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## Keeping OSHA Out of Your Bank Account

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September 2020

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## Questions?

Please email [arichie@grsm.com](mailto:arichie@grsm.com) or [snorman@grsm.com](mailto:snorman@grsm.com) if you have questions during the presentation.

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# Keeping OSHA Out of Your Bank Account



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## Types of Inspections

**Programmed** Inspections

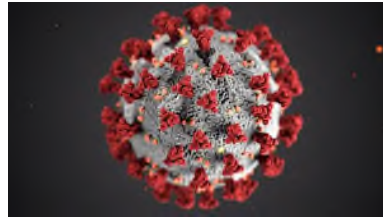
**Unprogrammed** Inspections

- Employee Complaints
- Referrals
- Imminent Dangers
- Fatalities and Catastrophes
- Follow-up inspections



## Inspections Related to COVID-19

- Employees have the right to:
  - Request an OSHA inspection,
  - Speak to the inspector, and
  - Report an illness.
- Best Practice:
  - Have a written plan documenting what training and measures have been taken to protect employees from COVID-19.



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## What Happens During an Inspection?



- Opening Conference
- Walkaround
- Interviews
- Document Requests
- Closing Conference

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## Opening Conference

- Inspector will present credentials
  - Employer has right to refuse entry without a warrant (generally not recommended)
- Nature and scope of inspection explained
  - ask to see written complaint if applicable

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## Opening Conference (cont'd)

- Identify areas containing confidential information or trade secrets
- Require inspector to follow all workplace safety procedures
- \*\* Select **at least 2 company representatives** in advance of an inspection who will represent the Company's interests during an OSHA inspection

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# Walkaround

- Know the proper scope of the inspection
- Take your own photographs/video or measurements
- Correct unsafe conditions observed during walkaround



# Interviews

- Management employees have a right to representation during an OSHA interview
- OSHA has the right to interview non-management employees in private
- Employers can conduct their own interviews of employees before and after OSHA inspection

**(BUT BE CAREFUL)**

EMPLOYEE INTERVIEW GENERAL PROGRAM QUESTIONNAIRE

Company Name: *Blue Chip*    Division: *Production*

Name: *[Redacted]*    Phone: *[Redacted]*

Address: *[Redacted]*    Job Title: *PEK*    Department: *Production*

How Long this Work?    Yes    No    Days    Prior job type of work?    Yes    No    How Long?    *10*    Days

How Long with this Company?    Yes    No    Days    Shift:    *1st*    Hours/Day:    *10-12:30*

Name of Area work: *Mechanical*    Machines work on?    *None*

What is UNSAFE?    *None*

Who is in Charge?    *[Redacted]*

Employer does inspections?    *Y*    N    *OK*    What was the last SAFETY MEET about?    *Fire*

How do you Report a Safety Hazard?    *Report to supervisor*

How do you Report Accident?    *Report to supervisor*

What happens if you violate SAFETY rules?    *Report to supervisor*

OTHER REQUIRED WRITTEN AND PRACTICED PROGRAMS

Work with Hazardous Substances?    *Y*    N    *OK*    Training?    *Y*    N    *OK*

What is Program and MSDS?    *MSDS*

Where is Program and MSDS?    *MSDS*

How long work in that area?    *10*    Years

Who pays for the PPE?    *Company*

Is there training on the use of PPE?    *Y*    N    *OK*

Has your work been evaluated for PPE appropriateness?    *Y*    N    *OK*

*Company for pallet jack*

*people in charge of safety meet for safety talks only*

*Should talk w/ supervisor prior to work shift about safety meets they attend*

# Document Requests

- Ask that document requests be **in writing**
- Maintain **your own copy** of records produced
- Keep safety polices, disciplinary records, etc. **easily accessible**

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH  
High Hazard Unit North  
CALIFORNIA Dept. 1500, Box 40  
COLUMBIA, CA 95019  
Tel: (510) 622-3009 Fax: (510) 622-3025 www.dir.ca.gov/OSHS

**DOCUMENT REQUEST**

EMPLOYER: Edwards Lifesciences DATE: 8/12/15 Request by: 8/15/2015  
 EMPLOYER CONTACT: Edwards Lifesciences CALIFORNIA INSPECTOR: John H. Hume

As discussed during the inspection on 8/12/15, it has been determined that copies of the following documents are required for review. Please provide the CALIFORNIA inspector with the required copies by the "submit" date noted above. If the copies are not provided by that date, it will be interpreted as an admission that the documents do not exist, and possible citations and monetary penalties could result.

