

# OSHA Inspections: Being Prepared, Maintaining Readiness for and Surviving a Surprise Visit To Minimize Your Liability Risks



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Presented by:

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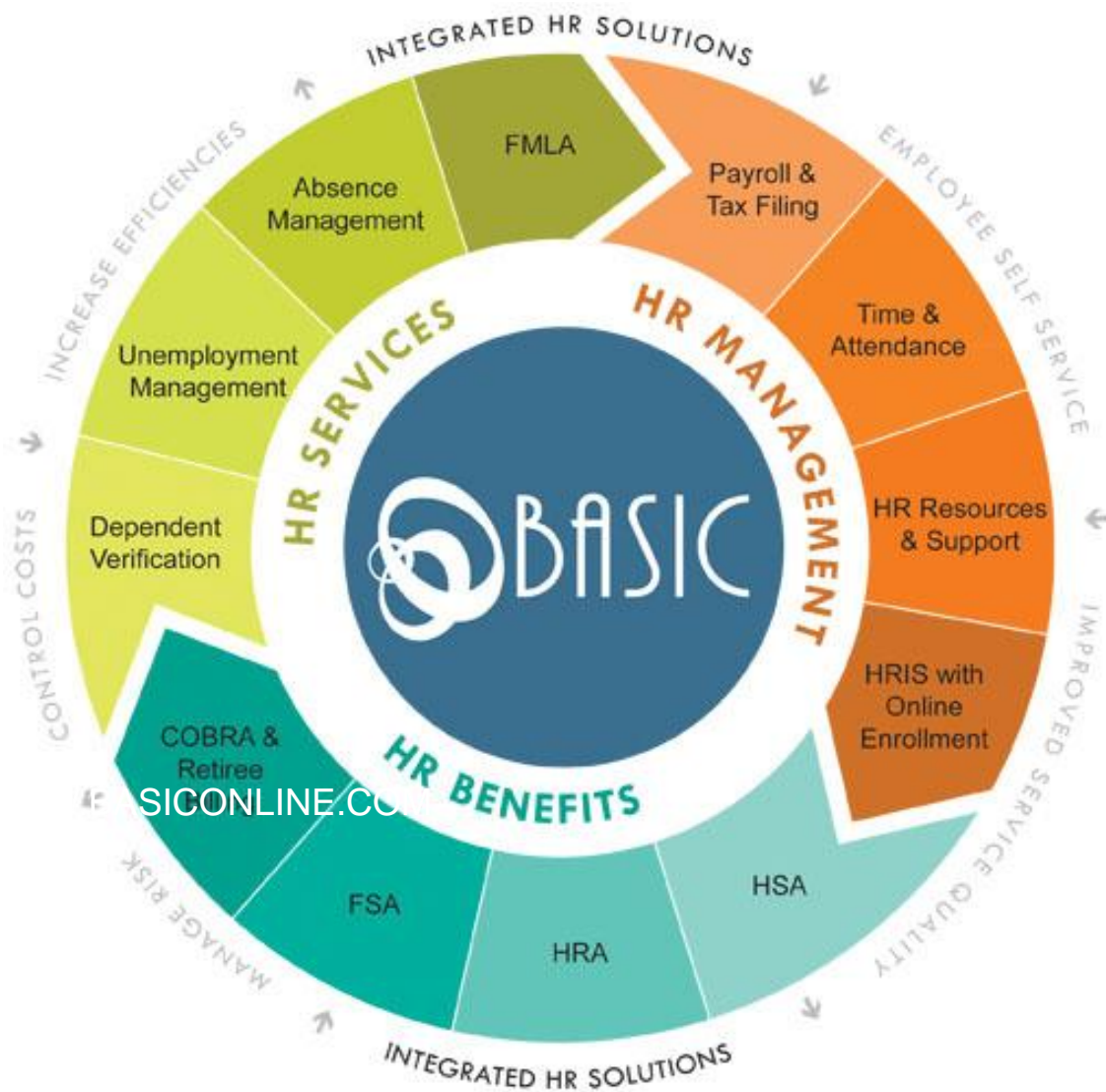
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# WHY ATTEND THIS TRAINING?

