



How to Prevent Costly OSHA Citations

A Special Employer Report

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Special Report

How to Prevent Costly OSHA Citations

There are certain employers who have the misfortune of not only being cited by OSHA once, but repeatedly. These employers essentially have fallen into a vicious citation cycle where the penalties keep rising and breaking this cycle of citations seems hopeless.

There is a way to get out of this predicament legally using OSHA's own rules and procedures. The concept is not complicated, and once understood, can be used by any employer regardless of their citation history with OSHA.

For those who do not understand how the OSHA enforcement system works, a quick, non-technical overview is in order. For those who do understand the OSHA enforcement system, please go to page 4, *The Citations Continue*.

OSHA Enforcement Procedures

Note: **Before** an OSHA compliance officer even talks to an employer or his representative, it is not uncommon for the officer to have documented alleged safety violations with video recordings or photographs from outside the work place perimeter.

An OSHA compliance officer arrives at the employer's work place generally for one of three reasons.

1. **Referral:** A hospital, the police, EMS responder, union business agent, etc. reported the employer to OSHA.
2. **Complaint:** An employee reported the employer to OSHA.

Note: Under no circumstances is OSHA allowed to reveal who submitted the complaint.

3. **Planned Inspection:** These inspections fall under the OSHA emphasis program which currently focuses on falls and excavations. These are generally high visibility safety violations such as: failure to use fall protection; improper scaffold erection; or failure to install trench boxes. These violations are generally visible from the road and may be the result of a compliance officer merely driving by and seeing the violations.

Note: Under no circumstances is OSHA allowed to forewarn an employer of a pending visit.

At the work place, the compliance officer will show his credentials to the employer's representative, explain the purpose of the inspection, and conduct an inspection of the work place with the employer's representative.

Violations are noted, a closing conference is conducted, and the compliance officer informs the employer's representative that either nothing will happen, or the employer will receive a notification of citation by mail.

If the employer is to be cited, the following applies:

- a. OSHA must issue the alleged citation within 6 months of the inspection.
- b. Usually the citation will be sent by certified mail or hand delivered with a signed receipt or documentation to whom it was delivered.
- c. The employer, upon receipt of the citation notification, has four options. **Within 15 workdays**, the employer must:
 1. Accept the alleged citations as true and pay the full penalty.
 2. Accept an Expedited Informal Settlement Agreement. The agreement, which may or may not be offered, is used by OSHA to eliminate the time spent on informal conferences.

By signing this agreement and returning by certified mail with a check within 15 workdays, the employer accepts the citations as true and agrees to comply with OSHA standards. OSHA's inducement to accept this agreement is usually a 25-35% reduction in the penalty.

3. Participate in an Informal Conference and sign an informal agreement.

Though an OSHA Area Office may allow an informal agreement discussion to be held by phone, generally it is conducted in person, face to face. The employer tries to reduce or eliminate penalties by explaining his position including safety steps that are being taken.

OSHA has a tremendous advantage during an Informal Conference because they conduct them every day and because they know the standards inside and out.

Rarely does the employer have intimate knowledge of OSHA procedures. Often employers just want to "get it over with" and get back to work.

4. Contest the citations.

The contest is sent to the OSHA Area Office.

The Review Commission (OSHA's judicial system) sets the legal process in motion assigning a judge and determining if the case will go to "Simplified Proceedings" [previously referred to as an "EZ Trial"] or a Full Hearing. An employer may request Simplified Proceedings if it is not selected.

During this process, the possibility for negotiations exists for settlement options between the employer, OSHA's attorneys, and the Area Office.

Approximately 95% of contested cases are settled before the hearing date.

Highlights of Simplified Proceedings:

Maximum proposed penalty: \$30,000.00

Legal proceedings are less formal

Judge promotes settlement between the employer and OSHA

Judge hears case; reviews facts; and issues a decision usually within 60 days or establishes a full hearing date

Judge may render his or her decision “from the bench” or at the end of the proceedings

Cases with willful or repeat violations, or those involving a fatality, are not suitable to undergo Simplified Proceedings.

Highlights of a Full Hearing:

Formal legal proceedings

Production of documents

Interrogatories

Exhibits

Judge hears case; reviews facts; and issues a decision usually within 60 days

If the employer does not respond in writing (either through a notice of contest or settling the case) within 15 working days of the notification, it is considered final and the penalties are firmly fixed.

Note: Technically, a late notice of contest may be allowed if the final order was entered as a result of “mistake, inadvertence, surprise or excusable neglect” or for special mitigating circumstances. It is practically impossible to prevail with these technicalities.

The Citations Continue

If the employer has been cited before, the employer will have had written or verbal contact with an OSHA area office.

After the employer’s citations have been abated, negotiations completed, and the penalty is paid, OSHA may not have provided the employer with the knowledge to stop future penalties. OSHA generally requires the employer to prepare a written safety

program and increase their training effort if this has not been done already. Ultimately, the responsibility of safety rests with the employer.

Not surprisingly, when a compliance officer returns for another inspection, the employer gets cited again. It is obvious that the safety program and increased training did not stop the penalties.

