

# **SPRINGFIELD-CLARK COUNTY** **SAFETY COUNCIL**

## **OSHA INSPECTIONS**

**Why Do They Occur**  
**How to Participate in Them**  
**Post Inspection Considerations**

**February 9, 2021**

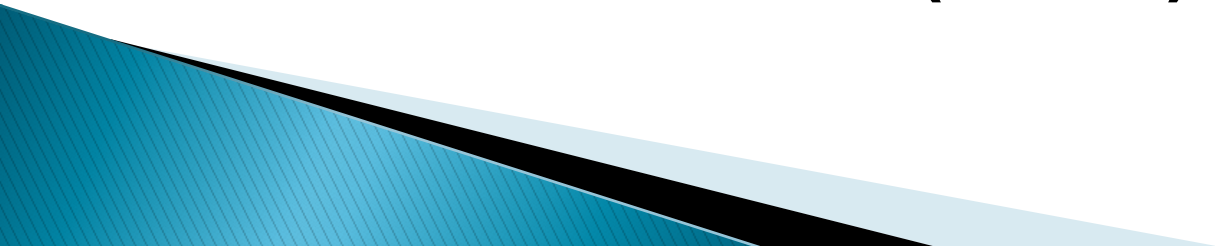
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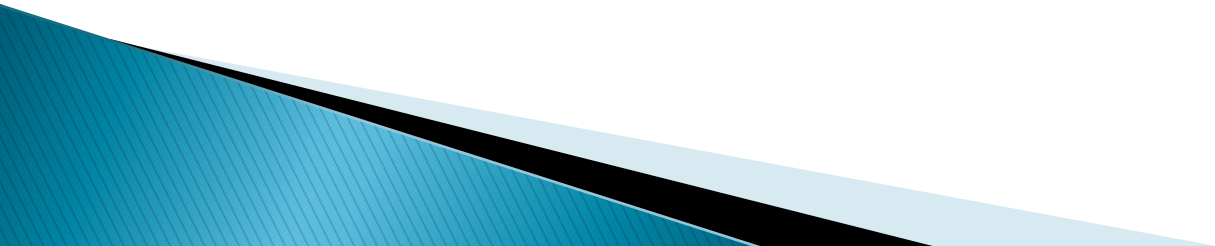
# **WHY IS OSHA KNOCKING** **AT YOUR DOOR?**

- ▶ **This will determine how you handle a visit**
  - **Employee complaint**
  - **Self report – Catastrophic accident**
  - **Third-party report to OSHA**
  - **Follow up**
  - **Emphasis Program**
  - **General schedule (wall to wall)**
  - **Violations in plain sight**

# **EMPLOYEE COMPLAINT**

- ▶ **Limit to complaint item(s)**
  - ▶ **First question for compliance officer:  
Why are you here?**
  - ▶ **Ask to see complaint.**
  - ▶ **Determine how to limit scope of inspection**
  - ▶ **Proceed with opening conference**
  - ▶ **Set parameters for inspection**
  - ▶ **All employee interviews in office area, if possible**
  - ▶ **Employees not involved in inspection are to continue to work. (or not)**
- 

# **SELF REPORT INSPECTION**

- ▶ **You are making report of catastrophic accident – you know OSHA will be there.**
  - ▶ **Call your attorney – In addition to OSHA citations there may be W/C safety issues, third-party lawsuits, etc.**
  - ▶ **When possible, try to get attorney to site ASAP to do initial witness interviews – Nail down statements. If done by your attorney – protected.**
  - ▶ **If attorney is on site when OSHA arrives, let attorney establish protocols.**
- 

## **SELF REPORT INSPECTION contd.**

- ▶ **If attorney is not present, you will need to establish protocol for inspection. Have attorney available by telephone.**
- ▶ **While this sort of inspection may be a little more involved and take longer, it is just a standard complaint type of inspection on steroids.**

**Follow some general protocols.**



# **EMPHASIS PROGRAM**

**LIMIT inspection to concern of emphasis program.**

**Example: Power press emphasis program. Inspector looks only at power presses.**

**Interpret the emphasis program as narrowly as possible – take time to confirm the scope of emphasis program.**



# **GENERAL SCHEDULE**

## **▶ Question probable cause**

**If no probable cause –**

- 1. demand a search warrant**
- 2. in lieu of #1, negotiate the scope of the inspection**

**If OSHA has probable cause, try to limit inspection to scope of probable cause.**



## **DELAY INSPECTION**

**You want someone to handle inspection who is aware of inspection protocols, employer's rights during inspection, and is very knowledgeable with how company operates.**

**Such a person should be there even if attorney is at inspection.**

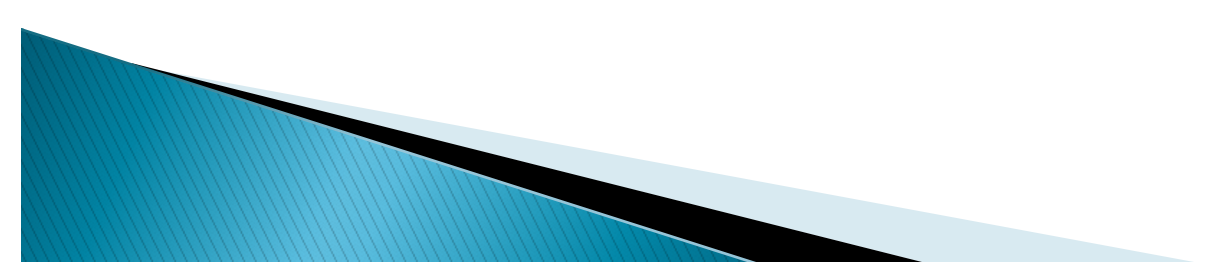




# **OPENING CONFERENCE**

**Use it to set parameters for inspection**

- **How long in facility or at location**
- **Scope of walk around**
- **Number of employee interviews**
  - **Where are these to take place**
- **Trade secret issues**
- **Identify employee representative**



