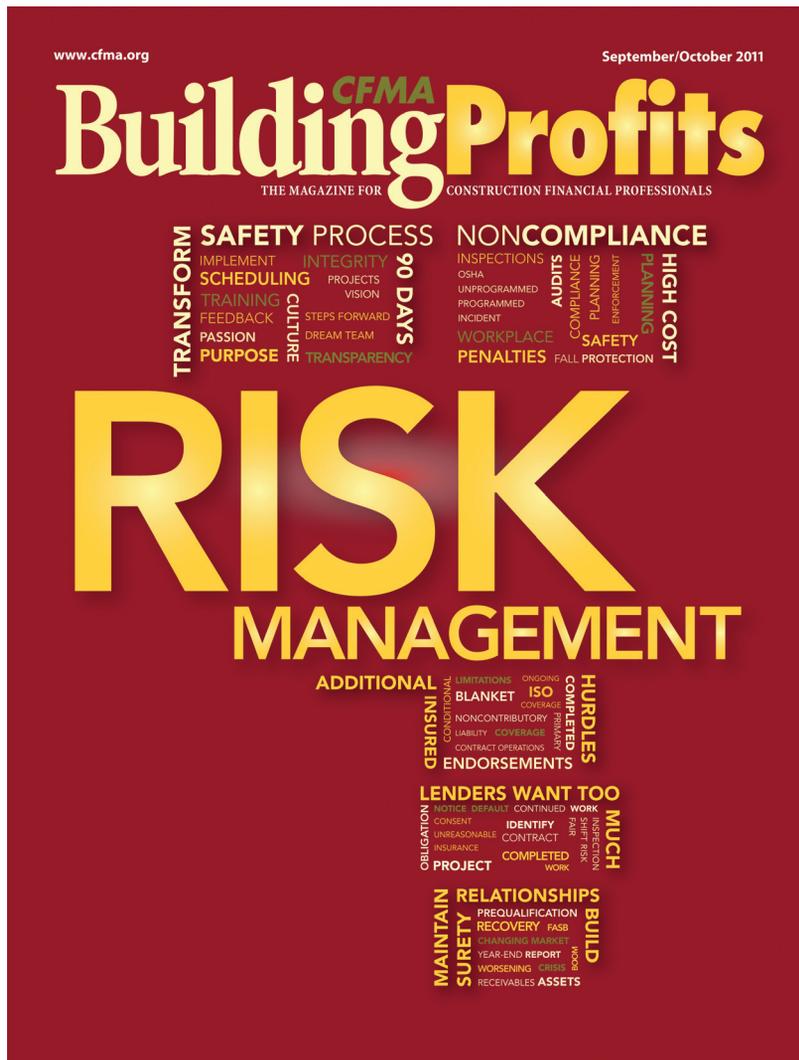


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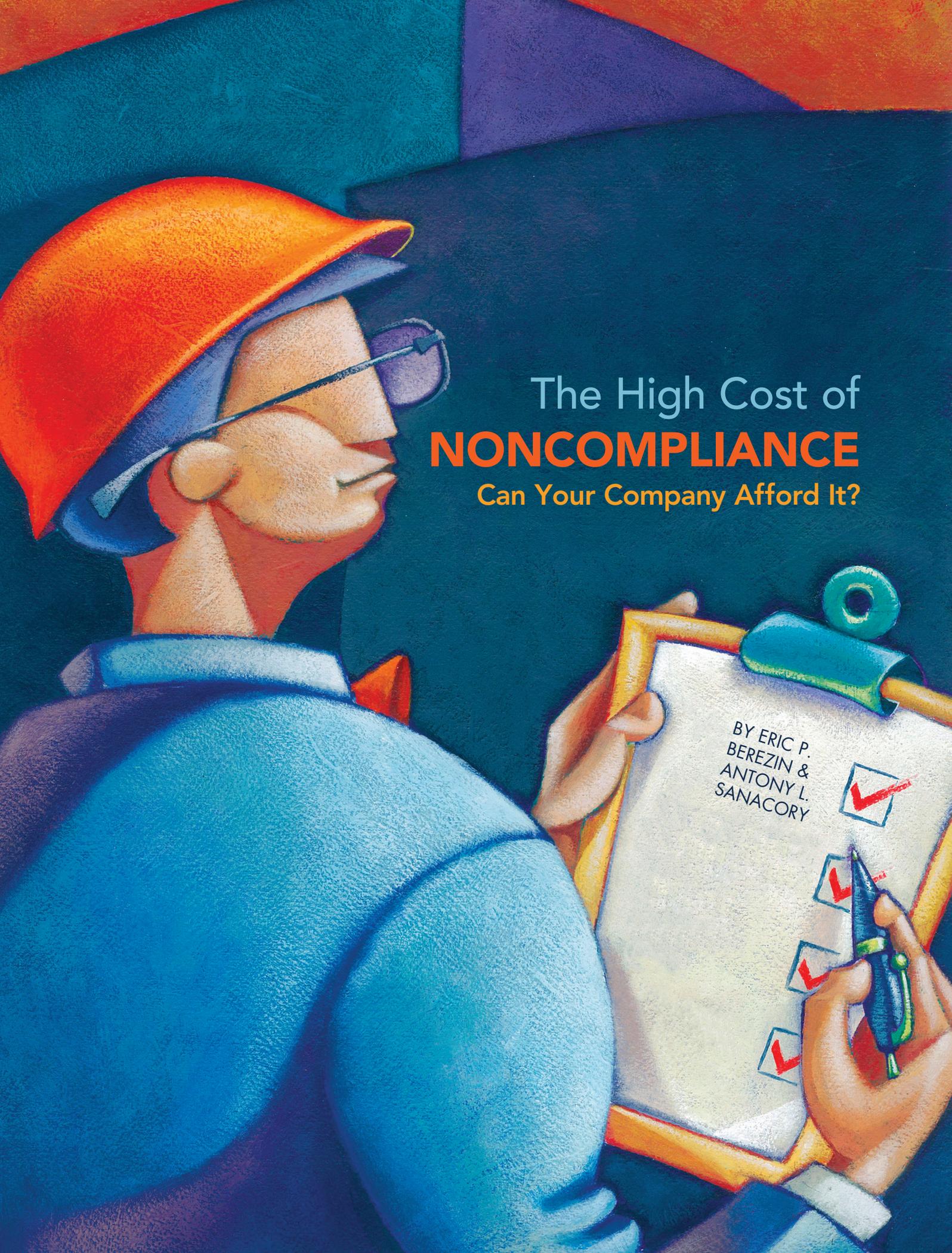
R E P R I N T



SEPTEMBER - OCTOBER 2011

CONSTRUCTION FINANCIAL MANAGEMENT ASSOCIATION

The Source & Resource for Construction Financial Professionals

An illustration of a worker wearing an orange hard hat and safety glasses, looking down at a clipboard. The worker is wearing a blue long-sleeved shirt. The clipboard has a white sheet of paper with a checklist. The text on the clipboard reads "BY ERIC P. BEREZIN & ANTONY L. SANACORY" followed by four checkboxes, each with a red checkmark. The worker's hand is holding a blue pen over the checkboxes. The background is a dark blue and purple gradient.

The High Cost of
NONCOMPLIANCE

Can Your Company Afford It?

BY ERIC P.
BEREZIN &
ANTONY L.
SANACORY





With the economy sputtering along, many contractors are forced to make some very difficult decisions, such as whether or not to downsize, close underperforming offices, and/or cut back on training and other compliance programs.

While the immediate (and perhaps understandable) reaction may be to reduce staff, consolidate offices, and/or suspend training and other compliance initiatives, contractors must remain compliant with the myriad of local, state, and federal laws, notwithstanding a slowdown in business.

Several federal agencies, including the Occupational Safety & Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC), continue to be very aggressive in their enforcement activities.

In the past year or so, OSHA has implemented a number of enforcement initiatives that have a direct impact on the construction industry, including the Severe Violator Enforcement Program (SVEP), new fall protection directives for residential construction, and proposed legislation that could significantly change the penalty scheme and increase civil and criminal penalties for OSHA violations.

In order to balance your company's fiscal responsibility with its continuing compliance obligations, you must know your legal obligations and develop a manageable plan to ensure compliance.

