

Why and How Best to Prepare for an OSHA Inspection

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ERIC J. CONN is Head of the OSHA Practice Group at Epstein Becker & Green, where his practice focuses on all aspects of occupational safety & health law, including:

- Representing employers in inspections, investigations, and enforcement actions involving OSHA, CSB, MSHA and other federal, state and local agencies
- Managing investigations of catastrophic industrial, construction, grain, and manufacturing accidents
- Handling OSHA litigation, including appeals of citations & negotiation of settlements to minimize exposure to Repeat violations and the impact of OSHA enforcement on wrongful death & injury cases
- Conducting safety training & compliance counseling

Agenda

- **Why Prepare for OSHA Inspections**
- **OSHA's Enforcement Philosophy**
- **Update on OSHA Enforcement Issues**
- **Tools & Procedures To Put in Place**
- **Managing OSHA Inspections**

Why Grain Handlers Must Prepare for OSHA

- Significant increase in OSHA enforcement
- OSHA's extreme scrutiny of grain industry
- Other costs of OSHA inspections/enforcement
- Cast workplace in best possible light
- Better control over the flow of information
- Improve safety
- Minimize exposure to Willful violations
- Too late to prepare once OSHA arrives



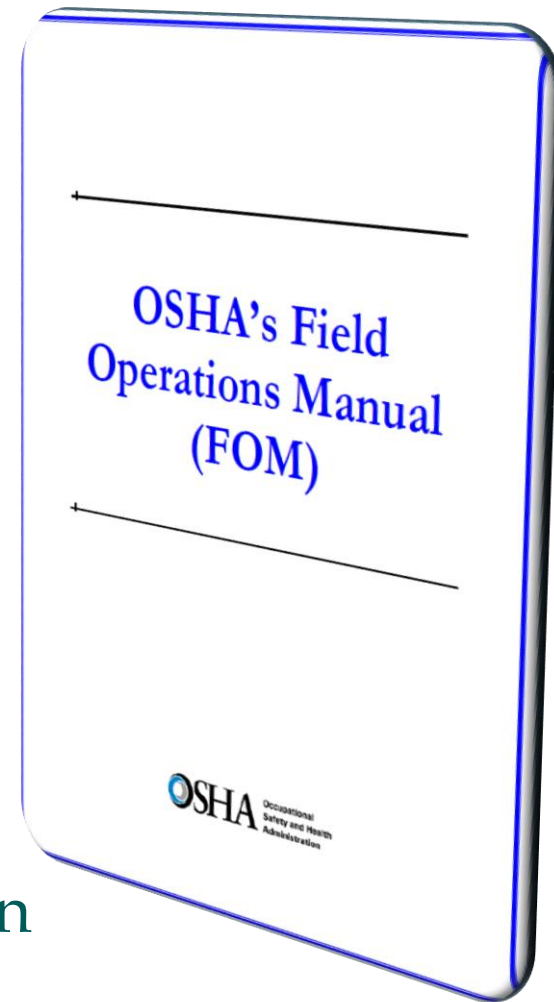
Enforcement-Heavy Philosophy

- 100+ new CSHOs
- More citations
- Increased penalties
- More criminal cases
- Spike in significant/egregious cases
- New enforcement initiatives
- Added special emphasis programs
- Expanded scope beyond single workplace



