

**KEEP THE JOB SAFE AND HEALTHY: A  
WORKER'S TOOLKIT TO UNDERSTANDING  
OSHA'S LEGAL PROCESS**

**Occupational Safety & Health Law Project**

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## Preface

This toolkit is a collection of information and resources that will educate workers and their representatives about, and empower them to participate in, Occupational Safety and Health Administration (OSHA) legal enforcement process when they experience on-the-job health and safety hazards. Too often, after OSHA does an inspection and issues a citation against an employer for violations, workers do not fully participate in the employers' subsequent appeal proceedings to challenge the violations or penalties. Through this toolkit, we hope to give workers the knowledge and power to fully and actively participate in OSHA's legal proceedings. Workers' participation in OSHA enforcement proceedings will help ensure that our workplaces are safer and healthier.

Your participation is important when employers appeal OSHA citations:

- You know the workplace and the hazards. Neither the OSHA lawyer nor the judge have been to your workplace. Your input is important to make sure they understand what hazards you face and what needs to be done to fix them.
- Your presence is a constant reminder to the judge that workers' health and safety is at stake.
- Cases are won or lost based on facts. Your participation ensures that all facts relevant to the citation are presented to the judge.
- Workers presence alone shows the employer that workers are willing to stand up to the boss when their safety and health is threatened – which will be a strong message to the employer, other workers, and OSHA itself.

## **DO WORKERS NEED THEIR OWN LAWYER?**

This resource is specifically about the legal process that occurs **after** OSHA issues a citation. While OSHA’s legal proceedings can be formal, and many employers and OSHA are represented by attorneys, workers **can participate without a lawyer**. This toolkit will explain how this can be accomplished.

Workers and their representatives can have a major impact on both OSHA and the company without a lawyer representing them – especially at the early stages of a case before it goes to a formal hearing. See Chapter 5 about workers role during discussions between OSHA and employers to “settle” the case without a formal hearing before the Judge.

Your feedback is critical to keep this document useful and current! Our goal is to ensure that any worker or worker representative—across industries and across the United States—has access to this information. Please contact the OSH Law Project at [www.OSHLAW.org](http://www.OSHLAW.org) with feedback or questions.

### **Important**

***THIS TOOLKIT IS GENERAL LEGAL INFORMATION. IT IS NOT ADVICE ABOUT YOUR PARTICULAR CASE, SITUATION, OR CITATION. THIS TOOLKIT DOES NOT REPLACE THE ADVICE OF AN ATTORNEY AND EXCEPTIONS MAY APPLY TO YOUR SITUATION THAT ARE NOT COVERED HERE.***

## Chapter 1 – Overview: OSHA Appeal Proceedings

This appeal process begins after an Occupational Health and Safety Administration (OSHA) inspector has performed an inspection, found violations of OSHA’s rules, and issued a formal “citation” (including penalties). Once OSHA issues a citation, the process moves forward and both the employer who was cited and the workers employed at the cited location can get involved in appealing the citation.

OSHA is a federal government agency, part of the US Department of Labor. In about one-half of the states, federal OSHA enforces the health and safety laws. In these federal enforcement states, employer appeals of OSHA citations are handled by the Occupational Safety and Health Review Commission (OSHRC). The OSHRC is an *independent government agency* that is separate from the Department of Labor and OSHA. The OSHRC decides all challenges to an OSHA citation.<sup>1</sup> OSHA is represented by attorneys from the U.S. Department of Labor’s Office of the Solicitor (SOL) in actions before OSHRC.

In [22 states](#), however, the state government has its own “OSHA” and the state enforces health and safety laws. In these states, OSHA monitors whether the state does an effective job of enforcing the law. Each of these state plan states has a different process for handling employer or worker appeals. These procedures are usually similar to the federal OSHA procedures, but there can be major differences – including whether workers need a lawyer to represent them. See below for a list of the states with state OSHA programs. In these states, you may need to talk to a lawyer -- or a union representative who is experienced in the state’s

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<sup>1</sup> *About the Commission*, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, [HTTP://WWW.OSHRC.GOV/](http://www.oshrc.gov/).

OSHA appeals process – to learn the correct ways to get involved in employers’ appeals of OSHA citations.

### **How does a worker get involved in OSHA’s enforcement actions?**

There are two ways for a worker to get involved. They depend on whether the **employer** or the **worker** challenges OSHA’s citation.

- **EMPLOYER CHALLENGES THE CITATION**: An employer may contest the citation by filing a **Notice of Contest** with the OSHA Area Office. <sup>2</sup> If the employer does this, a worker – or a group of workers -- may formally participate in the case by “electing party status.” <sup>3</sup> If you do so, you may participate in the OSHRC enforcement actions surrounding the case, including settlement negotiations with OSHA, “discovery” actions to force employers to reveal hidden facts about the violations, and the hearing on the citation.
- **WORKER CHALLENGES THE ABATEMENT PERIOD**: Workers have the right to object to the length of time OSHA has given the employer to fix hazardous conditions at the worksite (typically saying that OSHA is giving employer too long). This is called challenging the “reasonableness of the abatement period.”<sup>4</sup>

We go into much more detail on these processes in later chapters. **Read on!** But in almost all cases, the majority of appeals are started by employers. Therefore, it is vital that workers and their representatives pay close attention after OSHA performs any inspection to determine whether citations are issued and, if so, whether your employer decides to appeal the violations and any penalties that OSHA has issued to the company. If the company appeals, it must post the notice of contest it files with OSHA in the workplace. <sup>5</sup>

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<sup>2</sup> 29 C.F.R. §1903.17(a)

<sup>3</sup> *Section 2 – Preserving Rights and Choosing a Proceeding, Employees May Elect Party Status*, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, <http://www.oshrc.gov/publications/procedures.html> (last update Nov. 13, 2007). (check Blue Book Rule 18.2.2)

<sup>4</sup> 29 C.F.R. §1903.17(b)

<sup>5</sup> 29 U.S.C. §658(b)

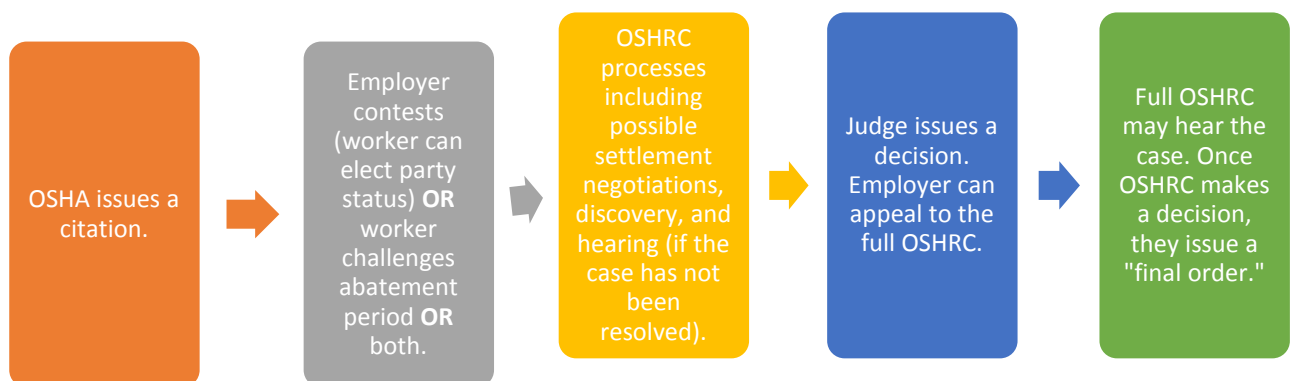
Once an employer challenges the citation (or a worker challenges the abatement period), the case will be heard by an OSHRC administrative law judge (“judge” or “ALJ”). OSHRC has 12 judges who handle all challenges to citations against employers by OSHA.

The judge has a lot of responsibility over the case and he or she:

- May try to get OSHA and the company to settle the case (agree to resolve their differences in the case, such as the penalties, before it goes further), which will then be the “final order” (the ultimate decision on the case).
- Will supervise discovery (the process where the different parties supply information demanded by one of the other parties).
- Will control and lead any hearing on the citation.
- Will decide what ultimately happens in the appeal (upholds or rejects the employer’s appeal), which will then usually be the “final order.”

Once the judge decides on a case, the decision can be appealed (challenged again) to the full OSHRC. If OSHRC takes no action, the judge’s decision becomes a “final order.” If OSHRC decides the appeal, its decision is the “final order.” Employers do not have to “abate hazards” (make the workplace safer by meeting the requirements of OSHA standards) until **after** an OSHRC final order has been issued.

### Chapter 1 Key Takeaways: OSHA’s Timeline





## Chapter 2 – OSHA Issued a citation. What Happens Now?

After OSHA completes an inspection at your workplace, it has **six months** to determine whether or not to cite the employer for violations of the Occupational Safety & Health Act (OSH Act)<sup>6</sup> and to issue the “citation.”

**OSHA may cite an employer for:**

- **A violation of one of its standards and regulations OR**
- **A violation of the OSHA law’s “general duty clause” that requires employers to provide safe jobs and workplaces even where OSHA has no specific standards concerning the “recognized hazards” involved.<sup>7</sup>**

OSHA lets employers know they have found violations of the law by issuing a [citation](#) (including the penalty).

When OSHA issues a citation, an employer has **15 working days** to respond.<sup>8</sup> If the employer does nothing, the citation becomes a “final order” of OSHRC automatically.<sup>9</sup> This means the citation is final and the employer must abate the cited hazard. But, if the employer contests the citation, the OSHA appeal process begins.

### **Step One: Citations**

Citations contains four pieces of important information:

- **A description of each violation OSHA discovered:** The citation will list each regulation (a legally-enforceable rule that explains the existing OSHA law) that OSHA claims the employer violated. It will also list every hazard that OSHA believes violates the general duty clause.
- **Facts that describe what violates the law:** It will describe facts showing what conditions violated the Act.

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<sup>6</sup> 29 U.S.C. 658(C)

<sup>7</sup> 29 U.S.C. 658(a)

<sup>8</sup> 29 U.S.C. 659(a).

<sup>9</sup> 29 U.S.C. 659(a)

- **Example 1:** The punch press located in Production Area Six lacked a guard.
- **Example 2:** The supervisor failed to train workers about removing guards.
- **Proposed penalty for the violation:** Most violations listed in the citation will include a proposed penalty (most “Other” violations have no penalties). The permitted fines under the OSH Act are modest and they vary for each category of violation. The more serious the violation, the higher the penalty.
- **Proposed abatement date:** The citation will have a date by which the employer must correct the violation (the hazard/dangerous condition or other failure to comply with the regulation).<sup>10</sup>

**Categories of violations:** The law that OSHA enforces (the OSH Act) has different categories of violations. These categories of violations are based on several factors:

- **“Serious” violations:** How serious an injury or illness would be if one occurred (even if such injuries never happened yet or were still unlikely). Most violations issued by Federal OSHA are “Serious.”
- **“Willful”** (on purpose, or indicating “plain indifference” by supervisors)
- **“Repeated”** (the employer had any kind of violation of the same standard within the last 5 years)
- **“Other than serious”**
- **“De minimis”** (not very important, because of little real hazard to workers).

**Missing Violations:** If hazards exist that you believe violate the law, but OSHA did not issue citations for those violations, you should call the OSHA inspector as soon as possible and ask for an explanation. It is highly likely that it is too late to alter a citation, but changes may still be possible. In addition, if more than one inspector is involved, OSHA may issue separate citations at different times.

**Timing:** After an inspection is completed, OSHA must issue any citation with “reasonable promptness,” and it must be issued within **six months**.<sup>11</sup> After the inspection, you should call the inspector to determine what happened and ask if, and when, a citation will be issued.

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<sup>10</sup> 29 U.S.C. 658(a)

<sup>11</sup> 29 U.S.C. 658(c)

If workers were involved in the inspection, such as filing a Complaint to start the inspection in the first place, the inspector has the authority to inform them at the same time as the employer, before issuing the final citation, what the expected violations will be. This is called the “Closing Conference”, and is a routine part of OSHA inspections. If workers who filed a complaint were not contacted for a “Closing Conference” after the inspector leaves, they should call the inspector and request the information about likely violations.

