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PROPERTY & CASUALTY

DON'T PANIC – HOW TO HANDLE AN INVESTIGATION UNDER MIOSHA

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Investigations under Michigan's Occupational Safety and Health Act (MIOSHA) can have significant financial and practical consequences for the unwary employer. Michigan's Department of Consumer and Industry Services (DCIS) has been empowered to investigate potential violations of MIOSHA by spot checks, conducted without advance warning, and even without any complaint being filed with the state. Addressing these investigations effectively can spell the difference for an employer between huge administrative fines and surviving (relatively) unscathed.

I. WHAT PROMPTS AN INVESTIGATION

There are three circumstances in which an administrative search of the employer's premises will be conducted: investigation of an employee complaint, investigation of a workplace death or major workplace accident and investigation in the course of the state's administrative enforcement plan.

The first type of investigation occurs when an employee makes a complaint to the state about a workplace condition that he or she believes constitutes a violation of the Act (whether a regulation and/or MIOSHA's general duty clause). If the DCIS believes that reasonable grounds exist for an investigation, it will conduct an immediate investigation of the employer's grounds to determine whether a violation actually does exist.

The second type of investigation occurs when an employer makes a report of an employee death on the job, or the serious injury of three or more employees on the job within eight hours of the incident in question. Again, DCIS investigates such reports immediately to determine whether a violation of applicable workplace standards occurred.

Finally, investigations can occur as part of the DCIS' random inspection program. These random inspections are basically a "pop quiz" to determine whether an employer is complying

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with its obligations under MIOSHA. These investigations occur without warning and are “wall to wall” inspections that cover the entirety of the employer's operation.

An investigation is typically commenced simply by the inspector presenting his or her credentials, announcing who he or she is and the purpose for the visit, and requesting that he or she be given access. An employer has the legal right to demand that the state present a warrant before beginning the inspection. The question that has to be answered, however, is whether the employer wishes to exercise that right.

The standard for issuance of an administrative search warrant differs substantially from the standard for issuance of a criminal search warrant. Criminal search warrants require establishment of “probable cause” for a search. Administrative search warrants require only that the state present specific evidence of an existing violation or a showing that a business has been chosen for inspection on the basis of a general administrative plan. Given this lowered standard, it is unlikely that requiring an inspector to get a warrant before being allowed to inspect will prevent the inspection from taking place. Instead, it is more likely that demanding a warrant will simply frustrate the inspector and provoke a more thorough inspection.

Some exceptions exist, of course. If an employer has been subjected to repeated inspections over a short period of time, it may be worth making the challenge to the alleged general administrative plan and having a judge decide whether an inspection should take place. Typically, however, demanding a warrant is a fruitless exercise.

II. BEFORE AN INSPECTION OCCURS

Even before an inspection takes place, there are a number of things that an employer can do to both avoid liability as a result of a DCIS inspection and protect the employees in the workplace. Specifically:

- Designate a specific person to be responsible for safety programs.
- Establish written safety training on a regular basis for all employees.
- Schedule safety meetings with employees to solicit input on safety issues in the plant.
- Establish and consistently enforce safety rules.
- Conduct your own periodic safety inspections.
- Tagout equipment in need of repair and remove it from operation.
- Get copies of standards applicable to your business.
- Make sure you are complying with lockout/tagout and stored energy regulations.
- Inform supervisors that safety is a priority and hold them accountable for enforcement of safety standards.

While following these suggestions will not guarantee protection from MIOSHA finding that an employer has failed to comply with applicable regulations, it will reduce the chance of any serious violations being found.

III. DURING THE INSPECTION

Once a safety officer presents his credentials and is given access to the employer's property, the next step is to call a pre-inspection conference. The safety officer, the employer, and a designated employee representative all gather to discuss the purpose of the visit and reason for the inspection. This inspection is important for two reasons. First, it is an opportunity for the employer to "take the temperature" of the safety officer and determine the breath of the inspection. The employer's attitude towards the inspection is important during this conference, since it will affect the safety officer's willingness to accept explanations offered by the employer, as well as the safety officer's willingness to overlook easily addressed housekeeping violations. Second, the pre-inspection hearing allows the employer to determine what the scope of the inspection is likely to be, so that the safety officer is not provided with unnecessary information that can result in additional citations being issued.

After the pre-inspection conference, the actual inspection will begin. The safety officer has complete control over where he or she goes in the employer's facility. He or she is not limited to inspecting only certain areas, or to inspecting only for a limited period of time. Furthermore, the safety officer can interview employees regarding their exposure to conditions considered violations of applicable OSHA standards. Employers do not have the right to be present for those interviews and must allow them to go forward without interfering.

The employer's role during the actual inspection is very limited. However, the employer participates in a meaningful way simply by shadowing the inspector. The representative of the employer should follow the inspector, taking notes about conditions the inspector believes are violative of OSHA standards. Those notes will be valuable in defending any citations that are ultimately issued by the state. Furthermore, it is important to "keep tabs" on the inspector, so that the employer knows where he or she is at all times. By knowing where the inspector is, the employer can take steps to be sure that all regulations are being complied with, including standards governing personal protective equipment, lockout/tagout, housekeeping, and fire exits. Finally, to the extent the inspection is taking place because of an employee complaint or as part of an accident investigation, the employer should try to keep the safety officer focused on the area of the workplace at issue. Take the safety officer to the area in question by the most direct route possible, with the least opportunity to see other potential violations.