If the employer gets cited for the same safety violation, the penalties dramatically increase – two to ten times the original amount. OSHA may also reclassify the citation as “repeat” or “willful,” which is not only expensive and more difficult to defend, it is a blot on the employer’s history.

A willful violation penalty starts at \$5,000.00 and can reach as high as \$70,000.00. This is why it is so important to get citations deleted rather than accept an Expedited Informal Settlement or an informal agreement. For the purposes of repeat citations, safety violations remain on the employer’s history with OSHA for 5 years, even with reduced penalties.

Either there is no way out of the employer’s predicament or OSHA neglected to fully inform the employer of the critical, legal, and established procedures for avoiding penalties.

There must be a way to protect the employer. There is!

Establishing an Unpreventable Employee Misconduct Defense

The employer must complete all four steps below. While completing one, two, or even three steps will make your work places safer, failure to complete all steps concurrently will ensure that you cannot break the OSHA citation cycle.

Step 1

Establish Policies and Procedures that Meet OSHA Requirements

The first step in breaking the OSHA citation cycle is preparing a written safety program that addresses the employer’s company needs while meeting OSHA requirements.

When OSHA told the employer a safety program was needed, they were correct.

An employer is required by law to provide a workplace that is free from recognized hazards.

The safety program must contain adequate work rules, procedures, and personal protective equipment that address and negate the safety hazards that can reasonably be expected on the work place.

However, just having a safety program and not actually using it is a waste of time and effort. It will not protect your employees and it will not protect you from OSHA citations.

Step 2

Effectively Communicate Your Safety Program and Procedures to Your Employees

The second step in breaking the OSHA citation cycle is conveying the contents of the safety program to employees.

Clearly, employees must know what is expected of them. That is the whole purpose of a safety program. An employer may offer in-house orientation and refresher training, on-the-job training, outside training, and conduct regularly scheduled safety meetings.

For this step to be valid, this training must be documented.

Note: The next two steps are the most difficult and they are often overlooked. The employer must impress on competent persons and supervisors the necessity of real work place inspections and following enforcement procedures. Without completing these two steps, the employer does not have a chance of prevailing when confronted by OSHA.

Step 3

Perform Regular and Frequent Worksite Inspections

The third step in breaking the OSHA citation cycle is inspecting the work place on a regular basis.

In every work place, there generally should be a competent person who has the knowledge to recognize safety hazards and the authority to stop work should a safety hazard be discovered that cannot be corrected immediately. If a work place is properly set up and routine work is being performed safely, the competent person does not necessarily have to be present.

Documented (formal) work place inspections should be conducted at least weekly. However, at all times competent persons and supervisors should be aware of safety violations and make corrections as necessary.

Though not specifically required, it is certainly in the employer's best interest to document work place inspections. If they are not documented, it is substantially more difficult to prove they were performed.

A common fault that occurs during inspections is finding no safety violations. It is understandable that a supervisor or competent person might feel that it reflects poorly if safety violations are reported, but in fact, it is just the opposite. Finding and

correcting violations is the essence of safety. It demonstrates to employees the seriousness of maintaining a safe work site. It is unreasonable – even unbelievable - that the one time an OSHA compliance officer comes to a work place, employees are caught violating OSHA standards while the employer has copies of inspections showing everything is always perfect.

It should be noted that if an inspection is diligently performed and an honest oversight is made, this in no way should be held against the employer. Additionally, if an employee is violating a safety standard and the supervisor has no knowledge of the violation or reason to suspect a violation that, too, cannot be held against the employer.

Finding and correcting safety violations indicates that the employer's supervisor and/or competent person is actually doing their job. The employer must impress upon supervisors that finding and correcting faults reflects favorably on them.

Step 4

Enforce Your Safety Policies and Procedures

The fourth and final step in breaking the OSHA citation cycle is enforcement of the safety program procedures.

Employers must establish an enforcement program that is reasonable, fair, consistently employed, effective, and understood. In addition, OSHA considers the timeliness of enforcement as an important factor.

The penalties for employees, which must be documented, can range from written warnings to time off to dismissal. Certainly, an employee who deliberately disobeys a known safety rule and refuses to comply with a supervisor's guidance should be dismissed.

It is important that all employees understand the employer's enforcement procedures and that they are consistently and fairly applied.

Serious violations would be treated more harshly than other than serious violations. Repetitive violations would incur progressively more severe penalties.

The Affirmative Defense of Unpreventable Employee Misconduct

Many employers are leery of even considering the affirmative defense of unpreventable employee misconduct because they think that their employees will be cited and/or fined by OSHA. This is not the case.

**According to the OSH Act, citations can only be issued to employers.
Employees cannot be cited or fined by OSHA.**

If the employer has performed the above four (4) steps, according to OSHA's own documents and more importantly confirmed by the Occupational Safety and Health Review Commission, they can successfully pursue an affirmative defense of unpreventable employee misconduct.

The conditions for affirmative defense of unpreventable employee misconduct must be:

1. unknown to the employer; and
2. in violation of an adequate work rule which was effectively communicated and uniformly enforced.

In situations where the employer has met all the conditions for affirmative defense of unpreventable employee misconduct, no citation is issued.