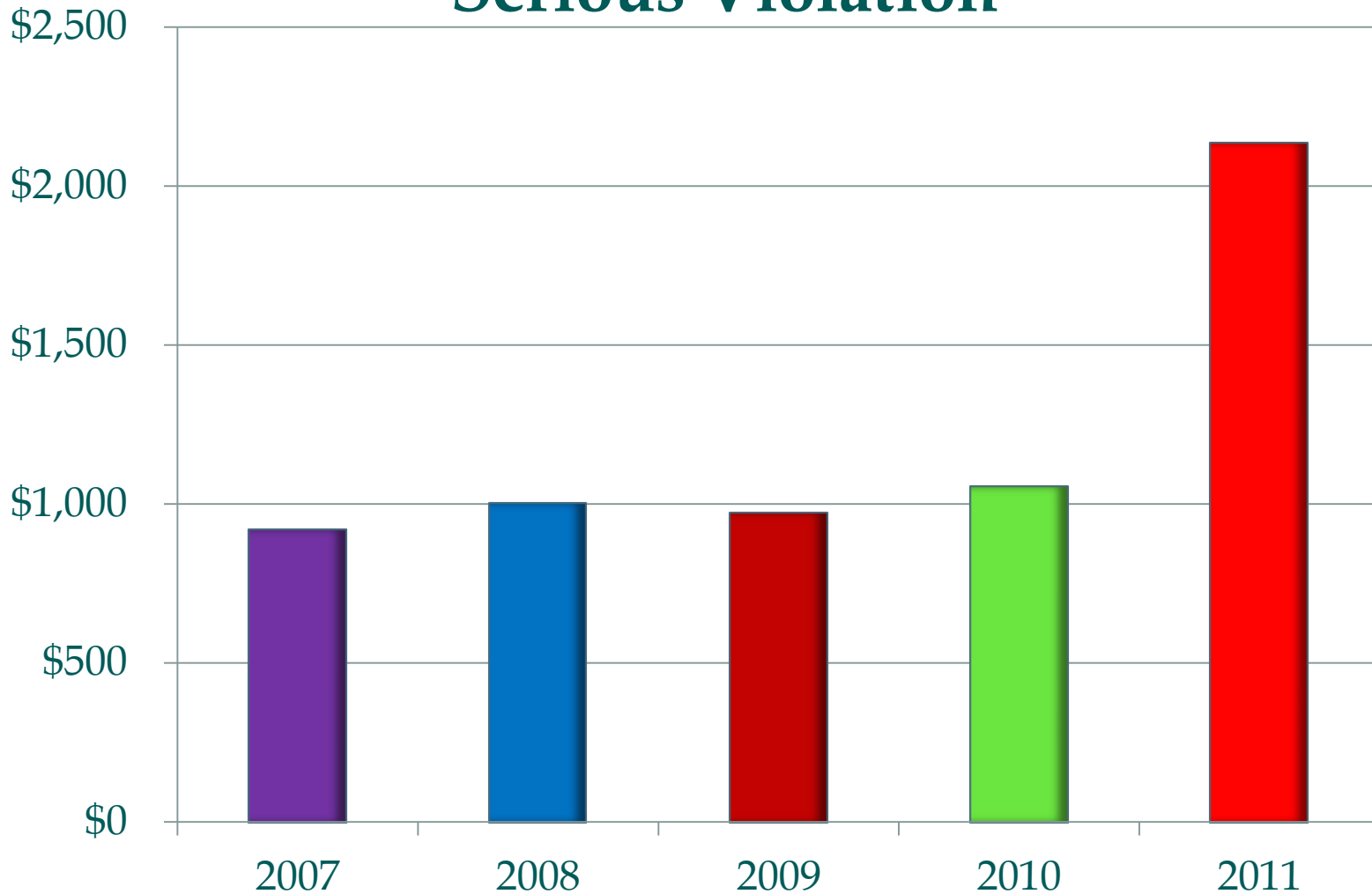
Enforcement-Heavy Philosophy

- Field Operations Manual amended to force up penalties:
 - Doubled minimum penalties
 - Halved allowable penalty reductions for size
 - Time for “Repeat” increased from 3 to 5 years
 - Time for clean history reduction expanded from 3 to 5 years
 - Maximum 30% penalty reduction at informal conference



Increase in Average Penalty Amounts

Average Penalty Per Serious Violation



Follow-up Inspections/Repeat Violations

OSHA historically:

- Treated workplaces as individual, independent establishments
- Limited its review of employers' OSHA records to 3 years
- Reactive Philosophy (less likely to revisit workplaces within a few years)

OSHA now:

- Treats workplaces within a corporate family as 1 workplace
- Looks back 5 years at employers' OSHA enforcement records
- Proactive Philosophy (hand selects past violators as targets for inspection)

Proactive Targeting Philosophy

- Shift from reactive to proactive targeting
- Increased use of National Emphasis Programs (“NEP”) and Local Emphasis Programs (“LEP”)