At the end of the inspection, the safety officer must hold a closing conference. At that conference, the safety officer will describe the violations he or she found and give the employer a rough idea of the citations that he or she intends to issue in writing within the next 90 days. The employer should ask at that closing conference the nature of all citations that he or she believes were found, including references to all standards alleged to have been violated. The employer should also ask the severity of each violation he or she intends to impose, and what abatement dates he or she intends to impose. By collecting this information, the employer gets a jump on any potential appeal, has additional time to abate citations that will be imposed and, in some cases, it may even be possible to convince the safety officer that the citation should be lessened in severity or not imposed at all. It is important, however, that if the employer offers to abate an alleged violation by a particular date and that the offered date is met – it is virtually impossible to argue that an abatement date is unreasonable if the employer offered that date on its own.

IV. AFTER INSPECTION – THE CITATIONS

After the safety officer conducts his or her inspection, DCIS has 90 days before being required to issue written citations to the employer. It is virtually certain that any employer inspected will be found to be in violation of MIOSHA in some way. Those citations come in a variety of levels of severity.

Every citation has two components: the fine and the abatement. The fine is simple to explain — it is a monetary penalty imposed by DCIS for the violation in question. Abatement is fixing the problem for which the citation was issued. To satisfy a citation issued by DCIS, both the fine and the abatement must be addressed.

The first level of severity is “other than serious.” This is a technical violation of a regulation promulgated by DCIS, but which is not a serious threat to health and safety of employees. Usually, these citations do not result in any monetary fine (or, if they do, only a very minor fine). However, the citations still must be abated, even if they are not serious in nature. Abatement can, in some circumstances be much more costly than any fine issued by the state.

The next level of severity is the “serious” violation. Serious violations can result in a citation between \$0 and \$7,000 per violation. Furthermore, like all violations cited by DCIS, serious violations must be abated. Abatement can be costly process, requiring modification of the workplace, work processes, or extensive training of the workforce. Serious violations exist where violation of a standard results in a substantial probability that an employee could be killed or seriously harmed.

This does not mean that it is likely that an employee will be killed or seriously harmed; rather, it means that if an employee were injured as a result of the violation, it is likely that the injury would be serious or fatal. Thus, the sheer improbability that an injury will result is not an excuse for not complying with a MIOSHA standard. Many employers, when confronted with MIOSHA citations, respond by simply stating that it would be impossible for an injury to occur because of that violation. Yet, that is not a defense; if there is a possibility that injury will occur, the violation will stand.

After the “serious” violation, the next level of severity is “willful” or “repeat serious.” Both willful and repeat serious violations can result in fines of up to \$70,000 per violation, and they are both similar in that they both result from an employer violating a regulation about which it had knowledge. However, a willful violation is issued where the state can show that the employer had knowledge of the regulation in some way and intentionally refused to follow the duties imposed by that regulation. A “repeat serious” citation, by contrast, can be found where an employer has previously been cited for a violation of a regulation, and is found to have violated the same standard a second time with regard to a different area or machine in the workplace. Willful violations also differ in that a willful violation that actually results in death or serious injury can be prosecuted by the state by imposition of a fine of up to \$70,000 and up to one year in prison.

Finally, employers that have previously been inspected and found to be in violation of a standard and that fail to abate that violation can be held liable for a “failure to abate” citation. A failure to

abate citation can result in a fine of up to \$70,000, even if the underlying condition is “other than serious.”

V. APPEAL OF CITATIONS

Once a MIOSHA citation is issued, it is not immediately final. The employer has 15 working days from the date the citation is received to file an initial appeal. That initial appeal is simply a letter to DCIS. DCIS must respond to that initial appeal letter within 15 business days. Typically, the initial appeal is simply a means of getting to the second, more substantive phase of the appeal process. Only the most egregious errors (such as failure to describe the citation in any way, or failure to identify a standard that has allegedly been violated) will be cured through the initial appeal.

After denial of the initial appeal, the employer then has 15 business days to file a second appeal, this time for a formal appeal to be heard by an administrative law judge. A month or two after filing a formal appeal, a notice of prehearing conference is issued. At the prehearing conference (which usually occurs three to four months after the notice is issued) DCIS will attempt to resolve the citations through negotiation of citations, abatement dates, fines, or any combination of the three. If the prehearing conference does not resolve the allegations, the next step is an actual hearing before an administrative law judge. That hearing typically is set six to eight months after the prehearing conference. At the hearing, the employer has the ability to present evidence that supports their claim that they are in compliance with the regulation in question, that the severity of the citation was improper, that the fine is improperly high, or that the abatement date is incorrect. The administrative law judge, after hearing the employer's case as well as the state's, renders a written decision upholding, overruling, or modifying the citations set by DCIS.

Should the appeal to the administrative law judge fail, there are a number of discretionary appeals that the employer can take to the Ingham County Circuit Court, the Michigan Court of Appeals, or the Michigan Supreme Court. However, those discretionary appeals are a last resort, and cannot be relied upon to reverse an adverse decision of the administrative law judge.

VI. CONCLUSION

MIOSHA inspections can result in significant liability to an unwary employer. However, by carefully complying with MIOSHA regulations, as well as handling inspections appropriately, an employer can effectively limit that liability.