

Using OSHA to Protect Your Safety and Health



Training from the
New Jersey Work Environment Council

First Edition – October 2013

Table of Contents

About WEC

Introduction 2

Activity 1 Your Experience With OSHA 3

Activity 2 Employee Rights and Employer Responsibilities Under OSHA 5

- Fact Sheet 1 What Is OSHA and Who Is Covered?
- Fact Sheet 2 OSHA and State/Local Employees
- Fact Sheet 3 Employer Responsibilities under OSHA
- Fact Sheet 4 Employers Have “Right to Know” Responsibilities
- Fact Sheet 5 Some Employer Rights under OSHA
- Fact Sheet 6 Some Employee Responsibilities under OSHA
- Fact Sheet 7 Employee Rights: Training
- Fact Sheet 8 Employee Rights: Information
- Fact Sheet 9 Requesting Action from Your Employer
- Fact Sheet 10 Requesting Action from OSHA
- Fact Sheet 11 Participate in OSHA Inspections
- Fact Sheet 12 Find Out Inspection Results

Summary

Activity 3 Using OSHA Effectively 21

- Fact Sheet 13 Before You File an OSHA Complaint
- Fact Sheet 14 OSHA’s Limitations

Summary

Background Fact Sheets 28

- Fact Sheet 15 Time to File an OSHA Complaint
- Fact Sheet 16 Whistleblower Protection
- OSHA Memorandum on Employer Safety Incentive and Disincentive Policies and Practices
- Fact Sheet 17 Do You Have a Right to Refuse Unsafe Work?

Further Resources 38

Introduction

The goal of this training is to familiarize you with the federal Occupational Safety and Health Act, the Occupational Safety and Health Administration (or “OSHA”), which implements this law, and to learn how to use OSHA inspections as *one* important tool to fix and prevent hazards.

Some background facts:¹

- In 1970, President Nixon signed the Occupational Safety and Health Act.
- This law created an agency, called OSHA, part of the United States Department of Labor.
- The primary role of OSHA is to set workplace safety and health standards and enforce them through the inspection process.
- Coupled with efforts by workers and their unions, advocates, employers, and health and safety professionals, OSHA and state OSHA agencies have dramatically improved workplace safety, reducing job-related deaths and injuries by more than 65 percent since enactment of the law.
- In 1970, about 38 workers were killed on the job every day. By 2010, this number had fallen to about 12 workers every day, while U.S. employment has almost doubled.
- However, workers still face major hazards: each year more than 3.3 million employees suffer a serious job-related injury or illness. Millions more are exposed to toxic chemicals that may cause illnesses years from now.

In this document, we generally refer to OSHA. However, in New Jersey, state and local employers are covered by the New Jersey Public Employees Occupational Safety and Health Act, which has similar but not identical provisions.

¹ These statistics are found in *All About OSHA*, OSHA Publication 3302, 2012.

Activity 1

Your Experience with OSHA

Purpose

To share our experiences using OSHA to address safety and health hazards.

What has been your experience with inspections conducted by the Occupational Safety and Health Administration or “OSHA”?

Has OSHA prevented hazards or helped improve conditions in your workplace?

Task

In your small groups, discuss and answer these questions using the work sheet below:

1) Have you had an OSHA inspection in your workplace?

Yes No Not Sure

2) What positive results have you had using OSHA?

3) What challenges have you faced using OSHA?

Does OSHA Help Protect Volunteers?

The Occupational Safety and Health Act covers most employers and employees. It does *not* cover volunteers who still can face safety and health hazards during their voluntary activities.

However, if you are a volunteer and need assistance concerning a hazard, consider that:

- OSHA standards can suggest essential protections for worksites with volunteers present.
- If the sponsoring agency provides any financial support (such as stipends, insurance, housing, etc.) to volunteers, OSHA may view them as an employer and their worksites subject to inspection.
- OSHA will consider written and telephone complaints from volunteers about hazards on a case by case basis. OSHA may contact the sponsoring agency about the hazard - even if they do not have legal authority to inspect or to cite the employer for violating safety and health standards.
- Even if there is just one employee on-site, they will be covered by most OSHA standards. Monitor conditions where employees appear to have greater protections than volunteers, even if they work side by side.

Activity 2

Employee Rights and Employer Responsibilities under OSHA

Purpose

To learn about key employee rights and employer responsibilities under the OSHA law.

Task

In your small groups, prepare a brief presentation on employee rights **and/or** employer responsibilities under OSHA. Review Fact Sheets 1 through 12 on pages 6 through 19. Then, working together, make a list of key points you will make during the presentation. Try to support each point by referring to a fact sheet.

