



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Construction Safety Law 2020

Presented by:
Brent I. Clark
Adam R. Young

March 18, 2020

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Speakers



Brent I. Clark

(312) 460-5876

bclark@seyfarth.com

Brent is the chair of the Workplace Safety and Environmental practice group at Seyfarth Shaw LLP.



Adam R. Young

(312) 460-5538,

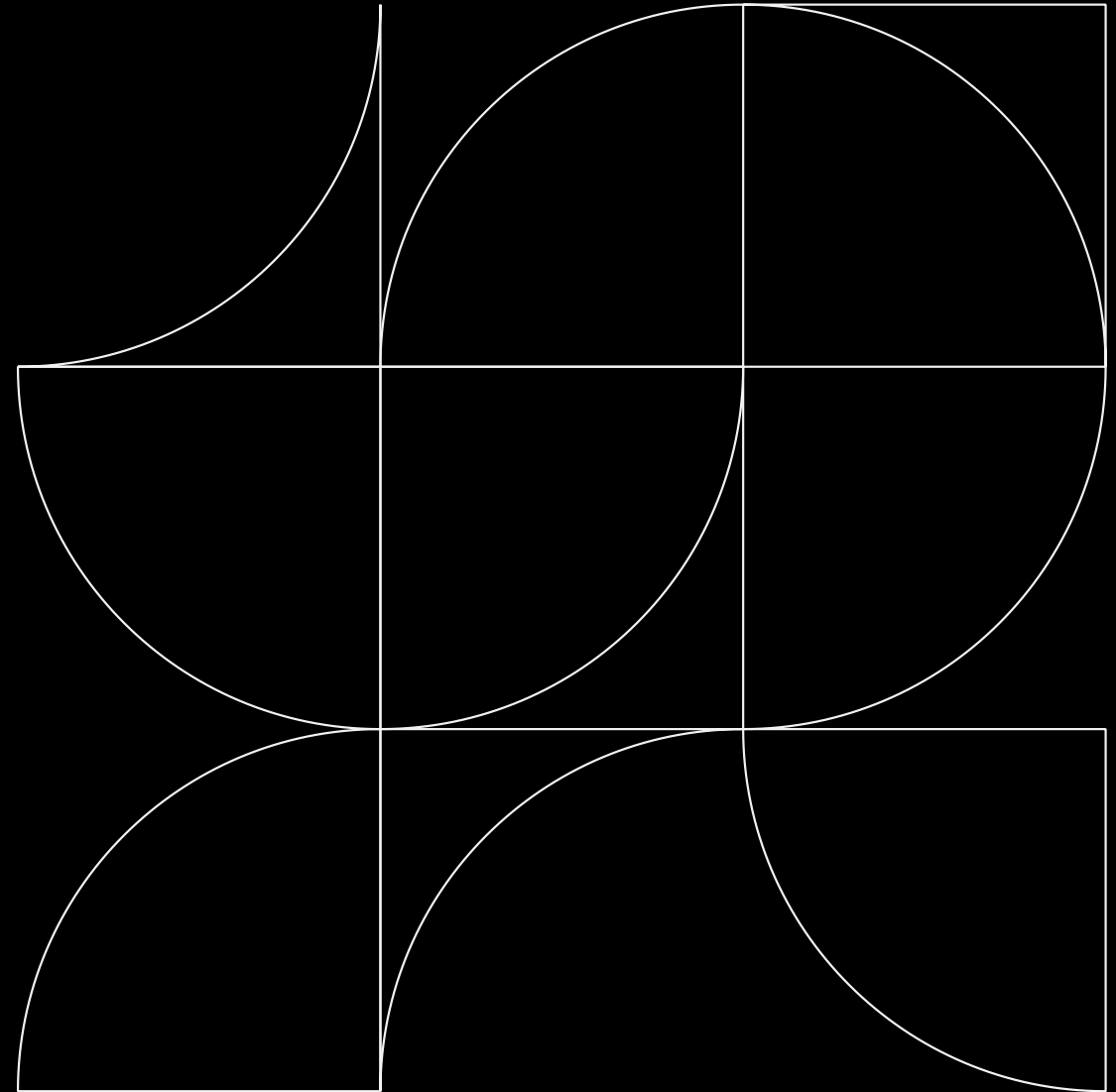
ayoung@seyfarth.com

Adam is a workplace safety and employment attorney with Seyfarth Shaw LLP.