# OPENING CONFERENCE contd.

▶ **Initial records review –**

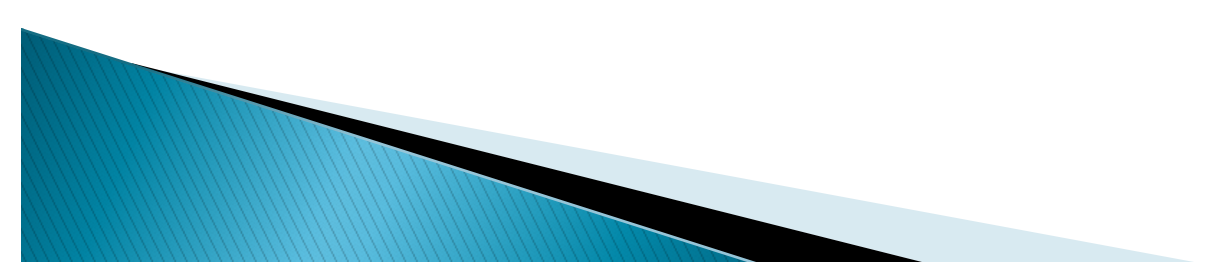
**OSHA 300**

**Safety program**

**HazCom program**

**Forklift training**

**PPE program**



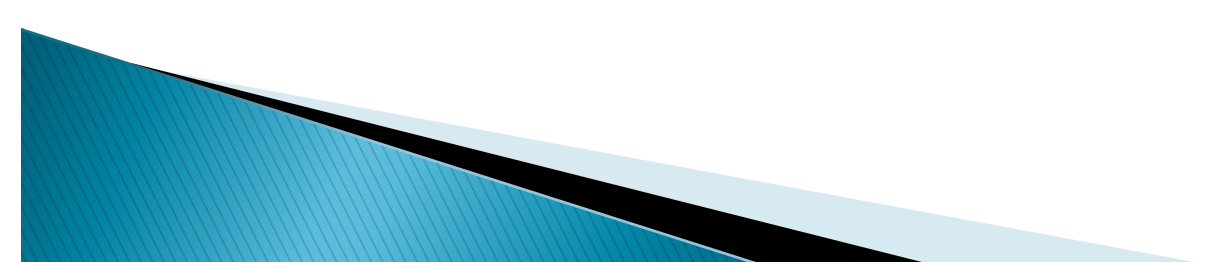
# **THE INSPECTION**

**Never leave compliance officer alone.**

**Remember any violations observed by CSHO may be cited, even if not connected to complaint item.**

**Any kind of focused inspection – to site as directly is possible.**

**Take entire visit seriously.**



## **THE INSPECTION contd.**

**Answer questions asked – If not sure, talk to counsel.**

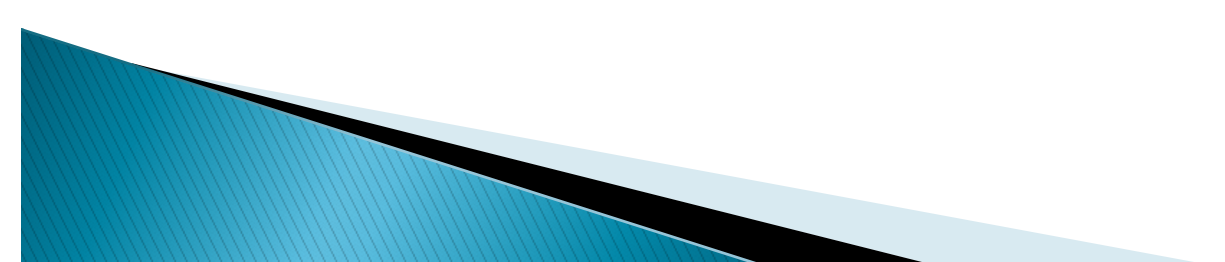
**NEVER LIE**

**Take duplicate photographs & measurements.**

**Take lots of photographs.**

**Ask to split samples.**

**Pay attention – Is CSHO video or tape recording any part of inspection?**



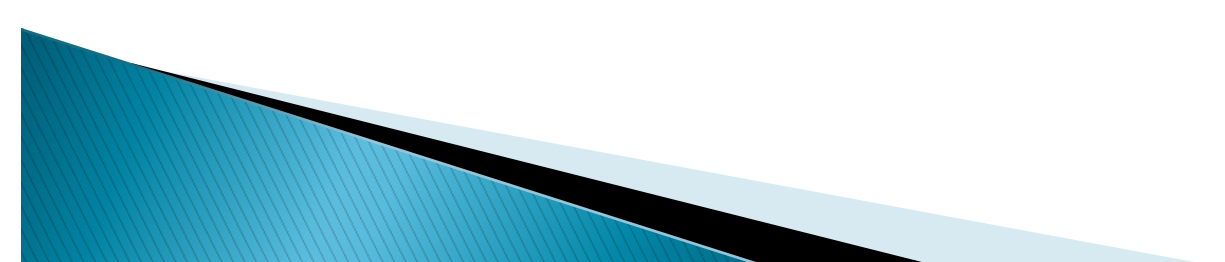
## **THE INSPECTION contd.**

**Whenever air monitoring is done, take photos of area and note environmental conditions. Take photos of any employees who are wearing monitoring equipment.**

