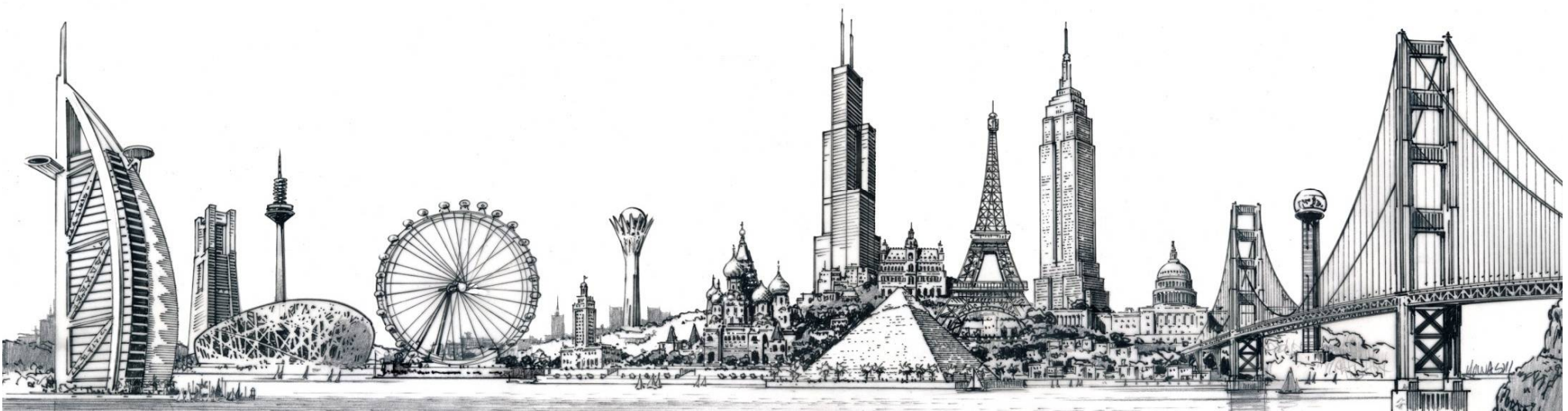


**Morgan Lewis**

**MACSC  
OSHA & ACCIDENT INVESTIGATIONS**

**NOVEMBER 10, 2017**



# Roadmap to Presentation

## **I. Introduction**

- Lessons Learned**
- OSHA in 2017**

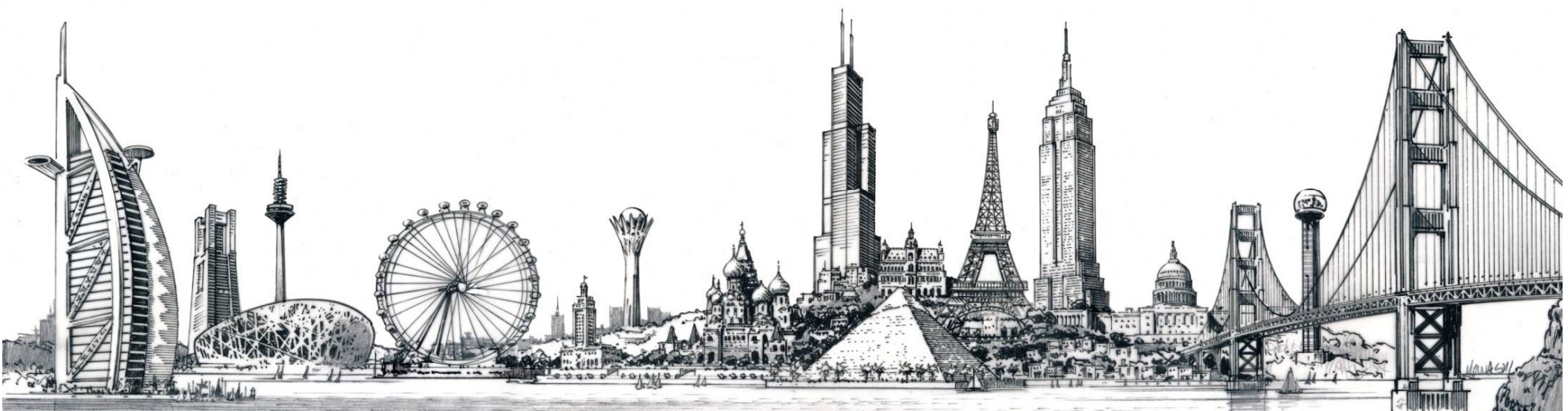