Program Objectives

- Discuss OSHA enforcement initiatives and trends
- New penalty and liability policies
- How to reduce the risk of OSHA citations
- How to manage an OSHA inspection

OSHA Enforcement Agendas, Defenses and Inspections



OSHA Liability

- Initially, employer responsible for its own employees
- Employer had to ensure that its employees were protected against:
 - “Recognized Hazards” To Employee Safety and Health (General Duty Clause)
 - Hazards Identified In Specific Regulations
29 CFR 1926, e.g. falls, electrical, lead, silica, etc.) (Construction Industry



Most Commonly Cited Regulations in Construction

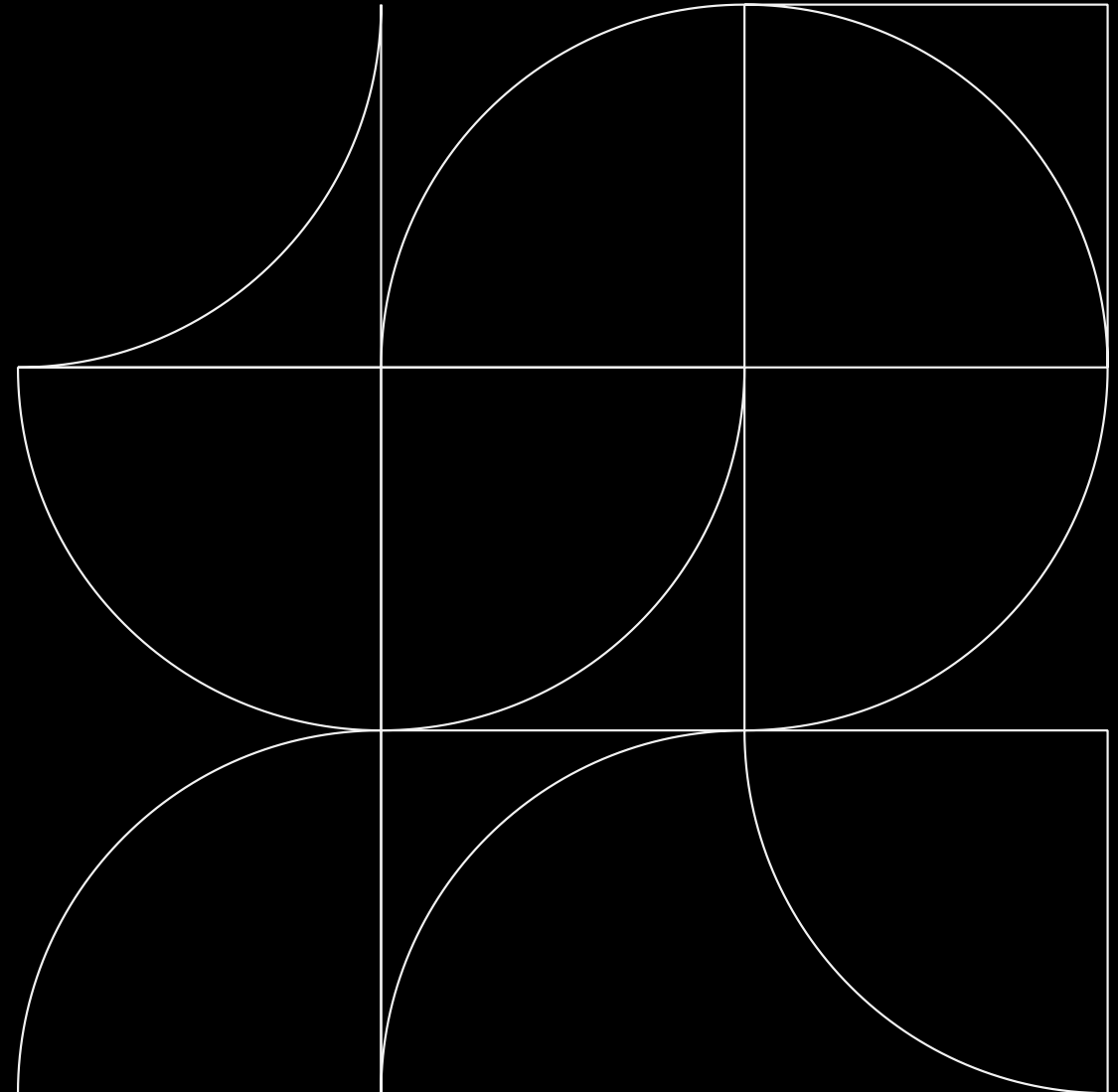
1. Fall protection, construction ([29 CFR 1926.501](#))
2. Scaffolding, general requirements, construction ([29 CFR 1926.451](#))
3. Ladders, construction ([29 CFR 1926.1053](#))
4. Fall Protection–Training Requirements ([29 CFR 1926.503](#))
5. Eye and Face Protection ([29 CFR 1926.102](#))



OSHA Emphasis Programs

- National Emphasis Programs
 - Lead
 - Trenching and Excavation
 - Crystalline Silica
- Example Local Emphasis Programs
 - Roadway Work Zone Activities
 - Fall Hazards in Construction

New penalty and liability policies



Revised Penalty Structure

	<u>2019</u>	<u>January 15, 2020</u>
Other Than Serious	\$13,260	\$13,494
Serious	\$13,260	\$13,494
Willful	\$132,598	\$134,937
Repeat	\$132,598	\$134,937
Failure to Abate	\$13,260 per day	\$13,494 per day

- OSHA penalties increased to Consumer Price Index (CPI)
- Will be revised every following year

OSHA Liability

- Liability was expanded under “Multi-Employer Workplace Doctrine”
- Now, each Employer is potentially responsible for the safety and health of another Employer’s Employee, if the Employer:
 - Creates the hazard
 - Exposes an Employee to the Hazard
 - Is responsible to correct the hazard, or
 - Is the controlling Employer on the site
- Liability can involve citations (against Employer) and criminal prosecution (against Employer and Management Representatives)

Many Different Categories of Employers and Employees On-Site

- General Contractor
- Subcontractors
- Leased/Borrowed Employees
- Temporary Employees
- Consultants

Key: OSHA is looking at the workplace as a whole – so should you.



