

**OSC | 11**  
Ohio Safety Congress & Expo



**#465 When OSHA knocks on your door**

Charles Smith

Wednesday, March 30, 2011  
2:30 to 3:30 p.m.



**Ohio Safety Congress 2011**

OSHA Enforcement –  
Are You on the OSHA Watch List?



**Charles D. Smith, Esq.**  
Roetzel & Andress, LPA

© Roetzel & Andress, LPA 2011

**Introduction**

- New administrative rules in 2010
- Increase in enforcement efforts
- Shift focus from VPPs
- OSHA staffing and training  
110 new compliance workers =  
40,000 inspections in the coming year




3

**Severe Violator Enforcement Program (SVEP)**

- Launched June 2010
- Replaces EEP program
- Creates a nationwide referral procedure
- OSHA will maintain SVEP log on inspections
- Penalty changes
- High-emphasis hazards




4

**Whistleblower Protection Program**

- Prohibits employer from discharging or retaliating against employee who exercised rights under OSH Act
- Facts needed by persons who seek to file a complaint
- OSHA charged to administer whistleblower provisions of 18 other federal statutes




5

**OSHA Inspection: First 24**

- What triggers it?
  - Imminent danger
  - Fatality and catastrophe
  - Employer or employee complaints




6

### Imminent Danger: First 24

- Inspection will occur within 24 hours of notice to OSHA

**24**  
hours

### Fatality and/or Catastrophe: First 24

- One or more fatalities
- Three or more employees hospitalized
- Significant publicity

### Employee Complaints: First 24

- Complaints signed by an employee will always result in an inspection



### Your Inspection Team: First 24

- Management
- Photographer
- Document controller



### Are You Exempt from OSHA?

- Almost all private employers covered by OSHA
- Employers who do not have to comply with OSHA recordkeeping policies
- Office facilities and/or administrative offices are covered



### Issues to Address Before Inspection: First 24

- Training and documentation
- Compliance with regulations
- Injury/illness records for last 5 years
- Hazcom, lockout/tagout, respiration programs, PSM
- Emergency preparedness and evacuation procedures
- Posting requirements

### When the Inspector Arrives: First 24

- Request credentials
- Find out purpose of inspection
- Determine scope of inspection
- Delay inspection
- Request warrant
- Closing conference



### Use of Counsel: First 24

- Communications with governmental authorities, including OSHA and EPA inspectors
- Lead internal investigation of accident and report (negative) results in protected context
- Collect information in anticipation of litigation
- Organization of any follow-up communications

### Legal Investigation: First 24

- Initiate "Privileged and Confidential" investigation
  - All investigators and specialists hired by counsel: accident re-creation experts, forensic experts, environmental scientists and engineers, etc.
  - All paperwork and communications described as "work product" or in "anticipation of litigation"
- All aspects of investigation reported to counsel

### Legal Investigation: First 24

- Cannot be "standard operating procedure" or for "safety" purposes
- Determine whether employee(s) may be liable for the incident in "work product" context, not "safety"
  - Explore conflict of interest issues thoroughly

### Legal Investigation: First 24

- Ensure that site is secure throughout investigation
- Photograph/video site appropriately
- Gather all necessary evidence promptly after the incident
  - Document chain of custody carefully

### Legal Investigation: First 24

- Initial evaluation of liability exposure to the company
- Advise management immediately

### Legal Investigation: First Week

- Remember: All aspects of investigation reported to counsel
- Monitor all investigations conducted by the government
- All paperwork and communications described as “work product” or in “anticipation of litigation”
  - Not “standard” or for “safety”
  - Ensure “chain of custody”

### Legal Investigation: First Week

- Advise company officials regarding attorney-client privilege/waiver issues
  - Subsequent comments can waive protection
- Counsel company officials regarding communications with the government
  - Warn of inadvertent waivers/admissions

### Legal Investigation: First Week

- Participate in all witness / employee / contractor interviews conducted by the government
- Debrief all former employees that are interviewed as well

### Insurance: First Week

- Identify all secondary sources of insurance
  - i.e., company listed as named insured, additional insured on third party policies, etc.
- Notify all company insurance carriers of the incident



### Workers' Compensation Subrogation

- If there is a question of third-party liability

### Third Party Liability: First Week

- Determine whether a third party may be responsible for the incident
- If so, notify third party immediately
  - Ask third party to notify its insurance carrier(s) as well

## Third Party Liability: First Week

- Establish claim adjustment protocols
- Retain outside claim adjusters, as needed
- Review claims to assess magnitude of exposure to the company



25

## Legal Defense Strategies

- Review evidence regarding the cause of the incident
- Evaluate all available legal defenses
- Determine whether additional evidence is needed to prepare a proper defense
- Gather the evidence that is necessary to defend against governmental and third party claims



26

## Q&A Session



Washington, D.C. • New York • Cleveland • Columbus • Akron • Cincinnati  
Toledo • Fort Myers • Naples • Orlando • Tallahassee • Fort Lauderdale

© Roetzel & Andress, LPA 2011

## Contact Information

**Charles D. Smith, Esq.**

155 East Broad Street  
PNC Plaza, 12<sup>th</sup> Floor  
Columbus, OH 43215  
614.723.2025  
[csmith@ralaw.com](mailto:csmith@ralaw.com)



Washington, D.C. • New York • Cleveland • Columbus • Akron • Cincinnati  
Toledo • Fort Myers • Naples • Orlando • Tallahassee • Fort Lauderdale

© Roetzel & Andress, LPA 2011

Points of view, ideas, products, demonstrations or devices presented or displayed at the Ohio Safety Congress & Expo do not constitute endorsements by BWC. BWC is not liable for any errors or omissions in event materials.

**OSC | 11**  
Ohio Safety Congress & Expo