Use your list below to outline key points of your presentation.

1.

2.

3.

4.

5.

6.

7.

8.

Fact Sheet 1: What Is OSHA and Who Is Covered?

The Occupational Safety and Health Act was enacted in 1970 during the Nixon Administration. The Act created the Occupational Safety and Health Administration (OSHA), part of the U.S. Department of Labor. Before 1970, worker safety and health protections under federal law were very limited.

OSHA's primary responsibility is to develop mandatory job safety and health standards and to enforce them through workplace inspections, which can include issuing both citations and financial penalties for violations.

OSHA covers most private sector employers (and employees), including those in manufacturing, construction, health care, services, etc.² OSHA also covers federal government employers and public employees in some states, including New Jersey.

In cases where another federal agency regulates safety and health in a particular industry (e.g., mining, trucking, railroads), OSHA standards still apply if the other agency's regulations do not address specific working conditions.

² Most employees in the nation come under OSHA's jurisdiction. OSHA covers private sector employers and employees in all 50 states, the District of Columbia, and other U.S. jurisdictions either directly through Federal OSHA or through an OSHA-approved state program. State-run health and safety programs must be at least as effective as the Federal OSHA program. Not covered by the OSH Act are: Self-employed; immediate family members of farm employers that do not employ outside employees; and workplace hazards regulated by another Federal agency (for example, the Mine Safety and Health Administration, the Federal Aviation Administration, the Coast Guard).

Fact Sheet 2: OSHA and State/Local Employees

The Occupational Safety and Health Act does not mandate coverage of non-federal public workplaces. For example, public employees in Pennsylvania, as well as in 24 other states, have no OSHA protection!

The Act requires the 22 states that operate their own state plans for the private sector to also cover public workplaces.

In addition, New Jersey, New York, Connecticut, and Illinois have “stand alone” OSHA-approved plans for public employees that have oversight by federal OSHA.

Public employers include the state, counties, local governments, public and charter schools, fire districts, and publicly owned water and sewage treatment facilities.

In New Jersey, inspections in non-federal public workplaces are conducted by the NJ Departments of Labor and Workforce Development (for safety hazards) and Health (for health hazards).

Fact Sheet 3: Employer Responsibilities under OSHA

Employers covered by the Act must:

- Meet their “general duty” to provide a workplace free from recognized hazards.³
- Be familiar with and comply with standards and regulations issued under the Act.
- Make copies of certain standards and regulations for review by employees upon request.
- Provide training required by specific OSHA standards and regulations.
- Provide properly maintained tools, equipment, and personal protective equipment (PPE), when required by specific standards. (Employers must cover the costs of most personal protective equipment.)
- Provide medical examinations, such as hearing tests, when required by OSHA standards.
- Orally report to OSHA the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident within eight hours.
- Keep accurate OSHA-required records of work-related injuries and illnesses.
- Abate cited violations within the prescribed period (unless the citation is contested by management).
- Not retaliate against an employee for most health and safety activities, including filing an OSHA inspection request.

³ Employers must comply with the general duty clause, section 5(a)1, of the OSH Act, which requires employers to keep their workplace free of serious recognized hazards. OSHA sometimes cites this clause when no specific OSHA standard applies to the hazard.

Fact Sheet 4: Employers Have “Right to Know” Responsibilities under OSHA

Employers covered by the Act must:

- Post a copy of the OSHA Summary of Occupational Injuries and Illnesses (Form 300A) for the prior year during the entire months of February, March and April.
- Provide current and former employees and their representatives with access to the OSHA Summary *and* the OSHA Log (Form 300) by the end of the next business day from the date of the request.
- Provide employees with access to their personal medical and exposure records within 15 working days.
- Under the Hazard Communication Standard, provide ready access to “safety data sheets” (formerly known as “material safety data sheets”) for hazardous materials, as well as other information and training.
- Post, at a prominent workplace location, the OSHA Poster (OSHA 3165) informing employees and employers of their rights and responsibilities.