Specialty Contractor Defense

- An employer may reasonably rely on a specialty contractor to perform work in its area of specialization in compliance with OSHA regulations.
- What makes reliance on a subcontractor reasonable?
 - subcontractor knowledge and experience
 - employer's experience and history with subcontractor
 - terms of the contract, scope of the work
 - no actual knowledge of onsite non-compliance / safety issues
 - no constructive knowledge due to reasonable quality assurance

Specialty Contractor Defense: Examples from the Law

- *Secretary of Labor v. Suncor Energy (U.S.A.) Inc.*, Docket No. 13-0900 (O.S.H.R.C. 2019)
 - Host employer is “not required to inspect the worksite as intensively as an employer whose own employees are exposed.”
 - Commission rejects OSHA’s “scattershot approach” to cite all employers at a worksite.
- *Manua v. Scalia*, No. 18-1307 (D.C. Cir 1-28-2020)
 - Reliance on the subcontractor is unreasonable when “an employer has reason, by way of expertise, control, and time, to foresee a danger to its employees.”
 - Employer must take its own safety measures to protect employees, such as designating the crane work zone

Many Different Categories of Employers and Employees On-Site

- Critical Issues:
 - Contractual relationship – does it define responsibility for safety and health compliance, employee training, personal protective equipment.
 - Consider whether you exercise control over “means and methods” of performing work by independent contractor employees or temporary employees if staffing service has on-site supervision
 - Imminent Danger – Host employer must stop work immediately if any employee in imminent danger of injury.

Aggressive Enforcement

- Use of interpreters
- Emphasis on repeat citations
- Cautionary tale:
 - Use of knowledge of previous inspection to justify willful citation
- Requests for Root Cause analysis and company insurance audits
- Severe Violator Enforcement Program
- Fall Protection – Walking/Working Surfaces
- Crystalline Silica

Aggressive Enforcement

- Employee by Employee Citations
 - PPE Standard – each employee failure to use personal protective equipment
 - Fall Protection – each instance of failure to use fall protection
- Enhanced Use of General Duty Clause
 - Workplace Violence
 - Arc Flash – Arc Blast
 - Heat Illness – Cold Exposure

Revised Recordkeeping Rule

- Rule will potentially impact employer policies relating to:
 - requirement to timely report injuries or illnesses to employer
 - incentive program metric based on recordable injury or illness (DART rate)
 - post-accident mandatory drug testing

Employee Literacy Challenges

- OSHA inspections revealing increasing lack of Employee Literacy
- Employees do not “understand” training
- English Speaking employees are unable to read safety and health programs
- OSHA challenges the particular language in safety programs
- Employers are rewriting safety programs to level of fourth grade educational comprehension
- Employers utilize more visual aids such as pictograms

Native Language Requirements

- All training must be given in a language that the employee understands
 - Certain OSHA regulations require “training”, others require Employer to prove training was “effective” or “understood”
 - OSHA will look at how employer provides work instructions to employees and whether it is different than safety training (e.g. safety training in English but supervisor gives work instructions in Spanish).
 - OSHA will interview employees to determine whether they understand English only training (e.g. if employee cannot speak English but all training documents are English only, you have a problem).
 - Employers must determine whether employees are literate
 - Bilingual trainers and documentation may be required to prove training was compliant.

Criminal Law Liability

OSHA

- Potential liability if:
 - Fatality
 - Violation of specific regulation
 - Violation was willful, and
 - Violation caused fatality
- Penalty
 - 6 months imprisonment, and/or
 - \$500,000 fine per fatality for employer
 - \$250,000 fine per fatality for individual

NOTE: No Miranda Warnings Necessary

Criminal Law Liability

OSHA – Additional Potential Criminal Liability

- Obstruction of justice for interfering with inspection
- Falsification of records
- Lying to federal inspector

STATE LAW

- Murder
- Manslaughter
- Reckless Endangerment
- Battery

Liability for Employer and Manager

Elements of an OSHA Citation



1. Applicable OSHA standard
2. Hazard existed (instance of violation of the OSHA standard)
3. Employee exposure to a hazard
 - Employee exposure must be reasonably foreseeable
 - OSH Act not designed to prevent intentional act by an employee
4. Employer knowledge of the alleged violation
 - Employer knew or should have known of alleged violation
 - “Employer” means a supervisor or member of management
 - “Lead” or “foreman” could be a manager

