

When OSHA Knocks: Employer Rights and Responsibilities



Samantha Monsees
Partner | Kansas City
smonsees@fisherphillips.com
816-460-1233



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Agenda

1. Confirmation of David Keeling
2. Employer Rights During an OSHA Inspection
3. Planning for Inspections
4. Handling OSHA Requests



Senate Confirms David Keeling



- Nominated in February, confirmed by Senate on October 3 OSHA Assistant Secretary
- UPS – package handler to executive
- Amazon – Director of Road and Transportation Safety
- Supported by Coalition of Workplace Safety and Teamsters



David Keeling – Asst. Secretary of Labor - OSHA

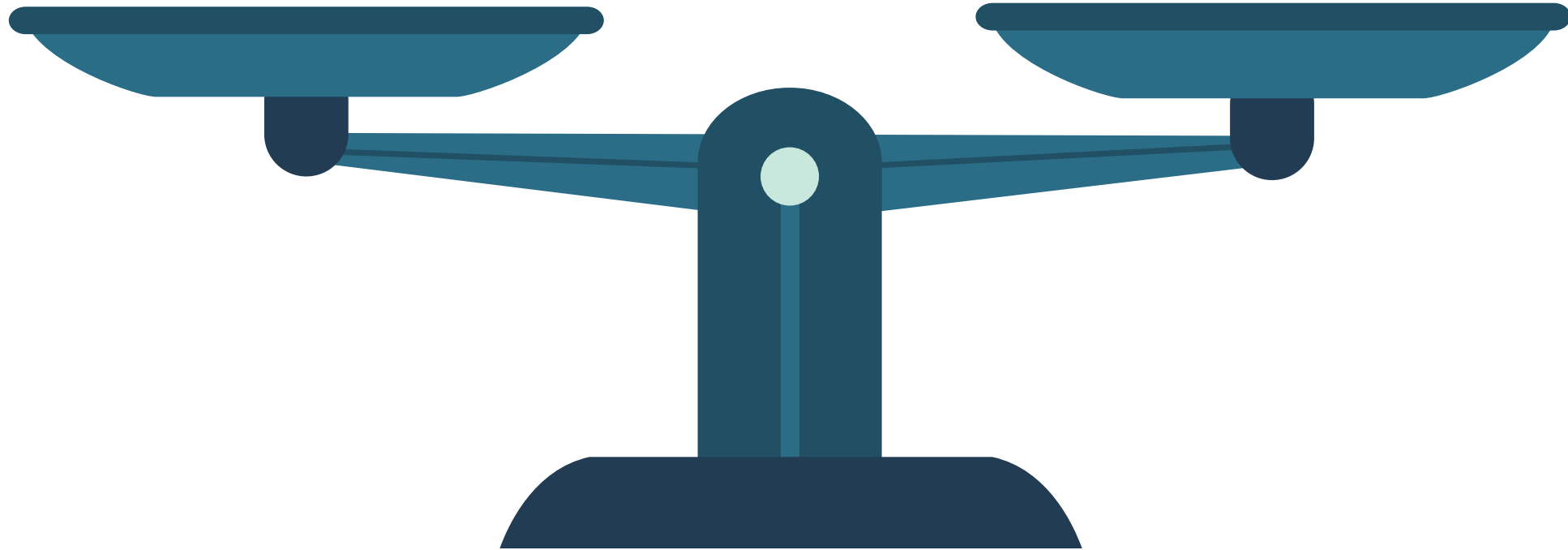
- Modernizing standards and oversight by using technology, data and consensus standards to stay ahead of evolving workplace risks (workplace violence standard).
- Strengthening cooperation among safety professionals, employers and unions, including updates to OSHA’s Voluntary Protection Programs.
- Transforming enforcement through proactive, predictive approaches that prevent injuries and fatalities before they happen.