**LEPs for Grain
Handling
Facilities**

**Falls In General
Industry LEP**

**Combustible
Dust NEP**

**Injury &
Illness
Recordkeeping
NEP**

Proactive Targeting Philosophy

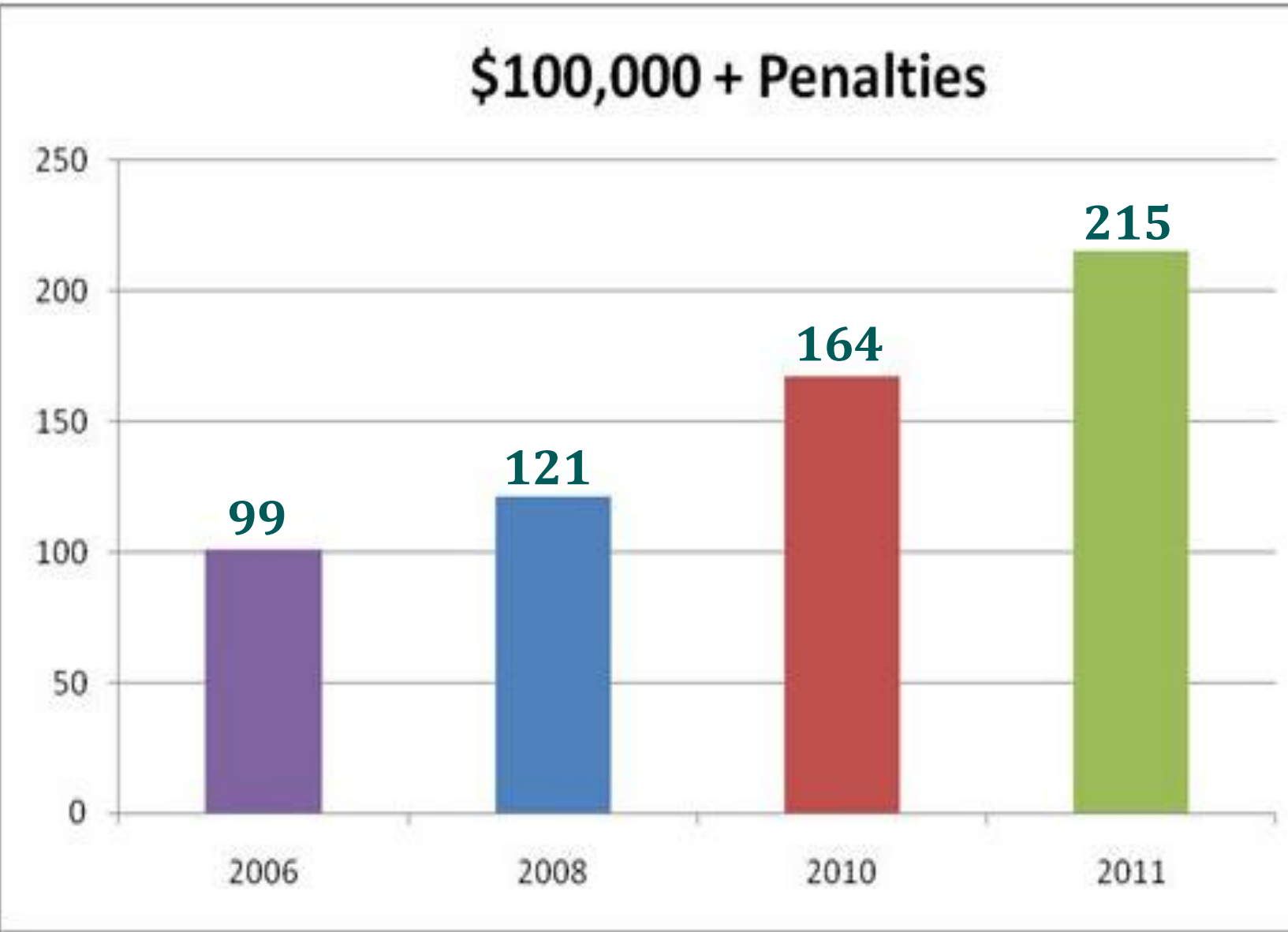
| OSHA Inspection Statistics | 2006 | 2010 | Percent Change |
|--------------------------------|--------|--------|----------------|
| Total Inspection | 38,579 | 40,993 | 6.2% |
| Total Programmed Inspections | 21,506 | 24,759 | 15.1% |
| Total Unprogrammed Inspections | 17,073 | 16,234 | - 4.9% |