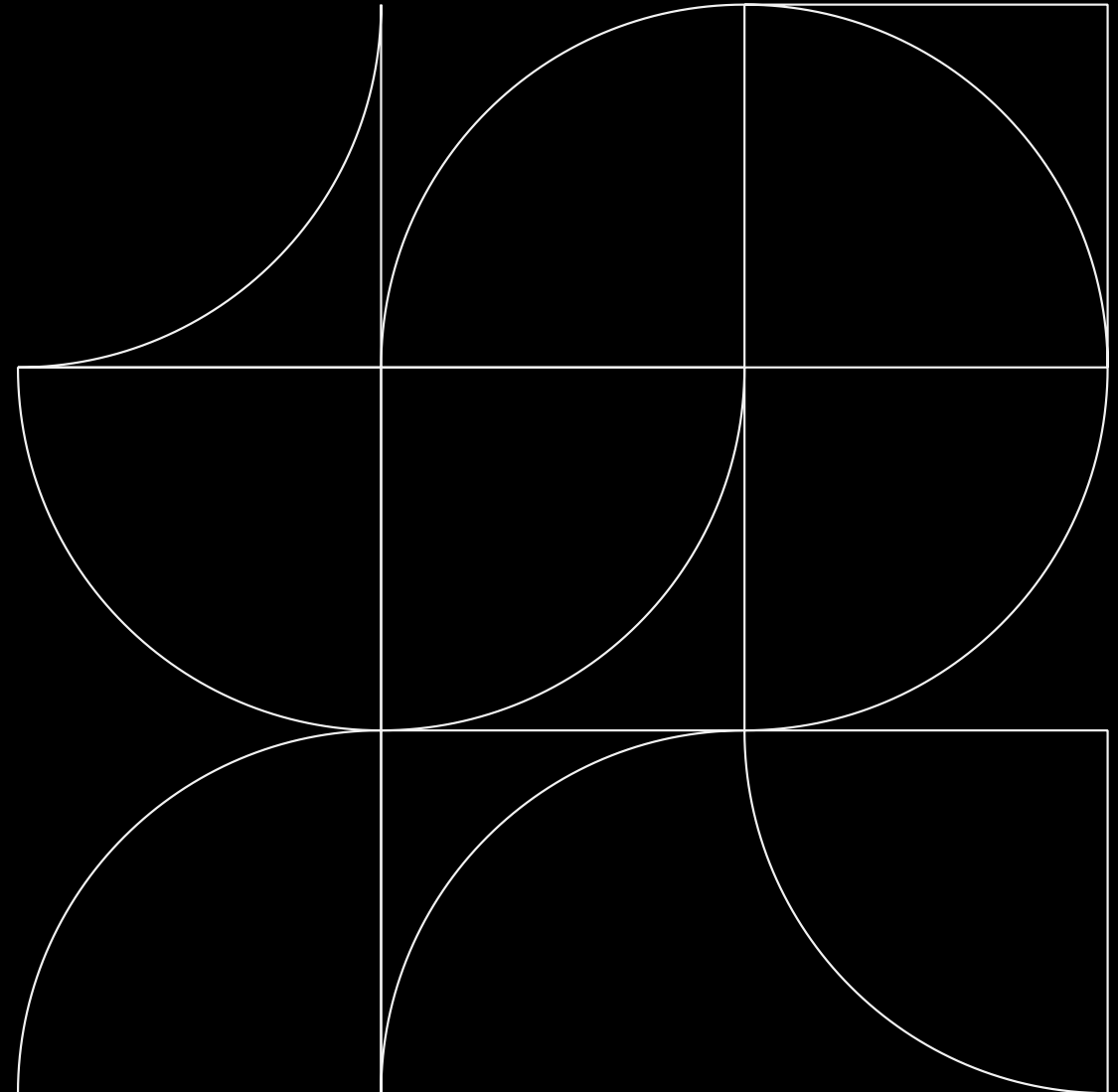
Unavoidable Employee Misconduct

- More important than ever to establish strong *unavoidable* employee misconduct defense.
- All four elements required
 - 1) Safety Rule addressing the hazard (written program)
 - 2) Employee training (sign-offs and computer modules)
 - 3) Supervision (safety audits)
 - 4) Enforcement (disciplinary records)

Unavoidable Employee Misconduct

- How do we establish this defense?
 - A good hazard assessment
 - Training—there may be a cultural, literacy or language barrier.
 - Need to use translators, interpreters.
 - Need enforcement – this is where most employers fail.
 - Maintain records of enforcement/discipline.

How to reduce the risk of OSHA citations



How to Reduce the Risk of OSHA Citations

- Focus on hazards that are at core of your business.
- Focus on hazards that are driving your OSHA recordables.
- Report fatalities and serious injuries where required by law.