Fact Sheet 5: Some Employer Rights under OSHA

Employers have a right to:

- Be advised by the OSHA inspector of the reason for the inspection.
- Have an opening conference and closing conference with the inspector.
- Accompany the inspector during the inspection.
- Have an informal conference with OSHA to discuss a citation and notification of penalty. Employers may use this opportunity to do any of the following:
 - Obtain a better explanation of the violations cited;
 - Obtain a better understanding of specific standards that apply;
 - Negotiate and enter into an informal settlement agreement;
 - Discuss methods to correct violations;
 - Discuss problems concerning abatement dates;
 - Discuss problems concerning employee safety practices;
 - Resolve disputed citations and penalties, thereby eliminating the need for using the more formal procedures involved with litigation before the Occupational Safety and Health Review Commission.
- File a *Notice of Intent to Contest* to dispute alleged any or all inspection violations, including citations and/or penalties, before the independent Occupational Safety and Health Review Commission. A proper employer contest of any item suspends the legal obligation to abate and pay a penalty until the item contested has been resolved. The *Notice* must be submitted within 15 working days after receipt of the citation.
- Apply for a “variance” from a standard’s requirements when unable to fully comply with the effective date of abatement because of a lack of technical expertise or materials or when other proven and effective means are in place to protect employees.

Fact Sheet 6: Some Employee Responsibilities under OSHA

Employees covered under the OSH Act should:

- Read the OSHA poster at the work site.
- Comply with all applicable OSHA standards.
- Follow all lawful employer safety and health rules.
- Wear or use prescribed protective equipment while working.
- Report hazardous conditions to the appropriate supervisor.
- Report any job-related injury or illness to the employer and seek prompt treatment.
- Cooperate with the OSHA inspector conducting an inspection.

Employees Cannot Be Cited for OSHA Violations

Employees must follow all applicable standards, regulations, and orders issued by OSHA. However, OSHA cannot cite or penalize workers as individuals for violations.

Fact Sheet 7: Employee Rights: Training

You have the right to get training from your employer as required by specific OSHA standards.

Examples of OSHA standards with training requirements for *general industry* include: ⁴

Injury and Illness Recordkeeping – Employee Involvement (1904.35)
Housekeeping (1910.22) – This standard has been used to address mold.

Emergency Action Plans (1910.38)

Powered Platforms (1910.66)

Occupational Noise Exposure (1910.95)

Flammable and Combustible Liquids (1910.106)

Storage and Handling of Anhydrous Ammonia (1910.111)

Process Safety Management of Highly Hazardous Chemicals (1910.119)

Hazardous Waste Operations and Emergency Response or “HAZWOPER” (1910.120)

Personal Protective Equipment (1910.132)

Respiratory Protection (1910.134)

Confined Spaces (1910.146)

Lockout/Tagout (1910.147)

Medical Services and First Aid (1910.151)

Asbestos (1910.1001)

Access to Employee Exposure and Medical Records (1910.1020)

Lead (1910.1025)

Bloodborne Pathogens (1910.1030)

Hazard Communication (1910.1200)

⁴ A useful publication that summarizes many, but not all, of OSHA’s training requirements is *Training Requirements in OSHA Standards and Training Guidelines*, OSHA Publication # 2254, 1998. Go to OSHA’s website at www.osha.gov.

Examples of OSHA standards with training requirements for *construction* include:

General Safety and Health Provisions, including for regular and frequent inspections to be made by a “competent” person (1926.20b (2) and (4))

Emergency Action Plans (1926.35)

Woodworking Tools (1926.304)

Scaffolding (1926.404)

Fall Protection (1926.503)

Materials Handling Equipment (1926.602)

Preparatory Operations for demolition (1926.850)

Ladders (1926.1053)

Asbestos (1926.1101)

Excavation and Trenching (1926.651-2)

Fact Sheet 8: Employee Rights – Information

You have the right to get information from your employer as required by specific OSHA standards and regulations.

For example, your employer must:

- Provide copies of OSHA standards, rules, regulations, and requirements that your employer should have available at the workplace.
- Provide information on hazardous chemicals used in your workplace. Employers must ensure that Safety Data Sheets (SDSs, formerly MSDSs) are readily accessible during each work shift to employees when they are in their work area(s).
- Provide current and former employees and their representatives with access to completed forms documenting occupational injuries and illnesses. These are OSHA Incident Reports (Form 301), the OSHA Summary (Form 300A), and the OSHA Log (Form 300).⁵ Completed forms must be provided by the end of the next business day from the date of the request.
- Inform you of the existence, location and availability of your medical and exposure records when you first begin employment and at least annually thereafter. Employers also must provide these records to you or your designated representatives within 15 working days of your request.
- Observe any monitoring or measuring of toxic materials or chemicals, as well as harmful physical agents, such as noise, and share the resulting records with employees, upon request. If the exposure levels are above the OSHA limit, the employer must tell you what will be done to reduce the exposure (the right to observe monitoring exists only when a standard provides employees with the right to observe monitoring).