OSHA INSPECTIONS

Strategic Balancing Act

**Fulfilling Employer
Responsibilities**

**Asserting Employer
Rights**



**Professionalism
And Wisdom**

Why OSHA Matters



- Broad impact beyond employee safety and health:
 - » Workers' compensation
 - » ADA
 - » Union issues
 - » Civil Liability (e.g., third party tort litigation)
- Employers and their supervisors must consider the potential for liability, including tort and criminal liability.
- Increasing coordination among agencies and with organized labor

Costs of an OSHA Inspection

- Civil Penalties from OSHA
- Workers' Comp. Costs (injury)
- Third-Party Liability (injury)
- Potential non-renewal of insurance or increased premiums



Costs of an OSHA Inspection (Cont'd)

- Lost opportunity costs (customers rethinking relationships)
- Bad publicity
- Resource drain (personnel)
- Low employee morale if OSHA is seen as critiquing the whole workplace



Increases effective January 15, 2025

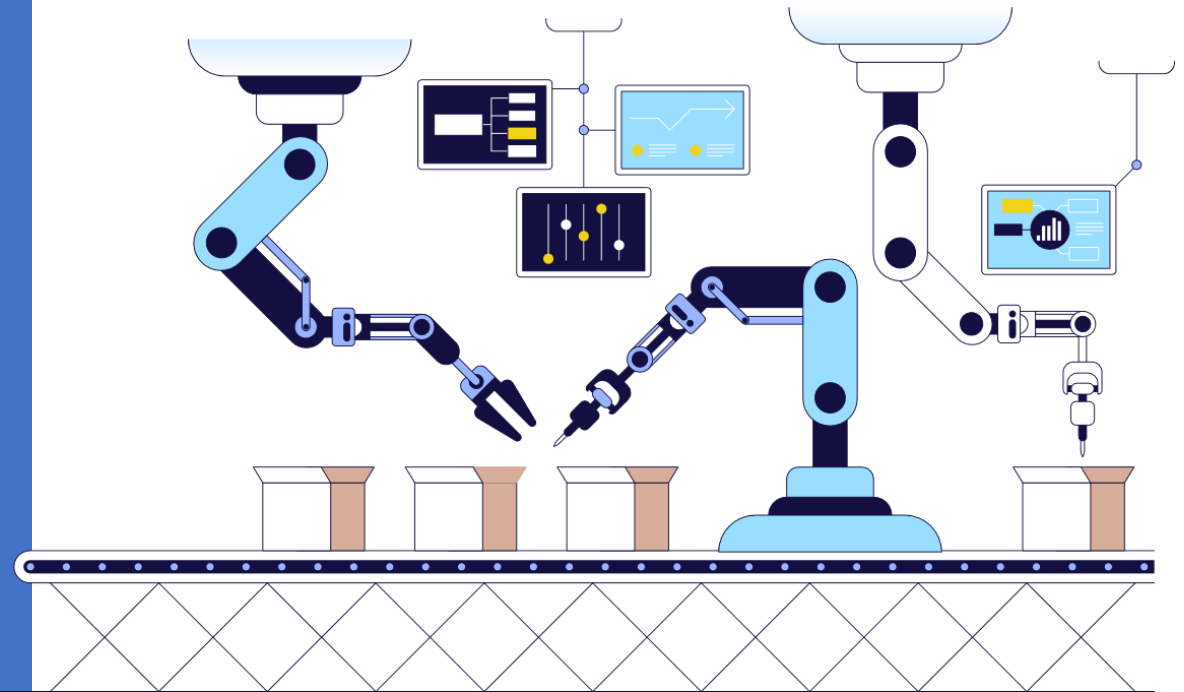


OSHA Penalties

Below are the maximum penalty amounts, with the annual adjustment for inflation, that may be assessed after Jan. 15, 2025. (See [OSHA Memo, Jan. 7, 2025](#)).