Increase in Repeat Violations from 2006 to 2010

| Classification of Violations | Percent Change |
|------------------------------|----------------|
| Serious | 22.1% |
| Repeat & Willful | 225.2% |
| Other-than-Serious | - 10.4% |

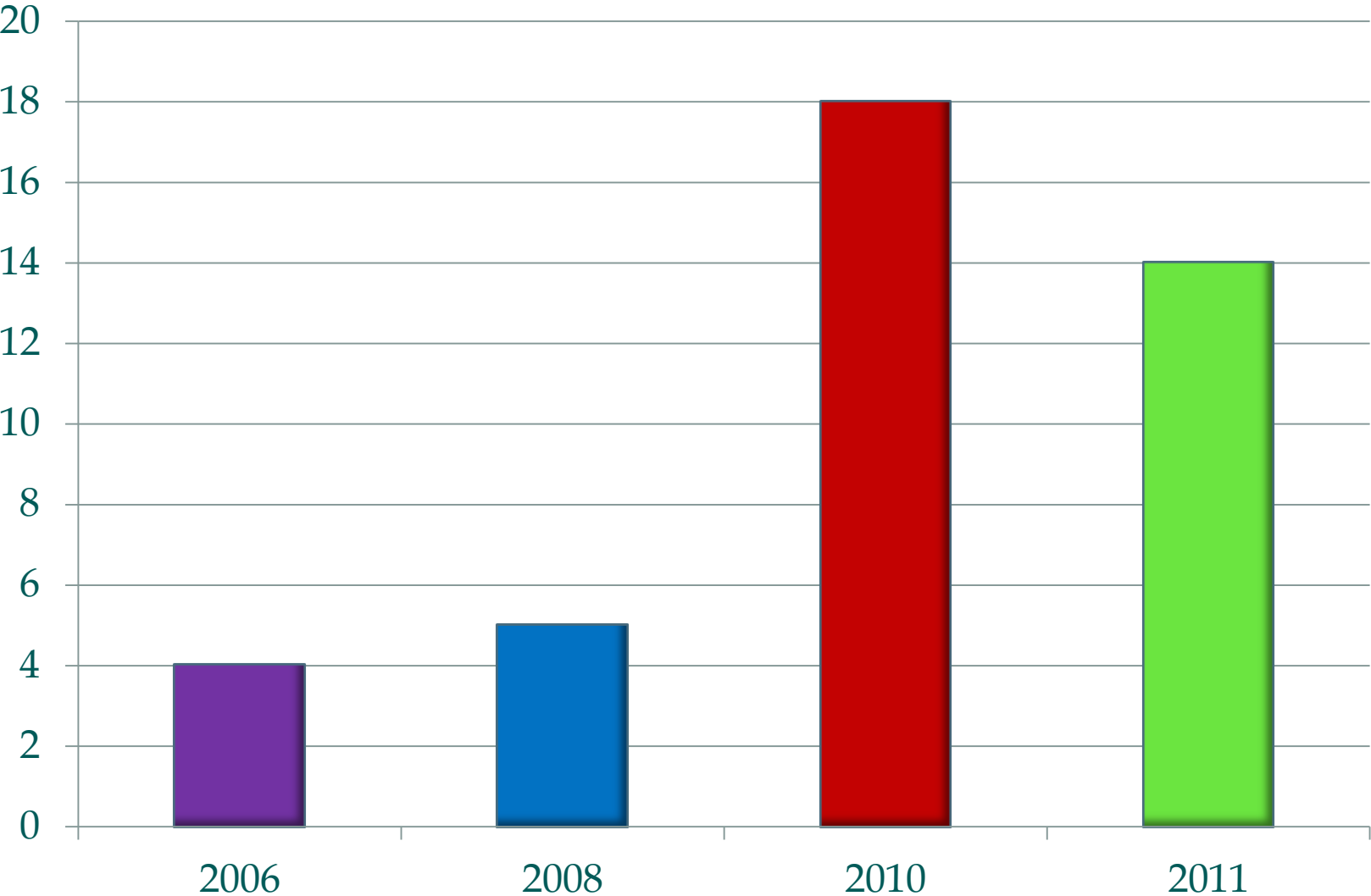
Increase in Penalties from 2006 - 2011

\$100,000 + Penalties



Increase in Penalties from 2006 - 2011

\$1,000,000 + Cases



Severe Violator Enforcement Program

Severe Violators = Employers who “demonstrate indifference to their OSH Act obligations” by:


Any egregious enforcement action



1+ Willful, Repeat, or FTA citations related to a *fatality or catastrophe*

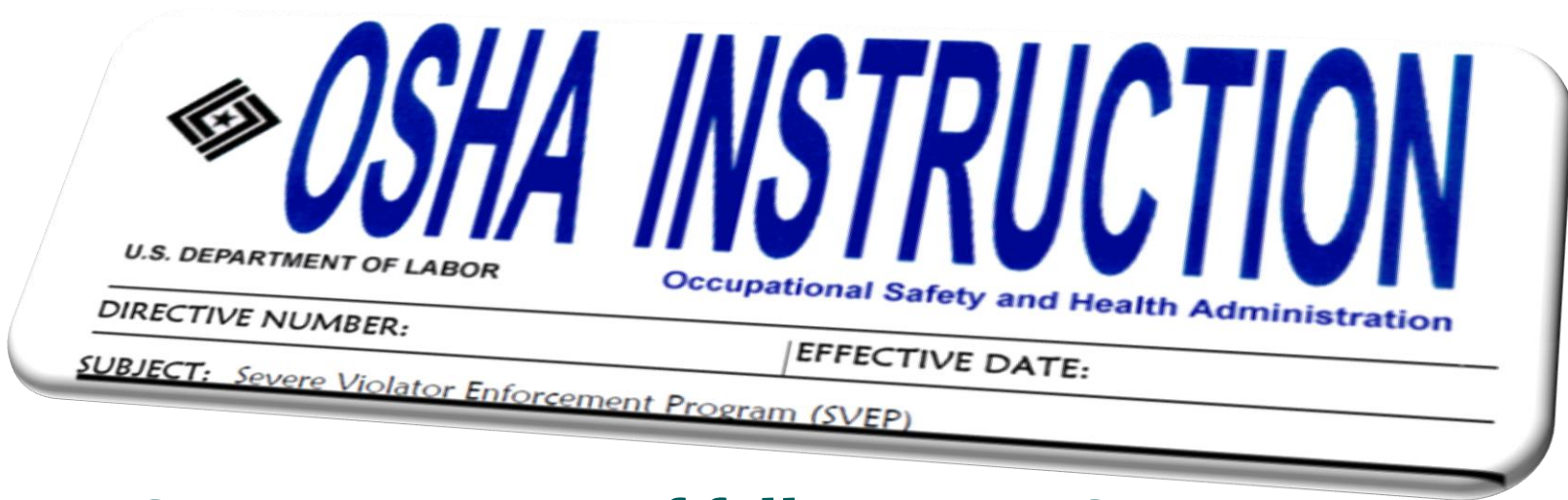


2+ Willful, Repeat or FTA citations related to *High-Emphasis Hazards*



3+ willful, repeat, or FTA citation related to *potential release of a HHC*

Severe Violator Enforcement Program



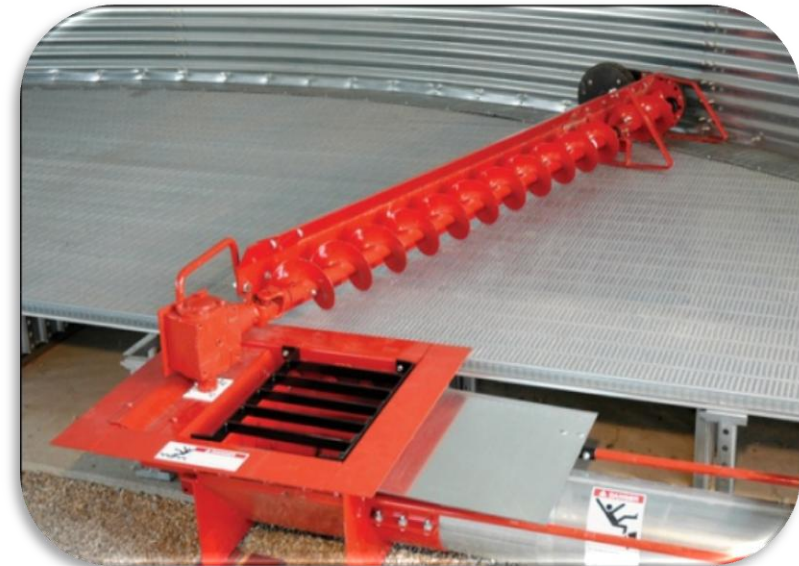
- Consequences of falling into SVEP:
 - Mandatory follow-up inspections
 - Enhanced settlement agreements
 - Corporate-wide agreements
 - Shaming
 - No defined way out (coming soon)