## **II. What to do after an accident**

- Reporting Injuries and Illness to OSHA**
- Post-Accident Investigations**

## **III. How to Handle an OSHA Inspection?**

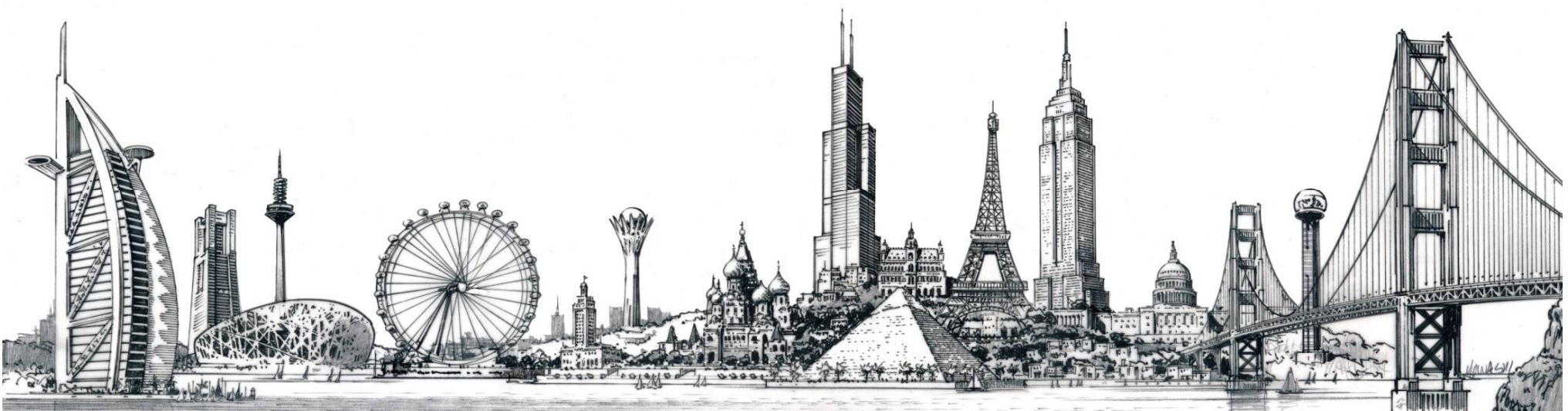
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## PART I: INTRODUCTION