You want to make sure a citation is issued if violations were found because if the inspector takes too long to issue a citation—more than 6 months—a new inspection will be required, starting the whole process over.

**Posting:** An employer cited by OSHA must post a copy of the OSHA citation at the place where the violation is alleged to have occurred, so that workers will know that OSHA has found violations.<sup>12</sup> OSHA will also send a copy of the citation and Notification of Penalty to the workers or Union who filed a complaint requesting the inspection. In the even that there was no Complaint to start the inspection, OSHA may also send the citation to any union representing workers at the site.<sup>13</sup>

**Contesting:** An employer cited by OSHA has **15 working days** (or roughly 3 weeks, if you count weekends and holidays) to contest (challenge) the citation.<sup>14</sup> Workers have **15 working days** to file a contest challenging how much time OSHA has allowed to correct the violation.<sup>15</sup>

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<sup>12</sup> 29 C.F.R. §1903.16

<sup>13</sup> OSHA Field Operations Manual, Chapter 5, Section XI.B.2

<sup>14</sup> 20 U.S.C. §659(a)

<sup>15</sup> *Section 2 –Preserving Rights and Choosing a Proceeding, Employees May Contest Abatement Period*, OCCUPATIONAL SAFETY HEALTH REVIEW COMMISSION, <http://www.oshrc.gov/publications/procedures.html#2>, (last updated November 13, 2007).

**OSHA Decides:** OSHA ultimately decides what conditions do and do not violate the OSH Act.

Workers cannot challenge OSHA's decision not to cite an employer for conditions the workers feel are hazardous.

### **Step 2: Informal Conference**

Once an employer receives a citation, it has **15 working days** to file a Notice to Contest. During this 15-day period, employers may request an Informal Conference with OSHA.<sup>16</sup> The main purpose of this Informal Conference is for OSHA and the employer to try and work out a settlement of the citation. Employers will often seek settlements with lower penalties, while accepting the underlying violations.

Affected employees (or their representative) may request an Informal Conference if they believe OSHA's citation will not fix the hazards at the worksite.<sup>17</sup> Or, if an employer requests an Informal Conference, workers and their representatives may also request to participate in the Informal Conference requested by the employer,<sup>18</sup> although employers have the right to insist that OSHA meet separately with workers.

**As soon as citations are issued, tell the OSHA Inspector or the Area Director that you want to participate in any Informal Conference.** You should make s/he aware of any concerns you have. These concerns may include that:

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<sup>16</sup> 29 C.F.R. §1903.20 and Field Operations Manual, chapter 5, Section IX.C.2.c states that the OSHA Area Director shall not amend or withdraw a citation if "employee representatives have not been given the opportunity to present their views." OSHA has an uneven track record in consulting employee representatives.

<sup>17</sup> 29 C.F.R. 1903.20

<sup>18</sup> 29 C.F.R. 1903.20 ; *Post-citation Procedures and Abatement Verification, Informal Conference, Opportunity to Participate*, OSHA'S FIELD OPERATIONS MANUAL 7-3, available at, [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-150.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf)

- Hazards are still present at the workplace (or are still occurring) and will not be corrected by any proposed settlement.
- Penalties are too low and should not be reduced further in any informal settlement (although such reductions are usually routine).
- OSHA has allowed the employer too much time to fix the violations.

OSHA policy requires that local OSHA officials meet with interested workers or representatives who have requested an Informal Conference before agreeing to settle citations.<sup>19</sup> However, even if they meet with workers, OSHA may withdraw citations, reduce penalties, and settle cases on whatever terms it wants – even extending the deadlines for fixing the violations.

### **Step 3: Notice of Contest or Final Order**

After the 15-day window following OSHA’s issuance of the citation, either:

- 1) an employer will file a Notice of Contest, or
- 2) the citation (including any penalties) will automatically become an OSHRC “final order”

meaning the employer must fix the violations in the citation.

- **Employer Notice of Contest:** An employer cited for violations of the OSH Act may challenge any part of the citation – the violations, the penalties, or the deadlines for fixing the violations.<sup>20</sup> The employer may press many arguments, such as: the conditions cited by OSHA do not violate the law; no workers were exposed to the violations; the violations were not as serious as OSHA claims; or the proposed penalty is too high. To challenge a citation, the employer must file a Notice of Contest within 15 working days of receiving the citations.<sup>21</sup> The employer must post its notice of contest at the worksite.<sup>22</sup> NOTE: During the entire time that an appeal is pending, no “abatement” is required.<sup>23</sup> This means that the employer does not have to fix the hazards until OSHA enforcement proceedings have been resolved. This often takes years. This is one of the

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<sup>19</sup> OSHA Field Operations Manual Chapter 5, Section IX.C.2.c.

<sup>20</sup> 29 C.F.R. § 1903.17

<sup>21</sup> 29 C.F.R. § 659(a)

<sup>22</sup> 29 C.F.R. § 658(b)

<sup>23</sup> 29 U.S.C. § 666(d)

most important reasons why OSHA inspectors attempt to get employers to agree to settlements in the Informal Conference, even if it means major reductions in the penalties.

- **Final Order:** After 15 working days, a citation becomes a “final order” if an employer does not contest it. At that point, the time for abatement starts to run.<sup>24</sup> In other words, if the employer does not contest the citation, after 15 days the clock starts running for the employer to fix the hazard.

### **Chapter 2 Key Takeaways**

**Citations have important information, including the violations OSHA discovers.**

**If something is missing from a citation, you should tell OSHA immediately. And if OSHA does an inspection but does not issue the citation promptly, call them to check on it!**

**Employers must post the citation at the job site.**

**You can participate in OSHA’s informal conference. Your voice is important!**

**15 days after OSHA issues a citation, it becomes final if the employer does not file a Notice to Contest.**

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<sup>24</sup> 29 C.F.R. § 659(a)

### Chapter 3- Electing Party Status: Get Involved (Part One)

**Why?:** Workers' participation in OSHA proceedings is very important! Employees who "elect party status" in OSHA's enforcement actions can participate in all aspects of the case, and can have a significant effect on the results of any settlement, or a judge's decision if the case goes all the way to a formal hearing.<sup>25</sup>

**What happens if workers don't get involved?:** OSHA's lawyers will always be involved to defend OSHA's citations, violations and penalties from employers' appeals. However, in the large majority of cases, the employer's objections are "resolved" in a formal settlement with OSHA – handled by OSHA's lawyers. See Chapter 5 for more details. But in general, **unless workers and their representatives are directly involved in the settlement discussions with OSHA's lawyers and the employer, OSHA may not know whether the settlement will fully protect workers' interests in safety and health on the job.**

Getting involved in OSHRC proceedings sends a powerful message to employers that you know your rights to a safe and healthful workplace. Employers understand the power of workers' participation in OSHA enforcement, and workers' involvement can have a positive impact on job safety long after the particular details of any one case are finally settled.

For all these reasons, it is essential that workers who care about OSHA's enforcement on their jobs should seriously consider getting directly involved in any employer appeal, including any settlement discussions with OSHA's lawyers.

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<sup>25</sup> 29 C.F.R. §2200.20(a)

**Who?:** OSHRC Rules permit **affected employees** to elect party status.<sup>26</sup> Employees can designate a **representative** to act on their behalf.<sup>27</sup> The representative may be an attorney, organizer, or other community or union representative.<sup>28</sup>

- **Affected employees:** Includes those who work for the cited employer and are affected by the violations included in the citation (such as: exposed to the hazards that OSHA cited in the violations; covered by the training rules the employer has violated).<sup>29</sup> Former workers and family members of workers killed or injured in an on-the-job accident are not viewed as “affected employees.”
- **Unions & Representatives:** In a workplace where a union has a collective bargaining relationship with the employer, the union is automatically recognized as the workers’ representative.<sup>30</sup> You should let your union representative know when a citation is issued against your employer so that if the employer appeals the citation, the union can elect party status in OSHRC proceedings. If the union elects party status, individual workers who are members of the bargaining unit may not separately participate in OSHA legal

#### It’s Important to Get Involved!

You are a constant reminder to the judge and the lawyers that **real people** are affected by the hazards.

You are an expert on your workplace.

You are in the best position to understand and investigate hazards, like machines are involved, how are they usually operated, why do they pose a hazard to workers, how many people have been injured working near the hazard, did the employer know about the hazard, and what did it do to fix the problem and protect workers. Testimony of workers like you is critical to showing the conditions at the workplace are unsafe.

You can keep your employer honest. The employer may try to mislead the judge or misrepresent what goes on at the work site. If you participate in the hearing, you can make sure the judge and OSHA know what really goes on.

Your participation helps keep jobs **healthy and safe!** OSHA citations are an important part of getting a safe workplace. But, OSHA can’t be everywhere. Workers need to stand up for their rights.

You can **keep an eye on OSHA** and make sure the do not negotiate a bad settlement. Every settlement is a compromise. You can help make sure that OSHA does not agree to a bad deal.

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<sup>26</sup>29 C.F.R. 2200.1(e). *see also* 29 C.F.R. §2200.20(a)

<sup>27</sup> 29 C.F.R. 2200.22; *see also* 29 C.F.R. 2200.23

<sup>28</sup> See 1988 decision of the Federal appeals court *in a case In re: Perry*, 859 F.2d 1053 (1<sup>st</sup> Cir.)(holding that workers have a first amendment right to select whomever they want to represent them before OSHRC and employer may not object to a representative chosen by workers simply because that representative is also a union organizer). In several recent cases, OSHRC judges have authorized union organizers – or anyone chosen by the workers -- to act as the representative of employees who elect party status. A summary of those cases can be found in Appendix 5.

<sup>29</sup> 29 C.F.R. 2200.1(e). *see also* 29 C.F.R. §2200.20(a)

<sup>30</sup> 29 C.F.R. 2200.22(b)



proceedings.<sup>31</sup> However, if you are represented by a union, and the union chooses not to elect party status in an OSHA appeals case, you and your co-workers may do so individually.<sup>32</sup>

- **Representatives without a union:** Employees who are not represented by a union may elect party status themselves.<sup>33</sup> If possible, workers should join together and elect party status. If co-workers join together to improve their working conditions (in this case, by electing party status), they may be protected from employer retaliation by the National Labor Relations Act (NLRA).<sup>34</sup> This could help you in case you face threats or retaliation from your boss. However, one worker acting alone to accomplish this not protected by the NLRA.<sup>35</sup>
- **Many people can act as representative:** Either the union, or a group of workers who are not represented by a union, may designate another group or individual to act as their representative.<sup>36</sup> Employees can designate a COSH group, a union organizer, an attorney, or pastor or community leader to act on their behalf. Co-workers of a workplace injury victim can also designate a representative of the victim's family as the workers' representative. Employers occasionally object when non-union workers designate someone –especially a labor union representative -- to act on their behalf. But, OSHRC and the courts have ruled that workers have the right to pick whoever they want to represent their interests.<sup>37</sup> The representative should not disrupt the proceedings before OSHRC; the employer's objections about the workers' representative should be rejected by the OSHRC Judge if the representative is not disruptive.

**What?:** Electing party status is the most effective way to participate in OSHRC proceedings<sup>38</sup>

after an employer files a Notice of Contest.<sup>39</sup> However, if you file a Notice of Contest challenging the citation's abatement date(s) for any of the violations, you do not automatically receive party status in the employer's case. You must still elect party status in the employer case in addition to, or instead of, filing a Notice of Contest contesting the abatement date.