This article will highlight a number of OSHA enforcement initiatives and provide suggestions on how to ensure compliance during these difficult economic times.

OSHA's Recent Activity

INCREASED OSHA INSPECTIONS, VIOLATIONS & PROPOSED PENALTIES

Whether viewed as a carrot or a stick, OSHA's primary tools for ensuring compliance are the threat of an onsite inspection and the issuance of citations and proposed penalties.

OSHA inspections typically fall into two categories: programmed and unprogrammed. *Programmed inspections*

are conducted proactively and target high-hazard industries like construction.

In FY 2010, there were 40,993 OSHA inspections, up from 39,004 in FY 2009. Of those 40,993 inspections, nearly 25,000 were programmed inspections.¹ This underscores the Agency's aggressive and proactive approach of inspecting a broad array of high-hazard industries and employers that OSHA views as "bad actors."

Unprogrammed inspections are conducted in response to a worksite fatality, a workplace incident that results in the hospitalization of three or more employees, a complaint, or a referral from another agency. Between FY 2009 and FY 2010, unprogrammed inspections increased from 14,688 to 16,234.²

Not only was OSHA's inspection activity higher in 2010, but so was the number of violations found during those inspections. For instance, in FY 2010, OSHA found a total of 96,742 violations, up from 87,663 in 2009. Of those, 1,519 were deemed to be willful violations, 74,885 were classified as serious violations, and 17,244 were "other than serious" violations. (Recordkeeping or posting requirement violations are often cited as "other than serious."³) In each instance, these numbers reflect an increase from 2009.⁴

Many employees who file complaints with OSHA are those whose internal efforts to resolve their concerns were unsuccessful. In order to reduce the number of such complaints, establish an internal procedure for employees to notify one (or more) designated management representative(s) of any safety or health concerns.

This internal procedure should outline steps for management to investigate the complaint, correct any unsafe conditions, and report back to the employee on the outcome of the complaint.

While not every complaint will require corrective action, each should be addressed and the employee should be informed of the outcome, even if it's concluded that no unsafe condition exists. Open communication within your company often prevents a formal complaint to OSHA.

Maintaining an effective system for reporting safety and health concerns also helps identify areas for improvement or where employees may not be adhering to established policies and procedures. Early identification and intervention can create a harmonious working relationship among employees, reduce occupational injuries (and potential workers' comp claims), and lessen the need for employees to notify OSHA of a safety or health problem.

SEVERE VIOLATOR ENFORCEMENT PROGRAM

The SVEP replaced OSHA's Enhanced Enforcement Program on June 18, 2010. According to the 2010 OSHA Enforcement Summary, the SVEP targets those employers that:

"...have demonstrated recalcitrance or indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations in one or more of the following circumstances: 1) a fatality or catastrophe situation; 2) in industry operations or processes that expose employees to the most severe occupational hazards and those identified as 'High-Emphasis Hazards,' as defined in Section XII of this Instruction (p.5); 3) exposing employees to hazards related to the potential release of a highly hazardous chemical; or 4) all egregious enforcement actions."⁵

Not surprisingly, fall and excavation/trenching hazards are among the High-Emphasis Hazards that are now included in the SVEP. Avoiding the stigma of a "severe violator" can save your company from potentially significant OSHA penalties, substantial down time due to a protracted OSHA onsite investigation, potentially damaging negative publicity from citations that allege willful violations, and excessive legal fees associated with litigation over OSHA citations and proposed penalties.

ENFORCEMENT OF RESIDENTIAL CONSTRUCTION FALL PROTECTION

On December 16, 2010, OSHA Instruction STD 03-00-002: *Compliance Guidance for Residential Construction* replaced OSHA Instruction STD 03-00-001 (in place since 1999) and STD 3.1 (in place since 1995). The new instruction became effective in June 2011, with compliance phased in over a three-month period.

Previously, STD 03-00-001 provided a standard fall protection plan (FPP) and stated that as long as an employer was compliant with OSHA's FPP, no written or site-specific plans would be required. Many employers tried to follow the FPP rather than develop their own.