⁵ When an employer plans to stop doing business and there is no successor employer to receive and maintain these records, the employer must notify you of your right of access to records at least three months before the employer ceases to do business.

Fact Sheet 9: Requesting Action from Your Employer

Request action from your employer to correct hazards or OSHA violations.

You can ask your employer to correct hazards even if they are not violations of specific OSHA standards. Keep copies of any written requests you make.

Under the Act, Section 11(c), your employer is not allowed to retaliate against you for your activities concerning improving working conditions, including asking the employer to correct hazards or filing a request for an inspection with OSHA.⁶

Requesting action from management with co-workers and your union, if you have one, is usually more effective than working on your own.

You can file a discrimination complaint under Section 11(c) of the OSH Act within 30 days if you are punished or discriminated against for exercising your safety and health rights. There may also be remedies under other federal and state laws, such as the National Labor Relations Act and New Jersey's Conscientious Employee Protection Act.

⁶ For more information about “whistleblower” protections enforced by OSHA, including for activities related to environmental protection, go to: www.whistleblowers.gov/

Fact Sheet 10: Requesting Action from OSHA

You can also file a complaint and request OSHA to conduct a workplace inspection if you believe hazards or violations of standards exist in your workplace. You can file a complaint online, in writing, by telephone or fax. If you want an OSHA inspector to come inspect your workplace, the most effective way to do this is to put your complaint in writing and send it to the nearest OSHA Area office.

You can request in your written complaint that OSHA keep your name confidential if you do not want your employer to know who filed the complaint. (Keeping your name confidential can have advantages and disadvantages.)

If you are in a union, generally the best way to file a complaint with OSHA is to get your union to do it. It is a union obligation to represent their members concerning working conditions. Moreover, you are likely to have more protection from retaliation if your union files the complaint.

It is often a good idea to meet with officials from the local area office when preparing your complaint. Of course, if your complaint is about an imminent danger, you should contact OSHA immediately.

Fact Sheet 11: Participate in OSHA Inspections⁷

- The authorized employee representative, such as a union representative, has a right to accompany an OSHA inspector during an inspection.^{8,9} This person is sometimes called the “walkaround representative”.

Under no circumstances may the employer choose the employee representative.

- The employee representative can participate in the “opening conference”, when the inspector explains the inspection’s purpose. (If either party objects to a joint opening conference, the inspector will conduct separate opening conferences for employees and management.)
- During the inspection:
 - ➔ Where there is no union or employee representative, the inspector must talk confidentially with a reasonable number of workers during the inspection.
 - ➔ Respond to questions from the inspector and tell him/her about hazards.
 - ➔ Workers have a right to talk privately and confidentially to the inspector, whether or not an employees’ representative was chosen.

(continued)

⁷ For more information about the inspection process, go to www.coshnetwork.org/node/350.

⁸ The OSHA inspector is called the compliance safety and health officer or CSHO.

⁹ An important difference between federal OSHA and the N.J. Public Employees Occupational Safety and Health Act is that the employee who filed the inspection request has a right to accompany the inspector, in addition to a union representative. See N.J.S.A. 34:6A-36 and 34:6A-36 at http://lwd.state.nj.us/labor/lsse/laws/peosha_law.html#35.

Fact Sheet 11 (continued)

- ➔ Point out hazards, describe injuries, illnesses, or near misses and describe past complaints about hazards. Inform the inspector if working conditions are not typical. Make sure that the inspector is told if equipment has been shut down, windows opened, or other conditions are not normal.
- ➔ If health hazards are present, an OSHA industrial hygienist may conduct a *health* inspection. This inspector may take samples to measure levels of chemicals or other hazardous materials to determine whether they exceed OSHA standards.

Fact Sheet 12: Find Out Inspection Results

- The inspector will hold a closing conference, with employer and employee representatives, jointly or separately, at the conclusion of the inspection.
- The inspector will discuss “apparent violations” and ways to correct hazards, deadlines, and possible fines.
- Employees can request a review if OSHA decides not to issue a citation.
- Citations shall be mailed to employee representatives no later than one day after the citation is sent to the employer (and to any employee upon request).

Participate in any meetings or hearings to discuss any employer objections to OSHA's citations or to changes in abatement deadlines.

File a formal appeal of deadlines for correction of hazards (employees cannot file an appeal for other reasons, such as if they believe the penalty amount was wrong).

File an appeal of the deadlines that OSHA sets for your employer to correct any violation in the citation. If you feel the time is too long, write to the OSHA Area Director within 10 working days from when the employer posts the notice.