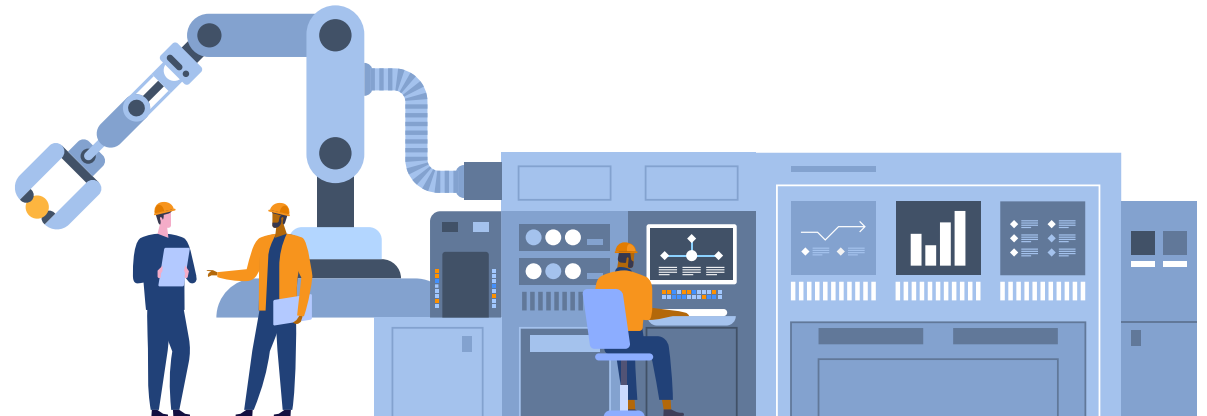
Type of Violation	Penalty
Serious Other-Than-Serious Posting Requirements	\$16,550 per violation
Failure to Abate	\$16,550 per day beyond the abatement date
Willful or Repeated	\$165,514 per violation

Employer Rights during an OSHA Inspection



Employer Rights During Inspection

1. Right to a Reasonable Inspection
2. Right to Representation During Management Interviews
3. Right Not to Perform Demonstrations of Work or Work Process
4. Right to Continue Operations in a Safe Manner
5. Right to Protect Trade Secret Information
6. Right to Establish Unpreventable Employee Misconduct



Elements of an OSHA Inspection

1. The Knock at the Door
2. The Opening Conference
3. The Walk-Around
4. The Closing Conference



Elements of an OSHA Inspection

Step 1: Knock at the Door

1. No advance knowledge of first visit
2. Will not “come back later”
3. Request and review **credentials**
4. Alert the **facility contact** (usually the highest ranking official on site or the safety director/manager)
5. **Warrant** or no warrant?
 - Reasons to consider requiring a warrant



Elements of an OSHA Inspection

Step 2: Opening Conference

- **When?** Immediately after the inspector is permitted access.
- **What?** Explains the nature (type) and scope (complete, partial) of the inspection.
 - a. Background questions regarding nature of business
 - b. Review written safety and health programs, 300 logs, training records
- **Who?** If unionized, the inspector will seek permission to include the employee representative.




Elements of an OSHA Inspection

Step 2: Opening Conference: Determine Type and Scope of Inspection

- Imminent Danger
- Fatality
- Catastrophe
- Complaint
- Referral
- Programmed
- Follow-Up






Elements of an OSHA Inspection

Step 2: Opening Conference

1. Set ground rules for the inspection
2. **Don't volunteer information**
3. Treat the inspector in a professional fashion
4. Notification of corporate officials and counsel
5. Coordination with on-site contractors and vendors



Elements of an OSHA Inspection


Step 2: Opening Conference

- Request documents (keep all information requests within the scope of the investigation);
NOTE: If inspectors request **trade secret/confidential information**, ask that they treat it as confidential)
 - » Information typically requested:
 - OSHA 300 Log, 300A, and 301s – within 4 hours
 - Names of first-aid trained and designated responders
 - Copy of Emergency Action Plan
 - First aid and blood borne pathogen training records
 - Location and content of first aid supplies
 - Required personal protective equipment
 - Other relevant safety programs/documents

Elements of an OSHA Inspection: Rules of Thumb for Documents

- Anticipate litigation
- Consistency
- Avoid speculation






Elements of an OSHA Inspection

Step 3: Walk-Around

What to expect?

