



OSHA's Top 25 "Low-Hanging" Fruit Safety Violations

OSHA's National Office is encouraging Regional and Area Offices to increase the number of citations issued. As a result, inspectors are looking at the following "low-hanging" fruit list to find more violations.

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| 1. | § 1910.132(d)(1) | Workplace hazard assessment for PPE |
| 2. | § 1910.132(d)(1) | Written certification that PPE Hazard Assessment has been completed |
| 3. | § 1910.37(a) | Maintenance of exit routes |
| 4. | § 1910.157(c) | Mounting and location of portable fire extinguishers |
| 5. | § 1910.157(e) | Inspection, maintenance and testing of portable fire extinguishers |
| 6. | § 1910.305(b) | Electrical cabinets unused opening |
| 7. | § 1910.305(f) | Use of flexible cords and cables |
| 8. | § 1910.1200(e) | Written Hazard Communication Program with list of chemicals |
| 9. | § 1910.305(g)(1) | Extension cord used in place of permanent wiring |
| 10. | § 1910.304(g)(5) | Missing grounding prongs |
| 11. | § 1910.212(a) | Machine guarding |
| 12. | § 1910.22(a) | Housekeeping |
| 13. | § 1910.176(b) | Secure storage of materials |
| 14. | § 1910.151(b) | Medical services and first aid supplies |
| 15. | § 1910.132(f) | Written certification of training for personal protective equipment |
| 16. | § 1910.38 | Emergency action plan |
| 17. | § 1910.25(d).26(c) | Portable ladders, care and maintenance |
| 18. | § 1910.22(d) | Floor loading/rating protection |
| 19. | § 1910.151(c) | No emergency eye wash stations for employees using corrosive materials |
| 20. | § 1910.147(c)(4)&(6) | Lockout/tagout procedures for equipment not developed |
| 21. | § 1910.157(g)(1) | Fire extinguisher training |
| 22. | § 1910.157(g)(2) | Initial and annual fire extinguisher training |
| 23. | § 1910.147(c)(6) | Lockout/tagout – period inspections |
| 24. | § 1910.141(d)(2) | Lavatories having hot and cold water |
| 25. | § 1904.32(b) | OSHA 300A Summary - certification |

Fisher & Phillips is ready to assist you in implementing an action plan to improve your safety program, to increase your productivity and quality while at the same time protecting your Company's brand/reputation as well as assisting you to effectively deal with an enforcement-focused OSHA.

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OSHA Inspection Checklist

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OSHA Inspection Checklist

A. Prior to Inspection

- Display the official OSHA poster where notices to employees are customarily posted.
- Obtain upper management commitment to workplace safety and display commitment statement.
- Conduct internal or external safety audit and hazard assessment of the facility to spot and correct apparent safety and health hazards. It is important that hazards identified are addressed or corrected in a timely manner.
- Ensure that a management official has been assigned responsibility for safety and health compliance and for dealing with employees, OSHA, and other individuals on the subject of workplace safety and health.
- Determine which OSHA standards and regulations apply to the facility and ensure that all required written programs, plans, training and recordkeeping are complete and updated on an annual basis. Insure that the facility's personal protective equipment hazard assessment has been completed.
- Train designated management personnel on how to properly handle and respond to an OSHA inspection, as well as approaches by law enforcement officials, building or fire inspectors, and inspectors from other safety regulators.
- Determine the company policy on requiring OSHA to have a warrant prior to allowing an inspection to be conducted.
- Foster employee participation in safety and health management and instill commitment in employees to safe work practices.
- Establish a crisis management team to deal with catastrophic occurrences, fatalities, and OSHA-related publicity.