**There are certain things that you should be aware of if you elect party status:**

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<sup>31</sup> 29 C.F.R. 2200.22(b)

<sup>32</sup> 29 C.F.R. 2200.22(b)

<sup>33</sup> 29 C.F.R. 2200.22(c)

<sup>34</sup> 29 U.S.C. §157

<sup>35</sup> <https://www.nlr.gov/rights-we-protect/protected-concerted-activity>

<sup>36</sup> 29 C.F.R. §2200.22(a)

<sup>37</sup> See note 27 above, and Appendix 5

<sup>38</sup> 29 C.F.R. §2200.20(a)

<sup>39</sup> 29 C.F.R. §2200.20(a)

- You will be served copies of all papers filed in the case.
- You must receive a copy of the settlement agreement and given a “meaningful opportunity” by OSHA’s lawyers to review the terms and comment on them before the agreement will be approved by the ALJ.
- In the event the case goes all the way to an actual formal hearing, you may call witnesses to testify and cross examine witnesses called by others, and otherwise submit evidence relevant to the issues in the case.
- You cannot be required to pay a penalty because you participate in an OSHRC proceeding.
- The employer is prohibited by the OSH Act from threatening, disciplining or discharging you for exercising your right to participate in an OSHRC proceeding.
- You must pay any costs related to participating in the case, and you are not entitled to collect money for damages or collect any portion of the fine.
- Monies paid by your employer for penalties imposed by OSHA citations or settlements, or by the Commission, are payable only to the United States Treasury.

**When?:** You may send a letter electing party status up until 10 days before the hearing on the citations.<sup>40</sup> However, it is best to elect party status as soon as you learn that your employer has contested the OSHA citations. That way, you will be included in all settlement discussions – which often are the first things that happen in the case.

If the case is not settled, you will receive copies of all documents filed in the case, and be able to participate in “discovery” relating to the case.

**What if the hearing has already started and I missed the deadline for electing party status?:**

It is more difficult, but not impossible, to elect party status after the hearing begins. At that late date, you need to have “good cause” for the delay and you must request that the judge exercise “discretion” to permit you to participate.<sup>41</sup> You should draft a letter titled “Request to Elect Party Status Late” and explain why the judge should allow your late entrance into the

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<sup>40</sup> 29 C.F.R. §2200.20(a)

<sup>41</sup> 29 C.F.R. §2200.20(a)

case, why it would be helpful for the judge to do so, and why your participation would not hurt any other party to the case. You must send this letter to the judge assigned to hear your employer's contest, with a copy to the Executive Secretary of the Commission. Also, serve one copy each on your employer and the OSHA Solicitor for your region. Attach a certificate of service to the letter.

**Where and How?:** The workers who elect party status must each sign a statement stating their intent to do so. If the workers want to choose someone to act as their representative, such as an organizer or attorney, the worker's statement must also indicate who they designate as their representative. A form for workers to elect party status and to designate a representative can be found here at Appendix 4. The representative of these workers should send a letter to OSHRC indicating that they will be representing the workers. A copy of a letter to OSHRC from a representative can be found also at Appendix 4. The workers' statement electing party status and their designation of a representative should be sent with a cover letter to the Executive Secretary of [OSHRC in Washington, DC](#).<sup>42</sup> The letter should:

- Identify the workers or union on whose behalf party status is elected
- the name, address, phone number, and email address of the representative
- the name of the employer, and the OSHA inspection number or OSHRC docket number

Serve (send) a copy of your letter to OSHA's lawyers (the "Regional Solicitor"<sup>43</sup>) and the employer's representative. You must attach a [certificate of service](#) listing every party to the

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<sup>42</sup> 29 C.F.R. §2200.22(a) and 2200.7 ; see also *Section 2 – Preserving Rights and Choosing a Proceeding, Employees May Elect Party Status*, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, <http://www.oshrc.gov/publications/procedures.html#3> (last updated November 13, 2007). (See rule 18.2.2)

<sup>43</sup> This link provides the addresses for the OSHA Counsel in each Regional Solicitor's Office <http://www.dol.gov/sol/contacts/#ROS>

case, to your letter. If the letter electing party status is not signed by the person who will act as the worker representative, then the representative must send to OSHRC and the other parties an “notice of appearance” to let the judge know who speaks for the workers.<sup>44</sup>

### **Chapter 3 Key Takeaways**

**Electing party status is the best way for you to become involved in OSHA enforcement proceedings, and make sure workers’ interested are directly represented, especially if OSHA’s lawyers and the employer negotiate a settlement.**

**Affected workers can elect party status. A representative can represent you (including a union representative if it is a unionized employer).**

**You can elect party status up to 10 days before a hearing on the citation (or sometimes even once the hearing has begun) but it is best to do it as soon as you learn that the employer has appealed the violations.**

**Your voice and your participation are an important way that you can help keep workplaces safe and healthy!**

**Employers will usually pay more attention to workers’ safety concerns if the workers are directly involved in OSHA enforcement activities.**

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<sup>44</sup> 29 C.F.R. §2200.23(a)

## Chapter 4- Contesting the Reasonableness of the Abatement Period: Get Involved (Part Two)

In addition to electing party status to be involved in an employer's appeal of an OSHA citation, a worker can also "contest" the reasonableness of the abatement period proposed by OSHA in the citation.<sup>45</sup> The "abatement period" is the amount of time OSHA has allowed the employer to fix the cited violation.<sup>46</sup> If you believe you can show that it is unreasonably long<sup>47</sup> you can challenge the length of time OSHA has allowed the employer to fix the hazard.

**Difficulties with challenging abatement:** Filing formal objections to the abatement date proposed by OSHA in a citation or a subsequent settlement can take a long time and pose challenges.

Historically, unions have challenged the abatement date in only a few cases. You should consider the following *before* you challenge the abatement period.

- **Timing:** If the abatement date (the deadline for the employer to fix the hazard) on the citation is less than 6 months away, it is very unlikely that you will get a ruling (decision) from the OSHRC Judge before that deadline. That means that even if you prove your case, *it may have no effect*.
- **Your Participation:** If the employer does not contest the citation, and you contest the abatement period, you must file a legal case *yourself* against OSHA (who will likely be supported by your employer). You will have the burden of proving that the abatement date proposed by OSHA is unreasonable,<sup>48</sup> because an earlier deadline is doable by the employer.
- **Your Employer:** By filing a notice challenging the abatement date, there is a risk that you may *encourage* your employer to challenge other aspects of the citation – such as the original violations themselves. Also, if the employer challenges the citation, then no abatement is required until all the appeals before OSHRC have concluded.<sup>49</sup> So that means it could take even longer to get the hazard fixed.

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<sup>45</sup> 29 C.F.R. §2200.34; *see also* 29 U.S.C. §659(c); *see also* Section 2 – Preserving Rights and Choosing a Proceeding, Employees May Contest Abatement Period, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, <http://www.oshrc.gov/publications/procedures.html#2> (last updated November 13, 2007).

<sup>46</sup> 29 C.F.R. § 1903.19(b)

<sup>47</sup> Section 2 – Preserving Rights and Choosing a Proceeding, Employees May Contest Abatement Period, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, <http://www.oshrc.gov/publications/procedures.html#2> (last updated November 13, 2007).

<sup>48</sup> 29 C.F.R. §2200.38(a); *see also* 29 C.F.R. §2200.38(b); *see also* 29 C.F.R. §2200.38(c)

<sup>49</sup> Occupational Safety & Health Act (OSHA) of 1970 29 U.S.C. 659 (b) (2004).

If you do file a contest to the abatement period, be sure you are prepared to fight OSHA and to prove that 1) the abatement period OSHA proposed is too long and 2) the employer is able to fix it sooner.

**Abatement Options:** Despite the hurdles and frustrations, challenging

the abatement date may be a good idea sometimes. Consider the

following strategies and tips:

- **Challenge Both:** In some cases, it may be a good idea **both** to 1) challenge the reasonableness of the abatement period and 2) elect party status in the employer-initiated contest (see above for more information about party status). You may want to do this to prevent OSHA from settling the citation with the employer on terms you think are not adequate.<sup>50</sup> If you have elected party status, contesting the reasonableness of the abatement period is like an insurance policy to make it *more likely* that OSHA will address worker concerns before reaching a settlement. However, you should do this only if you reasonably believe the abatement date OSHA has set is too long – and think you could prove it.

#### ***Why do both?***

Most OSHA cases end with a settlement. During the settlement negotiations, the employer and OSHA both compromise. As part of this process, OSHA will often *extend* the abatement period, giving the employer longer to fix the hazard. However, if you have contested the abatement period, OSHA may not be able to make this compromise (and your employer would not get extra time to fix the hazard). In both versions, OSHA can settle with the employer over your objection. If OSHA settles over your objection, you can only challenge abatement date before the judge.

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<sup>50</sup> 29 C.F.R. § 2200.38(a); *see also* 29 C.F.R.

- **Notice:** If you want to challenge the reasonableness of the abatement period, you only have **15 working days** from the date on which your employer both received the citation and posted it in the workplace.<sup>51</sup> You must tell OSHA you want to challenge the abatement period by sending the local OSHA Area office a document called a Notice of Contest.

### Quick Tips

- ✓ Take notes on when the citation was first posted to confirm when the clock starts ticking. This date cannot be extended by OSHA.
- ✓ Ask your co-workers when they first saw the citation posted and make notes and include the names of each co-worker you ask, including the date, time and place of the conversation.
- ✓ These notes may be important if questions are raised about whether you filed the notice on time!

### The notice may be simple, but it must:

- State that you desire to contest the reasonableness of the abatement period.
- Identify your employer and the specific citation you are contesting. If possible, attach a copy of the citation.
- List every abatement date you think is too short. Each citation may contain several alleged violations and each violation may have a separate abatement date.

Check out [an example](#) here to get a better understanding of what a notice looks like!

**Letting Your Employer Know of the Challenge:** Under the law, you **do not** have to tell your employer that you are

challenging the abatement period. However, it is a good idea to notify the employer of the contest. If you tell the employer, do not do so until after the 15-day deadline for an employer challenge to the citation has passed. That way, your challenge to the abatement date will not encourage the employer to challenge other aspects of the citation.

**After You File:** Within 10 days of receiving your notice of contest, OSHA must file a “statement of reasons” with OSHRC, explaining in concise terms, why the abatement date it proposed is reasonable.<sup>52</sup> OSHA will also send you a copy of the statement. You must file a response in 10 calendar days explaining why you think the abatement date is unreasonable.<sup>53</sup> You will also have the right, before you have to

<sup>51</sup> 29 C.F.R. §659(c);

<sup>52</sup> Rule 38, 29 C.F.R. 2200.38.(a)

<sup>53</sup> 29 C.F.R. §2200.38(b)

actually present your case to the Judge, to obtain a copy of OSHA’s inspection files as well as other document concerning the hazards. (See Chapter 9 – “Discovery”)

If your employer has not challenged the citation, your case challenging the abatement date will be handled as an “expedited proceeding” under OSHRC Rule 103.<sup>54</sup> If you challenge the abatement period, and OSHA’s explanation for the abatement date shows that it is reasonable, you can withdraw your notice of contest.<sup>55</sup> To withdraw a Notice of Contest you must file a “Notice to Withdraw Notice of Contest.”

#### **Chapter 4 Key Takeaways**

**Challenging the abatement period comes with burdens and hurdles. Understand what is expected and the pros and cons of participating in this way.**

**Sometimes it is best to elect party status and challenge the reasonableness of the abatement period.**

**If you want to challenge the reasonableness of the abatement period, remember there is a 15 day window from the posting of the citation. Be on the look out!**

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<sup>54</sup> 29 C.F.R. §2200.38(c)

<sup>55</sup> 29 C.F.R. §2200.102; 29 C.F.R. §2200.7(c)



## Chapter 5 – Ending the Case through Settlement

*Most OSHA citations are settled with an agreement between OSHA and the cited employer.*

**Settlements Can Be Good:** In many cases, settlements are good for workers because they ensure that the employer will fix the hazards more quickly. OSHRC cases challenging OSHA citations often take months, and complicated cases that require hearings can take years. While they are ongoing, the employer does not have to fix the hazard.<sup>56</sup> OSHA and workers can get improvements through a settlement —like a mandatory health and safety program at the worksite—that they often will not get otherwise. Additionally, settlements make the process move more quickly. Finally, settlements allow OSHA to focus its resources on inspecting workplaces and put its time and energy into targeting the most dangerous or unhealthy workplaces.

**Settlements Can Be Bad:** However, many times OSHA and its lawyers settle a case too quickly and agree to a settlement that doesn't fix the hazards or doesn't fine the employer enough for breaking the law. OSHA can even withdraw entire violations – especially if workers or their representatives are not involved to counter the employer's version of "the facts."