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## LESSONS LEARNED

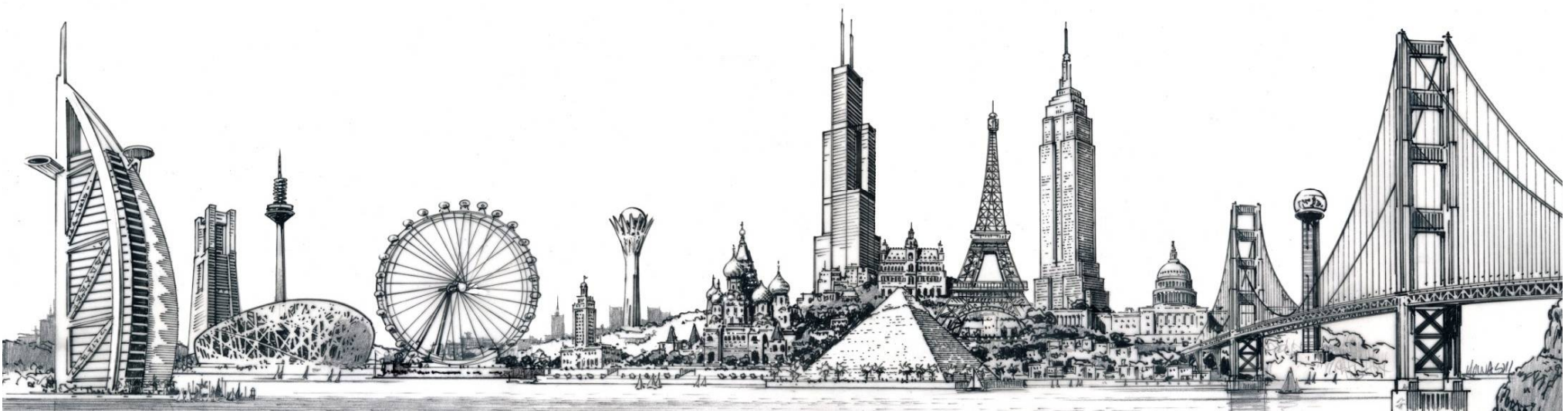


# Key Considerations

- Prepare now to prevent future chaos and confusion. Later, you will have limited time to react
- Think through issues including (1) whether to involve an attorney and (2) whether to report the accident to OSHA
- Know your rights and when to push back when OSHA shows up

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## OSHA IN 2017



# Accidents Occur For A Variety Of Reasons



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# Never Encourage Workers To Risk Life And *Limb* For The Job . . .



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# Unsafe Work Should Not Be On Your *Bucket* List . . .



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# 2017 Updates

## Public Perception of Government

“ On other issue areas, there are only **modest differences** between how Democrats and Republicans rate federal government performance.

For example, Republicans and Democrats are about **equally likely** to say the federal government is doing a good job ensuring that **food and medicine are safe** (73% each), **setting fair and safe workplace standards** (77% of Republicans vs. 79% of Democrats) and **responding to natural disasters** (78% vs. 82%). ”

**Pew Research Center study:**

*Beyond Distrust: How Americans View Their Government*

# 2017 Updates

## Public Perception of Government

“ In only one area, setting workplace standards, do a greater share of Republicans rate the government’s performance highly (77%) than say it should play a major role (54%). ”

Pew Research Center study:  
*Beyond Distrust: How Americans View Their Government*

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“The president is looking to slash the [DOL] agency’s budget by 21 percent, from \$12.2 billion this year to \$9.6 billion next year. Only the Environmental Protection Agency and the State Department would see greater cuts if Congress approved Trump’s plan.”

[http://www.huffingtonpost.com/entry/trump-budget-worker-protections\\_us\\_58caa983e4b00705db4cbe7f](http://www.huffingtonpost.com/entry/trump-budget-worker-protections_us_58caa983e4b00705db4cbe7f)