- Ensure that injuries and illnesses are properly recorded and supporting documentation is available.
- Ensure that Hazard Communication Plan, MSDS's, and related materials are available.
- Notify OSHA within eight (8) hours if a fatality occurs or within twenty-four (24) hours for amputations, loss of eye and hospitalization of one (1) employee for work-related injury. Where fatality or hospitalization occurs, consult with the company's OSHA counsel to determine what investigation should be conducted and what accident reports need to be prepared.
- Provide appropriate equipment, i.e. camera, video, monitoring, etc., for conducting OSHA inspections.
- Review previous OSHA citations and ensure abatement has been completed and hazards cited have not reoccurred.
- Ensure coordination between all employers on a multi-employer site.

B. Conducting the Inspection

1. Initial Contact and Opening Conference

- Refer the OSHA compliance officer arriving on the premises to the company's designated safety officer.
- No employees, other than the facility manager and /or the designated management safety officer, should communicate with the OSHA compliance officer prior to the opening conference.
- The safety officer should review the compliance officer's credentials as well as obtain his or her business card with an address and phone number to ensure that the compliance officer is on an official inspection.
- Determine from the compliance officer the purpose, scope, and the circumstances of the visit to the facility. If the inspection is based on a complaint, obtain a copy of the complaint.
- Determine if the compliance officer has a warrant to conduct the inspection. If yes, find out the scope of the warrant.
- Notify the company's OSHA counsel. This should be done prior to the opening conference in order to receive any instructions or to raise some defense or objection.
- Notify the designated employees' representative (if applicable) of OSHA's presence.



- Have an opening conference with the OSHA compliance officer to establish:
 - the focus areas of the inspection;
 - the scope and route of the walk-around inspection;
 - the designated trade-secret areas or processes;
 - the procedure for conducting employee interviews and producing documents;
 - the schedule of interviews;
 - the documents for review by OSHA;
 - the procedure for requesting copies of any employee complaints; and
 - the facility's rules and procedures OSHA will be expected to follow.
- Conduct all necessary safety and health advising/training of OSHA compliance officers prior to access to restricted areas. Ensure that the OSHA compliance officer wears all necessary personal protective equipment and follow all company safety and health policies.

2. Walk-Around Inspection

- A designated safety officer or manager should stay with each OSHA compliance officer at all times during the inspection except during hourly employee interviews.
- The designated safety officer should take detailed notes, including date(s) of inspection, areas inspected, items discussed and employees interviewed.
- If compliance officer deviates from area(s) covered by complaint then company safety officer should inquire as for the reason for the deviation.
- When appropriate, photographs should be taken of areas inspected by the OSHA compliance officer as well as all items photographed by the compliance officer. Video also should be utilized, if used by the compliance officer.
- The designated safety officer should immediately have corrected any alleged violations identified by the compliance officer to the extent possible, but should not acknowledge that a citation is appropriate.



- No management or supervisory employee should give information or make statements to the compliance officer without approval from the designated safety officer or the company's OSHA counsel.
- All work rules and safety procedures should be enforced and applicable to the compliance officer and walk-around team during the inspection.
- The compliance officer should be asked to put all requests for company information and/or documents in writing.
- The company's OSHA counsel should review all requests for documents and information as well as all information and documents provided.
- Document all samples or monitoring test taken by the OSHA compliance officer and request copies of all sampling and monitoring results as well as all photographs and videos taken. The company should request the OSHA compliance officer to schedule sampling and monitoring at a time when the company can conduct its own sampling and monitoring.
- Request copies of all OSHA sample and monitoring reports from the compliance officer.

3. Closing Conference

- Primarily listen to the Compliance Officer's proposal, and do not argue or debate the initial proposed findings.
- Remind the compliance officer of the scope of the inspection as stated in the opening conference.
- If directed by OSHA counsel, provide additional information and documentation relevant and supportive of the company's position as well as any information which shows abatement of any alleged violation.
- Obtain from the OSHA compliance officer an acknowledgment of receipt of the documents provided.
- Take detailed notes on the alleged hazards identified and the problem areas indicated by the compliance officer along with the applicable standards and suggested abatement procedures.
- Provide the OSHA compliance officer with the name, title, full address, and phone and fax numbers of the person to whom all OSHA correspondence should be directed.