Summary

- Under the federal OSHA law (and the N.J. Public Employees Occupational Safety and Health Act) you have a right to a safe and healthful workplace.
- OSHA requires employers to provide a workplace that is free of serious recognized hazards and complies with OSHA standards.
- Employees have the right to file a complaint with OSHA requesting an inspection, but OSHA has discretion to handle the complaint through a physical inspection of the workplace or by contacting the employer and asking them to abate the hazard(s).
- There are specific employer responsibilities under the law. Among them are to pay for most personal protective equipment, keep records of injuries and illnesses, etc.
- There are specific employee (and union) rights under the law. Among these are to participate in the inspection process, including an opening and closing conference.

Activity 3

Using OSHA Effectively

Purpose

To consider whether filing an OSHA request is the best way to address hazards in your workplace.

Task

Please read the scenario below:

You are considering filing a complaint to OSHA requesting an inspection – but you are not sure that this would prove the most effective approach to eliminating or preventing a hazard.

Read Fact Sheets 13 and 14 on pages 23 through 26. Then, working in your small groups (or individually, as directed), use the worksheet below to consider whether filing an OSHA inspection request is the best way to address a hazard in your workplace.

1) What is the hazard you are most concerned about?

2) What is its health or safety effect(s) on workers?

3) After reading the fact sheets, do you believe that filing a request for an OSHA inspection is the most effective way to address this hazard at this time?

Yes No

Explain why:

4) If no, what are some other steps you could take to address the hazard?

Fact Sheet 13: Before You File an OSHA Complaint

An OSHA complaint should only be filed when you and your coworkers determine that it is likely to produce positive results. **Filing an OSHA complaint is just one tactic among many.**

Whether you are facing hazards that pose “imminent danger” and require immediate action or those that have persisted for years, consider these steps before filing an OSHA complaint:

- **Call your Union**, if you have one. As your bargaining agent, your union can negotiate with your employer over a range of issues, including unsafe working conditions. Your union should also be able to judge whether to resolve hazardous conditions by working cooperatively with your employer, by complaining to OSHA, or by using other approaches. In addition, the legal power of the union should help protect you from retaliation for taking action.
- **If you don't have a union**, talk to your co-workers. Remember, there is strength in numbers and hazardous conditions are likely to affect many of you. Keep in mind that you have the right to have your name withheld from your employer if you make a complaint to OSHA (although there can be disadvantages to that).
- **Bring hazardous conditions to your employer's attention**, if possible. It is your employer's legal responsibility to keep your job safe and healthful. If you are a union member, work with your steward or safety committee to notify your employer about hazards – and allow appropriate response time. Despite OSHA's anti-retaliation provisions, some employers still retaliate against workers who raise health and safety concerns.

- **Meet or speak with OSHA *before* filing a request for an inspection.** Inspectors or other OSHA staff can be helpful if you have questions about how to make the strongest case for an inspection. They may be familiar with your employer, and they are likely to be familiar with the types of hazards you are facing. However, you should be clear that by making this inquiry you are not asking OSHA to take action – you are simply gathering information for a possible future complaint. Be prepared: depending on the severity of your complaint, it is possible OSHA will want to take immediate action.

Fact Sheet 14: OSHA's Limitations

There are good reasons for calling OSHA. You or your co-workers may be in "imminent" danger. You may have notified your employer about hazardous conditions and received an unsatisfactory response. And OSHA can inspect, identify hazards, and issue financial penalties to the employer in violation.

However, before contacting the agency, be familiar with some of OSHA's limitations:

- What's "Regulated" and What's Not

OSHA standards do not cover every hazard, and many current standards are not protective enough. For example, there are no federal standards regulating indoor air quality or extreme temperatures. Thus, complaining to OSHA about these hazards – or any of the "under-regulated" hazards – may not be enough to trigger an inspection or to get your employer to make changes even though an OSHA inspection occurred. And even though the OSH Act's "General Duty Clause" legally requires employers to maintain safe and healthful workplaces "free of recognized hazards", the agency overall has had limited success enforcing this provision (Section 5(a)(1) of the law).

Some Serious Hazards Not Specifically Covered by Federal OSHA Standards

- Indoor Air Quality
- Mold
- Extreme Temperatures
- Workplace Violence
- Tens of thousands of Toxic Chemicals (less than 500 are now covered)
- Cumulative Trauma/Repetitive Strain ("ergonomics")
- Job Stress

- **Who's Covered and Who's Not**

If you work in the private sector, you are most likely covered by OSHA. If you work for a state or local government, you may be covered by an OSHA program operated by your state government, such as in New Jersey. However, millions of public sector workers in 26 states are not covered by OSHA at all.