**OSHA Has The Power:** OSHA has unlimited discretion to settle citations it issues against employers on whatever basis it chooses, even if the union or affected employees object.<sup>57</sup> It is OSHA's policy to consult with any worker representatives of affected employees who have participated in the inspection process

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<sup>56</sup> 29 U.S.C. §659(a)

<sup>57</sup> *Cuyahoga Valley Railway v. United Transportation Union* 474 U.S. 3, 12 OSH Cases 1521 (1985). The Supreme Court held that when the Secretary and employer reach a settlement, the only objection that may be entertained by the Commission from the workers or their representatives is to the reasonableness of the abatement period. The Court reasoned that allowing any union or worker objection beyond the reasonableness of the abatement period would impermissibly seek to curtail the Secretary's prosecutorial discretion, "[a] necessary adjunct [of which] is the authority to withdraw a citation and enter into settlement discussions with the employer."

before settling a case. OSHA is more likely to hear your objections if you can persuade it, with facts, that employees continue to be endangered by an outstanding violation, or that workers' health and safety rights to training or information are still being violated by the employer.

### **Types of Settlements: Informal or Formal**

There are two types of settlements. Either type of settlement might change certain aspects of a citation. For example, settlement might change the number or types of violations that OSHA included in the citation, or it might reduce the penalty the employer must pay to OSHA. Settlement could also change the category of violations (make them less serious) or give the employer more time to fix the hazards.

**Informal Settlement:** A settlement entered into by OSHA and the employer before the employer files a formal "notice of contest" with OSHRC. OSHA's Field Operations Manual (FOM) is OSHA's set of operating policies for front-line inspectors and supervisors at OSHA's local "Area Offices." The FOM authorizes Area Office Directors to enter into "informal settlement agreements" with employers before an employer files a notice of contest.<sup>58</sup> During these negotiations, the OSHA Area Director may withdraw or change the citation, reduce the penalty, change how the violation is characterized, or alter the action needed to fix the violation.

Settlement typically occurs during an "Informal Conference," a meeting held within 15 working days of the issuance of any citation, where OSHA attempts to settle the case with an employer so the employer will not file an appeal with OSHRC.<sup>59</sup> A union representing workers at the cited employer, individual employees who either filed a complaint or participated in the inspection, or other concerned workers should tell the OSHA inspector and the Area Director -- even during the initial inspection -- that they also

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<sup>58</sup> FOM at 8-1 [quote from the FOM or other official agency source about Area Director discretion on penalty reductions, so that the reader will understand the expected bad news on penalties]

<sup>59</sup> 29 C.F. R. §1903.20; *see also* PRE-CONTEST SETTLEMENT (INFORMAL SETTLEMENT AGREEMENT), SETTLEMENT, FIELD OPERATION MANUAL, available at [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-150.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf) (2011).

want to participate in the Informal Conference. However, if the employer objects to worker participation, the OSHA Area Office is supposed to hold a separate meeting to discuss the citations and possible settlements with workers who requested to participate in the Informal Conference. During this meeting, unions or affected employees should be prepared to tell OSHA what they think is necessary to abate the hazards OSHA has cited. If OSHA did not cite other hazards, or assessed a penalty that appears

#### **Quick Tips on Settlements**

- ✓ If OSHA and the employer are going to settle an employer's objections to a citation, affected employees should focus their efforts on ensuring that the abatement required by OSHA really fixes the hazards at the work site.
- ✓ In most settlements, the biggest changes are in the penalties, since OSHA is concerned primarily about getting hazards fixed. OSHA settlements can include "other appropriate relief."
- ✓ In appropriate cases, workers might suggest that OSHA require an employer to establish a comprehensive health and safety program, conduct regular worksite inspections, hire outside experts, and conduct additional training for workers. If the employer has threatened workers who filed complaints or participated in the inspection, workers could also ask OSHA to include specific language about workers rights to participate in inspections, and telling workers to contact OSHA if they suffer retaliation.
- ✓ OSHA and the employer can also agree to a corporate-wide settlement agreement when several worksite are owned by one employer (corporation). This means that the settlement process would have a greater impact—employers would have to fix violations at several worksites!

unreasonably low, or failed to classify the violation as serious or willful, workers should ask OSHA for an explanation.

**Formal Settlement (Before OSHRC):** After a notice of contest is filed, OSHRC has control over the case and any settlement agreement must be approved by the judge assigned to the case. Settlements reached by OSHA (or by "SOL", the Office of the Solicitor of Labor – OSHA's attorneys in enforcement actions) after an employer has filed a notice of contest are referred to as "formal settlements." After a "formal settlement" proposal has been signed and is filed with the judge, employees must be given an opportunity to comment, whether or not they elected party status. An employer can do this by posting

the settlement at the worksite (usually on a bulletin board that workers can see easily).<sup>60</sup> Employees must raise all objections within 10 days of this posting. If there are no objections within the 10 days, the Judge will approve the settlement.<sup>61</sup> As with Informal Settlements, both OSHA and the Solicitor's Office have policies requiring that they consult workers before entering into a settlement agreement. However, to ensure that you are part of settlement discussions, you should tell both OSHA and SOL that you want to play an active role.

### **Collective Bargaining**

Where workers are represented by a union for collective bargaining purposes, the employer may have a "duty to bargain" with the union over the implementation of any safety programs the employer agrees to in settlement of an OSHA citation. A settlement requiring an employer to fix the cited hazard, for example by installing a guard on a press and pay a fine, may not require good faith bargaining with the union. But if OSHA and the employer are discussing more detailed terms of settlement, such as additional worker training, a health and safety program, or revised job duties, the employer has a duty to bargain in good faith with the union about how these policies are implemented before the employer can proceed to carry out these parts of the settlement. Typically, however, the union must ask the employer for the chance to negotiate about carrying out the settlement.

#### **Chapter 5 Key Takeaways**

**Settlement is the most common way that OSHA and employers resolve employers objections to citations.**

**Workers and their representatives should insist on being included in Settlement Discussions between employers and either OSHA or its lawyers.**

**Settlements have pros and cons. But they are usually better if workers are directly involved to "keep the employer honest."**

**OSHA can use settlements to get employers to take steps beyond those required by OSHA**

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<sup>60</sup> 29 C.F.R. §2200.100(c)

<sup>61</sup> General Electric Co., 14 OSH Cases 1763 (Rev. Comm'n 1990).

## Chapter 6—Simplified Enforcement Actions

OSHRC has established “simplified proceedings” (less complicated legal actions) to expedite review of relatively simple cases. They will do this where OSHA has assessed a fairly small penalty.<sup>62</sup> Simplified proceedings are available either when an employer challenges a citation or when workers challenge the length of the abatement period.<sup>63</sup> Simplified proceedings are governed by OSHRC procedural rules.<sup>64</sup> OSHRC also has a [guide to its simplified proceedings](#) available.

### A case may be eligible for simplified proceedings if:

- It involves relatively simple issues of law and fact
- Only a few citation items are challenged
- The total proposed penalty is below \$30,000
- The hearing is expected to last no more than two days
- **OR** the citation was issued against a small employer.<sup>65</sup>

Simplified proceedings are not available where the citation alleges that the violation is either *willful* (intentional) or repeated or when a fatality (death) is involved.<sup>66</sup> Any party may suggest that a case is appropriate for simplified proceedings by sending a letter with that suggestion to OSHRC.<sup>67</sup> If you are an affected employee and you and your co-workers file a notice of contest, you have the opportunity to request a Simplified Proceeding.<sup>68</sup> Even if no one suggests simplified proceedings, a judge can designate

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<sup>62</sup> 29 C.F.R. §2200.200; *see also* 29 C.F.R. 2200.202

<sup>63</sup> 29 C.F.R. §2200.203(a); *see also* 29 C.F.R. §2200.203(b)

<sup>64</sup> 29 C.F.R. 2200.200-211

<sup>65</sup> 29 C.F.R. §2200.202

<sup>66</sup> 29 C.F.R. §2200.202(a)

<sup>67</sup> 29 C.F.R. §2200.203(b). **You must file your request within 20 days of docketing of your case by the Executive Secretary’s Office.** The request must be in writing and it is sufficient if you state: “I request Simplified Proceedings.” <http://www.oshrc.gov/publications/proceedings.html#2> You must send the request to the Executive Secretary of OSHRC.

<sup>68</sup> 29 C.F.R. §2200.203(b)

the case for simplified proceedings.<sup>69</sup> In such cases, OSHA or your employer may request that the case not be considered using simplified procedures.<sup>70</sup>

There are several differences between cases designated for simplified proceedings and those handled under OSHRC's regular procedures.

**Features of simplified proceedings include:**

- No complaint or answer is required in simplified proceedings.<sup>71</sup>
- Discovery (the process where two sides exchange information) is limited in simplified proceedings.<sup>72</sup> OSHA is required to provide its investigatory report and any photos or videotapes in its file to the other parties in the case.<sup>73</sup> The employer must disclose all documents relevant to any affirmative defenses it may raise.<sup>74</sup> No other discovery is usually permitted.
- The filing of motions, asking the judge to order some action or resolve a disputed issue, is discouraged.<sup>75</sup>
- Hearings are held more quickly than in traditional cases. Briefs (written documents containing legal arguments) are not required at the end of the hearing.<sup>76</sup>
- The formal Rules of Evidence do not apply.<sup>77</sup>
- In many instances, the judge will announce a decision at the end of the hearing. A written decision will be issued within 45 days of the hearing.<sup>78</sup>

**Procedural Matters**

If you disagree with the judge's assignment of your case to Simplified Proceedings or another party's request for Simplified Proceedings, you need to file a short written statement with the judge assigned to your case.<sup>79</sup> You should explain why the case is inappropriate for Simplified Proceedings.<sup>80</sup>

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<sup>69</sup> 29 C.F.R. §2200.203(a)

<sup>70</sup> 29 C.F.R. §2200.204

<sup>71</sup> 29 C.F.R. §2200.206(a)

<sup>72</sup> 29 C.F.R. §2200.208

<sup>73</sup> 29 C.F.R. §2200.206(a)

<sup>74</sup> 29 C.F.R. §2200.206(b)

<sup>75</sup> 29 C.F.R. §2200.205(b)

<sup>76</sup> 29 C.F.R. §2200.209(e)

<sup>77</sup> 29 C.F.R. §2200.209(c)

<sup>78</sup> 29 C.F.R. §2200.209(f)

<sup>79</sup> 29 C.F.R. §2200.204(b)

<sup>80</sup> 29 C.F.R. §2200.204(b)

It is important that you act quickly, because the Judge is required to rule on a Request for Simplified Proceedings within 15 days.

If another party in the case requests that Simplified Proceedings be discontinued, and you disagree, you should respond within 7 days with a letter explaining why you disagree.<sup>81</sup> Furthermore, if another party requests the judge to discontinue Simplified Proceedings, and you agree, you should submit a letter saying so.<sup>82</sup> If all parties agree the case is inappropriate for Simplified Proceedings, the judge is required to grant the request.

### **Conferences: Pre-Hearing Conference**

The ALJ will schedule a pre-hearing conference to discuss settlement or to determine the facts and legal issues in which the parties agree.<sup>83</sup> Once the pre-hearing conference is held, the judge will schedule the hearing in the case to resolve contested issues.<sup>84</sup> After listening to the evidence, the judge will usually announce his or her decision orally and send a written decision soon after. If you are unsatisfied with the judge's decision from the Simplified Proceeding, you may petition the Commission to review the decision.<sup>85</sup> The petition should be filed no later than 20 days after the issuance of the judge's written decision. The Commission can only review the petition within 30 days of the issuance of the judge's written decision.<sup>86</sup> You should file as soon as possible to ensure the Commission has enough time to review your petition.

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<sup>81</sup> 29 C.F.R. §2200.204(b)

<sup>82</sup> 29 C.F.R. §2200.204(b)

<sup>83</sup> 29 C.F.R. §2200.207(b)

<sup>84</sup> 29 C.F.R. §2200.207(a)

<sup>85</sup> 29 C.F.R. §2200.210

<sup>86</sup> *Guide to Simplified Proceedings, Section 2 – Simplified Proceedings – An Overview for Employers and Employees, Review of the Judge's Decision*, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, available at <http://www.oshrc.gov/publications/proceedings.html#2> (last updated November 7, 2013).