To maintain and constantly improve employee safety

The first step to prepare for an OSHA inspection is to maintain a safe and compliant workplace.



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# WHY ATTEND THIS TRAINING?

## Avoid large OSHA penalties such as:

1. BP Products North America, Inc. (TX) - \$87 million
2. Whitesell Corp. (AL) - \$3.07 million
3. BP-Husky Refinery (OH) - \$3.04 million
4. E. N. Range, Inc. (FL) - \$2.1 million
5. South Dakota Wheat Growers ((SD) - \$1.6 million
6. Tempel Grain Elevators, LLC (CO) - \$\$1.59 million
7. CES Environmental Services, Inc. (TX) – \$1.4 million
8. Goodman Mfg. Co. (TX) - \$1.215 million
9. A-1 Excavating (WI) - \$861,000
10. WRR Environmental Services (WI) - \$787,000
11. Cooperative Plus (WI) - \$721,000
12. Sims Bark Co & Sims Stone Co. (GA & AL) – \$576,000



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# WHY ATTEND THIS TRAINING?

## Avoid large OSHA penalties such as:

13. Republic Engineered Products (OH) - \$563,00
14. Excelsior Brass Works (PA) - \$550,400
15. C.A. Franc (PA) - \$539,000 and criminal referral
16. All-Feed Processing & Packaging, Inc. (IL) - \$518,520
17. Loren Cook Co. (MO) - \$511,000
18. Cranesville Aggregate Co. (NY) - \$509,000
19. New Jersey Transit (NJ) - \$500,000
20. Parker Hannifin Corp. (MS) - \$487,700
21. Cambridge Contracting, Inc. (NY) - \$484,000.
22. Endres Processing Ohio, LLC (OH) - \$473,000
23. U.S. Minerals (IN) - \$466,400
24. US Minerals (IL) - \$396,000
25. Mar-Jac Poultry, Inc. (GA) - \$379,800



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# TOP 10 MOST FREQUENTLY CITED OSHA STANDARDS

## Fiscal Year 2011

### 1. Fall protection

- – 7,139 violations. "Falls continue to be the leading cause of fatalities in construction"

### 2. Scaffolding

- 7,069 violations. In 2010, 37 workers died from scaffolding-related incidents.

### 3. Hazard communication

- 6,538 violations.

### 4. Respiratory protection

- 3,944 violations.

### 5. Lockout/tagout

- 3,639 violations



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# TOP 10 MOST FREQUENTLY CITED OSHA STANDARDS

## Fiscal Year 2011

### 6. Electrical – (wiring methods)

- 3,584 violations

### 7. Powered industrial trucks

- 3,432 violations

### 8. Ladders

- 3,244 violations.

### 9. Electrical – (general requirements)

- 2,863 violations. According to 2009 BLS data, 1,600 nonfatal injuries were attributed to electrical shock.

### 10. Machine guarding

- 2,728 violations, in 2010, 90 workers were killed in machinery. In 2009, 5,930 occupational amputations were reported.



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# ADMINISTRATIVE STRUCTURE

- Federal law
  - Supremacy clause
  - Supersedes state safety laws
- Opt-Out (local enforcement option)
  - “Approved” state plan



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# STATE PLANS

- Must be “at least as effective as”
- States free to enact more demanding standards
- 27 state plans – AK, AZ, CA, CT (Public Sector Only), HI, IL (Public Sector Only), IN, IO, KY, MD, MI, MN, NV, NJ (Public Sector Only), NM, NY (Public Sector Only), NC, OR, PR, SC, TN, UT, VT, VI (Public Sector Only), VA, WA, WY