C. After the Inspection

- Try to obtain all sample and monitoring reports from OSHA.
- Review all areas noted by the compliance officer and make appropriate abatement.
- Provide the company's OSHA counsel with copies of all of the documents provided to OSHA and all of the notes, photographs, videos, etc., taken during the inspection.
- The company's OSHA counsel should make a written request to OSHA to ensure that all trade secrets and proprietary information disclosed during the inspection are kept confidential.
- If facility is issued citations by OSHA, the following should be done:
 - Post the citation (with penalty amounts deleted -Note: in state plan states need to check rule on posting requirements) in the area where employee notices normally are posted.
 - Immediately notify the company's OSHA counsel about the citation and send a copy of the citation to them.
 - With the advice of counsel, schedule an informal conference with OSHA.
 - Post Notice to Employees of informal hearing.
 - Where an agreement cannot be obtained quickly, employer must file a Notice of Contest within fifteen (15) working days of the employer's receipt of citations. Some state plan states maintain different procedures. An employer who misses a contest deadlines cannot typically get an extension or overcome the default.

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LEGAL ALERT

OSHA Greatly Increases Workplace Injury Reporting Requirements

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued a final rule on May 11, 2016 that greatly enhances injury and illness data collection from employers. The new rule will require many employers to electronically submit information about workplace injuries and illnesses to the government, and OSHA has announced it intends to post this data on its public website.

Details Of Finalized Rule: Who, What, And When

Under the final rule, OSHA has revised its requirements for recording and submitting records of work-based injuries and illnesses. Once the new rule takes effect, you will be required to electronically submit the recorded information for posting on the OSHA website. Establishments with 250 or more employees that are currently required to keep OSHA injury and illness records must electronically submit information from the OSHA 300 Logs, the 300A Summaries, and the 301 Injury and Illness Incident Reports to the agency.

For these establishments, there will be a phase-in where only the 300A Summaries for 2016 will be required to be electronically submitted by July 1, 2017. Meanwhile, the OSHA Forms 300A, 300, and 301s for 2017 will all be required to be submitted by July 1, 2018.

This new rule will also cover those establishments with 20 to 249 employees that are classified in 67 specific industries which have historically high rates of occupational injury and illness. These businesses must also electronically submit information from their 2016 OSHA 300A Summaries to OSHA by July 1, 2017. Beginning in 2019, the submission deadline will be changed from July 1 to March 2 for the previous year.

The final rule also allows OSHA to collect information from employers that are not required to submit information to the agency on a routine basis. These employers would only be required to submit the data requested upon written notification from OSHA.

Anti-Retaliation Protections

Under the new rule, OSHA reemphasizes the requirements of the whistleblower protections found in Section 11c of the federal law for employees to report injury and illnesses without fear of retaliation. The final rule contains three provisions to highlight the retaliation protection.

Specifically, you must inform employees of their right to report work-related injuries and illnesses free from retaliation. OSHA has stated that you may meet this obligation by posting the "Job Safety and Health – It's the Law" Workers' Right Poster from April 2015.



Second, your procedures for reporting work-related injuries and illnesses must be reasonable and must not deter or discourage employees from reporting. Finally, you may not retaliate against employees for reporting work-related injuries or illnesses.

Under this expanded retaliation provision, arguably, you can now be specifically cited for retaliation under the recordkeeping standard and, at the same time, your employees can file Section 11c retaliation complaints. If so, this greatly enhances the potential liability against you for any discipline issued for violation of safety rules.

Public Posting Of Information Causes Concern

As noted above, OSHA will post the establishment's specific injury and illness data it collects under this final recordkeeping rule on its public website (www.OSHA.gov). OSHA has stated that it will remove any personally identified information (PII) before the data is released to the public.

While the agency believes that public access to this very large set of workplace injury occurrences will provide public health researchers with an unprecedented opportunity to advance the field of injury and illness causation and prevention research, it also opens the door for unprecedented opportunities for significant OSHA citations and penalties, as well as negative consequences from other third parties utilizing this data.

