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What to Do When MSHA Comes a' Knockin'

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We are the Government and We are Here to Help You

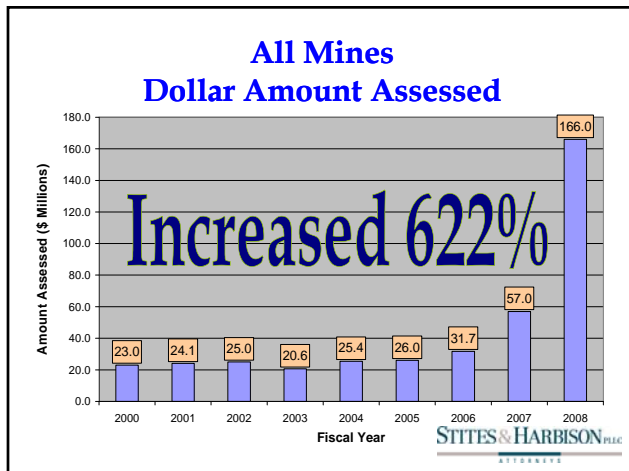
MSHA is not your Friend

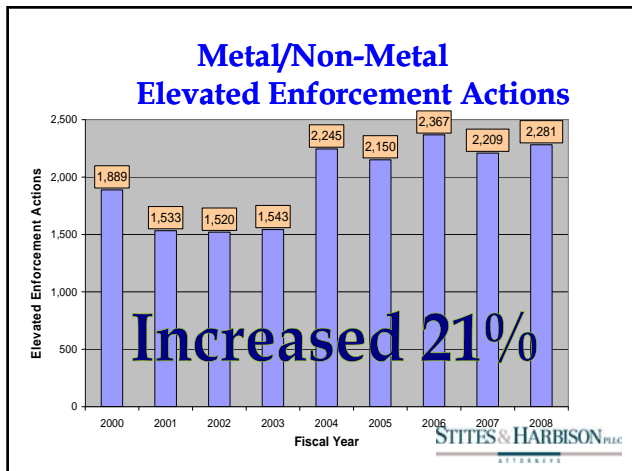
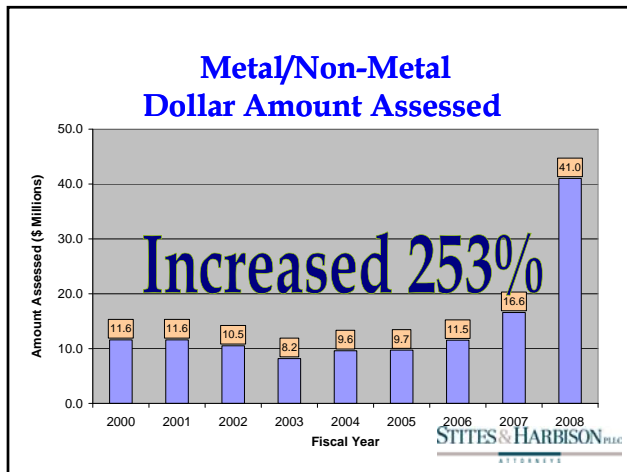
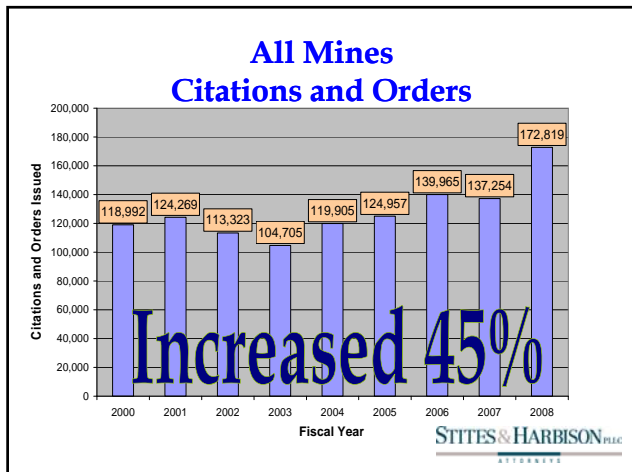
Anything You Say Can and Will Be Used Against You

