

# DEALER ALERT

**TO:** Environmental Health and Safety (EHS) Coordinator  
**FROM:** Sam Celly, MS JD CSP REA  
**SUBJECT: Response to Citation issued by OSHA**  
**DATE:** August 26, 2009

Following an inspection by an OSHA inspector, citations may be issued that carry penalties and fines. At times, OSHA may forward the case to the local prosecutor if the case involves labor code violations that are tantamount to a crime. In this Newsletter, we discuss some of the procedural issues that you need to undertake when you receive the citation. Legal advice must be sought in high stakes cases especially where the local prosecutor is involved!

**Time Frame is Crucial:** When the OSHA citation arrives, you have just 15 working days to file an appeal. The Occupational Safety and Health Act gives you the right to appeal the existence of a violation, the amount of the penalty, and the length of time allowed for abatement. There is no provision for an extension of time to file an appeal; so many employers file the “Notice of Contest” forms to preserve their right of appeal while considering all their options. Employers also have the right to appeal the reasonableness of the abatement period.

**Filing of Appeal:** When an appeal is filed, the employer must notify employees that they have the right to participate in the appeals process. If the employees are represented by a bargaining unit, the *Participation Notice* and a copy of the docketed *Notice of Contest* must be given to the authorized employee representative, or if unrepresented, the notices must be posted at or near the location of the alleged violation or other conspicuous place where it will be readily observed and easily read by the employees. After posting the notices or giving them to the representative, the employer must file proof or certification of service or posting to OSHA.

**Informal Conference:** To allow employers gain a better understanding of OSHA’s position and reasons behind the citation, and to clear up any misunderstandings and issues of fact, OSHA provides an opportunity for an informal conference with the District Manager. This is a wonderful opportunity to meet with the District Manager and discuss the citation and proposed corrective actions. In our experience, the informal conference results in dramatic reduction in civil penalties. The informal conference does not affect the formal appeals process, but often gives a good insight as to the approach that should be taken in the appeals hearing, If the informal conference allows all the issues to be resolved, or if you decide it is not in your best interest to go forward with the appeal, you may withdraw the *Notice of Contest* at any time by writing to the Appeals Board.

**Judicial Proceeding:** An OSHA appeals hearing before an Administrative Law Judge is a far less formal process than a civil or criminal court of law. Most appeals are heard without legal representation. However, lawyers are regularly used in high-stakes and complicated cases. The OSHA appeals process provides for all the tools available in a court of law, including discovery, subpoenas, and evidence by affidavit or declaration. During the hearing, all testimony is given

under oath. Each party has the right to call witnesses and present both oral and documentary evidence. Each party has the right to cross examine witnesses called by an opposing party. The administrative law judge will rule on any legal objection, privilege, claim, or defense. At times, the administrative law judge may question witnesses and a party may raise an objection to that question.

**Ruling:** After all oral and documentary evidence has been presented to an administrative law judge, and after oral or written argument has been made, the administrative law judge will take the matter under submission. In making the decision, the administrative law judge is confined to the evidence in the record. The administrative law judge will file a written decision usually within 30 days after the matter is taken under submission, and may extend that period for good cause. The decision will summarize the evidence received and relied upon, make findings of fact for all the issues involved in the appeal, and give the reasons or grounds for the decision. The decision will be mailed to each party or the representative appearing for each party.

**Appeal ALJ's Ruling:** Any party has the right to appeal the decision by filing a *petition for reconsideration*. The petition must be filed within 30 days of service of the order or decision. A *petition for reconsideration* must be based upon one or more of these grounds:

- The Appeals Board acted without or in excess of its powers
- The order or decision was procured by fraud
- The evidence does not justify the findings of fact
- The petitioner has just discovered new material evidence that could not with reasonable diligence have been produced at the hearing
- The findings of fact do not support the decision.

After reconsideration, any party who disagrees with the decision may still appeal to a court of law. The decisions of the appeals process are published in a number of journals, including the various OSHA reporters. Because of the publicity generated by the appeals process, some employers elect not to appeal. On the other hand, the record of the citation remains on the books for 3 years and may provide the basis for a repeat or willful citation if subsequent OSHA inspections find the same or similar violations.

More information about the appeals process is available from the Appeals Board in booklets prepared to guide employers through the appeal process. You may call us as well for any assistance regarding OSHA citations.

*The article was authored by Sam Celly of Celly Services, Inc. who has been helping automobile dealers comply with EPA & OSHA regulations since 1987. Sam received his BE (1984) and MS (1986) in Chemical Engineering followed by a J.D. from Southwestern University School of Law (1997). Your comments/questions are always welcome. Please send them to [sam@cellyservices.com](mailto:sam@cellyservices.com).*