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The agency also claims that this new recordkeeping reporting requirement will help you and your employees to identify hazards, fix problems, and prevent additional injuries and illnesses. However, the business community has expressed its concerns about a number of unintended negative consequences that could result from this revision of the recordkeeping standard throughout the rulemaking process.

Specifically, the business community believes that this new requirement will force companies to publicly reveal confidential business details which had in the past been considered privileged and confidential. It will also give undo access to business processes to competitors, plaintiffs' lawyers, community activists, and union organizers for use against the company. Finally, there is serious concern that the new rule places an excessive burden on employers while lacking statutory authority.

If you have any questions about this new rule, or how it may affect your business, please contact your Fisher & Phillips attorney or any member of our Workplace Safety and Catastrophe Management Practice Group at 404.231.1400.

This Legal Alert provides an overview of an agency rule. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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The November Surprise: OSHA Raises Penalties 82% And No One Notices

Employers woke up to a surprise on November 3. That's when we learned that the Federal Budget Agreement, which was quickly worked out behind closed doors and signed the day before, includes surprise provisions authorizing the Occupational Safety and Health Administration (OSHA) to increase penalties for the first time since 1990. To the surprise of almost all observers, the amount of the increase could be as much as 82%.

Feds Tell OSHA To Play Catch-Up

The Agreement requires OSHA to make a one-time "catch-up" increase to compensate for more than two decades of no increases. The catch-up increase can't exceed the inflation rate from 1990 through 2015 as measured by the Consumer Price Index (CPI), which is expected to be around 82%.

Assuming OSHA applies the maximum catch-up increase allowed, the current maximum \$70,000 fine for Repeat and Willful violations would grow to a maximum of \$125,438, and the \$7,000 maximum fine for Serious and Failure-to-Abate violations would increase to \$12,744.

After the one-time "catch-up" increase is implemented, OSHA will then annually increase maximum penalties the amount of the inflation rate for the prior fiscal year.

Significant Increases Likely

OSHA has not yet commented on this development, and it is not clear whether it will choose to increase penalties to the full extent allowed. However, based on the consistent comments from OSHA leadership about the benefits of stiffer regulatory punishments, it's highly likely that it will implement most, if not all, of the increases.

The initial penalty increases must become effective by August 1, 2016, but we can expect to learn well before then the extent to which OSHA will increase these amounts. The Federal Office of Management and Budget will issue guidance on implementing the bill's provisions by January 31, 2016. Raising the maximum fines in line with the CPI for the catch-up boost requires OSHA to publish an interim final rule by July 1, 2016, allowing the adjustment to take effect by August 31.



Who Is Most At Risk?

Many employers fail to recognize that the most hazardous businesses may not be the employers most at risk of incurring OSHA penalties. You need to remember that compliance with OSHA standards and having an accident-free workplace are not necessarily the same thing. Although there are clear correlations between the two, the fact that few of your employees are getting hurt does not always mean that you are in compliance with OSHA's many standards.

For example, there have been hundreds of thousands of dollars in recent citations against retailers for a handful of the same items: blocked exits, fire extinguishers, and electric cabinets among others. The sooner you realize that your business is at risk of OSHA violations, the better.

The employers most at risk under the increased-penalty scheme are those with many locations, those in industries where safety is not as prominent as in construction and foundries, those where supervision may be unsophisticated about safety issues, and those where turnover is high. Another common target group for OSHA is any company in the manufacturing industry, or any other business that requires a lot of guarding, lockout/tagout procedures, and related training.

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What Should You Do Now?

You have over nine months to adjust to this new reality, so we recommend you use that time well. These potential sledgehammer penalties can be used as a way to get the attention of corporate decision-makers. Rather than just treating safety as a cost center, you should work with your company safety professionals to develop a business plan to achieve your company's goals in this area.

