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OSHA Compliance Issues That Keep In-House Counsel Up At Night

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Overview

- Techniques and Strategies for Minimizing Risks
- What to do when OSHA knocks
- Negotiating/Litigating After Issuance of Citation



Preparing for an OSHA Visit

- Ensure compliance with the basics
 - Post OSHA-approved posters
 - Become familiar with OSHA standards applicable to workplace
 - Ensure equipment is maintained and all employees use PPE
 - Comply with OSHA record-keeping/posting requirements
- Conduct Employee Safety Training
 - Various OSHA standards require that employers provide training to employees regarding potential workplace hazards
 - Training may need to be provided in languages other than English



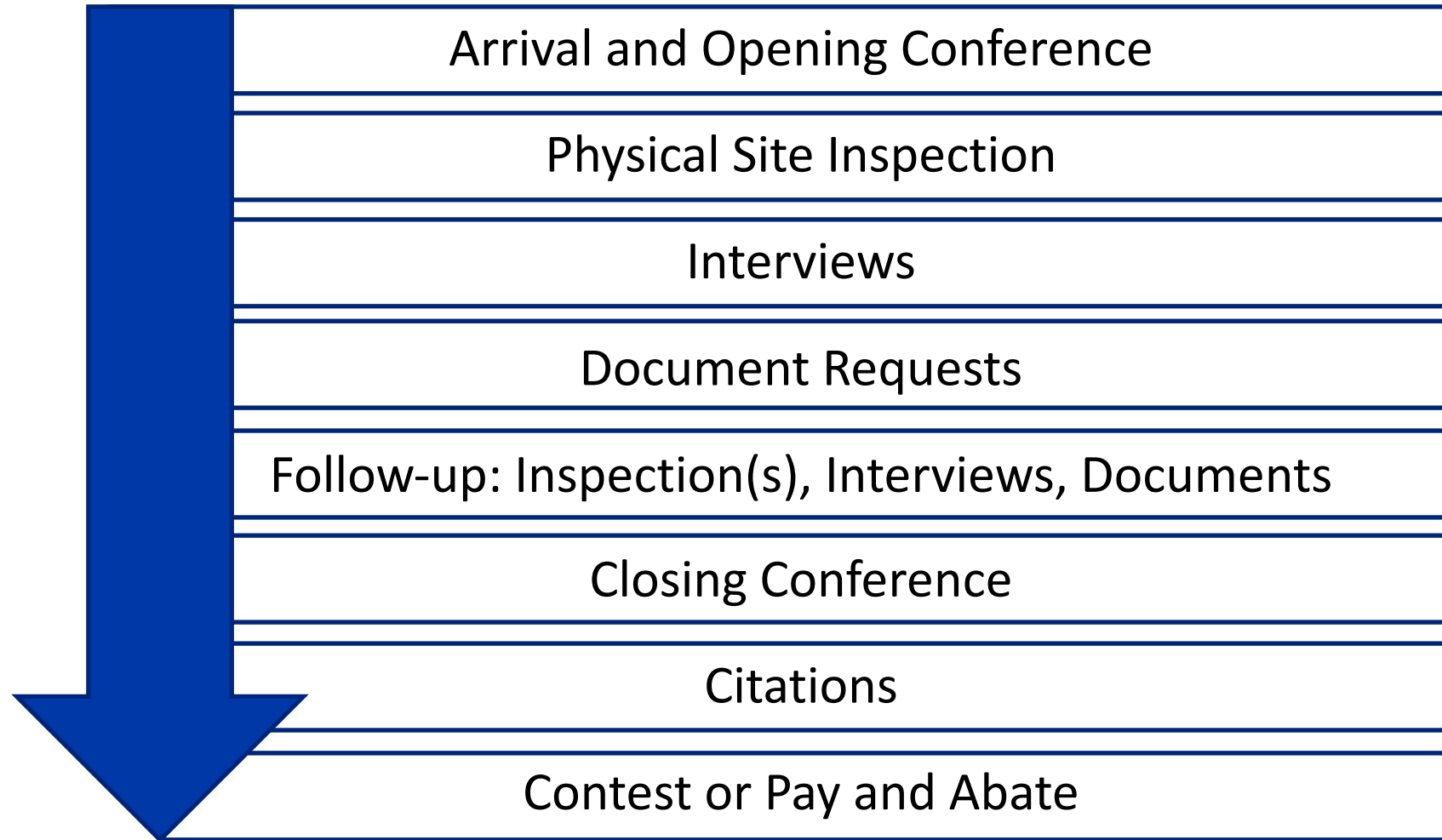
Preparing for an OSHA Visit

- Ensure that OSHA 300 log is up to date
 - Review log regularly to identify injury patterns
 - Develop safety training based on repeat nature of injuries
- Test Inspections
 - Hire an independent consultant to conduct safety inspection
 - Become your own “compliance officer”
 - Note: Self-Audits are discoverable and may not be protected by attorney/client privilege

Your Inspection Goals

- ✓ Know your company/industry top cited standards
- ✓ Limit the scope and guide the inspection
- ✓ Keep it friendly and professional
- ✓ Show the best side of your safe workplace
- ✓ Accompany OSHA everywhere
- ✓ Document everything
- ✓ Avoid harmful admissions but provide helpful information
- ✓ Learn what OSHA is thinking

Inspections from A-to-Z



Opening Conference Goals

1 LEARN

- Why is OSHA here?
- When and how long would OSHA like to inspect?
- Is there a warrant, or is OSHA asking for consent?
- What will OSHA do? Interviews? Collect evidence, photos, measurements, documents, health samples?

