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Baird Holm Labor Law Webinar Series

Session Eight

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Ignorance May Not Be Bliss: What You Should Know About OSHA, But Probably Don't

R.J. (Randy) Stevenson

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Overview of OSHA, Inspections, and Citations

- Over which employers does OSHA have jurisdiction?
- The OSH Act and its regulations
 - Standards
 - General Duty Clause
- Enforcement
- Inspection phases

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Citations and Penalties

- Other than Serious – Max \$13,494 per penalty
- Serious – Max \$13, 494 per penalty
- Willful – Max \$134,937 per penalty
- Repeated – Max \$134,93 per penalty
- Failure to correct – Max \$13,494 per day

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Before OSHA Comes Calling

- General Preparation
 - Safety and health program/discipline
 - Train employees/document training
 - Regular safety meetings
 - Stay up-to-date on recordkeeping
- Designate a “Walk-Around Team”
 - Team leaders
 - Train the team
 - Search warrant issue – require or not
 - “Government Inspections” policy

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What to Do Before OSHA Calls (cont.)

- Equip the Team
 - Video
 - Other monitoring equipment
- Pre-Inspection Audits
 - Internal, external, and consultation program
 - Attorney-client privilege and attorney work product rule issues

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Response Upon OSHA's Arrival

- Remain calm
- Invoke any search warrant requirement
- Consider granting "limited consent"
 - Remember the "plain view" doctrine
- Use an outside employer representative (e.g., legal counsel)
- The less said, the better

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Response Upon OSHA's Arrival (cont.)

- Gather evidence/take notes
- Do not allow unreasonable disruption
- Abatement During an Inspection
- Employee Interviews
 - Non-Supervisory
 - Prepare/Debrief
 - Supervisory

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Post- Inspection/Pre-Informal Conference

- Closing conference
- Following
 - Continue gathering evidence
 - Submit any exculpatory evidence to OSHA

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Following Receipt of the Citation

- The Informal Conference
 - Timing Issue
 - Attend or forego considerations
 - Penalty amount/concern over "repeat" liability
 - Potential tort liability (death/serious injury)
 - Abatement concerns
 - Ability to secure new business
 - Free Discovery

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Preparing for the Informal Conference

- Schedule ASAP
 - Identify attendees
 - In-person or by phone?
- Ascertain factual and legal arguments
- Formulate the game plan
 - Play-by-play and "color commentary"
 - Documents, photos/video, and other supporting evidence
 - Standards interpretations and cases

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Strategy at the Informal Conference

- Execute the game plan
 - Order of discussion
 - Set the tone/identify "must haves"
 - Don't lose credibility by overreaching
- Factual, followed by legal, arguments
 - Factual inaccuracies
 - No knowledge (or reason to know) of hazard
 - The law is subject to different interpretations
 - OSHA lacks sufficient evidence/limitations

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Strategy at the Informal Conference (cont.)

- Remember Mitigating Factors/Affirmative Defenses
 - Past OSHA, safety, and workers' comp record
 - Safety program and investment in safety
 - Low employee exposure to the hazard
 - Potential injury not great
 - No employee exposure
 - Employee misconduct



Strategy at the Informal Conference (cont.)

- Horse trading
 - Withdraw versus across-the-board reductions
 - Group cited items/have one penalty
 - Reclassify (e.g., "OTS")/cite a different regulation
 - Revise the language (esp. if tort concern)
 - Withdraw in exchange for training, etc.
- Settlement
 - Nonadmission clause (esp. if tort concern)
 - Notice of Contest



The Notice of Contest

- Always use legal counsel - this is litigation
- Must be written/received by OSHA by 15th working day after receipt of citation
- Failure to contest, no further recourse for review - final non-appealable order
- If in doubt about proposed settlement, file a Notice of Contest - settlement discussions can continue with the Regional Solicitor



Questions?

R.J. (Randy) Stevenson
rstevenson@bairdholm.com
(402) 636-8226

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