Submit by: 8/14/15

<input checked="" type="checkbox"/> Licenses & Permits - Reference Letter # 150101 No. 01 CCR 80 Current Reg. 0 Form Labor Certificate	Rec'd
<input type="checkbox"/> Facility Layout (floor plan, elevation, cross-section, etc.)	Rec'd
<input checked="" type="checkbox"/> OSHA Log 300 (from <u>2012</u> to <u>2015</u> ) - <u>CCR 1481</u> w/ <u>300 A</u>	Rec'd
<input type="checkbox"/> OSHA 5020 (Employer's First Report of Injury)	Rec'd
<input type="checkbox"/> DWC Form 1 (Worker's Compensation Claim)	Rec'd
<input checked="" type="checkbox"/> Worker's Compensation Insurance Certificate	Rec'd
<input checked="" type="checkbox"/> Injury and Illness Prevention Program (written safety program) # CCR 3201	Rec'd
<input checked="" type="checkbox"/> Safety Inspection Records - <u>Most current 4</u>	Rec'd
<input checked="" type="checkbox"/> Employee Training Records	Rec'd
<input checked="" type="checkbox"/> Safety Committee Meeting Minutes - <u>IF ANY</u>	Rec'd
<input checked="" type="checkbox"/> Heat Illness Prevention Program # CCR 3393	Rec'd
<input checked="" type="checkbox"/> First Aid Kit approval # CCR 3400	Rec'd
<input checked="" type="checkbox"/> Emergency Action Plan # CCR 3220	Rec'd
<input checked="" type="checkbox"/> Fire Prevention Plan # CCR 3221	Rec'd
<input checked="" type="checkbox"/> Hazard Communication Program # CCR 3191	Rec'd
<input checked="" type="checkbox"/> Hazardous Waste Management - <u>Linked info for Ammonia unit</u>	Rec'd
<input checked="" type="checkbox"/> Respiratory Protection Program # CCR 3144	Rec'd
<input checked="" type="checkbox"/> Hearing Conservation Program (Noise) # CCR 3097	Rec'd
<input type="checkbox"/> Exposure Control Plan / Bloodborne Pathogens # CCR 3193	Rec'd
<input checked="" type="checkbox"/> Workplace Exposure Records/Measuring Results - <u>NOISE &amp; AIR - IF ANY</u>	Rec'd
<input checked="" type="checkbox"/> Chemical Hygiene Plan # CCR 3191	Rec'd
<input type="checkbox"/> Carcinogen Registration # CCR 4006/110	Rec'd
<input checked="" type="checkbox"/> Permits / Variances for <u>AIR COMPRESSORS - IF ANY</u> - <u>not provided</u>	Rec'd
<input checked="" type="checkbox"/> Maintenance Records of Equipment - <u>HYDRA, FORK LIFTS, PUMP SYSTEMS</u>	Rec'd
<input checked="" type="checkbox"/> Safety Instructions / Equipment Manuals	Rec'd
<input checked="" type="checkbox"/> LIST OF EMPLOYEE NAMES & JOB TITLES	Rec'd
<input checked="" type="checkbox"/> FORK LIFT CERTIFICATIONS OF AUTH. DRIVERS	Rec'd

If you require an extension of time in order to satisfy this request, please contact the CALIFORNIA inspector identified with your inspection at the phone numbers above before the deadline.