- Purpose – observe the workplace for possible violations
- Scope – may last several hours or months, depending on the type of inspection
 - » Complaint or injury-based inspections → only areas indicated in the complaint
 - » Programmed inspections → entire site may be inspected
- Inspector may take photos and perform tests
 - » Only side-by-side monitoring or testing will be allowed



Elements of an OSHA Inspection

Step 3: Walk-Around

What to expect?

- Employer has a right to **accompany** the compliance officer
- Inspector has the right to **privately interview non-management employees**
- **Employee representatives** have the right to attend the entire inspection
- Employers can **limit** the area(s) seen by the compliance officer and **require compliance** with all safety and health rules, if applicable (e.g., PPE)



Elements of OSHA Inspection: Employee Interviews

Know your Rights

The OSHA Act permits OSHA compliance officers to conduct private interviews of employees. However, the employee must give his or her consent to such interview.



Elements of OSHA Inspection: Employee Rights During an Interview

Every Employee:

- **Has a right to refuse to be interviewed by the compliance officer.**
- **An employee cannot be forced to have a private one-on-one interview.**
- **These interviews are totally voluntary.**
- **If the employee declines to be interviewed, the agency will have to obtain a subpoena to require the interview.**
- **If the agency obtains a subpoena, the employee has the full scope of rights to respond, including the right to counsel.**



Elements of an OSHA Inspection: Employee Rights During an Interview


Every Employee:

- **Has a right to refuse to sign a statement, be tape recorded or photographed.**
- **Has the right to refuse to provide any private contact information, such as home address and telephone number.**
- **Has the right to require the interview to occur at the workplace.**



Elements of an OSHA Inspection: Management Rights During Interview

- **Management should notify the Company that OSHA requests an interview.**
- **The Company can participate in all management interviews.**
- **Management can require that the Company's legal counsel be present during the interview.**




Elements of an OSHA Inspection

Step 3: Walk-Around

What should you do?

- Take accurate **notes** on each area inspected
- **Copy** the inspector's actions (e.g., photograph what he/she photographs, tests, etc. from the same viewpoint)
- Take the inspector on a **pre-determined route**, if appropriate
 - » Have a "team" go ahead of the inspector to identify and fix obvious problems (hopefully these issues are minor and corrected already)
 - » Have a "team" trail behind the inspector to immediately abate identified problems (demonstrates good faith)



Elements of an OSHA Inspection

Step 4: Closing Conference

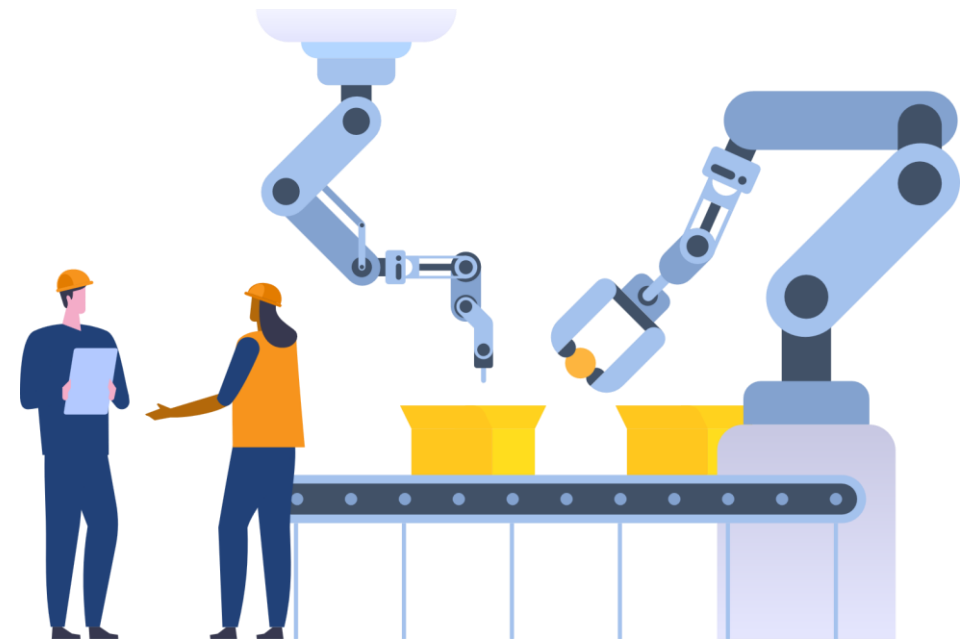
- **What?** A meeting (telephonic or in person) with the inspector, employer and employee representative.
- **Why?** Inspector explains the **apparent violations** found and the **violation classifications**. Also reviews the strengths and weaknesses of the **safety program**, as well as **abatement** dates, possible abatement methods and **posting** requirements for citations issued.
 - » Abatement period only begins when employer receives Citation and Notification of Penalty.
 - » Employer is ultimately responsible for choosing an appropriate abatement method.