Now, under STD 03-00-002, employers are required to have written, site-specific fall plans and must certify the training of their employees in each plan. OSHA notes further in STD 03-00-002 that:

"A written plan developed for repetitive use for a particular style/model home will be considered site-specific with respect to a particular site only if it fully addresses all issues related to fall protection at that site."⁶

Compliance with STD 03-00-002 means that whenever residential construction workers are at least six feet above lower levels, they must be protected by conventional fall protection (e.g., guardrails, safety net systems, or personal fall arrest systems). Employers in residential construction that choose to use alternative fall protection (e.g., slide guards or safety monitor systems) must meet all the requirements of OSHA standards §1926.501(b)(13) and §1926.502(k), and must prove that conventional fall protection is not feasible or creates a greater hazard.

In addition to the penalties that result from noncompliance, OSHA has the authority to initiate imminent danger proceedings that could ultimately result in a temporary restraining order by a U.S. District Court to "...restrain any condition or practice that poses an imminent danger to employees."⁷ Elevated work (much like trenching activities) has the potential for imminent danger for employees working on residential and commercial construction sites.

POTENTIAL CHANGES IN OSHA'S PENALTY SCHEME

On January 5, 2011, H.R. 190 *Protecting America's Workers Act* was introduced in the House of Representatives. If enacted, it will have a profound impact on employers' compliance obligations, the way OSHA performs its inspections, and the penalty amounts that can be issued as a result of serious, willful, and criminal violations of the *Occupational Safety and Health Act of 1970* (OSH Act). The stated purpose of this Act is:

"To amend the *Occupational Safety and Health Act of 1970* to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for high gravity



violations, to adjust penalties for inflation, to provide rights for victims or their family members, and for other purposes.”⁸

Notification

Currently, employers must notify OSHA within eight hours of a work-related fatality or work-related incident that involves the hospitalization of three or more employees. The new legislation would expand those reporting obligations to include any “work-related injury or illness that results in the in-patient hospitalization of any employee for medical treatment.”⁹

Investigations

OSHA’s corresponding obligation to conduct onsite investigations would also change under the new legislation. Currently, OSHA must investigate work-related fatalities and incidents that involve the hospitalization of three or more employees (historically referred to as FAT/CAT investigations).

However, under the proposed legislation, OSHA would have to conduct an onsite investigation if there is a work-related fatality or a “significant incident” (defined as “an incident that results in the in-patient hospitalization of two or more employees for medical treatment”).

Penalties

This new legislation also seeks to greatly increase the range of proposed penalties that can be assessed for serious, willful, and “other” violations. The maximum penalty for a willful violation would increase from \$70,000 to \$120,000; the minimum would increase from \$5,000 to \$8,000. Where a “willful or repeated violation caused or contributed to the death of an employee,” the employer could receive a penalty between \$50,000 to \$250,000 for each violation.

Similarly, penalties for serious violations would increase from \$7,000 to \$12,000. In the event that a serious violation “caused or contributed to the death of an employee,” OSHA would be authorized to assess a proposed penalty ranging from \$20,000 to \$50,000 per violation. Finally, for violations characterized as “other than serious,” the maximum penalty would increase from \$7,000 to \$12,000.¹⁰

The new legislation also seeks to expand the criminal penalties for a knowing violation of the OSH Act that “cause[s] or significantly contributes to the death of any employee.” For first-time offenders, the criminal penalties include fines and incarceration up to 10 years; second offenses can result in fines and incarceration for up to 20 years. Criminal penalties can be imposed against both the company and an officer or director of the company.

Compliance Planning to Mitigate OSHA Inspections

For many employers in the construction industry, an OSHA investigation is inevitable. So, it’s important to prepare now so that you are ready if (and when) that day arrives. There are some steps to take now that are fairly easy to implement; others may require more planning, time, and money.

Even though it’s difficult to justify certain expenditures during these tough economic times, investing in your company’s compliance program will provide such measurable returns as: a safer workplace; reduced lost work time and workers’ comp costs; increased employee morale and productivity; and reduced exposure to OSHA penalties.

UNDERSTAND OSHA’S NEW ENFORCEMENT OBJECTIVES

To ensure compliance, you must understand your company’s obligations under the OSH Act and various enforcement directives that the Agency has issued. Review OSHA’s Website, take advantage of trade organization training opportunities, or utilize the services of an outside consultant or legal advisor. Once you know and understand your company’s obligations, compliance programs and procedures can be developed.