**Do not volunteer information.**

**Take notes of everything CSHO does, where he/she goes, who they speak to.**

**Permit confidential employee interviews re issues which are focus of inspection.**



## **THE INSPECTION contd.**

**Speak with CSHO re limiting number of interviews.**

**Remember, information obtained during confidential interview can result in expanded inspection.**

**Enforce all safety rules in accordance with your safety enforcement program.**



# **COMPETENT PERSON**

**Compliance Officer will ask to see competent person.**

**Also, competent person for:**

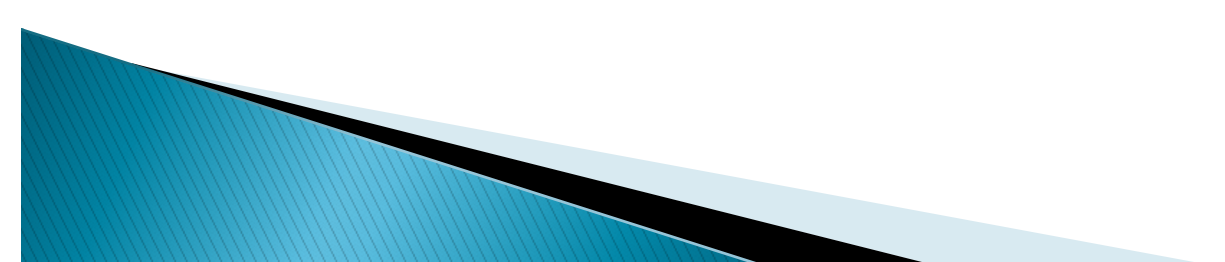
**Scaffolding**

**Fall Protection**

**Silica**

**Confined space**

**Asbestos**



## **CLOSING CONFERENCE**

**May be done in person or by telephone.**

**Avoid arguing with CSHO regarding possible citations.**

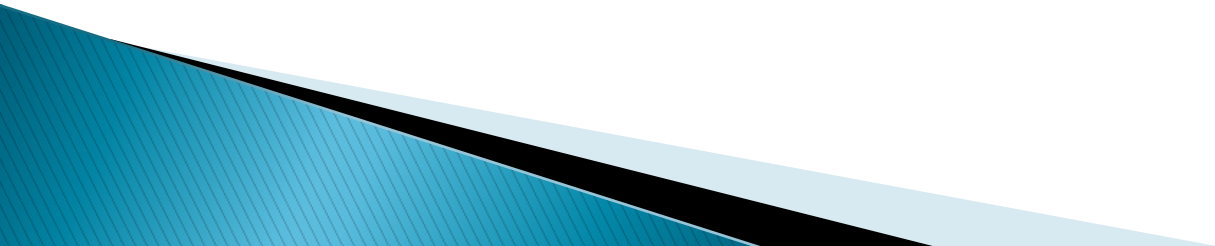
**Do not agree with suggested violations with CSHO.**

**If CSHO wants to continue or expand inspection, seek advice of counsel.**

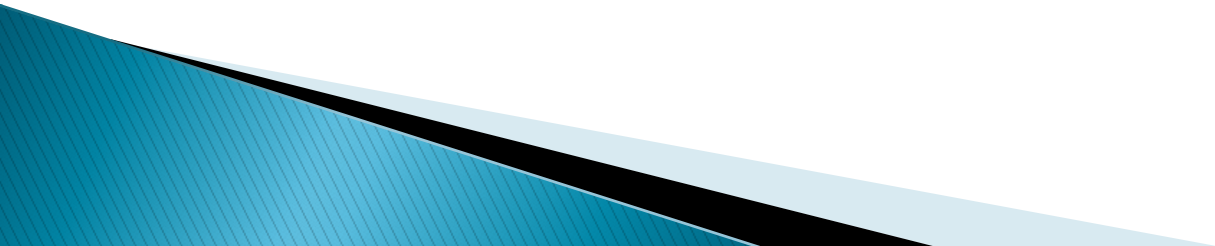




# **REASONABLY RESPONSIBLE EMPLOYER**

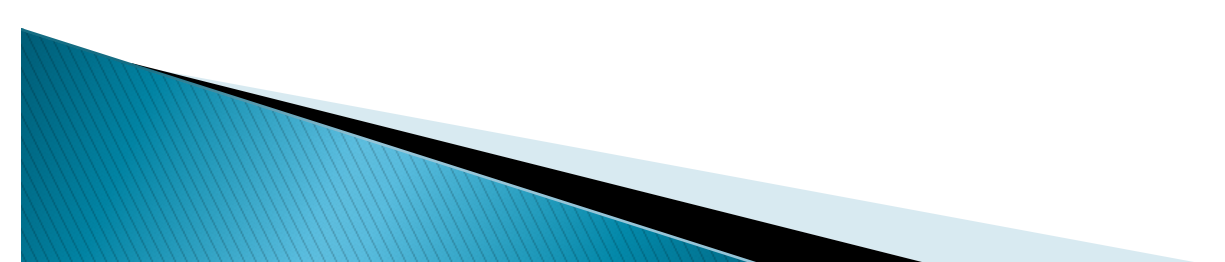
- ▶ **Does effective training**
  - ▶ **Has appropriate competent persons on job site**
  - ▶ **Audits job site**
  - ▶ **Enforces all safety rules**
  - ▶ **Only trained individuals are empowered to make safety related decisions**
- 

## Records request by CSHO

- ▶ **SDSs for all hazardous materials (Immediate)**
  - ▶ **OSHA 300 logs (back 3 yrs.)**  
**(4 business hours)**  
**Confirm time limit with CSHO**
  - ▶ **Confined space evaluation (Immediate)**
  - ▶ **PPE Hazard Assessment**
  - ▶ **Safety Program or IIPP**
- 

## Records request by CSHO cont'd.

- ▶ **Training records**
- ▶ **LOTO program evaluation (If applicable)**
- ▶ **Heat Illness Prevention Program (If applicable)**
- ▶ **Initial Exposure Assessments (If applicable)**



