

How can my local union participate in the post-inspection process after OSHA has left?

An OSHA inspection can be an important tool to make your workplace safer. Workers have the right to participate in the post-inspection process. They also have the right to:

- Know the results of the OSHA inspection, what violations have been identified, and when they will be corrected
- Ask for a review of any decision to not issue a citation
- File a formal protest if OSHA gives the employer too much time to correct a dangerous hazard
- Contest any effort by your employer to delay correcting the hazard
- Participate in any informal conference or negotiation between your employer and OSHA
- Initiate your own informal conference with OSHA to discuss the inspection or findings
- Participate fully in hearings and pre-hearing settlement negotiations when an employer contests the citation

What are the four types of citations issued by OSHA?

OSHA employs the following classifications to categorize citations:

- **'Serious'** violations occur when there is a substantial probability that the hazard could cause death or serious physical harm. Beginning August 1, 2016, penalties for all types of violations will increase to catch up with inflation. Under this new fee structure, the maximum penalty for a 'serious' violations will be \$12,600.
- **'Willful'** violations occur when the employer is aware of the hazard and knows that it violates OSHA standards, but makes no reasonable effort to eliminate it. A willful violation is "intentionally and knowingly" committed. Under the new fee structure, the maximum penalty for a 'willful' violation will be \$126,000. An employer whose willful violation results in the death of an employee is subject to criminal prosecution, up to six months in prison and additional fines if found guilty. Criminal prosecutions are rare, but can be very effective tools for mobilizing workers and deterring other employers. Unions should aggressively pursue prosecution when a death occurs.
- **'Other than Serious'** violations apply to a safety hazard that is unlikely to cause death or serious physical harm. Under the new fee structure, penalties up to \$12,600 may be imposed but are discretionary. Usually, no penalty is assessed.
- **'Repeated'** violations are violations that are substantially similar to one the employer was already cited for, even at a different facility, in the previous three years. Under the new fee structure, 'repeated' violations carry a fine of up to \$126,000.

OSHA also has the ability to issue citations for **'egregious'** violations. These are very uncommon and are assessed only when an employer has "flagrantly" disregarded its responsibility to provide a safe workplace. Aggravating factors must also be present. 'Egregious' violations are also known as 'violation-by-violation' because each instance of noncompliance is fined separately, resulting in extremely large penalties.

The fines for all types of violations will increase annually to keep up with inflation, beginning January 15, 2017. Employers can also be cited and fined for falsifying records, reports or applications, and for violating posting regulations, including failing to post the OSHA Notice, the Annual Injury/Illness Summary or a citation. The OSHA Area Director has the authority to adjust fines downward by as much as 95% based on the employer's good faith efforts, history of previous violations, and the size of the business.

What happens if my employer receives a citation?

If the OSHA inspector finds one or more violations at your workplace, a "Citation and Notification of Penalty" will be sent to your employer. The citation includes a brief description of the violation, a timetable for correcting the hazard, and the penalty. The person who filed the complaint resulting in the inspection, and the union, should also receive copies. Management must post the citation notice in a conspicuous place near each cited hazard for three working days or until the hazards are fixed, whichever is longer. If the union has not received a copy of the citation, they should request one as soon as it is posted.

Any documents related to the abatement, such as an abatement plan, must also be posted. The employer does not have to post the penalties. To ensure that the union receives a copy of the citation and penalty notification, you can send the OSHA Area Director a letter after the inspection. You may also send them a letter to confirm your desire to participate in any formal or informal conferences, and to elect party status if the citation is contested.

What can we do if my local union disagrees with the results of an OSHA inspection?

If no citation is issued, and you believe it should have been, you can contact your staff representative, the USW Health, Safety and Environment (HSE) Department and the OSHA Area Director to request an informal review of the decision to not issue a citation. You can include the reasons you think their decision was incorrect. You can also request to see the inspection file, including the inspector's notes, test results and closing conference report, to see if there are any errors. Only the worker whose complaint initiated the inspection or the union or other authorized employee representative can request a review.

If a citation was issued, but you think OSHA has given the employer too long to clean up the hazard, you can file an appeal with the OSHA Area Director. You must do so within 15 days of the time that management receives its notice of citation. In your letter of appeal, state the abatement period you wish to appeal and send it via registered mail/return receipt requested. The OSHA area office will consider your appeal, and if it does not agree with you, it will go to the Occupational Safety and Health Review Commission, which operates independently of OSHA. This commission has the power to uphold, change or overrule any action OSHA takes, but it may take months to act. In the meantime, OSHA's original abatement period stands.

If a citation is issued, but you are unsatisfied with how the inspection was conducted, the severity of the citation, hazards that were not cited, or an unreasonably low penalty, you can request an informal conference with OSHA. You can discuss these issues or any others raised by an inspection, citation, notice of proposed penalty or the employer's notice of intention to contest. Your employer will be notified and invited to participate in the conference.

What is an "Informal Settlement Agreement?"