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Increased Stakes

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- ### Metal/Non-Metal Enforcement FY 2008 vs. 2007
- 14% increase in regular inspections
 - 13% increase in inspection hours
 - 16% increase in citations and orders
 - 147% increase in assessed penalties
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Penalty Structure

- Immediate notification:
 - must notify MSHA within 15 minutes of any death, injury, or entrapment that has reasonable potential to cause death
 - at least \$15,000; max of \$60,000
- Unwarrantable failure
 - Minimum: \$2,000
 - Maximum: \$4,000
- Flagrant: Maximum of \$220,000

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Developing a Plan

- Identify areas where MSHA is likely to focus
- Identify documents and records that are likely to be inspected
- Update Safety Programs
- Illness and Injury Logs
- Review Safety Audits
- Inspection Game Plan

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Identify Areas Likely to be Inspected

20 most frequently cited citations (2008):

- Machine guards (26.98%)
- Equipment Defects (10.86%)
- Horns (10.74%)
- Electrical Conductors (10.41%)
- Properly constructed machine guards (6.62%)

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Identify Areas Likely to be Inspected

Areas of MSHA emphasis (leading causes of fatalities from 2000 – 2008)

- Falls;
- Unsafe operating equipment;
- Maintenance;
- Lock out Tag Out;
- Hit by equipment;
- Communication;
- Unsafe Act

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Identify documents and records that are likely to be inspected

- Injury logs
- Safety Training Manuals
- Safety Training Meeting Records and Attendance Records
- Hazard Communication
- Process Safety Management

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Update Safety Programs

- Neat, readable, and readily accessible
- Addresses new hazards, new plant processes
- Includes new MSHA regulations or areas of enforcement

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Illness and Injury Log

- Cross check with workers' compensation reports
- Cross check with other related medical records

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Review Safety Audits

- Safety audits are sometimes conducted by the company itself or insurance companies
- Ensure that the audit recommendations have been addressed and documented
- Audits may result in reduction of penalty (decreased from 30% to 10% by recent changes to law)

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Inspection Game Plan

- Develop a plan of action when MSHA conducts an unannounced inspection
- Consent or no consent?
- Warrant or no warrant?
- Call the lawyer

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Inspection Game Plan

- Identify members of management for *each* shift that will accompany inspectors
- Train members of management for this task

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Inspection Game Plan

- Never lie; never fabricate; never cover up
- Never admit to knowledge of violation or hazard; rather:
 - defer, or
 - simply say “I am not in a position to discuss that” or “I will look into it”; “We can discuss that later”
- You have the Right to Remain Silent
- You have the right to ask for authority for any particular request

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Inspection Game Plan

- Familiarize “inspection team” with MSHA regulations and the inspection process—including likely citations, admissions, good faith reductions in penalties, and the rights of employers during an inspection
- Identify room where conferences and employee interviews can be held
- “Friendly but Firm”

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Inspection Game Plan

Identify person responsible for coordinating response to MSHA investigation

- Arranging employee interviews with inspector
- Providing inspector with documents and establishing protocol for production of documents
- Coordinating follow-up visits
- Coordinating with attorneys and legal staff— involvement of counsel in investigation increases the chances that internal investigation will be subject to evidentiary privileges

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Inspection Game Plan

- Identify or establish a “chain of command” for MSHA inspections
- Assemble an “inspection kit”—video cameras, voice recorders, cameras

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Inspection Game Plan

Coordination with other investigations (federal agencies, local police, insurance companies, newspaper etc.)

- One person should be assigned to each individual investigation
- One person should be assigned to coordinate the multiple investigations

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- This presentation is for broad informational purposes only and does not create an attorney-client relationship.
- Always consult a lawyer before taking any action that may affect your rights.
- Every situation presents different facts that may affect your rights.

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