### **Chapter 6 Key Takeaways**

**Some OSHA appeals cases before OSHRC go through a “simplified legal proceedings” process.**

**Be sure to let the judge know if you object to simplified proceedings.**



## **Chapter 7 – Proving the case**

OSHA enforcement proceedings (OSHRC cases) are usually between an employer and OSHA. When an employer challenges a citation, OSHA has the responsibility to prove certain facts before the employer is required to fix the cited hazards.

### **OSHA's Responsibilities:**

#### **When an employer challenges a citation, OSHA must prove that:**

- The employer violated the OSH Act or OSHA regulations,
- OSHA has properly characterized the severity of the violations;
- The amount of the penalty is reasonable; and
- It is feasible for the employer to abate the hazard within the time permitted by OSHA.

Employees participating in OSHRC cases (OSHA enforcement actions) should be prepared to help OSHA find the worker testimony and other evidence that OSHA will use to establish that the citations were properly issued and that the employer should be required to fix the hazardous conditions. See Chapter 11 for more details about OSHA and worker representatives can collect and use evidence to support OSHA's violations and penalty decisions during any hearing before OSHRC.

### **Proving a Violation of a Standard or Regulation:**

To prove that an OSHA standard or regulation has been violated, OSHA **must show:**

- that the standard applies to the cited condition,
- that the standard was violated, and
- that workers were or may be exposed to the hazardous condition; and
- the cited employer knew or should have known of the conditions that violated the standard.

### **Proving a Violation of the General Duty Clause**

Where no standard applies, or the employer knows the standard is not adequate to protect workers, OSHA may cite the **general duty clause**,<sup>87</sup> which says “Each employer shall furnish to each of his employees employment and a place of employment free from recognized hazards” likely to harm his employees.

To prove a violation of the general duty clause, section 5(a)(1) of the Act, OSHA must show:<sup>88</sup>

- a workplace condition poses a hazard to workers
- the condition is recognized as a hazard;
- the hazard is likely to cause death or serious physical injury to workers;
- the employer failed to take all feasible steps to eliminate the hazard.<sup>89</sup>

OSHA violations are classified based on several factors, including the potential severity of worker injury, and the employer’s prior history or knowledge of the specific violations and hazards. The penalty (fine) assessed for each violation depends partly on this classification. Each classification has a maximum penalty. The penalty is assessed giving consideration to the following factors: the “gravity” of the violation; size of the employer’s business; the good faith of the employer; and the employer’s history of previous violations.<sup>90</sup> The penalties and classifications for OSHA citations are listed in Appendix 2.

The OSH Act also authorizes separate criminal penalties against an employer who willfully violates an OSHA standard and the violation causes a worker’s death. Criminal prosecutions are filed by federal prosecutors in a Federal District court, not directly by OSHA, so any trials involve Federal district judges rather than OSHRC judges. Federal prosecutors can also file criminal charges against employers who interfere in OSHA inspections or lie to OSHA inspectors.

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<sup>87</sup> See generally 29 U.S.C. §654; see also *Reich v. Arcadian Corp.*, 110 F3d 1192, 1196 (5<sup>th</sup> Cir. 1997).

<sup>88</sup> 29 U.S.C. §654

<sup>89</sup> *National Realty & Construction Co v. OSHA*, 489 F2d 1257, 1.O.S.H. Cas. (BNA) 1422, (D.C. Cir. 1973).

<sup>90</sup> FOM Chapter 6-3

## **Employers Fight Back: Common Defenses**

Even when OSHA proves a violation of the OSH Act or its regulations, the violation may be excused if the employer can prove an allowable defense to the violation. An employer must describe any defenses it intends to raise in its *Answer to the Complaint* or it may not do so at the hearing.<sup>91</sup> That means that if you are participating in the enforcement actions, you and OSHA would know the employer's defenses before the hearing – and sometimes even before OSHA and the company discuss a settlement. The employer has the responsibility of proving that a defense applies. If the employer does not meet its burden of proving a defense, the citation will be upheld.

### **The most common employer defenses are:**

- **Infeasibility: A Judge may “vacate” a citation** if the employer proves that compliance is “infeasible.” When a standard has been issued, it is presumed feasible.<sup>92</sup> To establish this defense, the employer must show both that compliance with the standard is technologically or economically infeasible and that no feasible alternative means of protection exists. Employers are required to take reasonable steps to reduce the hazard facing workers. They cannot sit idly by; they must take reasonable steps to protect workers. This may require that the employer preclude worker access to the hazard.<sup>93</sup>
- **Greater Hazard:** A citation may be excused if complying with the cited standard would present a **greater danger** to workers than would noncompliance. To establish this defense, an employer must show: (1) compliance with the standard would create greater hazards than would noncompliance; (2) alternative protective measures were taken or were not available; **and** (3) either the employer has requested a variance or that it would be futile to do so.<sup>94</sup> This is a narrow defense. Employers are rarely able to show that they sought and could not get a variance from OSHA. This defense is not available to excuse violations of the general duty clause. The Secretary's burden under the general duty clause is to identify a feasible means of abatement. OSHA cannot present an abatement method that would result in a greater hazard.

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<sup>91</sup> 29 C.F.R. §2200.34(b)(3); *see also* 29 C.F.R. §2200.34(b)(4)

<sup>92</sup> *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980).

<sup>93</sup> *Walker Towing Corp.*, 14 OSH Cases 2072, 2075-76 (Rev. Comm'n 1991).

<sup>94</sup> *Secretary v. Russ Kaller Inc*, 4 OSH Cases 1758, 1759 (Rev. Comm'n 1976).

- **Unpreventable Employee Misconduct:** A citation may be vacated where the conditions causing the violation were so unique that the employer could not foresee that they might occur. Employers often rely on this defense in an effort to shift blame for the violations onto the workers.
  - To establish this defense, the employer must show: (1) the employer has established work rules to prevent the violation; (2) the employer has adequately communicated the work rules to its workers; (3) it has taken steps to discover violations of its work rules; **and** (4) it has effectively enforced the work rules when violations are discovered.<sup>95</sup> The company must prove all four parts of the defense. The defense will not be upheld in situations where a safety manual contains a work rule that is consistently violated by workers, with the employer’s knowledge. An employer can demonstrate that its enforcement program is effective when it presents evidence of having a disciplinary program that is effectively administered when workers violate work place rules. To be effective, it must be shown that the disciplinary program is progressive, meaning it must be increasingly severe as a worker continues to commit infractions.
  
- **Preemption:** A citation may be invalid because the Act, or its regulations do not apply in this particular case. A claim of preemption may take several forms. The OSH Act does not apply, and a citation will be vacated, where another federal agency actually regulates the working conditions cited by OSHA.<sup>96</sup> A general standard may be preempted where a more specific standard applies. Likewise, the general duty clause may be preempted where a specific standard regulates the same hazard.<sup>97</sup> In each of these cases, OSHA may be permitted to amend the citation to allege a violation of the correct provision, unless doing so would prejudice the employer.

### Chapter 7 Key Takeaways

**When an employer challenges (contests) a citation, OSHA must establish that the citation was proper before the employer is required to fix the hazard.**

**There are several defenses employers use in enforcement actions, including infeasibility, greater hazard, unpreventable worker misconduct, and preemption.**

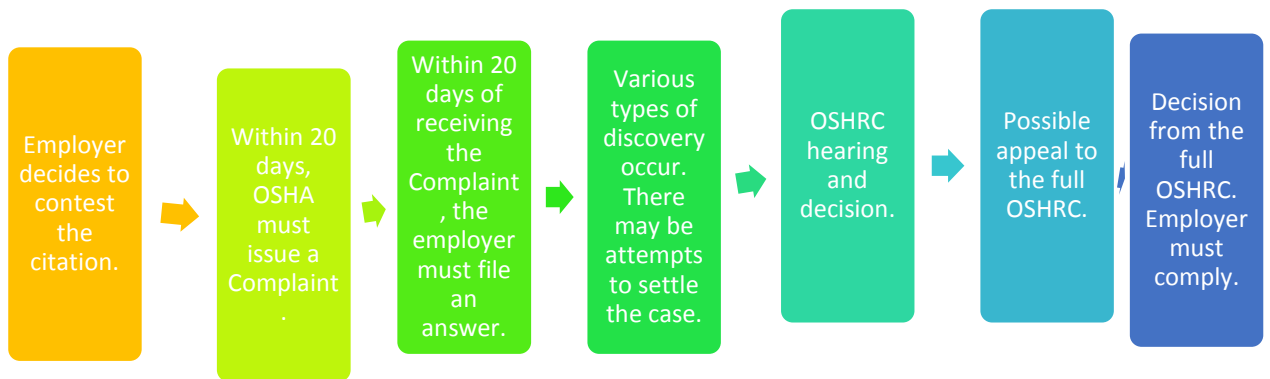
<sup>95</sup> *Sanderson Farms, Inc. v. OSHRC*, 348 F. App’x 53, 57 (5<sup>th</sup> Cir. 2009).

<sup>96</sup> 29 U.S.C. §653(b)(1); *see also Association of Flight Attendants-CWA v. Chao*, 493 F.3d 155,157 (D.C. Cir. 2007) .

<sup>97</sup> *Active Oil Service, Inc.* 21 OSH Cases 1184 (Rev. Comm’n 2005).

## Chapter 8 – The Essential Core of OSHA Enforcement actions

In many ways, the steps involved in OSHA’s enforcement actions are similar to the steps in other routine legal proceedings. After OSHA issues a citation, there are several steps on the path to settling the case or having the judge (or possibly the OSHRC) decide the case. Here’s a quick overview of the process. We’ll discuss the first parts of the process in this chapter.



If an employer files a notice of contest with OSHA, the OSHA Area Director must forward it to OSHRC for filing. OSHRC then assigns the case a docket number and formally opens a record.<sup>98</sup> It also assigns the case to a judge who will manage the proceedings. Thereafter, all documents filed in the case must include the OSHRC docket number and should be filed with the judge assigned to the case.

**Complaint:** Within 20 days after OSHA receives a notice of contest from an employer, SOL must file a Complaint in the case.<sup>99</sup> (Note: this is completely different from any complaint which workers filed in order to start an OSHA inspection in the first place.)

<sup>98</sup>*Employee Guide to Review Commission Procedures: Supplement to the Guide to Review Commission Procedures, Section 2 – Overview of Events and Proceedings, Notice of Docketing, available at, [http://www.oshrc.gov/publications/workerguide/workerguide\\_supp.html#sec1](http://www.oshrc.gov/publications/workerguide/workerguide_supp.html#sec1) (last updated May 15, 2006).*

<sup>99</sup> 29 C.F.R. §2200.34(a)(1)

OSHA's Complaint lays out each element of OSHA's case and will repeat the violations described in the citation as well as the proposed penalties. It must state with particularity the basis for OSHRC jurisdiction, the time, location, place and circumstances of each violation, the basis for the abatement date, the classification of the violation, and the justification for the penalty OSHA has proposed.<sup>100</sup> The Complaint gives the employer notice of the facts that OSHA intends to prove at the hearing. OSHA's Complaint may allege facts or violations that are different than those included in the citation. You will receive a copy of the Complaint if you have elected party status before it is filed.<sup>101</sup> If you have not elected party status, the employer must make the complaint available to you upon request.<sup>102</sup> Employees are not required to respond to the Complaint.

**Answer:** Within 20 days of receiving the Complaint, the employer must file an Answer.<sup>103</sup> An [Answer](#) is the employer's legal response to the allegations in the complaint. The Answer must either deny or admit the facts in the Complaint.<sup>104</sup> Anything not denied is admitted.<sup>105</sup> At the hearing, the employer will only be allowed to challenge facts that it denied in the Answer. In addition, the Answer will include any defenses the employer intends to raise during the hearing.<sup>106</sup> If the employer fails to raise a defense in the Answer, the employer may be prohibited from raising it later.<sup>107</sup> A defense is an explanation of why the conditions cited by OSHA do not violate the Act.