- **OSHA's Staff**

Nationwide, there are approximately 2,200 federal and state inspectors responsible for enforcing the law at more than eight million workplaces. This translates to one compliance officer for every 59,000 workers! At its current staffing and inspection levels, OSHA would take more than 100 years to inspect each of these workplaces just once. Because of these limitations, OSHA relies on the "deterrent" impact of its enforcement program. Inspections that result in penalties at one workplace are intended to send a message that other employers should heed. In fact, many employers fear that OSHA will inspect their operations. And workers should be aware that this possibility can actually be more effective than an actual inspection. As one union safety committee member said, "If you haven't used the possibility of an inspection with management first, it's too soon to file a complaint."

- **Lengthy Litigation**

An employer can contest the terms of an OSHA citation, which can lead to ongoing litigation. An employer has 15 working days from the date it receives the citation to contest in writing the citation, proposed penalties, and/or the abatement date. A contest of any item suspends the employer's legal obligation to abate the hazard and pay the penalty until the item contested has been resolved.

The contest is heard by an independent federal agency, the Occupational Safety and Health Review Commission. An administrative law judge will hear the case and issue a determination, which can be appealed by any party to the full Review Commission. Their ruling, in turn, may be appealed to the U.S. Court of Appeals.

In other words, cases that employers contest can sometimes take years to resolve.

Summary

OSHA inspections, under certain circumstances, can be a useful tool for addressing safety and health hazards.

But OSHA standards and enforcement have limitations, so requesting an OSHA inspection may not be the best approach.

There are various other ways to get the employer to correct hazards. These include:

- A written request to the employer
- Filing a grievance (where there is a union)
- Getting employee signatures on a petition to the employer
- Distributing information about the hazard to coworkers
- Negotiating health and safety contract language
- Reaching out to health, community, and environmental allies for support
- Getting media coverage
- Seeing if other regulatory agencies can address the issue (such as local fire authorities)

Overall, think of OSHA as one important tool in your toolkit to prevent workplace hazards.

Background Fact Sheet 15: Time to File an OSHA Complaint

Once you have determined that complaining to OSHA may be useful, you still need to make your case clear enough to get the agency's attention and a productive outcome. OSHA's response may depend on not only how and when you contact them, but also on how well your complaint addresses the severity of the hazard, the connection between the hazard and a specific OSHA standard, and whether the hazard poses a clear and immediate danger.

Know What OSHA Is Looking For

Since OSHA's small staff can't possibly conduct an inspection in response to every complaint, the agency evaluates the complaints it receives. It's similar to the way a hospital emergency room staff determines who to treat first. The agency does not judge complaints on a "first come, first served" basis. OSHA ranks complaints according to the severity of hazards and the number of workers potentially exposed, and familiarity with this approach can help you make a stronger case for an inspection:

The number one priority for inspections is "imminent danger" situations, in which workers face an immediate risk of death or serious physical harm. These complaints are often made from the work site, where workers should stay – but away from the hazard – after making a complaint.

The number two priority is incidents involving fatalities or "catastrophes" – defined by OSHA as an accident involving death or that requires hospitalization of three or more workers.

The number three priority is employee complaints and referrals. Complaints can be filed if you believe there is a violation of an OSHA standard or if you believe there is a serious health or safety hazard.

You can research your employer's OSHA inspection history, including standards violated and penalties, by viewing the "establishment search" area of OSHA's website at www.osha.gov/pls/imis/establishment.html.

Know What Standards Are Frequently Cited

A high percentage of citations are issued for a small number of OSHA standards. Go to OSHA's web site at www.osha.gov/pls/imis/citedstandard.html to see this data.

Many of these standards, including many of those most frequently cited, regulate dangers that are easily identified by OSHA inspectors, such as hazards related to portable fire extinguishers, guardrails, machine guarding and means of egress (exits). It's useful to know what standards OSHA can cite without difficulty. If you are exposed to chemicals, for example, you may want to say in your complaint that you are not being provided with respiratory, eye or other protection, and/or that you have asked for but have not received health effects information. OSHA inspectors are then more likely to look for these violations, so if your chemical exposure is below the agency's permissible limit, citations can still be issued for other violations. The experience of some unions also indicates that complaints about certain standards, like Hazard Communication (your "right to know" about toxic substances), are more likely to prompt OSHA to conduct a "comprehensive" inspection of your whole workplace, rather than a limited or "focused" inspection.