Impact on Grain Handlers

- Because many Co-ops and Grain Handlers operate multiple facilities:
 1. Enhance the lines of safety & health communication between sister facilities
 - Ex: Each facility must be aware of any OSHA activity at sister facilities
 2. Act to correct similar issues identified by OSHA at each location; and
 3. Challenge citation items

Enforcement Specific to Grain Handling Industry

1. Letters to Thousands of Grain Handlers
2. Local & Regional Emphasis Programs
3. Sweep Auger Issue & Interpretation Letters
4. Combustible Dust Rulemaking / NEP
5. Rolling Stock Fall Protection



OSHA[®] FactSheet

Worker Entry into Grain Storage Bins

Engulfment and Suffocation Hazards

Grain storage bin entry is very dangerous and exposes workers to serious suffocation hazards - a leading cause of fatalities in this industry. Suffocation can occur when workers are engulfed (buried or covered) by grain or when bins develop hazardous atmospheres or a lack of oxygen.

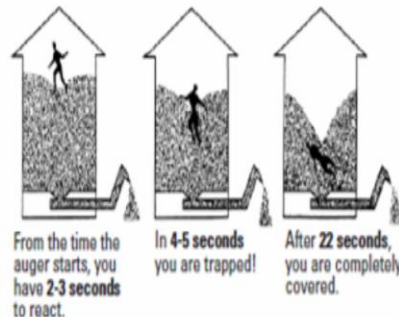


Figure 1. Flowing grain can bury a worker in seconds.

The OSHA Inspection

Sec. 8(a) of the OSH Act:

“OSHA may inspect at reasonable times any workplace during regular working hours and at other reasonable times within such reasonable limits and in a reasonable manner.”

Public Law 91-596
84 STAT. 1590
91st Congress, S.2193
December 29, 1970,
as amended through January 1, 2004. (1)

An Act

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Act of 1970."

OSHA's Inspection Rights

- Right to inspect workplaces (probable cause/plain view)
- No Advance Notice
- Right to inspect records
- Right to collect physical evidence
- Right to conduct interviews



Employees' Inspection Rights

- Right to file a Complaint
- Right to no be retaliation/ discrimination
- Participation Rights:
 - Opening Conference
 - Walkaround
 - Private interviews
 - Closing Conference
 - Informal Settlement Conference
 - Access to inspection records

Employer's Inspection Rights

Employers have a right to:

- “Reasonable Inspection” at “Reasonable Times”
- Demand a Warrant
- Have an Opening Conference
- Copy of a Formal Complaint
- Accompany CSHO on Walkaround
- Participate in Management Interviews
- Protect Trade Secret/CBI
- Insist on a Closing Conference
- Challenge Citations

What To Do Before OSHA Begins an Inspection?

- Review OSHA's grain handling emphasis programs and directives
- Review OSHA's Field Operations Manual
- Implement comprehensive Safety Programs
- Audit written programs and ensure implementation
- Think beyond a single facility
- Implement key grain handling safety programs:
 - Confined Space Entry
 - Housekeeping
 - Emergency Action Plans
 - LO/TO

What To Do Before OSHA Begins an Inspection?

- Designate Your Inspection Team:
 - Spokesperson
 - Escort
 - Photographer
 - Sampler
 - Walkaround Rep.
 - Union/Contractor Liaison
 - Document Coordinator
 - Interview Representative
- Train Your Inspection Team:
 - Who to contact
 - Inspection rights of OSHA, employers, and employees
 - OSHA Standards
 - How to control flow of info.



What To Do Before OSHA Begins an Inspection?