# OSHA CITATIONS ISSUED

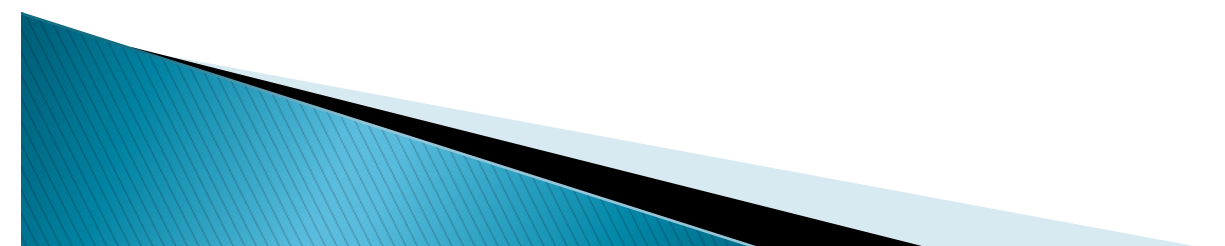
## **OSHA Citations Issued**

- **Informal Conference**
- **Settlement**

## **Notice of Contest (NOC)**

- **Simplified Proceedings**
- **Regular Proceedings**
- **Continued Negotiations with Area Director**
- **Settlement**


## **Court of Appeals**



# **EVALUATING OSHA CITATIONS**

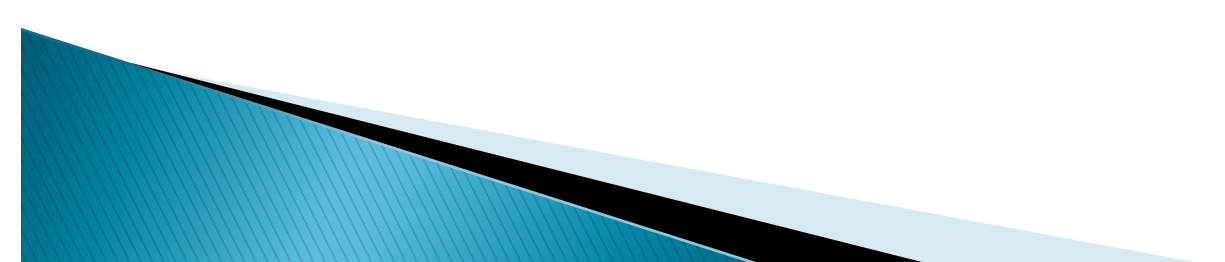
- ▶ **Carefully review standards cited and claims made in citation.**
- ▶ **Determine liability.**
- ▶ **Determine course of action.**
  - **Informal conference**
  - **Move directly to NOC**

# **DETERMINING LIABILITY**

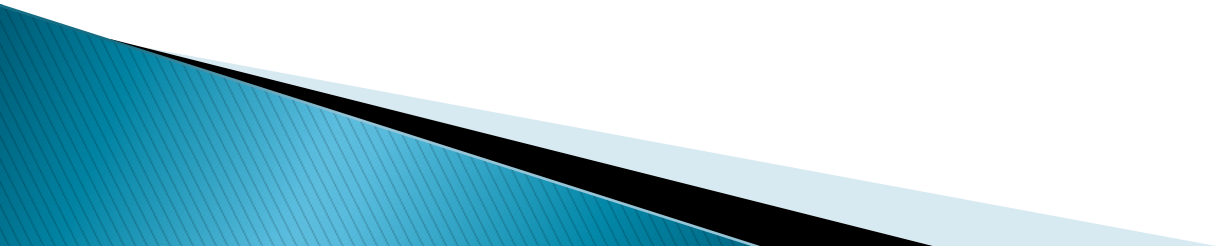
- ▶ **Are facts as stated correct?**
  - ▶ **Was anyone in management aware of alleged violations?**
  - ▶ **Are standards cited correct?**
  - ▶ **Has General Duty Clause been properly applied?**
  - ▶ **Is employee misconduct involved?**
  - ▶ **Is a defense available?**
    - **Affirmative, factual or legal.**
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## **COURSE OF ACTION**

- **Informal Conference**
- **Accept informal settlement offer received.**
- **Proceed directly to NOC.**



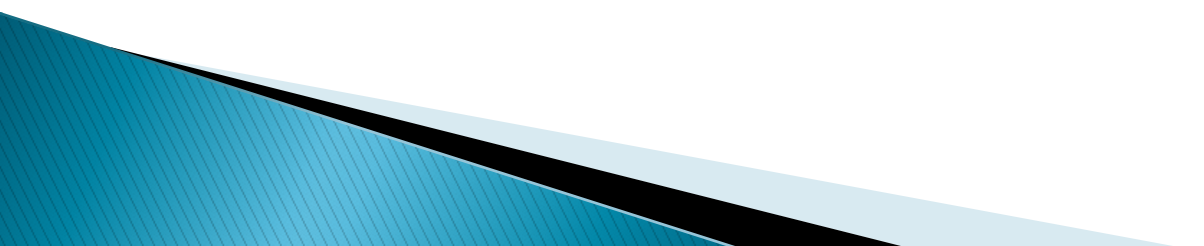
# INFORMAL CONFERENCE

- ▶ **Meet with Area Director.**
  - ▶ **Always have a game plan.**
  - ▶ **Used primarily to lower penalty.**
  - ▶ **New FOM guidelines.**
- 



