

A photograph of a panel discussion at a conference. Four men are seated at a long table on a stage, facing an audience. The man on the far left is speaking into a microphone. The other three men are listening attentively. There are water bottles and coffee cups on the table. In the background, a screen displays text about Vicbullet being named '2015 America's Safest Company' and the website 'safetyleadershipconference.com'. A podium on the right side of the stage has a sign that reads 'EHS Today Safety Leadership CONFERENCE'. The foreground shows the backs of several audience members' heads.

EHS Today

# Safety Leadership CONFERENCE

**September 18-20, 2023**

Orlando World Center Marriott | Orlando, FL

[safetyleadershipconference.com](https://safetyleadershipconference.com)

# Settling OSHA Citations: It's Not Just About OSHA

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# Occupational Safety and Health Administration

- Area Office
  - Regional Administrator (RAs)
  - Area Director
  - Assistant Area Director for Safety
  - Assistant Area Director for Health
  - Compliance Safety and Health Officers (CSHO)

# OSHA Litigation – Occupational Safety and Health Review Commission (OSHRC)

- U.S. Department of Labor – Office of the Solicitor (no private right of action) / OSHA Counsel
- Administrative Law Judge
  - Occupational Safety and Health Review Commission (OSHRC) Rules of Procedure
  - Generally no depositions
  - Federal Rules of Evidence
- OSHRC Appeal discretionary

# Simplified Proceeding

- Relatively few citations
- Aggregate proposed penalty of not more than \$30,000
- No willful or repeat
- No fatality
- Hearing expected to take less than 2 days

# Equal Access to Justice Act (“EAJA”)

- Provides an award of attorney fees and other expenses to eligible individuals and entities before OSHRC.
- Eligible party may receive an award when it prevails over Secretary of Labor unless the Secretary’s position in the proceeding was substantially justified or special circumstances make an award unjust.
- <https://www.osha.gov/laws-regs/federalregister/2021-06-11>

# Notice of Violation

- Essential Components of an OSHA Citation
  - Cited Standard(s)
  - Civil Money Penalties (CMPs), if any
  - Classification
  - Alleged Violation Description
  - Date Violation Must Be Abated, if not corrected during inspection



# Representative Defenses

- Vagueness
- Infeasibility
- Greater Hazard
- *Unpreventable Employee Misconduct*
- Supervisory Misconduct
- Statute of Limitations (6 months)
- De Minimis Violation



# What's next?

- Pay CMP's and comply with abatement certification
- Fifteen Working Days to Contest
  - Check State OSHA Plans
- Request Informal Conference
  - Does not stay 15 working day period to contest
  - Informal Settlement Agreement (ISA) must be executed and received by OSHA within the 15 working day period
  - Absent a compelling reason, always request an Informal Conference

# Informal Conference (usually via Teams)

- Who should attend?
  - Counsel
  - Human Resources
  - Operations
  - Safety Personnel
- Employee representative has right to attend.

# Informal Conference Preparation

- Prior to informal conference consider sending OSHA helpful documentation
  - Be aware of FOIA issues
- Be prepared to discuss abatement / demonstrate abatement
- Be prepared to argue reduction of CMP's based on statutory factors, *e.g.*, gravity, duration of exposure, number of employees exposed, etc.
- Be prepared to argue for reduction of classification
- Be prepared to discuss commitment to safety
- Be prepared to discuss defenses
- Have a game plan and a proposal

# Settlement Considerations

- Media Coverage
- Contractual Obligations (“OSHA Compliance Clauses”)
- Workers’ Compensation Claims / Premiums
- Other Insurance Related Premiums
- Third Party Claims
- Negligence (duty of care) / Tort Claims
- Public Contract Bidding / Vendor Questionnaires
- Union organizing
- Lines of credit / bank loans

# Settlement Considerations Cont.

- Reduce CMPs
  - Ask to group certain items
- *Reduction Classification / Withdraw Item*
- Enhance Abatement Requirements
- Potential for Repeat / Willful Citations
  - Of particular importance for multi-facility businesses
- Non-admission / Limited Use Clause
- Impact on future operations

# CMPs

- Not adjusted since 1990 → Effective August 2, 2016 (Increased by 78%)
- Annual Indexing (Consumer Price Index)
- Effective Repeat, Willful: \$156,259 per violation
  - Serious, other-than-serious: \$15,625 per violation
  - Failure to abate: \$15,625 (per day beyond the abatement date)
  - Criminal Penalties

# CMPs

- Civil Money Penalties – Negotiate at Informal
  - Gravity of the violation (primary factor), employer size, good faith, history of previous violations
  - Generally expect 20-40% reduction
  - Installment Plan



# Classifications

- De Minimis
- *Other-than-Serious*
- Serious
- Willful
- Repeat
- Failure to Abate

# Alleged Violation Description

- May negotiate changes to language
- Consider ISA as potential exhibit in collateral litigation



**Citation and Notification of Penalty**

Company Name:  
Inspection Site:

**Citation 1 Item 4** Type of Violation: **Serious**

29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee potentially exposed to fall hazards to enable each employee to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards.

Location:

- a) On or about 3/1/2019, The employer did not provide fall protection training to four employees disassembling storage shelves in the warehouse. Employees exposed to a fall of approximately 9 feet.
- b) On or about 3/4/2019, The employer did not provide fall protection training to two employees disassembling storage shelves in the warehouse. One employee fell approximately 9 feet and was fatality injured.

**NOTE: IN ADDITION TO ABATEMENT CERTIFICATION, THE EMPLOYER IS REQUIRED TO SUBMIT ABATEMENT DOCUMENTATION FOR THIS ITEM, FAILURE TO COMPLY WILL RESULT IN AN ADDITIONAL PENALTY OF \$1,000.00 IN ACCORDANCE WITH 29 CFR 1903.19.**

**ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated: 07/03/2019  
Proposed Penalty: \$5304.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

# Multi-Employer Worksite Citation Policy

- The Creating Employer
- The Exposing Employer
- The Correcting Employer
- The Controlling Employer

[https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=2024&p\\_table=DIRECTIVES](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=2024&p_table=DIRECTIVES)

# Expect More Inspections – Increased Penalties

- OSHA inspectors grew 19% in fiscal year 2022
- Instance by Instance (IBI) enforcement guidance
- Discretionary grouping enforcement guidance

# Second Bite At The Settlement Apple

- Contest Citation
- Litigation before OSHRC
- SOL attorney assigned
  - Obtain OSHA investigative file
  - May be more willing to listen to legal defenses, *e.g.*, employee misconduct
  - Can usually get at least the same ISA deal

# Questions?

OSHA Blog:

<https://www.oshachronicle.com/>