INSPECTION NO. 1084145 INSPECTOR ID: 71691 OFF RPT NO. 205-116  
OSHA 1420 (8)

# Closing Conference

- Don't try to **argue** or **settle** citations with the inspector
- Clarify the **specific standards** being cited
- Do not **admit** violations or recognized hazards
- Take thorough notes

## So You Got a Citation?



TAKE IT, TALK ABOUT IT OR CONTEST IT?

## Types of Citations

- Willful → Up to \$134,937
- Repeat → Up to \$134,937
- Serious → Up to \$13,494
- Other than Serious → Up to \$13, 494
- Failure to abate → Up to \$13,494/day

## Informal Conference

- Employer may request an Informal Conference after citations are issued (must be completed within 15 working days)



- OSHA Program Director is authorized to enter into settlements that revise citations

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## How to Contest

- Employer has **15 working days** from receipt of citation to file a Notice of Contest, until the citation and penalty are final
  - Must Identify what you are contesting
  - Must be in writing
  - May be mailed, but must be postmarked within 15 days
  - No extensions

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## Procedure After Notice of Contest

1. OSHA files suit
2. You file an Answer
3. Discovery and negotiations
4. Hearing

See State Administrative Regs for Details

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## Administrative Hearing

- Hearing before the ALJ is similar to bench trial
  - Opening statements
  - Witnesses
  - Post-hearing briefs
  - Decision
  - Appeal

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## OSHA'S Burden



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## OSHA'S Burden (cont'd)

In order to prove a violation of a standard, OSHA must prove four elements:

- 1) The standard cited applies to the conditions;
- 2) There was noncompliance with the standard;
- 3) An employee was exposed to or had access to the hazardous condition; and
- 4) The employer knew or should have known of the hazardous condition.

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## Defenses

### Preemption

### Procedural

- Statute of Limitations – 6 months
- Lack of reasonable promptness

### Substantive

- Employee misconduct
- Impossibility of compliance
- Greater hazard
- Lack of exposure/knowledge
- Existence of more specific standard

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## Most Common Defenses

1. Lack of knowledge
  - ✓ employer **did not and should not** have known of the hazardous condition
2. Employee misconduct
  - ✓ Conduct unknown to the employer;
  - ✓ in violation of a work rule;
  - ✓ which was communicated and uniformly enforced.



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## Document Your In-House Inspections

- 1) Include **duty to inspect** in job descriptions
  - Can be simple language
- 2) **Create forms** to record daily inspections
  - Date, Area of Inspection, Pass/Fail
- 3) **Keep records** of disciplinary actions
  - Even if verbal warning, record it

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## Documentation Regarding COVID-19

- Per OSHA's recordkeeping requirements, COVID-19 is a recordable illness.
- If there is "objective evidence" that the employee contracted the virus at work, it must be recorded.
- Recording a COVID-19 case does not, of itself, mean that an employer has violated an OSHA standard.



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## Retaliation Provisions

- OSHA may issue citations to employers for retaliating against employees for **reporting work-related injuries and illnesses**.
- OSHA can require abatement even if no 11(c) complaint has been filed:
  - » Reinstatement
  - » Back-pay

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## Injury Reporting Information to Employees

- Employers required to develop employee injury and illness reporting requirements – employers **must inform** employees of the following:
  - **Procedures for reporting** work-related injuries and illnesses promptly and accurately.
    - Employees must not be deterred or discouraged from reporting injuries and illnesses.
    - Reasonable reporting procedures are required.
  - **Employees have the right to report** work-related injuries and illnesses.
  - **Employers are prohibited from discharging or in any manner discriminating against employees for reporting** work-related injuries and illnesses.

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## Workers' Rights Regarding COVID-19

- Employees have the right to talk to their employers about hazards without fear of retaliation.
  - Retaliation includes firing, demoting, or transferring due to an employee raising a COVID-related concern.



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## Drug Testing as a Form of Retaliation

- OSHA “prohibit[s] employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses” *and*
- “Blanket post-injury drug testing policies deter proper reporting.”

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## Drug Testing as a Form of Retaliation (cont'd)

- OSHA states: “Employers need not specifically suspect drug use before testing, but **there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness** in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as **punitive or embarrassing** to the employee is likely to deter injury reporting.”