## % Construction Inspections FY 2010 - FY 2016



# Higher OSHA Penalties

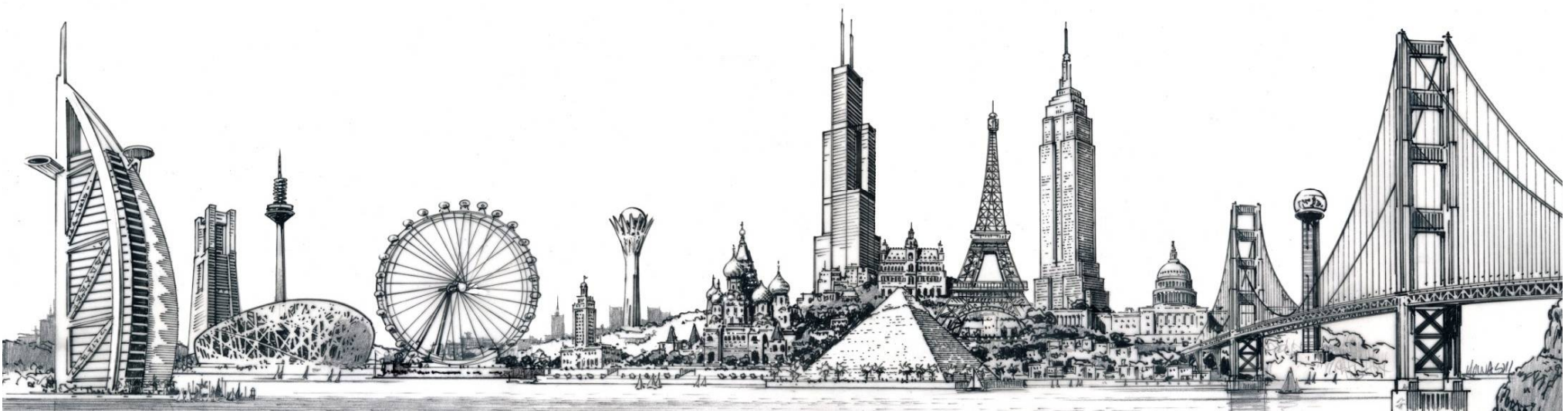
## OSHA<sup>®</sup> FactSheet

### OSHA Penalty Adjustments To Take Effect After August 1, 2016

Type of Violation	Current Maximum Penalty	New Maximum Penalty
Serious	\$7,000 per violation	<del>\$12,471</del> per violation    \$12,675
Other-Than-Serious		
Posting Requirements		
Failure to Abate	\$7,000 per day beyond the abatement date	<del>\$12,471</del> per day beyond the abatement date    \$12,675
Willful or Repeated	\$70,000 per violation	<del>\$124,709</del> per violation    \$126,749

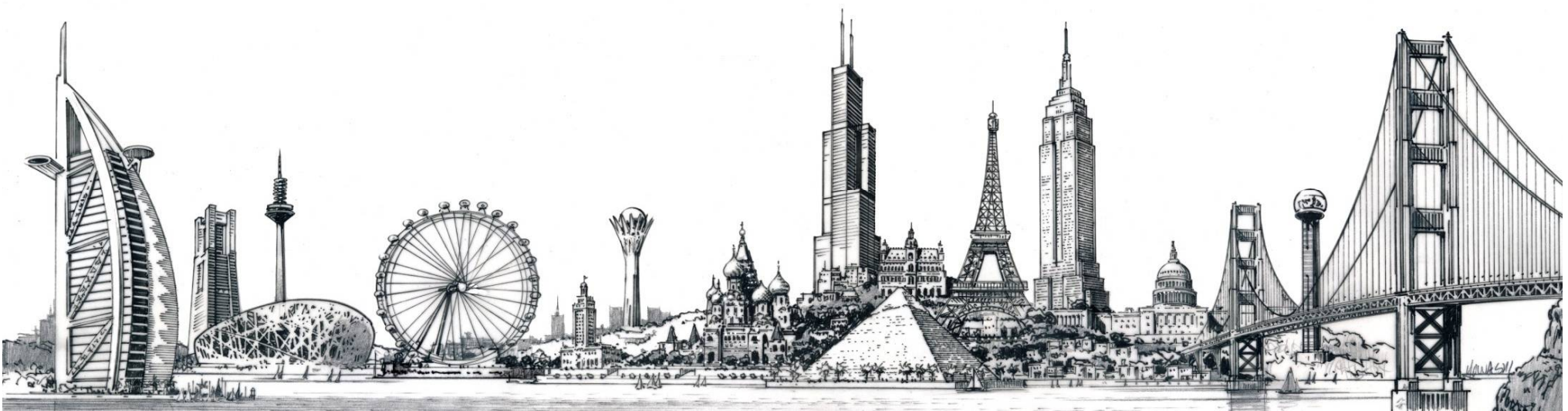
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# **PART II: WHAT TO DO AFTER AN ACCIDENT**



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# **TO REPORT OR NOT TO REPORT**



# Evaluate Accident for Reportability and Recordability

“Within **eight (8) hours** after the death of any employee as a result of a work-related incident, you must report the fatality to [OSHA]. Within **twenty-four (24) hours** after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.”

- Who is the employer or the injured employee?
  - “Log must include injuries and illnesses to employees on the employer's payroll **as well as injuries and illnesses of other employees the employer supervises on a day-to-day basis**, such as temporary workers or contractor employees who are subject to daily supervision by the employer.”
- Who is responsible for recording and reporting?
  - Make this clear ahead of time if ambiguous