Elements of an OSHA Inspection

Step 4: Closing Conference

1. What should an employer do to prepare?

- Be able to point out abatement made during and after the inspection.
- Ask questions to understand basis for citation.
- Provide new information if inspector misunderstood, but not time for debate.
- Take good notes to better understand basis of the citation.



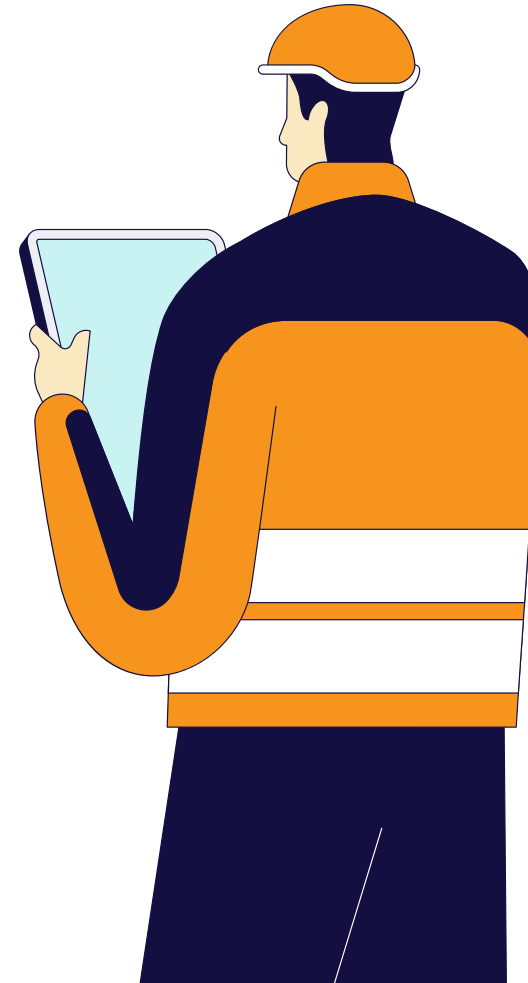
Planning for Inspections



How to Confidently Manage an OSHA Inspection

Things to remember throughout the inspection

- It is your facility—you have rights!
 - » Inspection conducted in a **reasonable manner** and during a **reasonable time**
 - » Completion of inspection within **6 months**
- Be cooperative and responsive **but maintain control of the inspection**



How to Confidently Manage an OSHA Inspection



Maintaining Control

1. Includes determining before an inspection...
 - a. What OSHA standards apply – is the company in compliance?
 - b. Previous OSHA Citations – have they been corrected?
 - c. Are support staff (receptionists, secretaries, guards) trained on how to react when OSHA arrives?
 - d. Will the company require a warrant from OSHA?
 - e. What will the company say when OSHA arrives at the facility?
 - f. Who is the right company person to contact, including OSHA counsel?
2. Consider implementing a *written procedure* for OSHA inspections