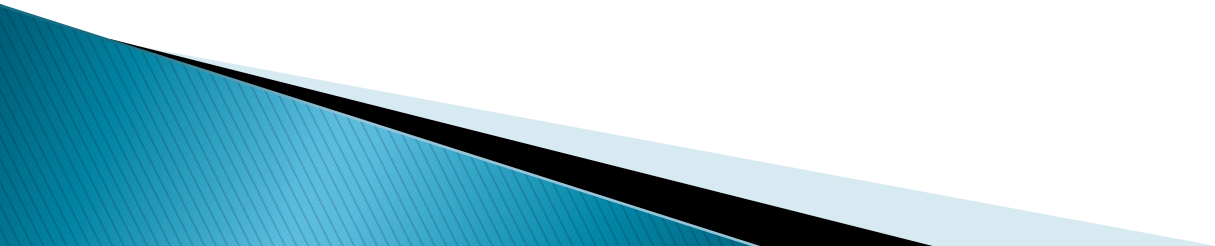
# **AREA DIRECTOR AUTHORITY**

**Determine whether size in history reduction is appropriate.**

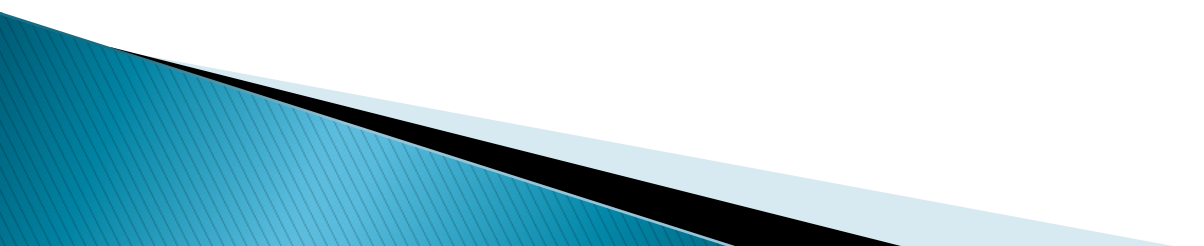
- **Area Director may offer up to a 30% reduction**
  - **Any reduction over 30% will have to be approved by Regional Director.**
  - **May offer additional 20% reduction to employers with fewer than 250 employees if employer agrees to hire outside safety consultant.**
- 

# SIZE REDUCTION


<u>Employees</u>	<u>Was</u>	<u>Is</u>
<b>1 - 25</b>	<b>60%</b>	<b>40%</b>
<b>26 - 100</b>	<b>40%</b>	<b>30%</b>
<b>101 - 250</b>	<b>20%</b>	<b>10%</b>
<b>250 or more</b>	<b>0</b>	<b>0</b>



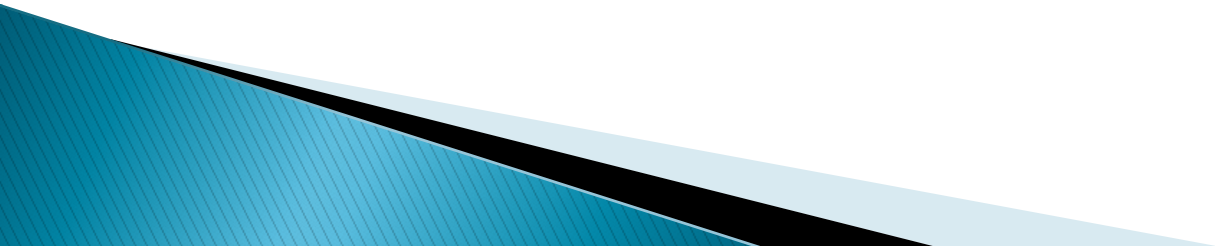
## **GOOD FAITH**

- ▶ **Retain up to 15% of reduction for good faith effort to maintain an effective safety and health management plan.**
  - ▶ **Program must be in place to get reduction.**
  - ▶ **Penalty reduction of 10% if strategic partnership agreement is eliminated.**
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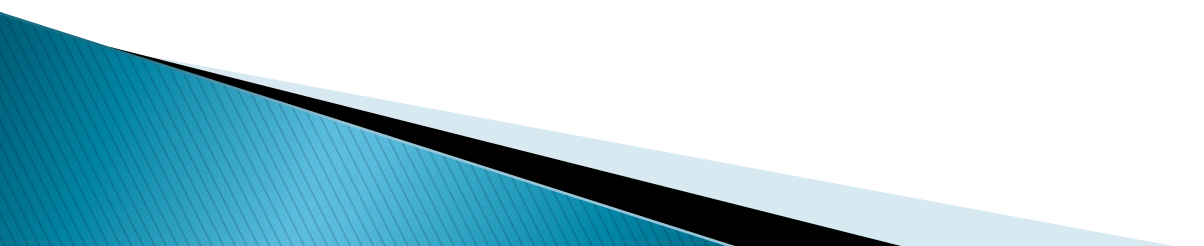
# FILE NOTICE OF CONTEST

- ▶ **Should be done only after careful consideration.**
  - ▶ **Know what you want.**
  - ▶ **Use is questionable if penalty is only concern.**
  - ▶ **Used primarily to raise legal or factual defenses.**
  - ▶ **Union can elect party status.**
- 

## **NOTICE OF CONTEST**

- ▶ **S/L – 15 working days from receipt by employer of citations.**
  - ▶ **Filed with Area Director.**
  - ▶ **Area Director sends file to Review Commission.**
  - ▶ **Chief Judge determines status.**
- 

# **SIMPLIFIED PROCEEDINGS**

- ▶ **Chief Judge assigns Administrative Law Judge.**
  - ▶ **DOL attorney has limited time to send investigation file info to employer or its attorney.**
  - ▶ **Judge assigned to case sets date and time for prehearing conference call and for hearing.**
  - ▶ **Either party may object to simplified proceedings designation.**
- 

# **SIMPLIFIED PROCEEDINGS**

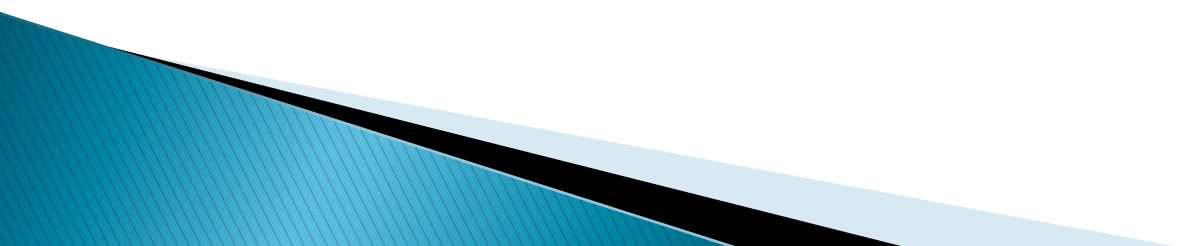
- ▶ **No formal discovery (depositions or interrogatories)**
- ▶ **Prehearing conference call**
  - **Narrow issues**
  - **Agreement on as many facts as possible**
  - **Statement of defenses by employer**
  - **List of witnesses and exhibits**