The employer must prove each element of each defense it raises.

#### Quick Tip

- ✓ You will be served with a copy of the Answer if you have elected party status. If you have not elected party status, your employer must make the answer available to you upon request.

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<sup>100</sup> 29 C.F.R. §2200.34(a)(2) – (a)(2)(iii)

<sup>101</sup> 29 C.F.R. §2200.7(a)

<sup>102</sup> 29 C.F.R. 2200. 7(g)

<sup>103</sup> 29 C.F.R. §2200.34(b)(1). See also 29 C.F.R. §2200.7(a)

<sup>104</sup> 29 C.F.R. §2200.34(b)(2)

<sup>105</sup> 29 C.F.R. §2200.34(b)(2)

<sup>106</sup> 29 C.F.R. §2200.34(3); see also *Id.* §2200.34(b)(4)

<sup>107</sup> 29 C.F.R. §2200.34(b)(4)

**Amendment:** Sometimes either party may wish to amend its pleadings. Amendments to pleadings are governed by the Federal Rules of Civil Procedure (Fed. R. Civ. P. ) Rule 15. A request to amend the pleadings must be made to the judge. The judge will likely permit an amendment of the pleadings when the amendment will aid in the proper resolution of the case and no party will be prejudiced by the amendment. Amendments requested early in the proceedings are more likely to be granted than those requested right before the hearing. Sometimes, an amendment is permitted so that the pleadings are consistent with the evidence that has been admitted during the hearing.

Fed. R. Civ. P. 15 (c) allow amendments to relate back to the original pleading date for purposes of determining timeliness.

### **Chapter 8 Key Takeaways**

**Within 20 days of the Notice to Contest, OSHA must create a complaint, providing relative facts and details.**

**Within 20 days of receiving the complaint, the employer must answer, admitting or denying the complaint, and asserting defenses.**

## Chapter 9: The Essential Details of OSHA's Enforcement Actions (Discovery)

Discovery is the process by which the parties to a legal proceeding exchange information. Discovery allows the parties to learn more about each other's case, to realistically assess their position, to narrow the issues for trial, and to evaluate the potential for settlement. OSHRC rules govern discovery.

Under OSHRC rules, anyone participating in the enforcement action may initiate discovery at any time after an answer is filed or a motion to delay filing an answer is ruled upon.<sup>108</sup> The response to any discovery request must be due at least **7 days** before the hearing or the request is untimely.<sup>109</sup> OSHRC Rule 52(a)(1) allows each party to submit discovery requests to another person without prior permission by the ALJ.<sup>110</sup> Where OSHRC has no rule on a subject, the Federal Rules of Civil Procedure apply.

Discovery requests and responses are exchanged among the parties. The requests and responses need not be filed with the OSHRC ALJ. Those portions of discovery responses on which a party relies in the hearing or in a motion must be filed with OSHRC.<sup>111</sup> If facts change or new information comes to light after a response to a discovery request is filed, the responding party may have a duty to supplement (add to) its original response.<sup>112</sup>

### Getting Information From the Government

- OSHA may be required to answer questions and produce documents in response to discovery requests in the same manner as would any other party. The government may be able to raise claims of privilege not available to other parties.
- Unlike private parties, OSHA and OSHRC are required to provide documents in their possession in response to a request under the Freedom of Information Act (FOIA).<sup>1</sup> A party seeking documents must file a request with the agency that holds the documents. A sample FOIA request can be found [here](#).
  - The request must specify the documents you are requesting. Be as specific as possible. Agencies may charge a fee for completing your request. If your request is too broad, the charges an agency imposes may be prohibitively high.
- If you are seeking documents on behalf of a nonprofit organization, such as a union or COSH group, or you cannot afford to pay the fee, and you may ask the agency to waive it.

<sup>108</sup> 29 C.F.R. §2200.52(a)(2)

<sup>109</sup> 29 C.F.R. §2200.52(a)(2)

<sup>110</sup> 29 C.F.R. 2200.52(a)(1)

<sup>111</sup> 29 C.F.R. §2200.52(j)

<sup>112</sup> 29 C.F.R. §2200.52(i)(2)



## Types of Discovery

- **Interrogatories:** Interrogatories are a set of written questions. OSHRC Rule 55 governs Requests for Interrogatories.<sup>113</sup> One party may submit up to 25 interrogatories (including subparts) to another party.<sup>114</sup> The recipient has 30 days to respond.<sup>115</sup> If you are required to answer interrogatories, you should answer each interrogatory separately and fully. The individual who answers the interrogatory must sign their answers under oath. You should raise an objection if you have a good reason for not answering the question. In such cases, you should state your objection instead of answering. Your objections should be signed by you or your attorney.<sup>116</sup>
- **Depositions:** Depositions are a method of taking oral testimony, under oath, usually in an office, before the hearing in the case. At a deposition, one party can ask another person questions about the case. OSHRC Rule 56(a) permits depositions only if the parties agree or if the OSHRC ALJ orders a deposition.<sup>117</sup> Depositions usually require ten (10) days written notice, unless the notice is waived.<sup>118</sup> If a party wants to rely upon deposition testimony at the hearing, that party must give notice to other participants and the ALJ at least 5 days before the hearing so they have an opportunity to object.<sup>119</sup>

**Request for Admissions:** A request for admission is a written statement that one party requests that the other party agree to.<sup>120</sup> You do not need an order from the judge to request an admission. Once agreed upon, admissions become established facts in the case.<sup>121</sup> Admissions can be a time saving way to establish basic facts, such as, a business is an employer under the OSH Act engaged in interstate commerce. A party may serve no more than 25 Requests, including subparts, for Admission on another party. Additional, Requests for Admission may be served with permission from the judge. A party must respond to a request within 30 days or the fact is admitted.<sup>122</sup> This form of discovery is utilized when a party wants to request the admission of the genuineness and authenticity of any document described in or attached to the request, or of the truth of any factual matter.<sup>123</sup>

**Requests for Entry Upon Land:** The parties may request to enter the work place to view the activities or work areas that OSHA alleges violate the Act.<sup>124</sup> OSHRC Rule 53 governs requests to enter the work place.<sup>125</sup> You must serve your employer a written request to permit entry upon

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<sup>113</sup> 29 C.F.R. §2200.55

<sup>114</sup> 29 C.F.R. §2200.55(a)

<sup>115</sup> 29 C.F.R. §2200.55(c)

<sup>116</sup> 29 C.F.R. §2200.55(c)

<sup>117</sup> 29 C.F.R. §2200.56(a)

<sup>118</sup> 29 C.F.R. §2200.56(c)

<sup>119</sup> 29 C.F.R. §2200.56(f)

<sup>120</sup> See generally 29 C.F.R. §2200.54

<sup>121</sup> 29 C.F.R. §2200.54(c)

<sup>122</sup> 29 C.F.R. §2200.54(b)

<sup>123</sup> 29 C.F.R. §2200.54(a)

<sup>124</sup> 29 C.F.R. §2200.53(a)(2)

<sup>125</sup> See generally 29 C.F.R. §2200.53

the land. The request must describe with “reasonable particularity the items or areas to be inspected, and it must specify a reasonable time, place and manner of making the inspection.” The employer has 30 days to respond to your written request for entry upon land, and the response must be in writing.<sup>126</sup> If the employer does not voluntarily allow the entry, you can file a motion with the ALJ for an order compelling the employer to allow inspection.<sup>127</sup> Often, a request upon land is made so that an expert witness can see the workplace and form an opinion about whether violations exist. If the workers have elected party status, the worker’s chosen representative should be allowed to accompany the Secretary’s expert during an entry upon land.<sup>128</sup> Often times, the employer will object to having any worker representative who is not also employed at the facility. Employees should object to this restriction and should be able to select their own “expert” representative to accompany the Secretary’s expert during the examination, absent unusual circumstances.<sup>129</sup>

- **Requests for Production of Documents:** A request for production of document is a demand that one party provide documents to another party.<sup>130</sup> Requests for documents are governed by OSHRC Rules 53. Just like a Request for Entry Upon Land, a Request for Documents must specifically describe the documents requested, either separately or by category. The party from whom documents are requested, must serve a written response within 30 days after service of the request. The response must state whether the documents will be produced or must state an objection. If an objection is filed, you may have to file a motion with the ALJ demanding production of documents.<sup>131</sup>

**Claims of Privilege:** Some documents or other information may be privileged and need not be given to another party in enforcement actions. Other information may be available only if it cannot be obtained from another source and it is critical to proving the case. Examples of privileges include attorney client privilege which protects information relayed confidentially between an attorney and his or her client or the doctor-patient privilege which prevents one party from ordering a doctor to testify against his or her patient without consent. Trade Secrets are confidential business information, the disclosure of which would damage the party’s business. OSHRC Rule 52(d)(1) governs claims of privilege, including trade secret claims.<sup>132</sup> It provides that when a claim of privilege is first made, the party who claims the

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<sup>126</sup> 29 C.F.R. §2200.53(b)

<sup>127</sup> 29 C.F.R. §2200.53(b)

<sup>128</sup> 29 C.F.R. §657(e)

<sup>129</sup> See Opinion of Rogers on Interlocutory Appeal in *Secretary of Labor v. Cooper Tire & Rubber*, No. 11-0079

<sup>130</sup> See *Generally* 29 C.F.R. §2200.53(a)(1)

<sup>131</sup> 29 C.F.R. §2200.53(b)

<sup>132</sup> See *Generally* 29 C.F.R. §2200.52; see also 29 C.F.R. §2200.52(e)(7)

privilege must specify which privilege applies and the nature of the material covered by the privilege.<sup>133</sup>

If the claim of privilege is challenged, OSHRC may order a more detailed factual explanation to justify the privilege, which will require the party to identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged.

### **Chapter 9 Key Takeaways**

**There are several types of discovery that are part of OSHA enforcement proceedings. These include interrogatories, depositions, requests for entry upon land, and requests for production of documents.**

**Some information is “privileged” and does not have to be handed over to the other side.**

**FOIA requests can be useful tools to get information from the government.**

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<sup>133</sup> 29 C.F.R. §2200.52(d)(1)

## Chapter 10 – The Process Continues: Motions

A motion is a written request asking a judge, the Commission, or a court to take some action. Any party to a proceeding may file a motion. Sometimes motions are filed for procedural reasons, like to ask the judge to extend the time for filing (submitting) a document or to excuse a late filing. Other times, a party may file a motion to govern discovery, like asking the judge to order a party to produce documents or requesting that any documents produced be confidential.

A party may also file a motion that has the effect of deciding an important legal issue in the case. There are two types of dispositive motions that are most likely to be filed in OSHRC cases before the hearing – Motion to Dismiss and Motion for Summary Judgment. Either of these motions may be filed by either the employer or the government and, if granted, would resolve contested legal issues before OSHRC.

**Motions to Dismiss by Employers:** Motions to Dismiss are a common part of discovery and a tool often used by employers. A Motion to Dismiss is filed when, accepting the facts as true, one party believes they are entitled to prevail as a matter of law. An employer may file a motion to dismiss for the following reasons:

- **Lack of Jurisdiction:** The OSHRC lacks jurisdiction over the employer because it is not engaged in a business affecting interstate commerce, because the employer is a public entity or because another federal agency regulates the working conditions cited by OSHA.
- **Failure to State a Claim:** The complaint fails to state a claim. When the facts alleged by OSHA do not amount to a violation of the Act, as a matter of law, the citation may be dismissed.

**Motions to Dismiss by OSHA:** Alternatively, OSHA may file a motion to dismiss when an employer files its notice of contest late. If the judge agrees with the motion (“grants” it), the citation is final and cannot be appealed. **This works to your advantage because it means that the employer must immediately start to fix the violation.** Therefore, if OSHA files a motion to dismiss, you should file a

brief statement in support of the Secretary's Motion to Dismiss. The OSHRC has consistently stated that late filed notice of contests, absent extraordinary circumstances, require dismissal. A motion to dismiss will only be granted where there are no set of facts that will allow the other side to prevail. A motion to dismiss is usually filed before discovery has been completed. In ruling on the motion, the judge may assume facts favorable to the person opposing the motion. These assumptions do not apply at the hearing; they only apply while the motion is being considered.