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# Types of Inspections

## INSPECTION PRIORITIES

- Imminent danger
- Fatalities/catastrophic accidents
- Employee complaints/referrals
- High-hazard industries &
- Special emphasis programs



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# PRE-INSPECTION ACTION PLAN

- Be a Boy Scout
- You wont have advanced notice of their arrival
- Any day, any time



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# PRE-INSPECTION ACTION PLAN

- OSHA Poster
- Assignment of responsibilities
- Training
- Recordkeeping
- Equipment needed during inspection
- **Review of insurance and third-party audits**
- **Prevent Complaint Inspections**



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# PRE-INSPECTION ACTION PLAN

- Hazard assessment and abatement
- Review of previous citations
- **Perform your own periodic audits and reviews**



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# PRE-INSPECTION ACTION PLAN

## SAFETY RESPONSIBILITY : DISCIPLINE – THE KEY ELEMENT

Discipline has a “*pro-employee*” purpose and is the cornerstone of an effective safety management program. Analyze the role of Discipline by the elements of the OSHA “Affirmative Defense” of “Unpreventable Employee Misconduct.”



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# PRE-INSPECTION ACTION PLAN

## UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE ELEMENTS:

- Establish work rules designed to ensure safe work and to avoid OSHA violations
- Communicate the work rules to employees
- Train the employees as needed
- Take appropriate steps to discover violations
- Effectively enforce the rules and practices when violations are discovered; and
- **Document the above actions**



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# THE ELEMENTS OF AN OSHA INSPECTION

The Knock at the Door

The Opening Conference

The Walk-Around

The Closing Conference

**CAUTION**



**CAUTION**



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# THROUGHOUT THE ENTIRE INSPECTION ALWAYS REMEMBER

- It is your facility
- You have rights. . .
  - Inspection conducted in a reasonable manner
  - Inspection conducted during a reasonable time
- Completion of inspection within 6 months
- Be cooperative and responsive  
**maintain control of the inspection**



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# MAINTAINING CONTROL

- Includes determining before an inspection...
  - What OSHA standards are applicable – do you comply?
  - **Previous OSHA Citations – are they all corrected?**
  - Assure support staff (receptionists, secretaries, guards) are trained.
  - Know what to say when government is at your door.
  - Who is the right company person to contact, including your OSHA Counsel?



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# THE KNOCK

- **No advance knowledge**
- Will not “come back later” – 1-hour rule
- Credentials – if unsure, call Area Director to confirm
- Escort compliance officer to the office and keep him there while you “assemble the troops”



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# SHOULD YOU DEMAND A WARRANT?

- A policy call
- Few employers routinely require warrants
- May be necessary to gain time, such as when a manager or counsel needs to be present



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# OPENING CONFERENCE

- Ascertain purpose of the inspection.
- Establish “scope” of the Inspection – get copy of complaint if applicable
- Set ground rules for inspection.
- **Don't volunteer information.**
- Treat the Inspector in a professional fashion
- Notification of corporate officials and counsel
- Coordination with on-site contractors and vendors
- Trade secret issues



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# THE WALKAROUND

## What is OSHA looking for?

- Violations of Section 5(a)(1), the general duty clause
- Violations of any of the specific promulgated standards:
  - 29 CFR 1910: General Industry
  - 29 CFR 1926: Construction
  - 29 CFR 1903: Recordkeeping
  - 29 CFR 1915, 1917, 1918: Maritime



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# SUPERVISOR LEGAL ROLE IN OSHA CITATIONS

To make out a federal OSHA citation, OSHA must prove that an employer knew of a violation, or with exercise of reasonable diligence, could have known of a non-compliant condition.



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# SUPERVISOR ROLE IN OSHA CITATIONS: LEARNING OF OSHA VIOLATIONS

“Because employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by providing that a supervisory employee knew of or was responsible for the violation.”