2 NEGOTIATE

- Inspection parameters, ground rules: walk-around, interviews, documents, evidence collection, testing.
- Trade secret / confidentiality issues?
- Need company expertise to participate?

When you find a condition...

- Fix any hazards immediately!
- “Why do you believe this is a violation? Which standard?”
- “Will you issue a citation? What type?”
- Understand the abatement. Explain why it is a challenge or less safe. Ask for more time if needed.
- Don’t speculate. Always answer truthfully! But, avoid admissions.
- Try to allay inspector concerns.



Can we chat?

- Each employee decides whether to interview and sets the terms:
 - How long? Need a break?
 - Where?
 - Who's in the room? Want someone with you?
 - Whether it's recorded or not.
- Try to have management attend each interview (or a trusted employee representative) if employee agrees.
- Company right to participate in management interviews. Know your role when you sit in!

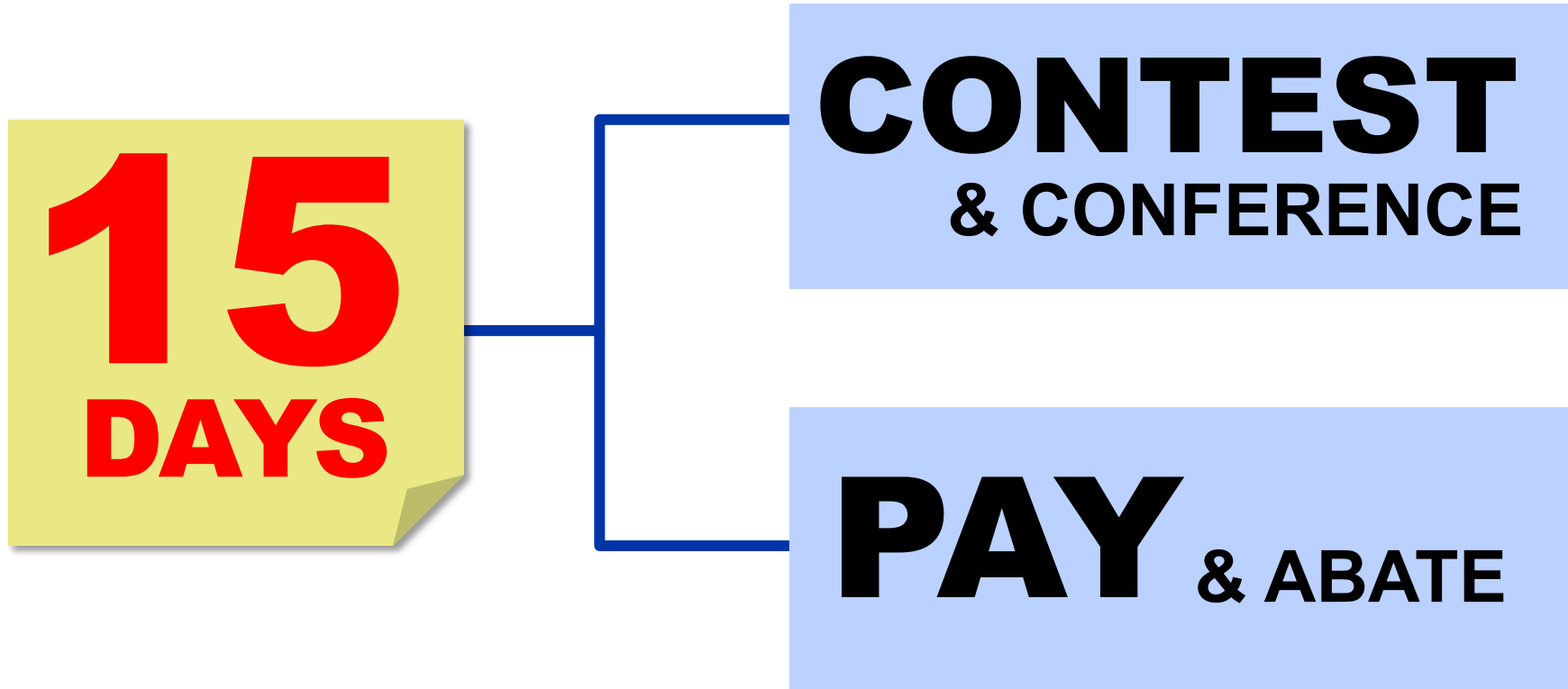


Can I see that document?

- Request all document requests in writing. “It’s our company policy.”
- OSHA has the right to see records required by regulation/law. Be ready to show those. Document what OSHA reviews.
- For other records:
 - Explain company policy to review written agency requests.
 - Ask counsel. Is it relevant, privileged, harmful?
 - Can you negotiate a narrower request?



You've been cited! What now?



Should I contest?

- Are the penalties expensive?
- Is abatement costly? Affect other sites?
- Was there a violation? Do you have a strong case? Was there employee misconduct despite training?
- Is this a repeat? Risk creating a record for repeats?
- If an accident, concern about civil liability?
- Will citation affect contracts? Community, employee, or investor relations?
- *Contests often lead to settlements.*





OSHA Litigation

- Occupational Safety and Health Review Commission (OSHRC) is the independent federal agency that adjudicates workplace safety and health disputes between OSHA and private industry
- Administrative law judges of the OSHRC perform the duties of ruling on motions, making findings of fact and conclusions of law



OSHA Litigation

- Discovery, scheduling, briefing, etc., based on OSHRC procedural rules
- Case proceeds like a trial, with witnesses, experts, etc.
- The administrative law judge either will affirm, modify or vacate the citations, characterizations or proposed penalties
- Following decision of ALJ – potential to appeal to OSH Review Commission
- Judicial Appeal in US Court of Appeals