# Evaluate Accident for Reportability and Recordability

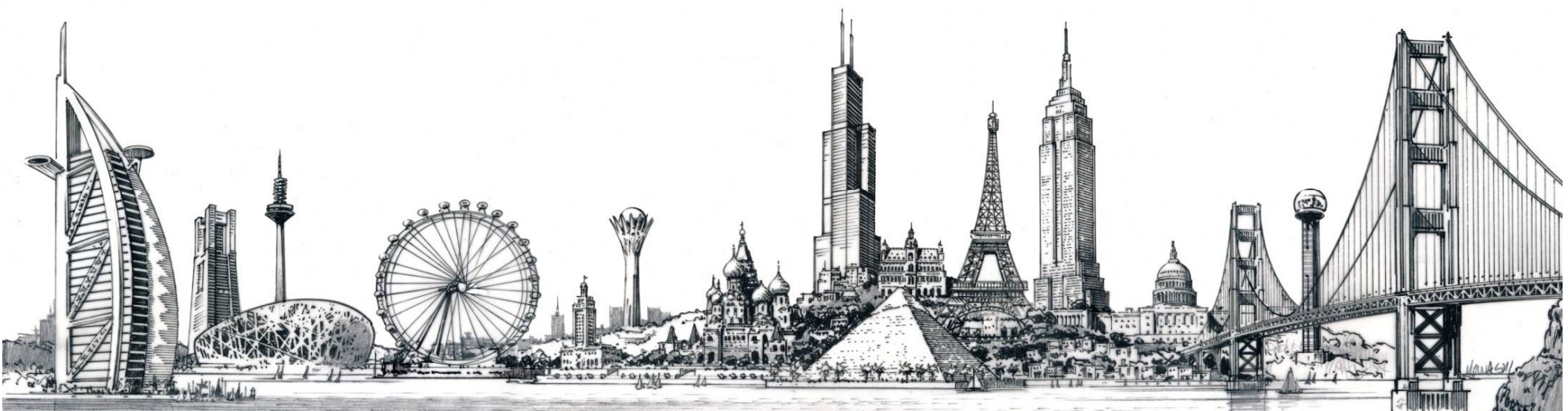
- Where did the incident occur?
  - Car? Parking lot? Away from work? State plan state?
- Was there an amputation?
  - “An amputation is the traumatic loss of all or part of a limb or other external body part. This would **include fingertip amputations with or without bone loss**; medical amputations resulting from irreparable damage; and amputations of body parts that have since been reattached.”

# Evaluate Accident for Reportability and Recordability

- Was there an in-patient hospitalization?
  - “Who determines whether an employee was formally admitted to the in-patient service of a hospital or clinic for care or treatment? The hospital or clinic makes the determination.” OSHA FAQ (meaning what?)
  - “If my employee spent the night at the hospital, do I have to report an in-patient hospitalization? OSHA defines in-patient hospitalization as a formal admission to the in-patient service of a hospital or clinic for care or treatment. An overnight stay does not determine whether the case is reportable or not.”
  - “Treatment in an Emergency Room only is not reportable.”
- How do you know without asking the employee medical questions? May raise ADA concerns

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ACCIDENT  
INVESTIGATION**



# Post-Accident Considerations

- After a workplace accident happens and is under control, what do you do?

# Simple Steps To Maximize Legal Protections

- Always consider reporting obligations
- Always consider attorney involvement
- Select appropriate investigation team
- Communicate nature of confidentiality and privilege to team
- Keep the investigation in a separate confidential file
- Mark all drafts as **CONFIDENTIAL WORKING DRAFT**
  - Drafts and deliberations also may be covered by attorney-client and work product privilege
- Mark all privileges. Ex.: **ATTORNEY WORK PRODUCT**

# Always Determine Applicability Of Privilege(s)

- **While other privileges may apply, these are key to consider upfront**
- *Attorney-Client Privilege*
  - Protects from disclosure confidential communications between a client and an attorney for the purposes of obtaining legal assistance
  - Does not preclude disclosure of underlying facts conveyed in those communications
- *Work product doctrine*
  - **Generally protects mental impressions created “in anticipation of litigation” by attorney or agent**
  - May be discoverable if opposing party can show substantial need

# Case Study 1 - Privilege

- **Sample Facts:**
  - Following an the unanticipated cave in of a trench, Employer hires Engineering Consulting, LLC (ECL) to assist with the post-accident investigation;
  - At the request of Employer's attorney, ECL compiles a draft report; and
  - Employer claims report was prepared by ECL to assist Employer's counsel in the analysis of technical issues associated with compliance with OSHA's construction standards.
- **Question:** Is the report prepared for Employer by a third party protected from disclosure by privilege?