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## Drug Testing as a Form of Retaliation (cont'd)

### Best Practices:

- Investigate potential causes of incidents before conducting post-incident testing.
- Do not have a blanket post-injury drug or alcohol testing policy.
- Do **not** tie drug and alcohol testing to:
  - **Injuries alone.**
  - The employee's **filing of a workers' compensation claim.**
  - An OSHA recordable **injury or illness.**

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## Recordkeeping

1. Injury Reporting Procedures
2. Post – Incident Drug Testing Policies
3. Safety Incentive Programs
4. Covid-19 Health Records
  - » This includes test results and temperature check results.

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## Safety Incentive Programs

- OSHA states: “It is a violation... for an employer to take adverse action against an employee for reporting a work-related injury or illness, **whether or not such adverse action was part of an incentive program.**”
- “Therefore, it is a violation for an employer to use an incentive program to take adverse action, including **denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus** or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness.

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## Safety Incentive Programs (cont'd)

- Ensure rewards and benefits are based on **leading** indicators rather than **lagging** factors.
  - **Lagging** factor
    - Injury rates
    - Recordable injuries over set period of time
  - **Leading** indicator
    - Compliance with safety rules
    - Completing training programs
    - Participation in safety committee

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## Safety Incentive Programs (cont'd)

### Example 1:

- Employer informs its employees that it will hold a substantial cash prize drawing for each work group at the end of each month **in which no employee in the work group sustains a lost-time injury.**
- Employee X reports an injury that she sustained while operating a mechanical power press. Employee X did not violate any employer safety rules when she sustained her injury.
- Employee X's injury requires her to miss work for two days. Employer cancels the cash prize drawing for that month for Employee X's work group **because of Employee X's lost-time injury.**

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## Safety Incentive Programs (cont'd)

### Example 2:

- Employer informs its employees that it will hold a substantial cash prize drawing for each work group at the end of each month **in which all members of the work group comply with applicable safety rules**, such as wearing required fall protection.
- Employee X sustains a lost-time injury when he falls from a platform while not wearing required fall protection, and he reports the injury to Employer.
- Employer cancels the cash prize drawing for Employee X's work group that month **because Employee X failed to wear required fall protection**.

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## Safety Incentive Programs (cont'd)

- Example 1 = **Retaliation**.
  - Employer cancelled the substantial cash prize drawing solely because the employee reported the injury.
- Example 2 = **No retaliation**.
  - Employer cancelled cash prize drawing because employee violated a legitimate work rule.

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## Safety Incentive Programs (cont'd)

- Do not use **lagging factors** as basis for rewards
- Use company **safety rules** as basis for incentive program
  - Use rules which are of important to your particular jobsite or workplace
- Create **tiered incentive structure**
  - Incentivizes workers or workgroups who violate safety rule early in incentive period

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## OSHA'S 2019 TOP TEN Cited Construction Violations

1. Duty to have fall protection
2. Training/Hazard Communication
3. Scaffolding
4. Lockout/Tagout
5. Respiratory Protection
6. Ladders
7. Powered Industrial Trucks
8. Fall protection
9. Machine Guarding
10. Eye and Face Protection



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## Expanded Duties During the COVID-19 Pandemic

- Employers have a duty to maintain a safe workplace for employees.
- In light of COVID-19, this includes:
  - Providing PPE when employees are exposed to occupational hazards.
  - Following federal/state emergency orders.
  - Cleaning the workplace.
  - Training employees on workplace safety/health.
  - Taking all appropriate steps to protect workers from exposure.

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## OSHA Resources

- OSHA
  - <https://www.osha.com/>
- OSHA and COVID-19
  - <https://www.osha.gov/SLTC/covid-19/>
- OSHA and the Construction Industry
  - <https://www.osha.gov/construction>



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## Multi-Employer Worksite Policy

Two step process for determining whether an employer is citable:

- 1) What's the employer's role on the worksite?
- 2) Did the employer fulfill the duties required of it specific role?