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# THE WALKAROUND

- Inspection may last several hours or several months
- **Employer – right to accompany CO**
- An Employee Representative, if any, must be permitted to attend entire inspection
- Limit the area seen by the CO



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# THE WALKAROUND

- Require CO to comply with all company safety and health rules, including training, where applicable
- Take accurate notes on areas reviewed and all discussions and comments from CO
- Do everything the CO does (photos, video, air monitoring, etc.)
- Maintain control
- **No staging of event or accident**
- **No destruction of evidence or misrepresentations – even if inadvertently**



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# THE INSPECTION

- CO will usually take photographs
  - Video equipment
  - Right to protect proprietary trade secrets
- CO may perform relevant tests
  - e.g., air sampling, noise monitoring
- **Advise CO that only side-by-side sampling or monitoring will be allowed**
- **Abated during inspection**



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# THE INSPECTION

- Interviews
  - Schedule away from production floor or work area
  - Normally in company conference room
- **Tape-recording**
- **Signed statement**
- Deposition



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# THE INSPECTION

- Hourly Employee Interviews
  - OSHA takes position no management present
  - Up to employee – can have Employee Representative
  - **Advise employee of his/her rights, appreciation of cooperation, and to tell the truth**
- Warning: Employees have whistleblower rights



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# THE INSPECTION

- Management and supervisor interviews
  - **Always another management/counsel present – agent of Company**
  - Definition of manager?
  - Fatality investigation – attorney always present
  - **No tape-recording**
  - **Signed statement**



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# THE INSPECTION

- Documentation
  - Recordkeeping
  - Training
  - Safety and health policies
  - Monitoring results
  - Medical surveillance
  - Medical access orders
  - **Previous safety audits**
  - **Standard required documents**



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# CLOSING CONFERENCE

- **Employers' opportunity for free discovery**
- Advise of observed unsafe conditions
- Usually, brief description as to possible violations – no discussion of penalties, classification and abatement dates
- Note any abatement made during the inspection
- Suggest possible corrections
- Request photos and monitoring results
- Discuss appeal rights
- **Not a time for debate**
- **Document Requests from OSHA**



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# CITATIONS

- In writing
- Violation described “with particularity”
- Timely – citation must issue within 6 months of the violation
- Proposed penalty specified
- Served by certified mail
- Post for 3 days or until abatement, whichever is longer



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# TYPES OF CITATIONS

- De minimis
- Other than serious
- Serious
- Willful
- Repeat
- Egregious
- Criminal



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# PENALTIES

- Other than serious
  - Up to \$7,000 per violation
- Serious
  - Up to \$7,000 per violation



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# PENALTIES

- Willful
  - Up to \$70,000 per violation
  - Grouping Permitted
  - \$5,000 Minimum
- Repeat
  - Up to \$70,000 per violation
- Egregious
  - Up to \$70,000 per violation
  - No Grouping
- Failure to abate
  - Up to \$7,000 per day



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# PENALTIES –CRIMINAL VIOLATIONS

- Willful violation & employee death:  
    \$10,000 or 6 months or both  
    Second conviction:  
    \$20,000 or 12 months or both
- Advance notice of inspection  
    \$1,000 or 6 months or both
- Falsification of required records, etc.  
    \$10,000 or 6 months or both
- Murder or attempted murder of CO  
    Term of years to life



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# CITATION OPTIONS

- Time is of the essence
- 15 days to appeal citation in writing
- Review all information and documentation gathered during the inspection
- Post citation
- Determine best legal defenses



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# CITATION OPTIONS

- Agree to citations, pay full penalty
- Informal conference/informal settlement
- **Notice of Contest – 15 working days (Federal); some state plan states different time period**
- Formal settlement
- Hearing



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# HEARINGS

- Occupational Safety and Health Review Commission
- Formal complaint and answer
- Discovery similar to Federal Court
- Hearing before Administrative Law Judge
- ALJ issues written opinion
- Appeal to three-member Review Commission
- Other options – expedited proceedings



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