**When your employer files a motion to dismiss, OSHA will take the lead in responding. However, when OSHA files a motion to dismiss your case challenging the abatement date, you will have to take the lead in explaining why your notice of contest should not be dismissed.**

**Motions for Summary Judgment:** A motion for summary judgment is a request that the judge rule in favor of the party filing the motion based on undisputed facts in the case.<sup>134</sup> The motion is governed by Federal Rule of Civil Procedure 56. This motion may be filed either by OSHA or the employer. A motion for summary judgment will only be granted when there are no material facts in dispute between the parties and the party filing the motion is entitled to win based on the law. The facts presented should be in the form of an affidavit. The judge may consider facts uncovered during discovery in deciding a motion for summary judgment. If a motion for summary judgment is filed, and you dispute some of the facts on which the motion relies, you should submit a response opposing the motion. The facts you present to the judge should either be those documents uncovered during discovery or a statement from you or your co-workers in the form of an affidavit. If the facts you present dispute those on which the motion is based, then the motion for summary judgment should be denied and a hearing held. When a motion to dismiss or for summary judgment is filed, lawyers representing OSHA will take the lead in opposing the motion, particularly on legal grounds. **You should make sure that any facts about which**

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<sup>134</sup> See generally Fed. R. Civ. P. 56

**you are aware and which differ from those put forward by the employer are presented to the judge before the judge issues a ruling (decision).**

**Responses to Motions:** When a motion is filed, the opposing party has 10 days to file a response.

Before a judge has been assigned to the case, motions and responses must be filed with the Executive Secretary of OSHRC. After a judge has been assigned to the case, motions and responses must be filed with the judge presiding over the case.

### **Chapter 10 Key Takeaways**

**Motions are written requests to the judge asking her to do something in the case.**

**Employers often file motions for lack of jurisdiction or failure to state a claim.**

**There is a ten day deadline to file a response to a motion.**

## Chapter 11- What to Expect at a Hearing

The hearing is similar to a trial and is the opportunity for each side to tell its case in front of a judge.

**Details:** The judge assigned to the case will issue a notice letting you know the date, time, and place of the hearing at least 30 days in advance.<sup>135</sup> **The employer must post the Notice of Hearing in the workplace. OSHRC tries to schedule hearings near the cited worksite to make it more convenient for witnesses to participate.** Workers who elect party status are entitled to participate in the hearing, represented by an attorney, or represented by someone who is qualified.<sup>136</sup>

**Roles:** When the hearing is scheduled to resolve an employer's challenge to a citation, SOL (OSHA's lawyers in enforcement actions) has the lead role and must prove each element of the case. Your role is to help them do so. There are several ways your participation can help OSHA establish the violations. First, if the nature of the work or workplace is unusual, you can help OSHA understand the workplace, production demands, and the hazards they present. OSHA inspectors go to thousands of workplaces. OSHA's lawyers may not see the workplace at all. They cannot be expected to understand all the unique features of your workplace.

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<sup>135</sup> 29 C.F.R. §2200.60

<sup>136</sup> 5 U.S.C. §555(b)

## The Hearing: Order, Roles, and Responsibilities:

### How to Prepare for a Hearing

- ✓ You can help OSHA and SOL do so by identifying workers who are familiar with the processes or procedures that were cited, workers who have been injured, past complaints to management about hazards, work rules and whether or not they are actually enforced, and other issues. OSHA needs witness testimony to establish the violations. You should help OSHA identify workers who have knowledge of the violations and are willing to testify.
- ✓ You should have a plan for presenting your case at the hearing. Map out your entire strategy. Your game plan should include the witnesses who will testify, the questions you will ask them, and the documents you will introduce. Your participation before OSHRC will be most valuable if you can help tell a story.
- ✓ You should interview workers who might be witnesses at the hearing beforehand. You should introduce these workers to the lawyers for OSHA. You are not permitted to coach the witness or tell them what to say, but you are allowed to ask them questions and hear their answers. Workers who may be witnesses should be advised to answer only the question that is asked of them. Both you and the witness should reread any prior statements the witness may have made to make sure the story remains the same.
- ✓ Prior to the hearing, the judge will schedule a prehearing conference. The conference may be in person or by phone. This conference has two purposes. The first is to see if it is possible to settle the case. The second is to identify issues for trial. Before the conference, each party may be required to submit a written prehearing statement that lists the witnesses they will call to testify at the hearing and the documents they will introduce into evidence.
- ✓ Once you decide who you may call as a witness, it is often useful to issue a subpoena to that person. A subpoena is a legal document ordering the person to appear at a certain place, at a certain time. A subpoena may be useful to ensure a witness is present and may be particularly helpful to ensure that co-workers are excused from work to testify at the hearing. The issuance of subpoenas is governed by OSHRC Rule 57. You must file an application requesting a subpoena with the judge. The judge will issue the requested subpoenas. You must arrange to have the subpoena served by sending it certified-mail, return receipt requested or hand delivering it.



**Witnesses:** The judge will control the hearing. SOL (OSHA's lawyers) will go first. SOL will present each of its witnesses. You, OSHA, and the employer will each have an opportunity to cross-examine each witness. When it is your turn to question the witness, make sure your questions are precise. Don't ask unnecessary or repetitive questions. If SOL has asked the witness all the questions you think are important, and you have nothing to add, you should pass (not ask any questions—there's no need to repeat questions). After SOL completes the presentation of its case, you will be offered the opportunity to call any additional witnesses to support the citations that have not already testified.

**Summary Judgment:** When OSHA's case has been fully presented, the employer may orally move for summary judgment. Even if the employer filed a similar request earlier and it was denied, the employer may repeat the request for summary judgment. In effect, the employer is arguing that OSHA did not prove each element of its case and, therefore, should lose. OSHA will oppose the motion. You should oppose the motion as well and explain why you do not want the citations vacated. If the Judge chooses not to rule on the Motion at the hearing, you should discuss why the motion should be denied in your post-hearing brief. If the judge denies the motion for summary judgment (and the ALJ usually does at this point), the employer will then proceed to call its witnesses.

**Employers at the hearing:** The employer has two tasks. First, the employer will try to rebut the testimony presented by OSHA by showing that it is untrue or that it should be interpreted differently. Second, the employer may try to establish that it has a defense to the citation. In addition, the employer will also likely offer evidence that the penalty and the classification of the violation should be reduced. At the conclusion of the employer's case, OSHA will have an opportunity to call rebuttal witnesses to respond to, and dispute, the testimony of the employer's witnesses. At this stage, OSHA cannot introduce new evidence, but may only present rebuttal evidence.

**Evidence:** The type of evidence presented during the hearing, whether by oral testimony or by documents, is governed by the Federal Rules of Evidence.<sup>137</sup> The FRE are a complex set of legal rules that are technical. Common sense should be your guide. The types of questions and evidence ordinarily used at grievance hearings are similar to what can be introduced in an OSHRC hearing.

### **Basic Rules of Evidence**

- When you question a witness, you should start with basic preliminary information -- name, address, employer, job title, years of experience, etc.
- You may ask a regular (not expert witness) only about their personal, first-hand knowledge of events, meaning things they saw or experienced (not things they heard about from other people).
- The evidence offered by the witness must be relevant to OSHA's enforcement actions. Witnesses may not testify about offers made during settlement, matters that are privileged, or offer an opinion except where the opinion is rationally related to their perception of something the witness observed.
  - On the other hand, a person who is qualified as an expert witness may offer opinion testimony about matters within their expertise.
- When you call a witness, your questions may not suggest the answer. Direct testimony should focus on who, what, when, where. Open-ended questions are best.
  - For example: ask "What did you see?"
  - Questions that require a yes or no answer are also permissible. However, leading questions, such as one that asks "Isn't it true that you told . . . ." are permitted only during cross-examination.
- If any person raises an objection to a question, the witness should wait until the judge rules on the objection before answering. You should be sure to brief your witness before the hearing, so he or she will know to wait for the judge's response after an objection has been raised.

**Hearing Wrap-Up:** At the close of the hearing, the Judge may also ask each party if they have any closing arguments. This is an opportunity for you to summarize the key evidence in your case. When the hearing is over, any party may request the opportunity to file a Proposed Findings of Fact and Conclusion of Law

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<sup>137</sup> See 29 C.F.R. 2200.71

or a Post-Hearing Brief. You should use these documents to argue your position on the law and your interpretation of the facts. You should decide whether to file these documents based on the complexity of the case. If the facts in the case were clearly presented to the judge, your arguments at the close of the hearing should suffice.

You must request permission to file either of these documents before the end of the hearing. If the judge grants the request, the judge will set a schedule for filing. File the papers with the Judge and be sure to send (serve) a copy to your employer and OSHA. The purpose of Proposed Findings of Fact and Conclusions of Law is to tell the judge **what** you would like the judge to decide. The Proposed Findings of Fact should be a numbered list of the facts necessary to prove a violation. The Proposed Legal Conclusions should be a numbered list of the legal determinations necessary to support the citation. The purpose of a post-hearing brief is to tell the judge **why** the judge should decide the case in the manner you propose.

Once the entire hearing record has been submitted, the judge will issue a written decision and order. There is no deadline for the judge's decision. Some decisions are issued quickly. Others take a long time. The judge's decision becomes final, and the employer has a duty to abate any violations the judge has upheld, 30 days after the decision is issued, unless OSHRC decides to hear an appeal of the decision.

### **Chapter 11 Key Takeaways**

**Judges will tell you when and where the hearing is. You should participate.**

**You, OSHA, and your employer can call and question witnesses at the hearing.**

**The rules of evidence apply at hearings. If you do not have a lawyer, use your common sense!**

## Chapter 12- One More Step: The Appeal

**Appeals:** There are three types of appeals that may be taken from an order of a judge. If you are considering an appeal, or if your employer or OSHA has requested OSHRC review, you ***should consult with an adviser who has experience with these types of cases.*** Documents filed in appeals must strictly conform to legal standards.

### Types of Appeals

- **Interlocutory Appeal:** An interlocutory appeal is an appeal by a party before the judge has finally decided whether to uphold a citation. Such appeals are unusual and there must be an urgent need to obtain review of a judge's decision before the judge decides whether to uphold the citation.

- Petition for Discretionary Review (PDR) Filed with OSHRC:** After an ALJ issues a decision, any party adversely affected by the decision may petition the 3-member OSHRC to review that decision. OSHRC selects the cases that it will review. It does not review every case in which a request is made.<sup>138</sup> Any party may request OSHRC review by filing a petition for discretionary review. The petition should be accompanied by a legal memo explaining why OSHRC should review the ALJ's decision. Any one OSHRC commissioner may designate a case for review. ***So, your petition must convince at least one commissioner of the importance of hearing your case. If your employer is seeking review, you must convince all commissioners not to grant review.*** OSHRC usually will review an ALJ decision if the facts on which the decision is based are not supported by any fair reading of the evidence (preponderance of the evidence); the decision is contrary to law or OSHRC rules; the case raises an important question of law or policy, or the procedures used by the ALJ prejudiced one of the parties. Your PDR should be concise and clearly identify the facts that were wrongly decided or the legal issues at stake. **If OSHRC grants review, the employer has no duty to abate the violation until OSHRC issues a final decision.** If it grants review, OSHRC will describe the issues on which review has been granted. The appeal before OSHRC is limited to those issues. OSHRC will establish a schedule for filing briefs on the issue and, in rare instances, may schedule oral argument on an appeal. Eventually, OSHRC will issue a decision. Sometimes, OSHRC takes years to issue a final decision in a case.

#### Quick Tips

- ✓ Three copies of a PDR must be filed with the Executive Secretary of OSHA within 20 days after the ALJ's decision is docketed.
- ✓ The earlier you file a petition, the more time OSHRC has to consider it. Any party may file a response, opposing OSHRC review.
- ✓ You must also file a certificate of service with your petition, or any response. If OSHRC takes no action within 30 days from the date the judge's decision is docketed with it, the judge decision becomes a final order of OSHRC. At that point, the clock begins to run on the employer's duty to fix the violation.