The Review Commission requires the employer to prove that "it has (1) established work rules designed to prevent the violation, (2) adequately communicated these work rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered" in order to successfully mount an affirmative defense of unpreventable employee misconduct. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997)

The Sixth Circuit has further held that "an employer must show that it has a thorough safety program, it has communicated and fully enforced the program, the conduct of the employee was unforeseeable, and the safety program was effective in theory and practice."

Excerpts from four court cases that demonstrate the affirmative defense of unpreventable employee misconduct are presented below.

OSHRC Docket No. 12-1056

Employer lost because:

1. The safety program was insufficient (*Step 1*).
2. Training was provided, but the pattern of non-compliance among workers showed that the training was inadequate (*Step 2*).
3. Inspections did not appear to be complete or follow any guidelines, and thus were deemed insufficient (*Step 3*).
4. Enforcement of safety violations did not show evidence that employees were issued progressive penalties for safety violations (*Step 4*).

An important note with this case – citations against this employer were for safety violations involving a supervisor. When a supervisor is involved, the misconduct defense becomes more difficult because the supervisor's apparent lack of regard for company safety policies indicates a safety program that is too lax.

OSHC Docket No. 11-0590

Employer lost because:

1. The competent person was not adequately trained to recognize hazards (*Step 2*).
2. The supervisor was not disciplined for failing to ensure a safe work environment for employees (*Step 4*).

OSHC Docket No. 10-2010

Employer lost because:

1. Even after multiple safety violations were discovered, the employer did not effectively enforce its safety rules (*Step 4*).

OSHC Docket No. 12-2154

Employer lost because:

1. No work rules were identified in any safety documents (*Step 1*).
2. There was no documentation that work rules were communicated to employees (*Step 2*).
3. They failed to show that employees' work practices were being monitored (*Step 3*).
4. There was no evidence of a disciplinary program for safety violations (*Step 4*).

These cases demonstrate that **all 4 steps** need to be accomplished from the standpoint of OSHA and the Review Commission.

The following is taken from OSHA's Field Operations Manual, which can be accessed through the OSHA website: <http://www.osha.gov>.

Note: The bold underline is added.

VI. Affirmative Defenses.

An affirmative defense is a claim which, if established by the employer and found to exist by the CSHO, will excuse the employer from a citation that has otherwise been documented.

- A. Burden of Proof. Although employers have the burden of proving any affirmative defenses at the time of the hearing, CSHOs must anticipate when an employer is likely to raise an argument supporting such a defense. **CSHOs shall keep in mind all potential affirmative defenses and attempt to gather contrary evidence, particularly when an employer makes an assertion that would indicate raising a defense/excuse against the violation(s).** CSHOs shall bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the Area Director or designee.
- B. Explanations. The following are explanations of common affirmative defenses.
- (1) Unpreventable Employee Misconduct or Supervisory Misconduct or "Isolated Event".
- a. To establish this defense in most jurisdictions, employers must show all the following elements:
- A work rule adequate to prevent the violation;
 - Effective communication of the rule to employees;
 - Methods for discovering violations of work rules; and
 - Effective enforcement of rules when violations are discovered.
- b. CSHOs shall document whether these elements are present, including if the work rule at issue tracks the requirements of the standard addressing the hazardous condition.

EXAMPLE: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts to be documented include: Who removed the guard and why? Did the employer know that the guard had been removed? How long or how often had the saw been used without the guard? Were there any supervisors in the area while the saw was operated without a guard? Did the employer have a work rule that the saw only be operated with the guard on? How was the work rule communicated? Did the employer monitor compliance with the rule? How was the work rule enforced by the employer when if found noncompliance?

It is clear from OSHA's official instructions to compliance officers that the affirmative defense of unpreventable employee misconduct is valid.

Summation

U.S. Compliance Systems has represented clients who've followed the 4 steps and provided documentation to OSHA prior to citations being issued. As a result, OSHA did not issue citations to these employers. In addition, we've represented clients who received citations, only to have them withdrawn after documentation of the 4 steps was submitted.

When looking up Review Commission cases, it may be discouraging to find that few employers seem to prevail with the affirmative defense of employee misconduct. However, the simple fact is that if you are an employer who has implemented and documented the 4 steps successfully, citations either will not be issued in the first place or will be withdrawn early in the process.

Whether or not you've ever been cited by OSHA, make or renew your commitment to safety by following the 4 steps:

- Establish a safety program that not only applies to your work, but also meets OSHA requirements. Make changes as needed.
- Provide regularly scheduled safety training for your employees in whatever way works for you and your employees. Remember, your employees need to understand the training and why it is important (that includes employees who are not fluent in English).
- Perform regular and frequent inspections. Employees need to know their safety is important to you.
- When you see safety violations, discipline the employee(s) in a manner appropriate for the type of violation they are committing.

Don't forget to document these steps. Written proof that you follow these 4 steps on a consistent basis will make it that much easier for you to show employee misconduct in the event that OSHA finds a violation during a visit. The rewards of following the 4 steps are significant: a safer work site and freedom from OSHA citations and penalties.

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