Revised Reporting Obligations

- Under Federal system, all fatalities, including those caused by heart attack, must be reported to OSHA within 8 hours. State Plans can be more restrictive.
- Under Federal system, all workplace incidents that result in hospitalization for treatment, an amputation or loss of any eye must be reported to OSHA within 24 hours of the incident. State Plans can be more restrictive.
- Employer not required to report fatalities or injuries occurring on public highways. Employer may have DOT required reporting depending on nature of accident or injuries.
- Employer required to report if accident occurs on property owned or controlled by Employer.
- Employer only required to report for employees that it controls, not for (a) third party independent contractor employees or (b) temporary employees if temporary staffing company has on-site supervision for temporary employees.



Responding to OSHA Communications

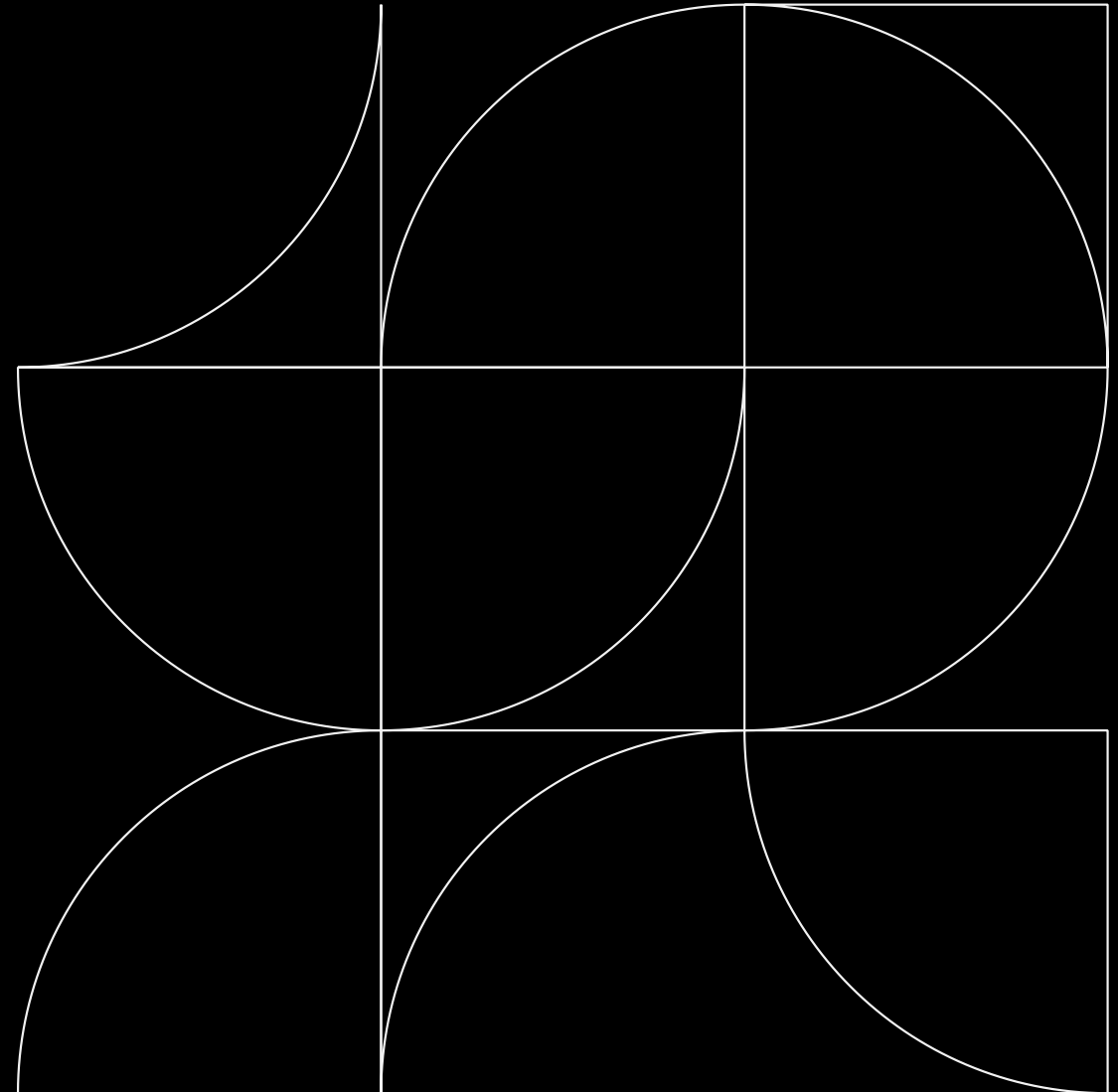
- Rapid Response Investigation (RRI)
- Employee Complaint Letters
- Avoiding Admissions of Civil or Criminal Liability (waiver of Fifth Amendment rights) in Responses

General Recommendations

- Be Truthful
- Keep Responses Simple and Short
- Answer the Question Asked
- Avoid Speculation
- Seek Advice from Experienced OSHA Counsel