# Case Study 1 – Privilege

## Review Commission Guidelines

- Application of the privilege to documents created by third parties
  - **Client must have provided information to the third party**, rather than the third party providing its own information;
    - Privilege will not apply if third party is employed “to gather data through studies and observations of the physical conditions at a client's site, rather than through client confidences.”
  - Client must have sought **legal** rather than some other kind of advice or information (for example, accounting advice); and
  - **Attorney must need the services of the third party** (i.e., to translate, interpret, or explain technical or complex information) in order to provide legal services.

Delek Ref., Ltd., 23 O.S.H. Cas. (BNA) ¶ 1567 (O.S.H.R.C. July 11, 2011).



## But See . . . Case Study 2 - Privilege

- **Sample Facts:**

- Employee files complaint with OSHA about failure to take precautions against hydrogen sulfide;
- Employer investigates and reports it has concluded there is no violation/risk; OSHA remains unsatisfied;
- Believing litigation is likely, Employer consults counsel who retains an expert to conduct air monitoring; and
- Expert submits air monitoring report to Employer.

- **Question:**

- Is the report protected from disclosure by privilege?

## Case Study 2 – Privilege

- Result:
  - Review Commission finds document protected by work product doctrine because it was (1) a document, (2) prepared in anticipation of litigation, and (3) prepared by a party's representative (here a consultant) for the party's attorney;
- Review Commission's Reasoning:
  - No limitation on the doctrine for document that contains "purely technical" or "factual" information;
  - OSHA failed to show undue hardship/substantial need for the materials;
    - OSHA could not establish that it could not obtain "substantially equivalent" materials
  - No evidence that Employer precluded OSHA from conducting its own air sampling;

Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1264 (3d Cir. 1993)

# Effective Interviewing Techniques

- **No group interviews**
- **Prepare topics to cover, not questions that must be asked.**
- **Listen, listen, listen**
- Company witness present – and legal(?)
- Contemporaneous notes, not tapes
- Demeanor – no opinions, conversational, serious
- Explain purpose of the interview (we're here to gather facts)
- Objectivity, not accusatory
- Don't put words in employee's mouth
- Limited confidentiality (need-to-know basis). Do not discuss with other employees
- **Stress no retaliation**

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# Questioning Witnesses

- Open-ended questions...
  - Exactly what happened?
  - When did it happen?
  - Where did it happen?
  - Who was present? Who has relevant information?
  - Who said or did what? In what order?
  - How did it happen?
  - Why did it happen?
  - Could it have been avoided?
  - Any notes, documents, or other evidence?
  - Easy questions first, hard questions last
  - **What did you see? Did you see this occur, or are you taking a best guess based on the aftermath?**

# Right To Employee Representation

- Union employees have the right to a representative at an investigatory meeting
- Employee must reasonably believe the interview may result in disciplinary action
- Employee must request representation
- Employer need not advise employees of right unless agreed to in CBA

# Avoid Potential Traps

- Keep an open mind
  - Never assume you know what happened
  - Do not reach conclusions based on the first (or second, or third) interview
- Speculation as to cause + 20/20 hindsight
- Making conclusions of law (not fact), particularly without a lawyer's input
  - Recognition of hazards for general duty clause
- After investigation is closed, work to resolve all issues identified
  - Avoid willful and repeat citations down the road

# Tell the Truth

- In addition to willful OSHA violations, employers can face other criminal sanctions for:
  - Falsifying OSHA documents (Section 17(g))
  - Providing advance notice of an OSHA inspection (Section 17(f))
  - Perjury during OSHA proceedings (18 U.S.C. Section 1001)
- Catastrophic events that impact the environment can also subject an employer to criminal prosecution under the:
  - Clean Water Act
  - Clean Air Act
  - Resource Conservation and Recovery Act
  - Comprehensive Environmental Response, Compensation, and Liability Act