REVIEW EXISTING SAFETY & HEALTH PROGRAMS

Take a fresh look at your company’s existing safety and health programs to identify gaps, outdated policies and procedures, and/or training requirements that have either not been met or need to be updated.

During most OSHA investigations, an employer’s written safety and health program is requested. Your company’s commitment to safety and health is obvious if its programs are easily accessible, organized in binders, and updated. This commitment can garner goodwill with the Agency and can establish your company’s good faith efforts at compliance – an important consideration if the Agency is making decisions about potential violations and proposed penalties.

REVIEW TRAINING RECORDS

Make certain that proper training or recertification has been completed and that the employee or training files include documentation of mandatory training. Review your company’s new employee training program and make certain it covers all training mandated by either OSHA or your company’s policies and procedures. Not surprisingly, OSHA looks unfavorably at companies that violate their own policies and procedures.

REVIEW INTERNAL OR EXTERNAL SAFETY AUDITS

Voluntary audits may be conducted for insurance or management purposes. Generally, conducting an audit shows a commitment to providing a safe workplace. If unsafe conditions are identified and corrected during an audit, then your company demonstrates good faith efforts to comply with its obligations under the OSH Act.

A failure to correct unsafe items identified during an audit (or to document why you believe that correction is unnecessary) can be used by OSHA to establish a knowing disregard of an unsafe condition, which can result in a willful citation. Review audit reports to ensure that any action items have either been corrected or addressed in some way.

REVIEW INJURY & ILLNESS LOGS

Invariably, OSHA will request 3-5 years' worth of injury and illness logs during the course of an onsite investigation. Inaccuracies or deficiencies in those records can result in significant penalties and a more expansive recordkeeping audit by the Agency.

To easily and inexpensively avoid potentially significant OSHA penalties, periodically review these records, ensure that changes or "line outs" are well documented, and check that the records are complete and updated.

INSPECT YOUR COMPANY'S WORKPLACE

Any unsafe condition in plain view can become the subject of an OSHA citation. Avoid these "gotcha" items by implementing a routine workplace inspection program. Also, maximize the value of these periodic inspections by developing a checklist of items to look for, such as blocked exits or electrical boxes, frayed extension cords, unguarded floor openings, missing ladder rungs, lack of proper safety equipment, debris on the ground, and uncapped or unsecured gas cylinders.

After the inspection is completed, ensure that any unsafe conditions are corrected, the corrective action and date it occurred is documented on the inspection sheet, and the person responsible for fixing the item is noted. Once all of the corrective actions have been completed, the person who conducted the inspection should confirm that the work was properly done, sign and date the inspection form, and send it to the person responsible for safety and health.

Depending on your company's document retention program, keep at least six months' worth of inspection forms to demonstrate consistency in your company's inspection practices if inspected by OSHA.

AUDIT YOUR COMPANY'S RECORDS OF ANY PAST OSHA CITATIONS

Under current guidelines, OSHA is authorized to review a company's three-year citation history for determining "repeat" violations. (The Agency has recently proposed expanding this to a five-year inspection/citation history.)

In order to reduce the likelihood of a repeat citation, review past jobsite citations issued and ensure that all cited conditions have been (and remain) corrected, and that none of the cited conditions exist at any other site.

Be prepared to show OSHA abatement documents from prior citations, since the failure to abate an unsafe condition previously cited can result in citations and penalties.

FORMULATE & IMPLEMENT AN EMERGENCY RESPONSE PLAN

Workplace violence, natural disasters, and pandemics all create potential safety and health hazards that employers need to plan for. In the absence of a particular OSHA standard that covers such events, OSHA can rely on the General Duty Clause to issue citations to an employer that fails to protect its employees from the hazards associated with these events.

Therefore, your company should develop and implement an emergency response program that includes:

- A procedure for notifying employees and external agencies when an incident or event occurs that may result in harm to employees;
- An evacuation plan;
- Training to ensure that all employees are familiar with and understand all of the elements of the plan; and
- Procedures for conducting "mock" evacuations under various conditions.