- Provide Inspection Tools:
 - Camera/Video Camera
 - Contact List
 - Document Control Log
 - Sampling Tools
 - Copy of OSHA's FOM
 - Document Labels
 - Choice of Rep. Forms
 - Cover Sheets
- Designate / Audit Walkaround Routes
- Determine Warrant/Consent Philosophy

Warrant or Consent?

- 4th Am. to U.S. Constitution:

- “The right of the people to be secure in their houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause, supported by oath... particularly describing the place to be searched.”

- Warrant or Consent?

- Probable Cause
- Plain View Exception



"It's a pretty nice warrant, all right, but I wouldn't call it 'outstanding'."

Warrant or Consent?

- **Benefits of Warrant:**
 - Constitutional right of privacy
 - Restraint on OSHA
 - Passage of time
- **Risks of Warrant:**
 - Potential retaliation
 - Loss of control over inspection
- **Benefits of Consent:**
 - Appearance of cooperation
 - Easier to manage inspection
 - Minimize business interruption
- **Risks of Consent:**
 - Scope of inspection may expand

Practitioner's Tip:

Generally, waive the warrant requirement and consent to the inspection, but only after negotiating acceptable scope and conditions

Stages of the OSHA Inspection



- Opening Conference



- Walkaround Inspection



- Employee Interviews



- Closing Conference



- Citations Issued / Contested

Opening Conference

- CSHO arrives and displays credentials
- Resolve the warrant issue
- Opening Conference begins
- Employee rep. may participate
- Explain purpose of inspection
- CSHO will discuss scope and duration
 - Wall-to-Wall
 - Complaint / Referral
 - NEP / LEP
 - Accident
- CSHO requests documents/information



Opening Conference

PRACTITIONER'S TIPS:

- Insist on an Opening Conference
- Designate in advance the location and who will participate in Opening Conference
- Ask, if CSHO does not volunteer purpose/scope
- Prepare a list of who needs to be notified:
 - Inspection Team -- OSHA Counsel -- Contractors
 - Sr. Managers -- Field Supervisors
- Introduce the management and inspection teams
- Explain to OSHA your Document Production Protocol
- Set up procedure for arranging employee interview
- Arrange for daily close-out meetings
- Arrange to screen photo/film for Trade Secret or CBI

Production of Documents/Information

- Insist on Written Requests for Documents:
 - Except: 300 Logs/300A Forms within 4 hours
- Voluntary vs. Subpoena
- Do not create new documents
- Do not leave documents in plain sight
- Do not volunteer information
 - Except: Without more information, OSHA will misunderstand a fact to your detriment
- Responsive, privileged or trade secret/confidential business information

Production of Documents

- Keep a copy set of all documents
- Maintain a Document Control Log

OSHA INSPECTION DOCUMENT CONTROL LOG

| REQ # | DATE REC'D | DESCRIPTION OF REQUEST | EMPLOYEE ASSIGNED | DATE OF ACTION | DOCUMENTS PRODUCED | TRADE SECRET OR CBI | BATES RANGE |
|-------|------------|---|-------------------|----------------|---|---------------------|---------------------------|
| 1-1 | 3/22/11 | OSHA 300 Logs for the past 5 years | J. Doe | 3/22/11 | 2006, 2007, 2008, 2009 & 2010 OSHA 300 Logs | | OSHA00001 - OSHA00010 |
| 1-2 | 3/22/11 | Completed Bin Entry Permits for the last year | J. Smith | 3/24/11 | Copies of completed PRCS entry permits for entries into grain bins dated 1/1/10 - present | X | OSHA000011 - OSHA00036 |
| 1-3 | 3/22/11 | Bin Entry Procedure | J. Smith | 3/24/11 | Copy of Permit Required Confined Space Procedure | X | OSHA000037 - OSHA00054 |

Walkaround Inspection

- Scope depends on nature/purpose of inspection
- Management rep. should accompany CSHO
- Employee rep. permitted to accompany
- Be cordial and professional, but protect your rights
- CSHO may take photos or video (take side-by-side images)
- If CSHO identifies hazards, fix ASAP but do not admit violations
- Require CSHO to abide by company safety rules



Walkaround Inspection

PRACTITIONER'S TIPS:

- Escort OSHA at all times
 - Ensure safety of CSHO
 - Gather intel about focus of inspection
 - Control flow of information
- Ask for advance notice prior to sampling
- Take detailed notes
- Hold short brief meeting at end of each day
 - Ask about concerns
 - Ask about interviews/tasks for next visit
 - Consider proactive presentations re: concerns

OSHA Inspection Interviews

- Arranged through interview procedure
- Pre-selected office or conference room
- Stop & Talk vs. Interview (5 Minute Rule)
 - OSHA must be Reasonable
- Voluntary vs. Subpoena



Hourly Employee Interviews

- OSHA demands privacy for hourly employee interviews
 - FOM
 - Union Representation
 - Right to private interview belongs to employee - not OSHA
 - “Choice of Representative” Form
- Do not coerce or intimidate employees
- Do not discriminate against employees

Management Interviews

- Knowledge of supervisor imputed to Company
- No impromptu management interviews
- Participate in all management interviews (the employer's right, not the witness')
- Prepare management witnesses

OSHA Inspection Interviews

Prepare All Employees for
OSHA Interviews



Explain
Witness'
Rights



Give
Interview
Tips



Prepared
Witness

Closing Conference

- Held at the close of the inspection (can be weeks after the on-site inspection)
- CSHO will explain employer's post-citation rights
- CSHO will communicate findings:
 - Standards allegedly violated
 - Bases for alleged violations
 - Possible abatement and abatement dates
 - Usually will not share classification or penalty

Closing Conference

PRACTITIONER'S TIPS:

- Take detailed notes
- Primarily an opportunity to listen
- Correct errors and misimpressions
- Report alleged violations already corrected
- Request time to offer supplemental info
- Avoid damaging admissions
- Make no abatement/abatement date promises
- Ask CSHO about classifications and penalties

Citations Issued / Contested

- Sec. 9(c) of the Act: “No citation may issue ... after the expiration of 6 months from the occurrence of any violation.”
 - As a practical matter, OSHA has 6 months to investigate, draft reports, and issue citation
 - Delay caused by warrants/subpoenas does not change the 6-month rule
- Citations are delivered by hand or by certified mail, rrr
- Enforcement Press Releases

Regulation By Shaming



“In some cases, ‘**regulation by shaming**’ may be the most effective means for OSHA to encourage elimination of life-threatening hazards, and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger. To do this, we will issue more hard-hitting press releases that explain more clearly why we cited a specific employer.”

Enforcement Press Releases

2008

161
Enforcement
Press
Releases

2011

588
Enforcement
Press
Releases

Regulation by Shaming

"Exposing workers to life-threatening safety and health hazards is unpardonable. Many of these hazards can easily be corrected. No worker should have to risk his or her life for a paycheck."

"Despite having been cited for similar infractions in the past, the company continues to place workers in harm's way by allowing hazards to exist."

"This injury resulted from managers' complacency, as they failed to oversee . . . operators to make sure fall protection was used. The fact that the body belt was too big for the operator shows a lack of concern and a desire to get the job done regardless of danger to the worker."

"Eliminating safety barriers and failing to develop emergency plans because they are inconvenient or time-consuming is no excuse for endangering employees."

"Employees should not have to risk their lives for a paycheck. This amputation would not have occurred if the company had been following proper safety procedures and maintaining its equipment."

"It only takes seconds for a trench to become a grave, and OSHA will not tolerate an employer's disregard for worker safety."

"This company has a long history of OSHA violations, including employee injuries and fatalities in several of its plants. It needs to make a serious effort to comply with common-sense regulations to protect its employees."



Shaming By Twitter



Regulation by Shaming

- Harm caused to employers:
 - Reputation
 - Customers
 - Prospective Employees
 - Business Dealings
 - Banks/Lenders
 - Insurance
- Ammunition for organized labor
- Constitutional Due Process implications
- May violate Administrative Procedure Act

Regulation by Shaming

Develop and Implement a Media Plan:

- ✓ Designate “responders” to press inquiries
- ✓ Train on press “do’s and don’ts”
- ✓ Train others to know to whom they must direct press inquiries
- ✓ Negotiate with OSHA
 - Advance copy of press release
 - Substance of press release
- ✓ Prepare a Media Holding Statement

QUESTIONS?



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