Within 15 working days of a citation, your employer can set up a meeting with the OSHA Area Director to negotiate an "informal settlement agreement" seeking to modify or withdraw the penalty or citation, have the violation reclassified or change the abatement

date. The OSHA Area Director has the authority to agree to a settlement - revising citations, lowering penalties, and pushing back abatement dates - to avoid prolonged legal disputes. If your employer requests a meeting to negotiate an informal settlement agreement, your union or the affected employees should be notified and offered the opportunity to attend and to provide an opinion. The local union should remain closely involved with this process, and should request information on the time and location of any meetings proactively.

You should always attend informal settlement agreement meetings, and prepare your arguments/position in advance. Attendees will often need to be on union business. Try to convince the area director to include the inspector in the conference since he or she is probably more aware of actual in-plant conditions. You can raise whatever objections you like, and participate fully in the negotiations. If you choose not to participate, you forfeit your right to be consulted prior to any future decision related to the citation. If the employer objects to your presence, a separate meeting with OSHA can be held for you. Separate or private discussions are also permitted at the informal conference.

What is a formal appeal?

Employers often contest issued citations. If your employer is not satisfied with the OSHA Area Director's response to an informal appeal, it can file a formal appeal. A formal appeal can also be filed immediately without going through the informal process first. The employer's "notice to contest" must be written, clearly identify the employer's basis for contesting, and sent within 15 days of receiving the citation. A copy of the notice must be given to the union. The company does not have to comply with any contested part of the citation until its appeal is considered and a final decision is issued, unless it is an imminent danger situation. If the employer is only contesting the penalty, it must still abate (fix) the hazard. The final decision will be made by an administrative law judge employed by the Review Commission. A Department of Labor (DOL) attorney will represent the agency and oppose any employer appeal. The employer will probably hire an attorney or use in-house lawyers to process their appeal. Regardless of how many lawyers are in the room, the voice of the union is essential.

Can my local union participate in the formal appeal?

If you want to participate in the hearings of the company's appeal of the citation, you must write a letter to the Review Commission informing them of your desire to "elect party status," or participate in the case. It is very important to do this as soon as your employer files its formal challenge. The USW HSE Department has a model request letter available for your use.

Actively participating in the case gives you the opportunity to argue against employer efforts to lengthen the abatement period or reduce the severity of its violations. You can even make the argument for more severe sanctions. The commission will seriously consider your comments, and some employers may think twice about contesting if they know you will participate. The union, as the "authorized employee representative," can also declare party status. If there is no union, any worker exposed to the hazards in the complaint can elect party status "on behalf of affected employees." When you inform the Review Commission of your desire to elect party status, you should send a copy of your letter to the OSHA Area Director and the employer via certified mail/return receipt requested. You should also send a copy to the USW HSE Department and your staff representative.

What is a Petition for Modification of Abatement?

Even if management fails to contest an abatement date, it can still delay fixing the problem. As late as the day after the abatement deadline, it can file a petition with the

OSHA Area Director seeking a modification or extension of the abatement date. This is known as a Petition for Modification of Abatement. The petition must be posted at the workplace, and the union must be notified. The petition must state what steps have been taken to comply, why full compliance is impossible, how much additional time is needed, and how workers will be protected in the interim. If your employer files a Petition for Modification of Abatement and you disagree, or feel the employer has not made a good faith effort to correct the hazard, you can object to the petition by writing to the OSHA Area Director. You must do this within 10 working days of when the petition was posted, or within 10 working days after an employee representative has received a copy. The petition, your objection and other documents will go to the Review Commission for an expedited hearing process. If the union does not object, OSHA has 15 days to grant or deny the petition.

Why should my local union elect party status?

Electing party status gives your local union the ability to participate fully in the case. After you have elected party status, you can:

- Receive copies of all documents filed in the case.
- Request additional information from your employer.
- Participate in conferences and pre-hearing settlement negotiations between OSHA and your employer.
- Argue for a more serious violation, stiffer penalties, or a shorter abatement period.
- Present witnesses and evidence at the hearing, and cross-examine company witnesses.
- Make oral and written statements.
- Appeal an adverse decision by the judge to the full Review Commission, or beyond to the US Circuit Court of Appeals, if necessary.

Even once you have elected party status, don't assume that you will be completely included without further action on your part. Contact the OSHA Area Director and the DOL attorney and tell them you want to participate fully. Remember that the vast majority of cases are settled prior to a formal hearing. Make sure the DOL attorney knows what you want out of negotiations and be prepared to argue for your position. You should keep your staff representative informed as the process progresses.

What can we do once a citation is posted?

You should first review the citation and abatement requirements, including dates, hazards that need to be corrected and any additional documentation requirements. Make sure any movable equipment that has been cited is immediately posted with a warning about the hazard, and that a copy of the citation is posted in the vicinity of any violations. Since the procedure used by OSHA to verify whether an employer has abated a hazard usually relies on accepting the employer's word, workers should verify abatement themselves. Notify OSHA immediately if you think the workplace changes have not removed the hazard, or if your employer has not adhered to the abatement timetable.

If you have any questions about an OSHA citation, or would like assistance filing for party status, please contact the USW Health, Safety and Environment Department.

This fact sheet was adapted by the Health, Safety and Environment Department of the United Steelworkers International Union from material originally developed by the National COSH Network.

Health, Safety & Environment Department safety@usw.org 412-562-2581