Filing an OSHA Complaint

Workers can file complaints to OSHA in person, by telephone, by fax, by mail or electronically through OSHA's web site: www.osha.gov. The agency evaluates each complaint to judge whether it is valid and whether it should prompt an off-site telephone investigation or an on-site inspection. The way you make your complaint is an important strategic decision, since it will likely determine whether your employer faces an on-site investigation.

Formal written complaints signed by a current employee or their representative must be submitted to initiate on-site inspections – except in unusual cases.

Non-formal fax or telephone complaints help OSHA respond more quickly to hazards. This may also be a useful approach for unorganized workers who would like to remain anonymous but need

some immediate action taken by their employer. OSHA usually follows up these complaints with a telephone call or faxed letter and the employer must respond within five days, identifying in writing any problems found and noting corrective actions taken or planned. The downside of this option is that OSHA does not conduct a physical inspection of the workplace, and there are cases where employers have falsely told OSHA they had corrected a problem (or that no problem existed in the first place). If you use this option and the problem does not get fixed, consider contacting OSHA again. Call 1-800-321-OSHA to make a complaint or to find out the fax number for the OSHA Area office near you.

Background Fact Sheet 16: Whistleblower Protection

To help ensure that workers are free to participate in safety and health activities, Section 11(c) of the OSH Act prohibits any person from discharging or in any manner retaliating or discriminating against any worker for exercising rights under the Act. These rights include raising safety and health concerns with an employer, reporting a work-related injury or illness, filing a complaint with OSHA, seeking an OSHA inspection, participating in an OSHA inspection, or participating or testifying in any proceeding related to an OSHA inspection.

- Protection from discrimination means that an employer cannot retaliate by taking “adverse action” against workers, such as:
 - Firing or laying off;
 - Blacklisting;
 - Demoting;
 - Denying overtime or promotion;
 - Disciplining;
 - Denying of benefits;
 - Failing to hire or rehire;
 - Intimidation;
 - Making threats;
 - Reassignment affecting prospects for promotion; or
 - Reducing pay or hours.

(continued)

Background Fact Sheet 16: Whistleblower Protection (continued)

OSHA has issued an important memo on “Employer Safety Incentive and Disincentive Policies and Practices” and how they may violate the OSHA law.¹⁰ It is reprinted on the next page.

If a worker believes an employer has discriminated against them for exercising their safety and health rights, they should contact their union (if they have one) and the local OSHA office right away. New Jersey employees also have similar rights under the New Jersey Conscientious Employees Act (CEPA).¹¹

You must call OSHA within 30 days of the alleged discrimination.

OSHA also enforces the whistleblower provisions of many other federal laws, including some environmental laws. For more information, visit www.whistleblowers.gov.

¹⁰ www.osha.gov/as/opa/whistleblowermemo.html

¹¹ Contact WEC for more information about the pros and cons of using OSHA Section 11(c). Read WEC’s CEPA factsheet at www.njwec.org/PDF/Factsheets/WEC_FactSheet_CEPA_Final_December2012.pdf

Reply to the attention of:

MAR 12 2012

MEMORANDUM FOR: REGIONAL ADMINISTRATORS, WHISTLEBLOWER PROGRAM MANAGERS

FROM: RICHARD E. FAIRFAX
Deputy Assistant Secretary

SUBJECT: Employer Safety Incentive and Disincentive Policies and Practices

Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness. 29 CFR 1904.36. This memorandum is intended to provide guidance to both field compliance officers and whistleblower investigative staff on several employer practices that can discourage employee reports of injuries and violate section 11(c), or other whistleblower statutes.

Reporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c). Other whistleblower statutes enforced by OSHA also may protect employees who report workplace injuries. In particular, the Federal Railroad Safety Act (FRSA) prohibits railroad carriers, their contractors and subcontractors from discriminating against employees for reporting injuries. 49 U.S.C. 20109(a)(4).

If employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk. Employers do not learn of and correct dangerous conditions that have resulted in injuries, and injured employees may not receive the proper medical attention, or the workers' compensation benefits to which they are entitled. Ensuring that employees can report injuries or illnesses without fear of retaliation is therefore crucial to protecting worker safety and health.

There are several types of workplace policies and practices that could discourage reporting and could constitute unlawful discrimination and a violation of section 11(c) and other whistleblower protection statutes. Some of these policies and practices may also violate OSHA's recordkeeping regulations, particularly the requirement to ensure that employees have a way to report work-related injuries and illnesses. 29 C.F.R. 1904.35(b)(1). I list the most common potentially discriminatory policies below. OSHA has also observed that the potential for unlawful discrimination under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates.