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## Employer Roles

- 1) **Four classifications** of employers' roles on multi-employer worksites:
  - Exposing
  - Creating
  - Correcting
  - Controlling

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## Exposing Employer

**Definition:** An employer whose own employees are exposed to the hazard

- Exposure to the hazard means access to the area surrounding the violative condition which presents the danger

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## Exposing Employer

### Duties:

- Where exposing employer creates the hazard – it must correct the hazard
- Where hazard created by other employer – exposing employer must take reasonable steps to protect its employees

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## Creating Employer

**Definition:** An employer who causes a hazardous condition that violates an OSHA standard.

**Duty:** Not to create violative conditions

- An employer who does so is citable even if the only employees exposed are those of other employers at the worksite

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## Correcting Employer

**Definition :** An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard

- **Example:** employer who installs and/or maintains particular safety/health equipment

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## Correcting Employer

**Duty:** Exercise reasonable care in preventing and discovering violations

- this includes correcting the hazard

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## Controlling Employer

**Definition :** An employer who has general supervisory authority over the worksite

- Control can be established by contract or by the exercise of control in practice

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## Controlling Employer

### Three Methods for Establishing Control:

1. Explicit contractual provisions
2. Combination of contractual rights
3. Actual practice

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## Controlling Employer

### Contractual Rights Showing Control:

- Authority to resolve disputes between subcontractors
- Authority to set schedules
- Authority to determine construction sequencing

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## Controlling Employer

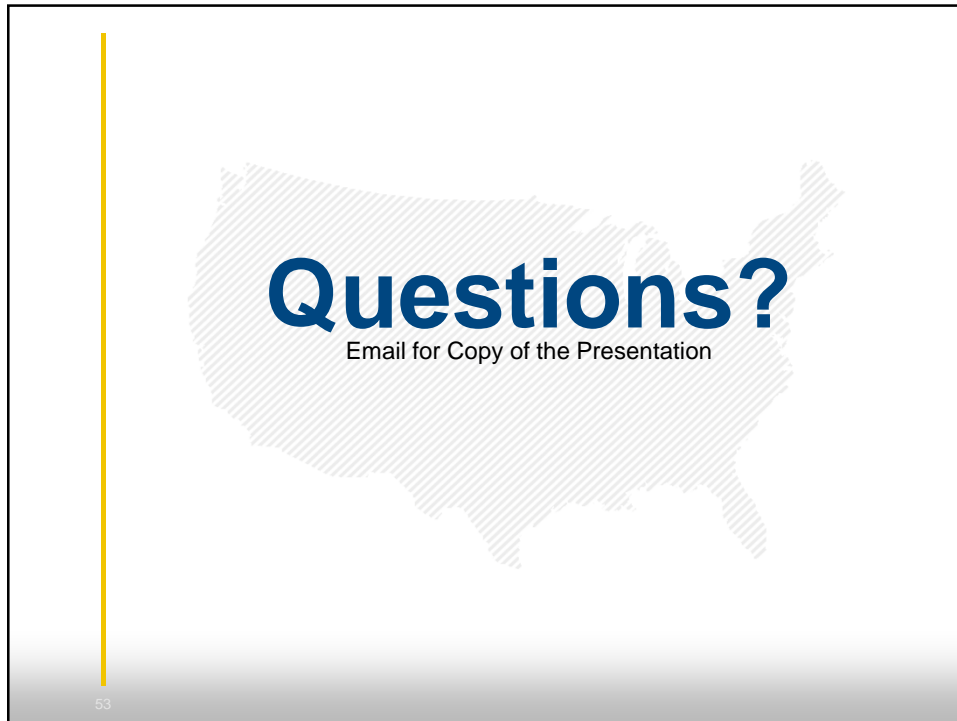
**Duty:** Must exercise reasonable care to prevent and detect violations

**Factors:**

- Knowledge of subcontractors' work practices
- Scale of the project
- Nature and pace of work

# CHECKLIST

SEE US FOR A CHECKLIST



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