**Eliminates or at least minimizes motions**



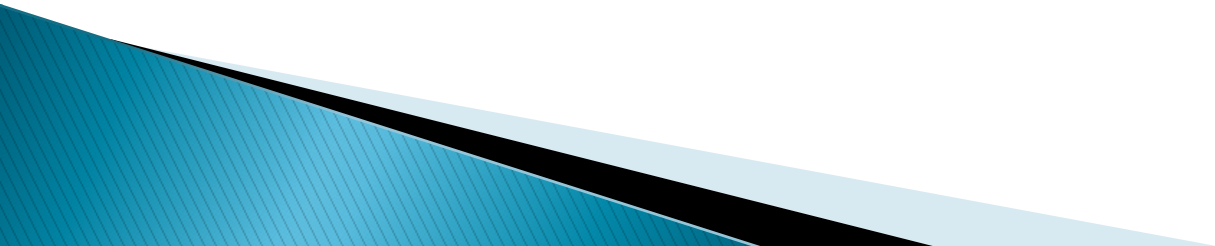
# SIMPLIFIED PROCEEDINGS

## **Not available:**

- **In cases involving a fatality or willful or repeat citations**
  - **In cases with proposed penalties greater than \$30,000**
  - **When hearing is expected to last longer than 2 days**
- 



## **STANDARD PROCEEDINGS**

- ▶ **DOL attorney is given fixed period of time to file a complaint.**
  - ▶ **Upon receipt employer attorney files answer.**
  - ▶ **Should also file discovery requests at same time.**
  - ▶ **No evidence received from OSHA without a discovery request.**
  - ▶ **An answer must state affirmative defenses.**
- 

# **STANDARD PROCEEDINGS**

- ▶ **Judge sets prehearing conference call and hearing date and time.**
  - ▶ **Discovery is permitted.**
  - ▶ **Post hearing briefs are accepted.**
- 

# **POST HEARING PROCEDURES**

**After receipt of Judge's decision, the employer may:**

- **Accept decision**
- **File petition for discretionary review by Review Commission.**

**If case is not directed for review, Judge's decision becomes final unless a Petition for Review is filed in Court of Appeals.**



# **REVIEW COMMISSION DIRECTS REVIEW**

- ▶ **Briefs by both parties**
- ▶ **Review Commission may affirm, modify, or reverse Judge's decision.**



# POST REVIEW COMMISSION

**Appeal as of right to Federal Appellate Court within jurisdiction of where the citation was issued, where the corporation has headquarters, or D.C. Circuit.**



## **STATE OSHA**

**In most states, procedure is completely different than with Federal OSHA.**

**Most state OSHA procedures are more complex than Federal OSHA.**

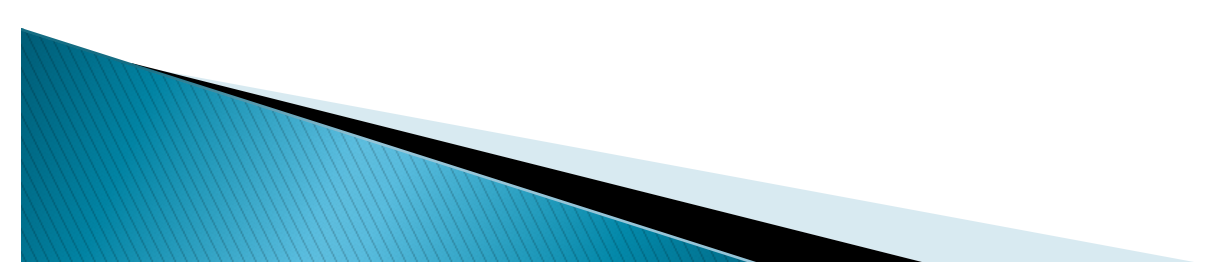
**Many states take a much more fixed position on settlement.**



**DO — Have a person knowledgeable within your company on OSHA inspection procedures and your rights during an inspection**

