

## Challenging an OSHA Citation Issued on Long Island

The Occupational Safety and Health Administration (OSHA) is charged with assuring that workplaces, including construction sites and shops, are safe and healthy working environments. To carry out their mission, OSHA will visit work sites and work places, including construction shops and yards, and perform inspections for compliance with OSHA regulations. OSHA visits (inspections) can be random or the result of being contacted by authorities or whistle blowers for potential work site violations. Often, the visit will result in the issuance of citations to the employer. Once the citation (violation) is issued, the employer has two options: accept it and pay the fine or challenge the citation.

Before accepting a citation, it is a good idea to speak with legal counsel about possible challenges or reductions, especially if the fine is large or the citation is willful or serious. Accepting a citation may have unforeseen consequences (such as impacting your insurance premiums or ability to even obtain insurance).

### Types of Citations

- **Other Than Serious Violation** – This is a violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm. A proposed penalty of up to \$12,471 for each violation is discretionary. The penalty for an other than serious citation may be adjusted downward by as much as 95 percent, depending on the employer's good faith, history of previous violations, and size of the business cited.
- **Serious Violation** – A violation where there is a substantial probability that death or serious physical harm could result (injury or death doesn't have to have actually resulted) and that the employer knew, or should have known, of the hazard. A mandatory penalty of up to \$12,471 for each serious citation is possible. A penalty for a serious violation may also be adjusted downward.
- **Willful Violation** – A violation that the employer knowingly commits or commits with plain indifference to the law. The employer either knows that what he or she is doing constitutes a violation or is aware that a hazardous condition existed and made no reasonable effort to eliminate it. Penalties of up to \$124,709 may be proposed for each willful violation, with a minimum penalty imposed for each citation. A proposed penalty for a willful *may* be adjusted downward. If an employee was killed, and a willful violation against the employer is upheld, the penalty is up to \$250,000 for an individual or \$500,000 for a corporation. A criminal conviction for a willful violation also carries a possible jail sentence of up to six (6) months.

### Challenging the Citation in Long Island

Once the employer receives the citation, he, she or it has only fifteen (15) working days to contact OSHA and settle the citation or file a "notice of contest." The first thing that all employers should do when they receive an OSHA citation is contact their attorney. A citation,

even one that is other than serious, can be harmful to the business, especially if there are repeat violations. Accordingly, they should never be taken lightly. All staff should be instructed that when an OSHA violation arrives it should **immediately** be brought to the attention of management.

Often, the first step your attorney will recommend is requesting an informal conference to discuss the violation. Many, but not all, OSHA citations are capable of being resolved at this informal conference. It is a quick, easy, and relatively inexpensive way to reduce or eliminate the violations. But preparation for the conference is key and the presence of legal counsel is strongly recommended.

If the informal conference is not successful, then the next step is to file a “notice of contest.” The notice **must** be filed within fifteen (15) working days of receipt of the citation. This is a hard deadline and missing the deadline often will result in waiver of the right to dispute the citation. The notice of contest gets filed with the local area director. For citations issued in Long Island, the local area office of OSHA is currently located at 1400 Old Country Road in Westbury. Again, it is **strongly** recommended that you engage legal counsel to file the notice of contest even if you chose to proceed with the informal conference yourself.

Once the notice of contest is received by OSHA the matter is forwarded to the Occupational Safety and Health Review Commission (OSHRC). The Department of Labor then has twenty (20) days to file a formal complaint with OSHRC. Make no mistake, even though you are not in the typical “court” system, your notice of contest has commenced litigation. The DOL will file its complaint and you will have to file an answer. Motions can then be filed before the Administrative Law Judge assigned to the matter and discovery is often permitted. Ultimately, if a resolution still cannot be reached, a trial will take place before the administrative law judge and a decision will be issued either affirming and upholding the violations or defeating them.

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