DEVELOP A PLAN TO RESPOND TO AN OSHA INVESTIGATION

An OSHA investigation can be very unsettling. You may have some forewarning that an investigation will be conducted (i.e., if there has been a fatality or a workplace accident that requires the hospitalization of multiple employees).

Other times, however, the inspection is in response to an employee complaint or part of one of OSHA's inspection initiatives and therefore completely unexpected. Planning ahead can ease some of the stress and uncertainty associated with an onsite investigation.



Understand Your Company's Rights

The first step in planning for an inspection is understanding your company's rights. Generally, employers can either consent to an investigation or insist that the Agency obtain a warrant before entering the premises. Deciding ahead of time whether to give consent or require a warrant will help eliminate some of the tension that is inevitable when an OSHA inspector arrives.

Have the Proper Equipment Ready

During the inspection, a representative from your company has the right to accompany the investigator while on site. Decide in advance who your company's representative(s) will be and maintain continuity once the inspection begins. If the investigator takes pictures or conducts sampling, then the company has the right to take "side by side" pictures and conduct "side by side" sampling. You should have the proper equipment on site or readily accessible.

Implement a Document Request Procedure

The investigator typically requests documents as part of the investigation. Develop a procedure for processing those requests. For instance, require the request to be in writing, that adequate time be afforded to gather and review the documents, and that documents containing confidential or proprietary information be labeled or marked as such to prevent their disclosure to any other parties. Also, maintain copies of all documents provided to the inspector.

Prepare for Interviews

Finally, the inspector may want to interview management representatives. If that occurs, then the interviewee is entitled to have someone present during the interview, and is under no obligation to sign a statement at the conclusion of the interview, even if asked to do so by the compliance officer. By understanding your rights under the OSH Act, and by planning ahead, much of the tension and uncertainty associated with an onsite investigation can be avoided.

Safety & Health Enhancements Often Result in Ancillary Benefits

A commitment to safety and health demonstrates goodwill toward your employees and the community at-large. It may also be an essential element of a bid or job proposal. Enhanced safety and health programs will improve employee morale and can reduce the likelihood of lawsuits, union disputes, or union organizing activities. Invest in safety and health compliance programs and encourage employee involvement in your company's health and safety initiatives to produce a happier, healthier, and more productive workforce. ■

Endnotes:

1. 2010 OSHA Enforcement Summary, www.osha.gov/dep/2010_enforcement_summary.html.
2. Id.
3. Id.
4. It appears that these statistics do not take into account violations that are withdrawn as a result of a settlement or through litigation. Therefore, these numbers may be slightly lower after post-settlement or post-litigation changes to OSHA's initial findings are taken into account.
5. CPL 02-00-149, *Severe Violator Enforcement Program*, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4503.
6. STD 03-11-002, *Compliance Guidance for Residential Construction*, www.osha.gov/pls/oshaweb/owadisp.show_document?ptable=DIRECTIVES&p_id=4755.
7. *OSHA's Field Operations Manual*, Chapter 11, Section D.2.c.
8. H.R. 190: *Protecting America's Workers Act* §302, www.opencongress.org/bills/112-h190/text.
9. Id. at §304.
10. Id. at §310.

ERIC P. BEREZIN is a Partner at Duane Morris, LLP, a national full-service law firm in Atlanta, GA. He practices in the areas of labor and employment law and occupational safety and health with an emphasis on litigation.

Eric has published numerous articles about safety and health-related topics as well as employment. He is a frequent speaker on topics related to occupational safety and health. He earned his JD from Rutgers University and a BS from American University, and is a member of the Labor and Employment Law Section of the American Bar Association as well as the Atlanta Bar Association.

Phone: 404-253-6989

E-Mail: epberzin@duanemorris.com

Website: www.duanemorris.com

ANTHONY L. SANACORY is a Partner at Duane Morris, LLP in Atlanta, GA. Tony has handled numerous construction disputes for owners, GCs, subcontractors, and suppliers in a number of different venues.

Tony is an active member of CFMA's Georgia Chapter and serves on its Education Committee. He received his bachelor's degree from The Pennsylvania State University and his JD from Duke University. He also is a veteran of the U.S. Army, having received commendations for his service in Korea and Kuwait.

Phone: 404-253-6939

E-Mail: asanacory@duanemorris.com

Website: www.duanemorris.com



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