While OSHA appreciates employers using safety as a key management metric, we cannot condone a program that encourages discrimination against workers who report injuries.

1. OSHA has received reports of employers who have a policy of taking disciplinary action against employees who are injured on the job, regardless of the circumstances surrounding the injury. Reporting an injury is always a protected activity. OSHA views discipline imposed under such a policy against an employee who reports an injury as a direct violation of section 11(c) or FRSA. In other words, an employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury. In addition, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35(b), and where it is encountered, a referral for a recordkeeping investigation should be made. Where OSHA encounters such conduct by a railroad carrier, or a contractor or subcontractor of a railroad carrier, a referral to the Federal Railroad Administration (FRA), which may conduct a recordkeeping investigation, may also be appropriate.
2. In another situation, an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. Such cases deserve careful scrutiny. Because the act of reporting the injury directly results in discipline, there is a clear potential for violating section 11(c) or FRSA. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination. In investigating such cases, factors such as the following may be considered: whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest. Again, where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, they may result in inaccurate injury records, and a referral for a recordkeeping investigation should be made.
3. In a third situation, an employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation

of a safety rule by the employee. OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. In some cases, however, an employer may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury. A careful investigation is needed. Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline against employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Enforcing a rule more stringently against injured employees than noninjured employees may suggest that the rule is a pretext for discrimination against an injured employee in violation of section 11(c) or FRSA.

4. Finally, some employers establish programs that unintentionally or intentionally provide employees an incentive to not report injuries. For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time. Such programs might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, there are better ways to encourage safe work practices, such as incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses". OSHA's VPP Guidance materials refer to a number of positive incentives, including providing tee shirts to workers serving on safety and health committees; offering modest rewards for suggesting ways to strengthen safety and health; or throwing a recognition party at the successful completion of company-wide safety and health training. See *Revised Policy Memo #5 - Further Improvements to VPP* (June 29, 2011).

Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury. FRSA similarly prohibits a railroad carrier, contractor or subcontractor from discriminating against an employee who notifies, or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury. If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will

be disqualified from receiving the incentive, which could be considered unlawful discrimination. One important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it "might have dissuaded reasonable workers from" reporting injuries. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

In addition, if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program would result in the employer's failure to record injuries that it is required to record under Part 1904. In this case, the employer is violating that rule, and a referral for a recordkeeping investigation should be made. If the employer is a railroad carrier, contractor or subcontractor, a violation of FRA injury-reporting regulations may have occurred and a referral to the FRA may be appropriate. This may be more likely in cases where an entire workgroup is disqualified because of a reported injury to one member, because the injured worker in such a case may feel reluctant to disadvantage the other workgroup members.

Please contact the Office of Whistleblower Protection Programs at (202) 693-2199 if you have further questions.

Background Fact Sheet 17: Do You Have a Right to Refuse Unsafe Work?

If:

- a safety or health condition clearly presents a risk of death or serious physical harm;
- there is not sufficient time for OSHA to inspect; and
- where possible, a worker has asked the employer to eliminate the danger,

you may have a legal right to refuse to work in a situation in which you would be exposed to the hazard.

Workers should request from their employers alternative tasks that would not expose them to the hazard.

If a worker, with no reasonable alternative, refuses in good faith to expose himself or herself to a dangerous condition under these circumstances, the OSH Act is supposed to protect employees from subsequent employer retaliation.

If you believe you have been discriminated against for refusing unsafe work, you can file an OSHA 11(c) complaint within 30 days. The National Labor Relations Act and the New Jersey Conscientious Employees Protection Act can also provide related protections.

In reality, refusing to do a dangerous job – even one that poses an imminent hazard – can prompt some employers to retaliate. The best protection against this is to work with your coworkers and union to prevent hazards and to negotiate contract language proving employees with unambiguous rights to refuse unsafe work until hazards are corrected.

Further Resources

The OSHA website at www.osha.gov has a wide range of useful resources, including standards, interpretations, and more detailed information on employer responsibilities and workers' rights, etc. You can also order multiple copies of printed OSHA publications for worksite distribution.

The New Jersey Work Environment Council website at www.njwec.org also has many useful resources. For WEC's *Preventing Workplace Hazard; An Action Guide for New Jersey Workers and Unions* (Second Edition), go to www.njwec.org/resources.cfm. You can also order printed copies. This guide includes 20 model information request letters, including ones to OSHA that designate a union "walkaround" representative and that request copies of OSHA inspection records.