Executives should to roll up their sleeves and set the right tone on this subject, keeping your eyes on making safety a genuine core value of the company and a regular part of how business is conducted.

If you have any questions about this development, or how it may affect your business, please contact your Fisher & Phillips attorney or one of the attorneys in our Workplace Safety and Catastrophe Management Practice Group.

This Legal Alert provides an overview of a specific budgetary development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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OSHA Updates National Emphasis Program on Amputations

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On August 13, 2015, OSHA announced its updated National Emphasis Program (NEP) for Amputations will now include all industries that contain machinery or equipment which may cause amputations. Under the new National Emphasis Program, OSHA is using current enforcement data and statistics from the Bureau of Labor's injury data report to assist with all site selection targeting.

This new directive (CPL 03-00-019) comes on the heels of an OSHA change to its record-keeping requirements that became effective January 1, 2015. The change required facilities to report fatalities to OSHA within eight hours of the occurrence and in-patient hospitalization, amputation, or loss of an eye within 24 hours of the occurrence.

OSHA's new inspections of facilities will now include an evaluation of employee exposures under normal business circumstances. Operations such as clearing jams, cleaning, oiling or greasing machines or machine pans, and locking out machinery to prevent accidental start-up all will be monitored. In addition, the new directive identifies 80 manufacturing industry groups that will be targeted for inspection, by their six-digit North American Industry Classification System (NAICS) code numbers.



In its press release, OSHA noted that inspections over the past 40 years have indicated that employee exposures to unguarded or inadequately guarded machinery and equipment occur in many workplaces, and all have the potential to cause amputations. However, the rate of amputations in the manufacturing field is more than double than that of private sector industries. According to data collected from the Bureau of Labor Statistics report, manufacturing employers have reported 2,000 employees who have suffered from work-related amputations in 2013.

This Legal Alert provides an overview of a specific new regulation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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OSHA Announces Final Rule On Recordkeeping Dramatically Increases Employers' Reporting Requirements Which OSHA Will Make Public

On September 18, 2014, OSHA published its final rule for Occupational Injury and Illness Recording and Reporting Requirements. The rule, which takes effect on January 1, 2015, makes several important changes that significantly expands reporting requirements for all employers while publishing the employer provided information on the OSHA website.

First, the new reporting requirements expand the list of severe injuries that employers must report. Currently, employers must notify OSHA of all work-related fatalities and work-related hospitalizations of three or more employees within eight hours of the incident. Under the new rule, employers will be required to report all work-related fatalities, in addition to the following: 1) all work-related inpatient hospitalizations of one or more employees; 2) all work-related amputations; and 3) all work-related losses of an eye.

The new rule retains the requirement for reporting all work-related fatalities within eight hours of an incident, but it imposes a 24-hour reporting window for work-related inpatient hospitalizations, amputations, and losses of an eye. All employers are subject to these reporting requirements, even those employers who are otherwise exempt from routinely keeping OSHA 300 Logs.

You can report these incidents to OSHA over the phone by calling the local OSHA Area Office site or the 24-hour OSHA hotline or, alternatively, electronically on OSHA's public website. Additional information is available on OSHA's webpage: <https://www.osha.gov/recordkeeping2014>.

The new recordkeeping rule also updates the list of industries that are partially exempt from OSHA recordkeeping requirements. Under the current regulations, two classes of employers are partially exempt from routinely keeping records of serious employee injuries and illnesses, including employers with 10 or fewer employees and employers in certain low-hazard industries, as classified by the Standard Industrial Classification (SIC) system.

The new rule retains the exemption for employers with 10 or fewer employees, but it relies on the North American Industry Classification System (NAICS) to categorize an industry as low hazard. As a result, employers in 25 industries previously exempt, who now do not fit within the new NAICS list of exempt industries must now comply with all OSHA's recordkeeping requirements.