# Recent Criminal Prosecutions

- Don Blakenship: Former CEO and Chairman of Massey Energy Company, the sixth largest coal company in the United States, found guilty by a jury in December 2015 of “willfully violating mine health and safety standards” involving an explosion at Massey’s Upper Big Branch Mine that killed 29 miners in 2010
  - Sentenced to one year in federal prison and ordered to pay a \$250,000 fine
  - Judge Irene C. Berger explained that *“by putting profitability of the company ahead of the safety of your employees, you, Mr. Blankenship, **created a culture of noncompliance at Upper Big Branch, where your subordinates accepted and, in fact, encouraged unsafe working conditions in order to reach profitability and production targets.**”*
- Randy Miller: Filmmaker pled guilty to criminal trespassing and involuntary manslaughter in Georgia state court in connection with the death of a film assistant
  - Miller ordered the crew to set up on an active trail track and trestle, even though the railroad company refused permission. Miller’s employee was killed when a train came down the track.
  - He was sentenced to two years in prison, which was later reduced to one year, and fined \$75,000 by OSHA for one willful and one serious safety violation (on appeal to the Eleventh Circuit).



# Recent Criminal Prosecutions

- James McCullagh: Philadelphia, owner of James McCullagh Roofing, Inc., pled guilty to five felonies and one misdemeanor involving lying to OSHA and sentenced to over 55 months in prison
  - In 2013, one of McCullagh's employees was killed after falling approximately 45 feet from a roof bracket scaffold while performing roofing work for McCullagh.
  - McCullagh failed to provide fall protection to his employees.
  - He attempted to cover up his failure to provide fall protection by falsely stating, on four occasions, that he had provided fall protection equipment, and he directed other employees to falsely state that they had fall protection.
- Craig Sanborn: Gunpowder plant owner, convicted in 2013 of two counts of manslaughter and two counts of negligent homicide involving a deadly 2010 explosion at a plant he owned
  - A state police bomb inspector denied Sanborn's application to store 1,000 pounds of powder at the site, but Sanborn did it anyway.
  - OSHA issued 16 "willful" and more than 30 "serious" violations, along with a \$1.2 million penalty.
  - Sentenced to 10-20 years in prison; upheld by the New Hampshire Supreme Court in December 2015.

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# **PART III: HOW TO HANDLE AN OSHA INSPECTION**

## **WHAT WOULD YOU DO?**



# What Would You Do?

A CSHO shows up to your worksite, says he is there as part of a “programmed lead inspection,” but cannot provide any other details.



# Probable Cause For An Onsite Inspection

## How does OSHA get probable cause?

1. An employee complaint – a “formal complaint”;
2. A mandatory report – fatality, hospitalization of one or more employee(s), amputation, loss of an eye;
3. A referral (competitors, firefighters, emergency medical personnel, etc.);
4. A newspaper article (including internet articles);
5. Observation by an OSHA Compliance Officer (CSHO) of hazardous conditions;
- 6. Inclusion on a programmed inspection list;** or
7. A follow-up inspection after a prior citation.



# What Would You Do?

- A CSHO arrives at a worksite and identifies himself as a representative of OSHA. There is no manager present.



# Have A Protocol In Place

- ❑ Designate **management-level employee(s) and legal counsel** who must be contacted *immediately* should OSHA appear and before the inspection starts.
- ❑ Inform crew of the protocol and the contact information for the designated manager(s).
  - The CSHO generally will wait a reasonable time for a **designated manager** to arrive.
  - The CSHO generally will wait to **minimize disruptions to business operations.**
- ❑ Ask the CSHO representative to wait outside of the worksite until the designated manager arrives.

We understand asking the CSHO to “wait outside” is difficult with outdoor work. If possible, stop operations until manager arrives.



# What Would You Do?

- CSHO arrives at worksite, shows credentials, says that a formal complaint has been made by a current employee about lack of respirators at the worksite.



# Opening Conference

- Ask for and retain a copy of all documents, including the complaint
- Ask questions.
  - For employee complaints, verify that the complaint is made by a current employee who has identified himself/herself to OSHA (but you are not entitled to the identity of the employee).
  - Ex: ask to confirm that the complaint was made by a current employee with a roster.
- You can request that the scope of the inspection be limited to the subject matter originally creating probable cause (here, nothing beyond respirators).
- If the CSHO's inspection expands beyond the originally agreed-upon scope, you can revoke consent after the inspection has started.





# What Can You Do?

- During the inspection, the CSHO sees a safety violation that has not been identified as within the scope of the inspection.
- What can you do?



# Plain View Exception To Scope Of Inspection

- Plain View Exception: If a violation that can cause serious injury or death is in plain view, the CSHO has a right to inspect it.
- If possible, plan your route.