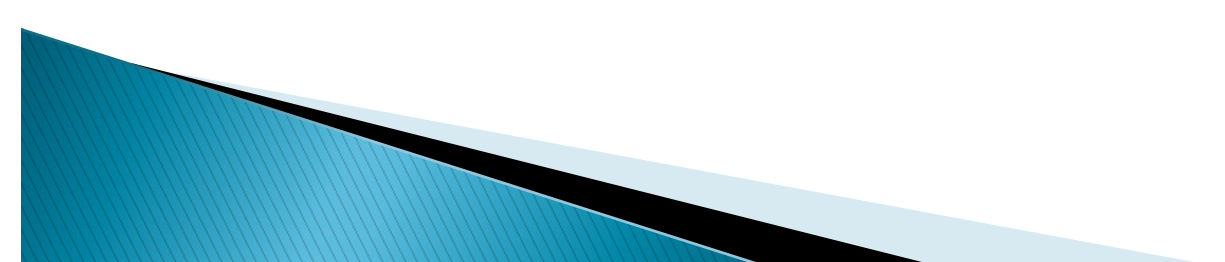
**- OR -**

**Have someone you can rely on who has that knowledge.**



**DON'T** — Automatically demand a search warrant.

**Be sure you have a reason beyond delaying the start of the inspection.**

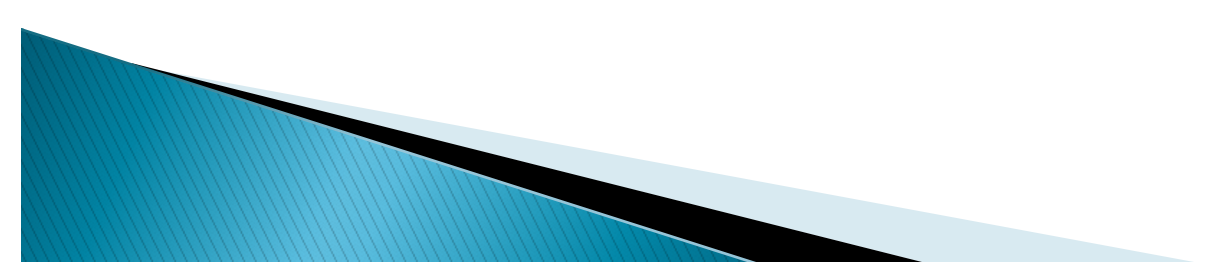




**DON'T — Permit OSHA inside your facility or on to your job site until your knowledgeable person is on the site.**

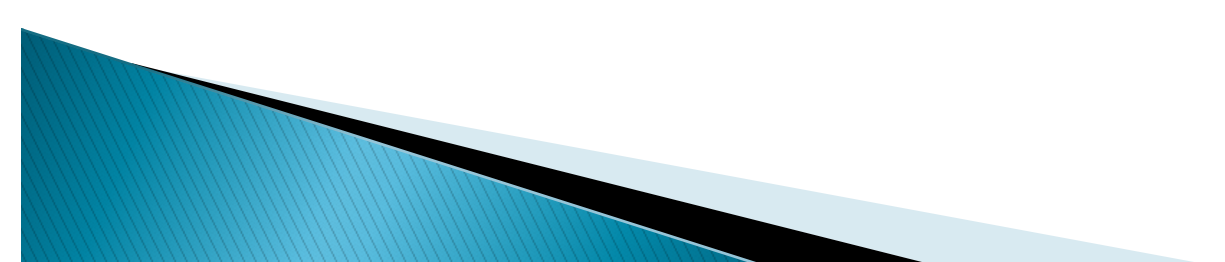
**- OR -**

**Until your outside counsel or your consultant is on the site.**



**DO — Request to see the compliance officer's credentials before providing any information to him/her or permitting him/her access to your work area or your employees.**

**DO — Ask and obtain the reason for the CSHO visit before making any decisions about the requested inspection. (Your right)**



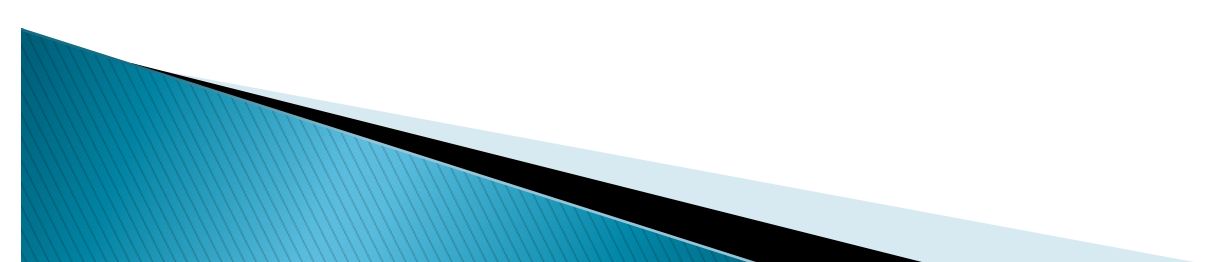
**If it is to be an inspection based on an employee complaint, **DON'T** show the CSHO more than the subject of the complaint.**



**DO** be courteous.

**DON'T** be casual — this is serious business.

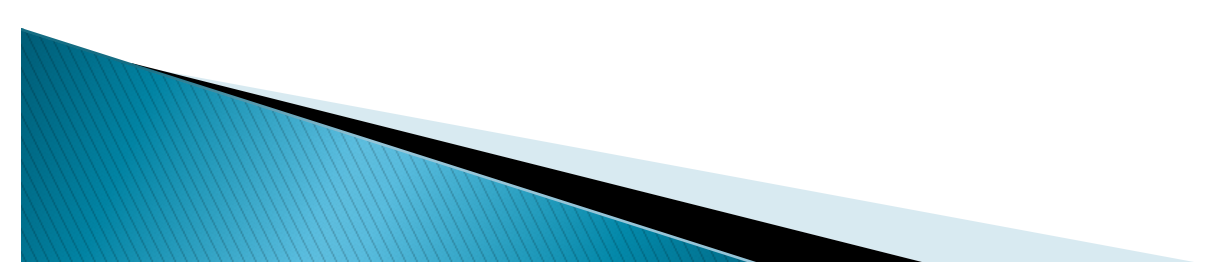
**DON'T** argue with the CSHO — you can't win.



