructive knowledge. See Georgia Elec. Co. v. Marshall, 595 F.2d 309, 321 (5th Cir.1979); New York State Elec. & Gas Corp., 88 F.3d at 105; see also Secretary of Labor v. Access Equip. Sys., Inc., 18 O.S.H. Cas. (BNA) 1718, at *9 (1999).

   b. In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable.

ii. The affirmative defense of unpreventable or unforeseeable employee misconduct.
1. This defense requires the employer to show that it:
   a. created a work rule to prevent the violation at issue;
   b. adequately communicated that rule to its employees;
   c. took all reasonable steps to discover noncompliance; and
   d. enforced the rule against employees when violations were discovered.

Practice Tip

Educate your employers on the "Hot Topics" for rules, training, communication and disciplinary actions. I.e. A roofer need not spend time on trench safety and no one ever gets cited for a bee sting.