How to manage an OSHA inspection

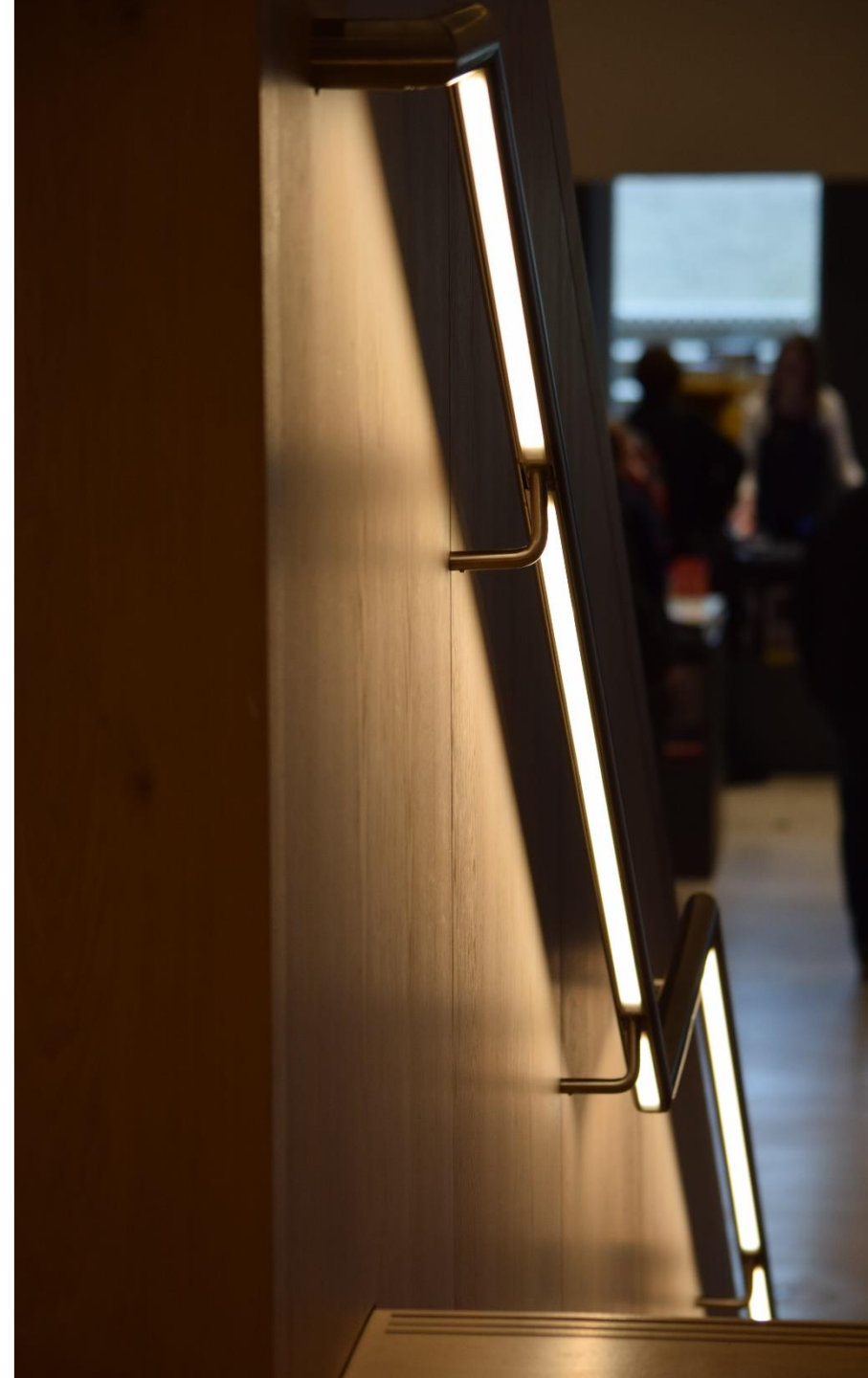


Inspection Management

- Increased enforcement and penalties make inspection management more critical than ever.
- The most effective defenses are developed Before and During an OSHA inspection, not after the inspection
 - Why?
- Inspection Plan – Basic Blocking Tackling
 - 1) Point person and backup/weekend person (Murphy's Law is that accidents will happen during the night shift and on weekends).
 - 2) Relevant written OSHA policies and logs should be readily available.
 - ✓ Keep copy in easily accessible binder
 - Update annually or as otherwise required

Inspection Management

- When OSHA Arrives:
 - Politely receive the compliance officer.
 - Show compliance officer to trailer or private area.
 - Inspection Focus
 - Determine why OSHA is inspecting
 - Types of inspections:
 - 1) Fatality/catastrophe
 - 2) Employee complaint
 - 3) Programmed
 - Local National emphasis program
 - Wall to wall inspection



Inspection Management

- When OSHA Arrives:
 - Immediately notify the point person.
 - Point person takes control of the inspection is responsible for all communications with Compliance Officer and shadows Compliance Officer throughout inspection.
 - First impression is important.
- Two Keys to Successful Inspection Management
 - 1) Focus
 - 2) Control