# What Can You Do?

- The CSHO indicates that she would prefer to conduct the inspection without you or another management employee present.
- What can you do?



# Your Rights On The Walkaround

- Too bad.
- You have the right to:
  - **Accompany the CSHO.**
  - **Take detailed notes.**
  - **Mirror and document the investigation of the CSHO.**
    - E.g., take photographs, measurements, samples when the CSHO does so.
  - If the basis of the inspection (for example, an employee complaint) is limited to a particular area or issue, **limit the CSHO to that specific location.**



# What Can You Do?

- The CSHO asks an employee: “can you demonstrate how you would enter this trench?”
- What can you do?



# The Walkaround

- You are under no obligation to put on a performance or make new documents for the CSHO
- Do not reenact an alleged violation during an inspection without consulting an attorney, supervisor, etc.



# What Can You Do?

- John, one of your hourly employees, agrees to speak with the CSHO.
- What can you do?



# Employee Interviews

- Non-Manager Employees
  - OSHA usually demands privacy for non-manager employee interviews.
  - The Employee has the right to speak or not speak with OSHA, and the right to sign or refuse to sign a written statement, **without retaliation**
  - OSHA must be reasonable regarding its interview requests (e.g., reasonable time and in a reasonable manner).





# What Can You Do?

- Hypothetical: A crew member asks you what he/she should say during the OSHA interview.
- What can you say?



# What can you say?

- **Be truthful and honest.**
- If you don't understand the question, you can ask for clarification.
- If the investigator refers to a document and has a question about it, you can ask to see it.
- There will be absolutely NO retaliation for your participation in this process.
  - There will be no retaliation for speaking with the investigator, agreeing to be recorded, or signing a written statement.
  - At the same time, if you do not want to speak to the investigator, be recorded, or sign a written statement, you do not have to.
- If you do sign a statement, like any other legal document you sign, check to make sure you believe that it is 100% completely true and correct before signing.



# What Can You Do?

- Sandra, one of your supervisors, tells you that she does not want the CSHO to record their conversation.
- What can you do?



# Management Interviews

- **Employers are entitled to have a company representative or attorney attend the interviews of managers or supervisors.**
- Management interviews can be scheduled based on the manager's reasonable availability.
- A manager is not required to be tape-recorded or videotaped without his/her consent. The manager is also not required to sign a written statement.

## ✓ Suggested Practice

- Consider contacting your labor and employment counsel to participate in the OSHA management interviews and assist you in identifying who qualifies as a management employee.



# What Can You Do?

- CSHO asks for copies of all documents that he reviewed during inspection.



# Request & Production of Records

- The CSHO has a right to **examine** records (1) relevant to the inspection OR (2) those required under the OSH Act and its regulations.
- **Ask for all document requests to be sent in writing** (avoids confusion later and focuses requests).
- Review and mark as confidential or trade secret for FOIA protection:
  - To protect privacy, redact SS#s, addresses, contact info, bank account #s, medical info, etc.
  - You can stamp policies and other documents as trade secret.
  - Individual employee records may require an administrative subpoena or written consent.



# Knowledge

- Knowledge is a required element for an OSHA citation. The Secretary must establish that the **employer knew or should have known with the exercise of reasonable diligence of the alleged hazardous condition.**
- Key to our defense:
  - Safety audits.
  - Pre-job briefings where hazards are discussed with crew.
  - Proof that employees were trained on proper procedures.
  - No foreseeability



# Isolated Employee Misconduct

- To establish isolated employee misconduct defense, an employer must show that it:
  - Established a work rule adequate to prevent the violation;
  - **Effectively communicated the rule to employees;**
  - Established **methods for discovering** violations of work rules, and yet did not know about an isolated violation of the work rules; and
  - Established **effective enforcement** of the rule when violations are discovered (**i.e., discipline**).
- Key to our defense:
  - Disciplinary records for similar offenses
  - Training on work rules
  - Periodic audits







Brandon Brigham  
Associate  
Labor and Employment

Morgan, Lewis & Bockius, LLP  
1701 Market Street  
Philadelphia, PA 19103  
brandon.brigha@morganlewis.com  
+1.215.963.4780

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