



How to Prevent Costly OSHA Citations

A Special Contractor Report

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Special Report

How to Prevent Costly OSHA Citations

There are certain contractors who have the misfortune of not only being cited by OSHA once, but repeatedly. These contractors 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 contractor 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: It is not uncommon, **before** an OSHA compliance officer even talks to a contractor or his representative to have documented with video recording or photograph alleged safety violations from outside the job site perimeter.

An OSHA compliance officer arrives at the contractor's job site generally for one of three reasons.

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

Note: Under no circumstances is OSHA allowed to reveal who turned the contractor in.

3. **Planned Inspection**: These inspections fall under 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 a contractor of a pending visit.

Once on the job site, the compliance officer will show his credentials to the contractor's representative, explain the purpose of the inspection, and, with the contractor's representative conduct an inspection of the job site.

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

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

- a. OSHA must issue the alleged citation within six months of the inspection.
- b. The citation will be sent by certified mail or hand delivered with a signed receipt or documentation to whom it was delivered.
- c. The contractor, upon receipt of the citation notification, has four options. Within 15 workdays, the contractor 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 contractor accepts the citations as true and agrees to comply with OSHA standards. OSHA's inducement to accept this agreement is usually a 25% to 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 contractor 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 everyday and because they know the standards inside and out.

The contractor on the other hand does not have intimate knowledge of OSHA procedures and often just wants 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 Procedures” [previously referred to as an “EZ Trial] or a Full Hearing.

During this process the possibility for negotiations exist for settlement options between the contractor, OSHA’s attorneys, and the Area Office.

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

Highlights of Simplified Proceeding:

Maximum proposed penalty: \$30,000.00

Legal proceedings are less formal

Judge promotes settlement between the contractor and OSHA.

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

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 contractor does not respond within 15 working days to 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 contractor has been cited before, the contractor will have had written or verbal contact with an OSHA area office.

After the contractor's citations have been abated, negotiations completed, penalty paid, it is doubtful that OSHA provided the contractor with the knowledge to stop future penalties. OSHA generally requires the contractor to, if not already done, prepare a written safety program and increase their training effort.

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

If the contractor 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 “willful” which is not only expensive and more difficult to defend, it is a blot on the contractor's history.

A willful violation penalty starts at \$7,000.00 and goes up in seven thousand dollar increments to \$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, even with reduced penalties, remain on the contractor's history with OSHA for three years.

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

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

Establishing an Unpreventable Employee Misconduct Defense

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

Step 1

Prepare a Meaningful Written Safety Program

The first step in breaking the OSHA citation cycle is preparing a written safety program that addresses the contractor's company needs.

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

A contractor 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 job site.

However, just having a safety program and not actually using it is a waste of time and effort.

Step 2

Convey the Contents of the Safety Program to Employees

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

Clearly, a contractor's employees must know what is expected of them. That is the whole purpose of a safety program. A contractor 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 contractor must impress on competent persons and supervisors the necessity of real job site inspections and following enforcement procedures. Without completing these two steps, the contractor does not have a chance of prevailing when confronted by OSHA.

Step 3

Perform Job Site Inspections

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

On every job site, 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 job site is properly set up and routine work is being performed safely, the competent person does not necessarily have to be present.

Documented (formal) job site inspections should be conducted at least weekly, however, at all times competent persons and supervisor should be aware of safety violations and make corrections as necessary.

Though not specifically required, it is certainly in the contractor's best interest to document job site 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 – it is unbelievable - that the one time an OSHA compliance officer comes to a contractor's job site, employees are caught violating OSHA standards while the contractor 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 contractor. 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 contractor.

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

Step 4

Establish Enforcement Procedures

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

The contractor must establish an enforcement program that is reasonable, fair, consistently employed, effective, and understood.

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 contractor'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 contractors 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.

If the contractor 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.

Excerpts from four court cases that demonstrate the affirmative defense of unpreventable employee misconduct are presented below. These cases can be accessed through the U.S. Occupational Safety & Health Review Commission website: <http://www.oshrc.gov> using their Docket Numbers.

Two cases won, two cases lost.

The Review Commission requires to successfully mount an affirmative defense of unpreventable employee misconduct, the employer must 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. *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.”

Contractor Case Lost #1

OSHRC Docket No. 03-0757

Contractor lost because even though it had a safety program, it did not establish a work rule to prevent the violation which was adequately communicated and enforced..

Contractor Case Lost #2

OSHRC Docket No. 03-1357

Contractor lost because the competent person did not take steps to discover (job site inspection) employee violations.

Contractor Case Won #1

OSHRC Docket No. 04-0836

Even though this case involved a fatality and even though the deceased employee had violated a safety standards, the affirmative defense of unpreventable employee misconduct prevailed because:

1. The contractor had established work rules designed to prevent the violation.
2. The contractor had adequately communicated these rules to its employees.
3. The contractor had taken steps to discover violations, and
4. The contractor had effectively enforced the rules when violations where found.

An interesting fact is emphasized in this case. A supervisor is not required to monitor his or her employees 100% of the time. The contractor’s duty is to take reasonable diligent measures to inspect its work site and discover hazardous conditions. So long as the contractor does this, it is not in violation simply because it has not detected or become aware of every instance of a hazard.

Contractor Case Won #2

OSHRC Docket No. 00-1331

The affirmative defense of unpreventable employee misconduct prevailed because:

1. The contractor had established work rules designed to prevent the violation.
2. The contractor had adequately communicated these rules to its employees.

3. The contractor had taken steps to discover violations, and
4. The contractor had effectively enforced the rules when violations were found.

The below is taken, from the OSHA Field Inspection Reference Manual CPL 2.103, Section 7, Chapter III, Inspection Documentation, paragraph C. 8., *Affirmative defense of unpreventable employee misconducts*, which can be accessed through the OSHA website: <http://www.osha.gov>.

Note: The bold underline is added.

C.8. Affirmative defense of unpreventable employee misconducts.

- a. Definition. An affirmative defense of unpreventable employee misconduct is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proved by the CSHO.
- b. Burden of Proof. Although affirmative defense of unpreventable employee misconducts must be proved by the employer at the time of the hearing, OSHA must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. **The CSHO, therefore, shall keep in mind the potential affirmative defense of unpreventable employee misconducts that the employer may make and attempt to gather contrary evidence when a statement made during the inspection fairly raises a defense.** The CSHO should bring the documentation of the hazards and facts related to possible affirmative defense of unpreventable employee misconducts to the attention of the Assistant Area Director. Where it appears that each and every element of an affirmative defense of unpreventable employee misconduct is present, the Area Director may decide that a citation is not warranted.
- c. Explanations. The following are explanations of the more common affirmative defense of unpreventable employee misconducts with which the CSHO shall become familiar. There are other affirmative defense of unpreventable employee misconducts besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.

(1) Unpreventable Employee Misconduct or "Isolated Event".

The violative condition was:

(a) Unknown to the employer; and

(b) In violation of an adequate work rule which was effectively communicated and uniformly enforced.

EXAMPLE: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts which the CSHO shall document may 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 guards? Did the employer have a work rule that the saw guards not be removed? How was the work rule communicated? Was the work rule enforced?

It is clear from Occupational Safety and Health Review Commission's decisions and OSHA's official instructions to compliance officers that the affirmative defense of unpreventable employee misconduct is valid.

Summation

A contractor who successfully completes the four steps mentioned above will have done everything that can be reasonably done and either will not be cited, or, if cited, will have the citations deleted.

It takes effort and commitment on the part of the contractor, but the rewards are significant: a safer work site and freedom from OSHA citations and penalties.

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