Inspection Management

OSHA rights during inspection

- To access worksite if have underlying legal basis
- Right to request documents that Employer required to maintain
- Right to conduct walkaround inspection, area should be limited to hazard that is basis for inspection
- Right to conduct employee interviews but employee can decline and employee not required to provide reason'
- No right to require employee to sign statement, tape record interview or photograph employee without employee consent

Inspection Management

- The Reason OSHA is Inspecting Drives the Scope of the Inspection
- Once You Determine the Scope, Control Inspection by Limiting it to Only Those Items Within the Scope

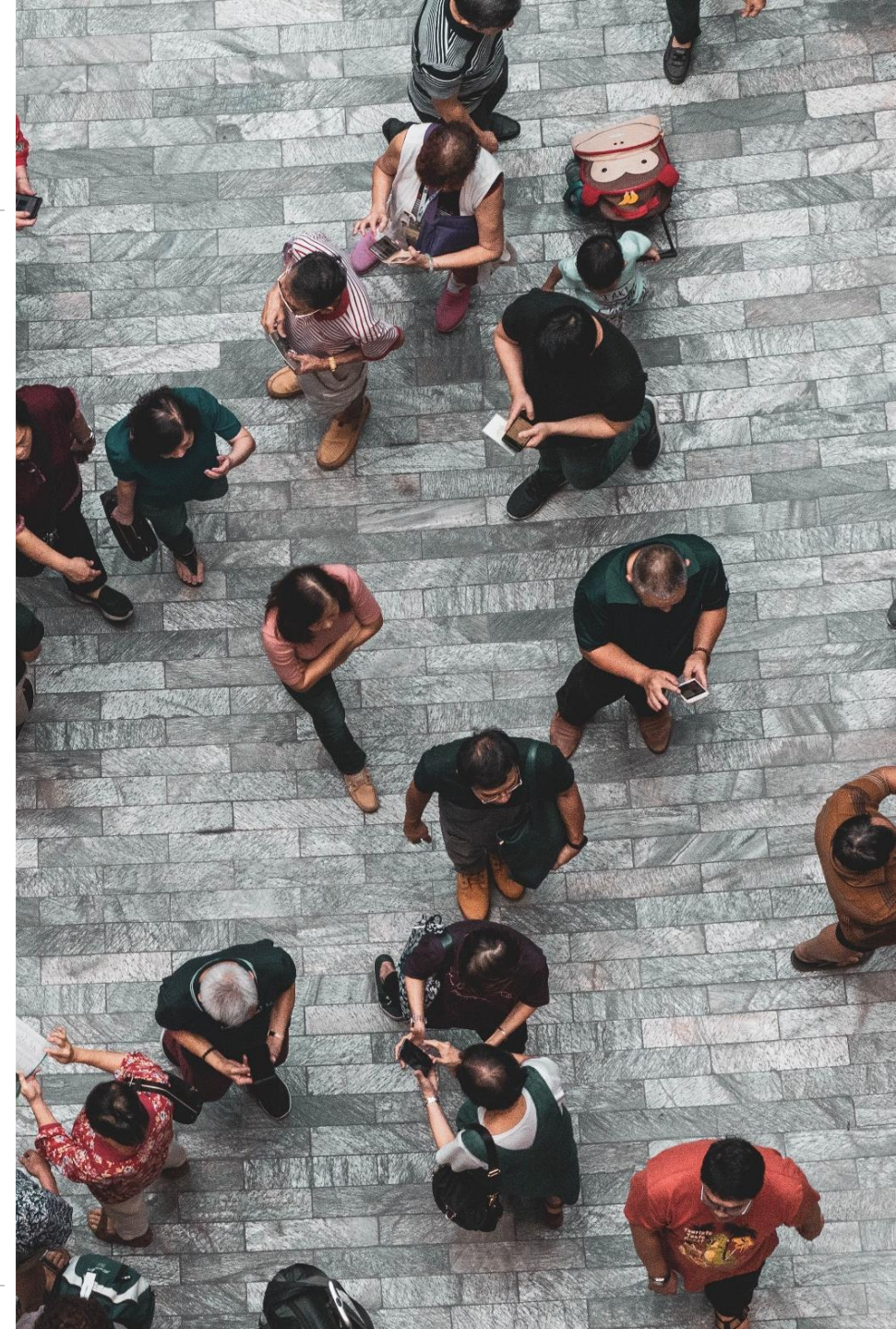
Example: Employee is injured by a forklift and Employer is required to report injury to OSHA. OSHA has a legal basis to conduct an on-site inspection but it should be limited to the area where the accident occurred and the hazards associated with the operation and maintenance of the forklift.

Inspection Management

- Plain View Doctrine
 - Compliance officer can issue citations for any violations in “plain view.”
 - If Compliance Officer doesn’t see it he/she can’t cite you for it.
 - Note use of drones at construction sites
- Admissions
 - Based on statements from managers, supervisors, foreman and leadmen that they were aware of hazard
 - Never admit to a violation (“I’ll check into that”).
 - Never admit you don’t have something (“let me get back to you on that”).