Conversely, employers in a small number of industries who previously had to comply with the recordkeeping requirements will now be



exempted under the new NAICS exemption list. A list of the industries previously exempt that now will be required to keep OSHA injury and illness records can be found at https://www.osha.gov/recordkeeping2014/reporting_industries.html. For step-by-step instructions to determine whether your company is categorized as an exempt industry under the new rule, visit <https://www.osha.gov/recordkeeping2014/OSHA3746.pdf>.

In a surprise move, OSHA's Assistant Secretary, Dr. David Michaels, announced that the fatality and injury reports will be posted online on the OSHA website. Online posting was not mentioned by OSHA during the three year-long rulemaking process. Michaels indicated that publishing severe injury and illness reports on the OSHA website was in part to publicly shame or "nudge" employers to take steps to prevent injuries so they are not seen as unsafe places to work.

OSHA intends for its new rule to have far-reaching implications to address concerns about serious hazards in the workplace. In the press statement accompanying the release of the final rule, OSHA representatives stated that OSHA would not send inspectors to investigate every reported incident, but it will question the employer about the cause of the injury and the steps the employer plans to take to prevent future injuries.

For more information, visit our website at www.laborlawyers.com or contact your regular Fisher & Phillips attorney.

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ABOUT FISHER & PHILLIPS

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The Firm's practice includes counseling and defending employers under all major federal and state labor, employment, and employee benefits laws and regulations including, among others: The Age Discrimination in Employment Act (ADEA); The Americans With Disabilities Act (ADA); The Civil Rights Acts of 1866, 1964 and 1991; The Consolidated Omnibus Reconciliation Act (COBRA); The Employee Polygraph Protection Act (EPPA); The Employee Retirement Income Security Act (ERISA); The Equal Pay Act (EPA); The Fair Credit Reporting Act (FCRA); The Fair Labor Standards Act (FLSA); The Family and Medical Leave Act (FMLA); The Immigration Reform and Control Act (IRCA); The National Labor Relations Act (NLRA); the Occupational Safety and Health Act (OSHA), and The Worker Adjustment and Retraining Notification Act (WARN), as these laws have been amended.

Our lawyers practice in federal and state courts throughout the United States. In addition to representing employers in litigation, we represent employers in federal, state and local administrative proceedings, mediation and arbitration, collective bargaining and administration of collective bargaining agreements, and in resolving threatened claims prior to the initiation of formal proceedings.

As a result of our representation of employers in litigation and formal claims proceedings, we have acquired considerable expertise in developing and implementing policies, practices, and procedures to help employers minimize or avoid the occurrence of employment-related claims, the risk of liability from such claims, or other forces that may interfere with employer rights.

ABOUT TODAY'S SPEAKER



Edwin G. Foulke, Jr is a partner with Fisher & Phillips LLP, a leading national labor and employment law firm. Ed is co-chair of the firm's Workplace Safety and Catastrophe Management Practice Group in its Atlanta, Georgia office. Prior to joining Fisher & Phillips, he was the Assistant Secretary of Labor for Occupational Safety and Health. Named by President George W. Bush to head OSHA, he served from April, 2006 to November 2008. During his tenure at OSHA, workplace injuries, illnesses and fatalities rates dropped to their lowest level in recorded history.

Ed's practice includes workplace safety and OSHA compliance and strategic safety planning, whistleblower compliance and litigation involving the 23 whistleblower statutes handled by OSHA, defense of employers in responding to workplace health and safety litigation including OSHA citations and providing advice and assistance to employers in responding to OSHA inspections, workplace fatalities and catastrophic accidents and in legislative and regulatory matters. He has represented employers in thousands of OSHA inspections and OSHA citation contests.

Ed has worked in the labor and employment area for 30+ years, specializing in occupational safety and health issues. In 2010, 2011 and again in 2012-13 he was named as one of the "50 Most Influential EHS Leaders" by *EHS Today* magazine, as well as being named one of the "50 Most Influential EHS Leaders" in the United States by *Occupational Hazards* magazine in 2008. Ed is recognized as one of the nation's leading authorities on occupational safety and health issues and one of the top speakers and writers in this area.