Handling OSHA Citations



Citations

Essential Elements

1. In **writing**
2. **Signed** by Area Director
3. Describe violation with “**particularity**”
4. **Timely** (issued within 6 months of the violation, unless continuing violation)
5. Specifies the **proposed penalty**
6. Served by **certified mail**
7. **Post** for 3 days or until abatement, whichever is longer





Categories of Citations

- Other than Serious
 - Serious
 - Willful
 - Repeat
-
- Serious and Other than Serious Max Penalty in 2025= \$16,550 per violation.
 - Willful and Repeat Penalty in 2024 = \$165,514 per violation.

Citations

What are the options?

1. Agree to citation and pay full penalty (rarely recommended)
2. Informal conference/informal settlement (careful of admissions)
3. Notice of Contest – 15 working days
4. Formal settlement
5. Hearing





Criminal Implications

- OSHA may impute a supervisor's knowledge or misconduct to the employer for purposes of willful citations and criminal liability.
- To prove a violation, the government must establish that:
 - (1) the defendant is an employer,
 - (2) violated an applicable standard,
 - (3) did so willfully, and
 - (4) that the violation caused the employee's death.
- A supervisor's knowledge can be imputed to the employer, and a corporate officer or director may be considered an "employer" for purposes of Section 666(e).
- Every willful citation that results in the death of an employee is reviewed by the DOJ for potential criminal referral.
- Willful +employee death = potential for criminal conviction for high level corporate reps/supervisors and imprisonment +fines