- Petition for Review Filed in U.S. Court of Appeals:**

Any party adversely affected or aggrieved by a final decision of OSHRC

may file a petition seeking review of the decision in the U.S. Court of Appeals where the violation took place, in the D.C. Circuit, or where the party has its principal place of business.<sup>139</sup> You are adversely affected or aggrieved by the Commission's order if the order means that workers continue to be exposed to hazards that OSHA would have required be fixed. A petition for review must be filed in the

<sup>138</sup> 29 C.F.R. 2200.91

<sup>139</sup> 29 U.S.C. §660(a),(b)

appropriate court before 60 days following OSHRC's final decision. If your case is going to be reviewed in the federal appeals courts, you should have a lawyer.

### **Chapter 12 Key Takeaways**

**There are three types of appeals, all with different pieces and processes.**

**If you want to file an appeal, there are strict legal rules. Consult an attorney.**

## **Appendix One: OSHRC Rules**

Proceedings (enforcement actions) before OSHRC are governed by its' procedural rules. These rules can be found at [29 C.F.R. Part 2200](#). If you are going to participate in an enforcement proceeding before OSHRC, you need to review OSHRC's rules.

Where a specific OSHRC rule applies, it is cited in this toolkit. You should check the rules to make sure the manual remains up to date. OSHRC has prepared [several guides](#) to its proceedings. They are worth consulting.

Here are several basic legal principles that apply during all OSHRC proceedings.

### **Basic Concepts**

**Counting Days:** When the rules specify a time limit for taking some action, you must make sure you meet the deadline. When OSHRC rules require that you file a document within **x** days, Rule 4 governs how to count those days.<sup>140</sup> The day on which you receive a document to which you must respond, does not count. You start counting days on the following day. If the response is due in less than 11 days, the period will begin on the following day, unless the day is a Saturday, Sunday or Federal holiday.<sup>141</sup> Also, be sure not to count intermediate Saturdays, Sundays, or federal holidays when you count the days.<sup>142</sup> If the response is due in 11 days or longer, you must count Saturdays, Sundays, and federal holidays. If you received the document by mail, add 3 days to the due date.<sup>143</sup> If the deadline falls on a Saturday, Sunday or holiday, the document is due on the next day that is not a Saturday, Sunday or federal holiday.

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<sup>140</sup> 29 C.F.R. §2200.4.

<sup>141</sup> 29 C.F.R. §2200.4(a)

<sup>142</sup> 29 C.F.R. §2200.4(a)

<sup>143</sup> 29 C.F.R. §2200.4(b)

**Preparing Documents:** Documents in OSHRC proceedings must be typed, double-spaced, on 8.5 x11 inch paper, with margins of 1.5 inches on all sides.<sup>144</sup> The first page of each document must include the caption of the case – the name of the parties and the OSHRC docket number.<sup>145</sup> Each document must be signed by you or your representative.<sup>146</sup> By signing the document, you are certifying that you have read it, that it is true to the best of your information and belief, and that it is not filed for the purpose of delay.

**Serving Documents:** All documents must be provided to every party in the case.<sup>147</sup> This is called “serving” the parties. If you elect party status, you are a party to the case and will receive copies of every document filed by OSHA or the employer.<sup>148</sup> As a party, when you file documents, you must serve a copy on the attorney representing OSHA and the employer’s attorney (or if the employer does not have an attorney, serve the employer).<sup>149</sup> Every document filed in the case must have a “certificate of service” attached to it.<sup>150</sup> The certificate of service must list each party to whom you sent a copy of the document, must describe how the document was sent to the party, and must be signed by the person who sent the documents. Here is a [sample](#).

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the parties listed below by first class mail on [insert date].

[\[Address of OSHA Area Office\]](#)

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<sup>144</sup> Rule 30(a), 29 C.F.R. 2200.30(a)

<sup>145</sup> Rule 31, 29 C.F.R. 2200.31 describes the required caption. Rule 30(f) requires that it be included on each pleading or motion filed.

<sup>146</sup> Rule 32, 29 C.F.R. 2200.32

<sup>147</sup> Rule 7, 29 C.F.R. 2200.7

<sup>148</sup> 29 C.F.R. §2200.7(a)

<sup>149</sup> 29 C.F.R. §2200.7(b)

<sup>150</sup> 29 C.F.R. §2200.7(d)



[\[Address of SOL Office Handling the Case\]](#)

[\[Address of Employer or the Employer's Attorneys\]](#)

[\[your signature\]](#)

**Posted citations:** An employer is required to post any citations issued by OSHA in the workplace.<sup>151</sup> OSHRC rules require that the employer also post information advising workers that they have a right to participate in the OSHRC proceedings and also allowing them to view any documents filed in the OSHRC case at the worksite.<sup>152</sup> A sample of the required notice can be found [here](#). In a unionized workplace, the employer must also serve the union with a copy of any notice of contest and any notice of hearing it receives.<sup>153</sup> In an unorganized workplace, the employer must post these documents in the same place that it posted the citation.<sup>154</sup>

**Filing Documents:** A copy of all documents, other than those relating to discovery, must also be filed with OSHRC.<sup>155</sup> After the case is docketed at OSHRC, but before a judge is assigned to the case, all documents (except discovery documents) must be filed with the [Executive Secretary of OSHRC in Washington, DC](#).<sup>156</sup> After a judge has been assigned to the case, one copy of all documents must be filed with the judge.<sup>157</sup> The notice of assignment sent by OSHRC will include the address for the judge. Filing may either be by mail, in person, or electronically.<sup>158</sup>

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<sup>151</sup> 20 C.F.R. §1903.16(a)

<sup>152</sup> 29 C.F.R. §2200.7(g).

<sup>153</sup> 29 C.F.R. 2200.7(f); *see also* 29 C.F.R. 2200.(j)

<sup>154</sup> 29 C.F.R. §2200.7(g); *see also* 29 C.F.R. 2200(i)

<sup>155</sup> 29 C.F.R. 2200.8

<sup>156</sup> 29 C.F.R. 2200.8(b)

<sup>157</sup> 29 C.F.R. §2200.8(b)

<sup>158</sup> 29 C.F.R. §2200.8(c)

**Appendix 2: Categories of citations**

The classifications of OSHA violations include:

Type of Violation	Maximum Penalty	Definition
De Minimis	\$0	The violation has no direct and immediate relationship to safety and health. There is no penalty and no duty to abate the violation.
Other than Serious <sup>159</sup>	\$7000	The violation poses a direct and immediate relationship with safety and health but is unlikely to cause death or serious physical harm.
Serious <sup>160</sup>	\$7000	There is a substantial probability that serious physical harm or death could result from the violation.
Willful <sup>161</sup>	\$70,000	A violation committed with intentional, knowing or voluntary disregard for the requirements of the OSH Act or plain indifference to worker safety
Repeated <sup>162</sup>	\$70,000	The violation is repeated if at the time it occurred there was a final order of OSHRC against the same employer for a substantially similar violation within the past 5 years

<sup>159</sup> 29 U.S.C. §666(c)

<sup>160</sup> 29 U.S.C. §666(b)

<sup>161</sup> 29 U.S.C. §666(a)

<sup>162</sup> 29 U.S.C. §666(a)

Failure to Abate <sup>163</sup>	\$7000/day	An employer can be cited for failure to abate for each day that the violation continues after the date for fixing the violation has past.

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<sup>163</sup> 29 U.S.C. §666(d)

### **Appendix 3**

Send FOIA request to:

National OSHA FOIA Officer at U.S. Department of Labor – OSHA

FOIA Officer Rm. N3647 200 Constitution Ave., NW

Washington, D.C. 20210

Or faxed to (202) 693-1635

Or sending an email to [foarequests@dol.gov](mailto:foarequests@dol.gov).

Send a FOIA appeal to:

Solicitor of Labor, U.S. Department of Labor,

200 Constitution Ave., N.W., Room S2002, Washington, D.C. 20210.

#### **Quick Tips**

Make sure to write on your appeal letter and its envelope “F.O.I.A. Appeal.” Once OSHA F.O.I.A. receives your appeal they have 20 days to make a determination.

**Appendix 4**

**Sample Authorization from Workers Electing Party Status**

As employees of the [ employer's name ] we hereby authorize [organization name to represent workers] to represent us under the OSHAct in the company's appeal of any OSHA citations at our workplace.

NAME (Signature)

Address

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NAME (Print)

DATE

TEL

---

NAME (Signature)

Address

---

NAME (Print)

DATE

TEL.

---

NAME (Signature)

Address

---

NAME (Print)

DATE

TEL.

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**In Spanish**

Como empleados de [employer name ] autorizamos a [fill in your organization name here] a representarnos bajo la Ley de Seguridad y Salud Ocupacionales (OSHAct) en la apelación de la empresa contra cualquier citación de OSHA en nuestro lugar de trabajo.

NOMBRE (Firma)

DIRECCIÓN DE LA CASA

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NOMBRE (Imprime su nombre)

FECHA

TELÉFONO

-----  
NOMBRE (Firma)

DIRECCIÓN DE LA CASA

---

NOMBRE (Imprime su nombre)

FECHA

TELÉFONO

-----  
NOMBRE (Firma)

DIRECCIÓN DE LA CASA

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NOMBRE (Imprime su nombre)

FECHA

TELÉFONO

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NOMBRE (Firma)

DIRECCIÓN DE LA CASA

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NOMBRE (Imprime su nombre)

FECHA

TELÉFONO

**Letter to OSHRC Electing Party Status**

[Insert Date]

Executive Director

Occupational Safety and Health Review Commission

1120 20th St., NW

Washington, DC 20036

RE: [Insert Name of Case and OSHRC Docket Number or OSHA Inspection Number]

Dear Sir,

Pursuant to OSHRC Rule 20(a), 29 C.F.R. §2200.20, [number of employees signing authorizations] current employees at [insert name of employer] desire to elect party status in the above-captioned case and have designated the [insert name of organization representing workers] to act as their representative for the purposes of this proceeding. A copy of each employee's designation of the [insert name of organization] as their representative is attached.

Please enter my appearance as representative for [insert name of organization] in the Commission's records. A certificate of service is attached, showing that a copy of this letter was mailed to OSHA, the Office of Solicitor, and counsel for the employer.

Sincerely yours,

[your name]



## Appendix 5

### Federal OSHRC decisions awarding party status to non-union employees

Nov. 2, 1978 Sec’y v. J.P. Stevens (No. 78-2738): In a decision of the full OSHRC (as transmitted by the Executive Secretary), an individual employee Jack Handy was granted party status, including the right to have a labor union (ACTWU) serve as his “representative” pursuant to Commission Rule 1(h) – the definition of “representative.”

October 28, 2005, Sec’y vs Cintas Corp, No. 05-1507: OSHRC Chief ALJ Irwin Sommer overrules employer objection to a labor union serving as a “representative” for individual employees in a non-union worksite, awards party status to two Cintas Corp. workers, and grants them the right to have UNITE HERE serve as their representative:

“Mr. Santos and Ms. Lucca may choose the representative they desire to represent them in this matter, and it is clear from the authorization form that their chosen representative is Unite Here.”

Jan. 4, 2008, Sec’y vs Cintas Corp, No. 07-1710: OSHRC ALJ Kenneth Welsch again overrules objection by Cintas Corp. to the representation of a Cintas employee by a labor union, and despite a specific employer request to consider the issue *de novo* (notwithstanding the decision by Chief Judge Sommer in 2005). ALJ Welsch specifically rejects that request, stating:

“A “person” is defined by the Occupational Safety and Health Act, 29 USC § 652(4), to mean “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” UNITE HERE qualifies as a representative and has entered its appearance by filing a party request on behalf of Anthony. The cases cited by respondent do not support its argument to exclude UNITE HERE as Anthony's representative in this case. The court agrees with Judge Sommer's findings in another case allowing UNITE HERE to participate as a representative of affected employees seeking party status in an Order dated October 28, 2005, in *Secretary of Labor v Cintas*, (No. 05-1507, 2005).

It is, therefore, ORDERED:

- I. Antonio Anthony who is represented by UNITE HERE is granted party status as an affected employee.”