Inspection Management

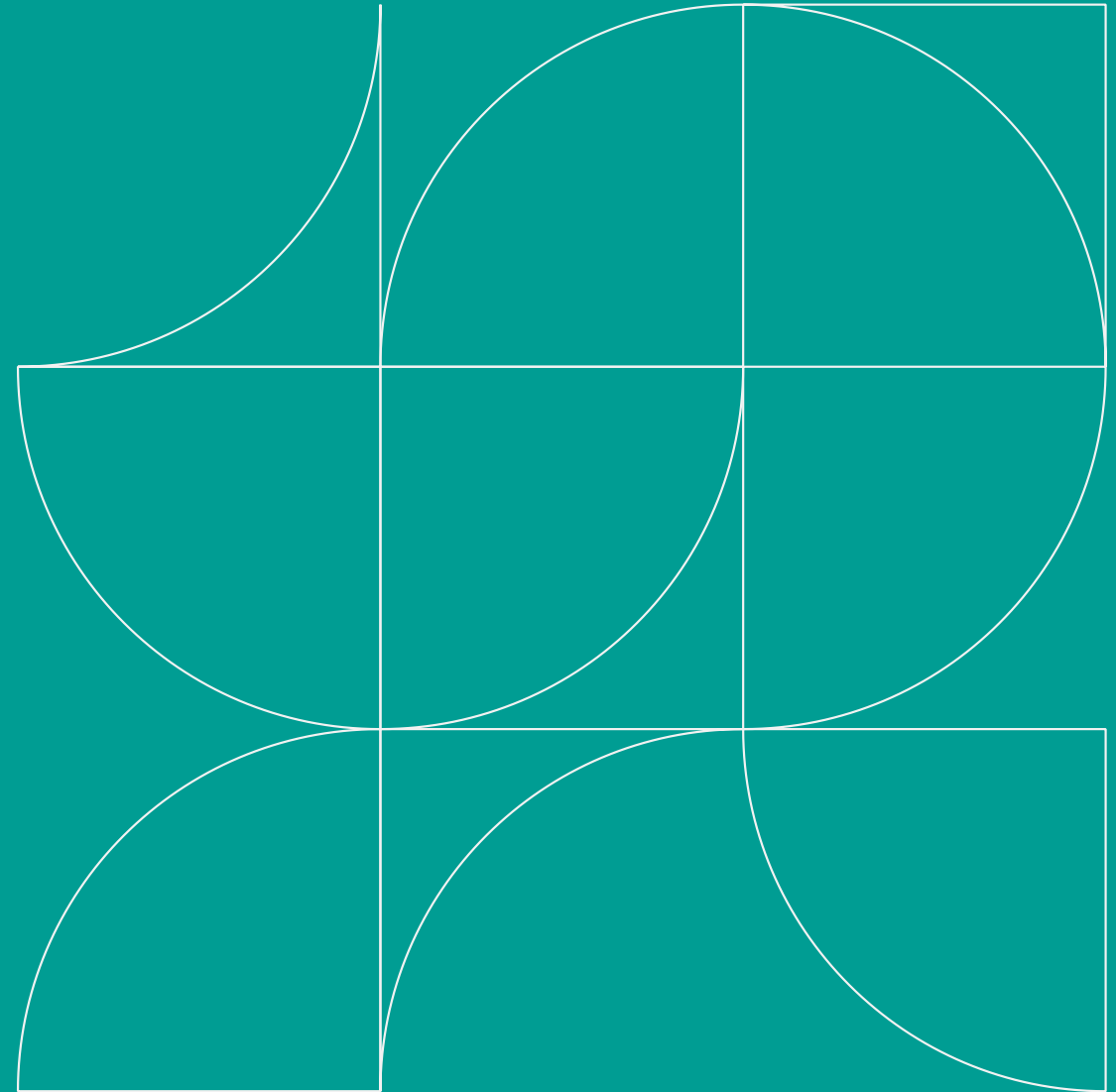
- Immediately Correct Unsafe Conditions Identified by The Compliance Officer Without Admitting That The Condition Constitutes a Violation
 - May avoid the citation
 - May lessen the classification or penalty of a citation
 - OSHA must give employer credit for a “quick fix” of a potential hazard
- Employee Interviews
 - Non-Management Interviews
 - Explain employee rights
 - Conduct your own investigation



Inspection Management

- Management Interview
 - Right To Counsel
 - Binding Admissions
- Avoid the “casual” interview
- Remember: Everything is on the record. Do not engage in idle conversation concerning safety issues.
- Document Control Is Important
 - No Such Thing As A “Safety Program”
 - Ask Compliance Officer which specific program he/she is looking for.
 - Only Provide OSHA with Documents That Are Within The Scope Of The Inspection.
 - OSHA Can Issue Citations For Violations Relating To Any Document The Employer Gives To Them.
 - General Rule Of Thumb: Less Is More

Any Questions?



**thank
you**

Brent I. Clark

email: bclark@seyfarth.com

phone: (312) 460-5876

Adam R. Young

email: ayoung@seyfarth.com

phone: (312) 460-5538