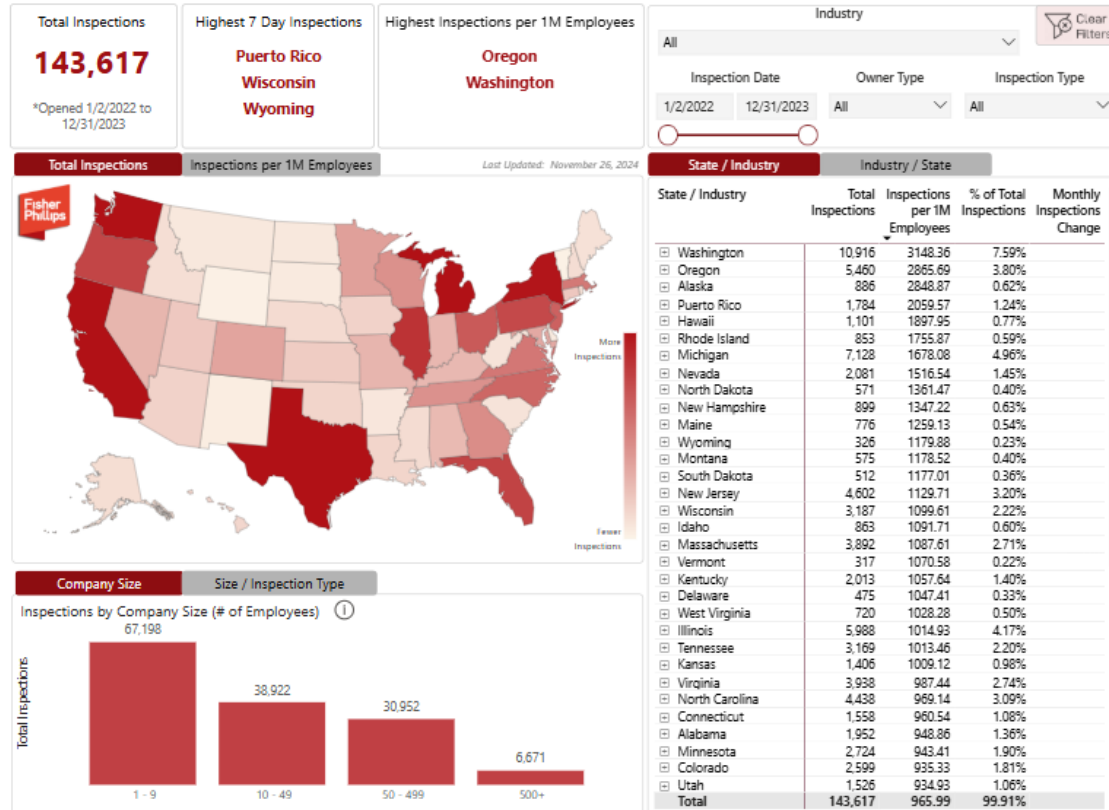
Takeaways

1. Know what you don't know!
2. Don't panic!
3. Study your rights.
4. Know OSHA's rights and your timelines.
5. Plan for OSHA Inspections.
6. Know when to involve counsel.
 - a. Know Your History
 - b. Know Your Risks
 - c. Good idea with fatalities and serious injuries.

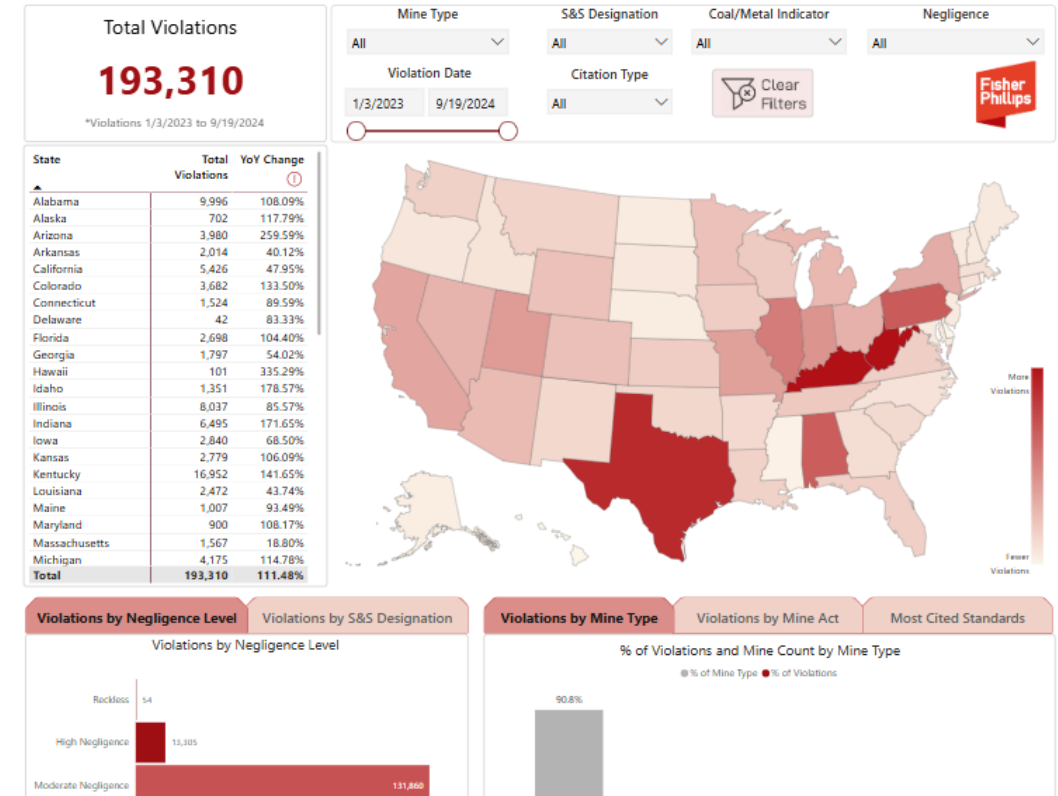


Fisher Phillips Resources

OSHA Inspections Tracker



MSHA Violations Tracker



Fisher Phillips Resources

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Samantha Monsees
Partner | Kansas City
smonsees@fisherphillips.com