**DON'T** volunteer information.

**DO** answer questions to the best of your ability.

**DO** answer only the question asked.

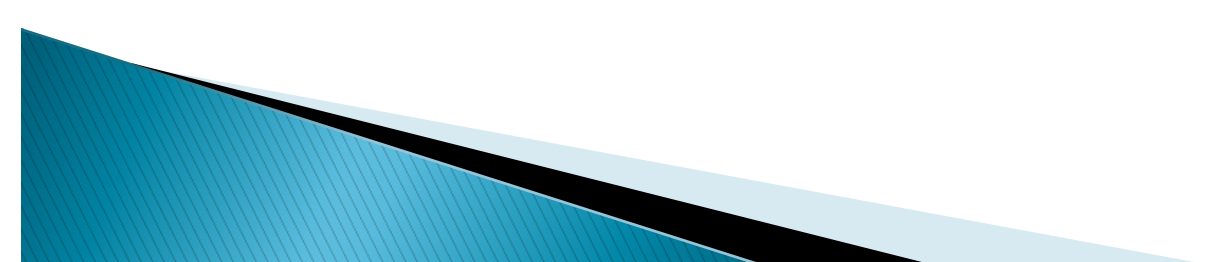


**DO** ask if anything you are saying is being recorded.

**DO** be aware of any videotaping that is being done by CSHO.



**DON'T LEAVE** compliance officer alone  
while he/she is on your construction site.



**DO** permit the CSHO to conduct confidential interviews.

**DO** note all interviews by CSHO – who and how long.

**DO** attempt to participate in any management interviews.



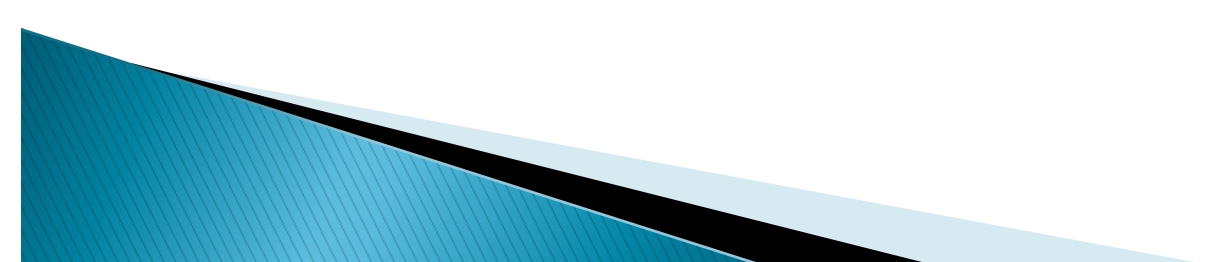


**DON'T** permit CSHO to direct your employees.

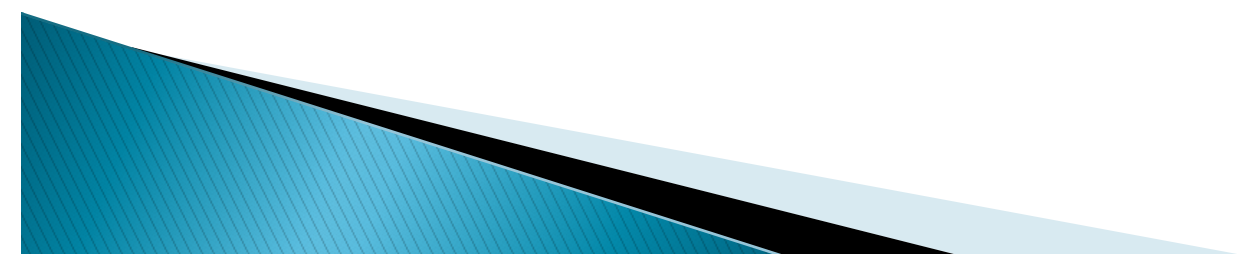
**DON'T** permit CSHO to have a “private” demonstration of equipment under color of confidential interview.



**DON'T** permit the CSHO to hold group discussions on the construction site.



**DON'T** lie to the CSHO.



**DO** enforce **ALL** of your safety rules while with the CSHO. This extends to the CSHO as well as your employees.

**DO** issue appropriate discipline.

**DON'T** violate your own safety policy just to accommodate the CSHO.

**(The CSHO signing a release is not enough.)**



**DO** be sure that if the CSHO is observing an employee operate equipment, the employee is operating it according to established procedures.

**DON'T** permit CSHO to conduct experiments.



**DO** take many notes.

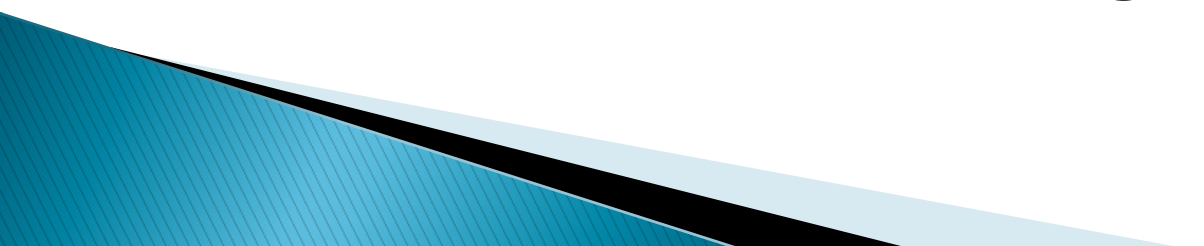
**DO** take duplicate measurements. If you feel the measurement made by CSHO is not accurate, **DO** take what you believe is correct measurement in addition to noting CSHO measurement.



**DO** take photographs.

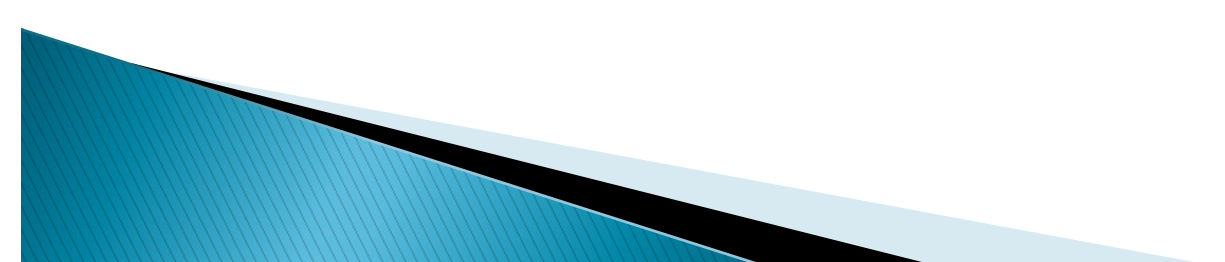
**DO** make sure they are duplicates of CSHO photos. If CSHO takes samples, **DO** request to split sample or **DO** take your own sample.

**DO** note environmental conditions, whenever samples are taken, as well as how CSHO monitors sampling.



**DON'T** release copies of any employee records without first checking with H/R Dept. or legal counsel.

**DO** correct any hazards observed by CSHO immediately, during inspection, if possible.





**DO** be efficient – get CSHO out of facility or off construction site ASAP.

**DON'T** invite CSHO back to pick up any records which were not immediately available during inspection.