International Labour Organization

SAFETY + HEALTH FOR ALL

Key principles underlying sanctioning procedures applicable to occupational safety and health violations

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Foreword

The effectiveness of labour law, including occupational safety and health (OSH) legislation, results from a complex relationship between its normative quality; its accessibility; its response to actual regulatory needs; and an effective sanctioning system, both with regard to the sanctions it establishes and the procedural rules for applying them. Nonetheless, it has been widely observed that many countries struggle to varying degrees in regulating their administrative and judicial sanctioning procedures as applicable to labour law infractions.

This brief attempts to provide policymakers and lawmakers with some practical insights into sanctioning procedures. Following a general introduction, including references to international labour standards (sect.I), it provides an overview of national legislation (sect. II), international labour standards (sect. III), general principles (sect. IV) and legislative techniques (sect. V) in this domain. The brief also includes a set of five studies that provide an overview of the sanctioning procedures in the social domain in Finland, France , Spain, Great Britain (United Kingdom) and the United States of America (see appendixes).

The brief has been developed under the umbrella of the International Labour Organization (ILO) Flagship Programme "Safety + Health for All",[1] which aims to increase the impact of technical assistance provided by the ILO to improve the safety and health of workers, particularly in low-income and lower-middle-income countries. To this end, special efforts are being made to strengthen the enforcement of OSH laws, notably through robust workplace inspection and effective sanctioning processes. With this perspective, this brief is an important contribution to the objectives of the Safety + Health for All Programme.

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1 ILO, "Safety + Health for All". See: https://www.ilo.org/global/topics/safety-and-health-at-work/programmes-projects/safety-health-for-all/lang--en/index.htm


international labour standards
OSH legislation
procedural rules
enforcement
compliance

I. Introduction

Labour law compliance refers to the respect and observance of labour law (including the fulfilment of any legally established requirements and obligations related to occupational safety and health (OSH)) by natural and legal persons. It depends on many factors, including the level of awareness and understanding of legal requirements; the level of education and expertise on the matter that is being regulated (OSH for the purposes of this brief); the availability of financial and material resources; the motivation triggered by any kind of incentives (for example, reputational or financial); and the fear of sanctions.

Compliance can be voluntary, that is, when the duty holder (market operators, citizens, employers and so on) obeys rules willingly and without the intervention of authorities; or it can be compulsory, that is, when duty holders are required by the authorities and through various means, including sanctions, to observe the law. This compulsory compliance with labour law, including OSH-related rules, is referred to as *labour law enforcement* and is the primary responsibility of labour inspectorates and judicial bodies. Sanctioning is a procedure that needs to be regulated to ensure that the rights of citizens as duty holders, in particular the rights of employers, are protected and respected (for example, the right of offenders to defend themselves against what they may consider to be an unfair sanction or procedure followed to impose such a sanction) while the intended results of the sanctions are achieved (that is, the observance of the law).

International labour standards require Member States to include appropriate and sufficiently dissuasive sanctions in their legislative frameworks to ensure that the law is applied and respected by labour market operators. In particular, Article 18 of the Labour Inspection Convention, 1947 (No. 81) and Article 24 of the Labour Inspection (Agriculture) Convention, 1969 (No. 129) state that "adequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced".

Many countries experience regulatory gaps and challenges in relation to the sanctioning procedure applicable to infractions related to labour and OSH law, including:

- insufficient or poorly developed procedural rules that do not adhere to a number of key legal principles, which may result in inefficient and unfair sanctioning procedures;
- opaque rules, stated in overcomplicated and unclear language, which may give rise to confusion and misunderstanding of the sanctioning procedure by its parties; and
- multiple, scattered, overlapping and contradicting legal provisions governing the sanctioning procedure that are difficult to locate, interpret and understand.

This brief attempts to assist countries in addressing these challenges by:

- capturing the most commonly accepted good governance principles that a sanctioning procedure should adhere to in order to be sound and effective;
- providing guidance on essential legislative drafting techniques that should be followed when conceiving procedural rules;
- offering a glimpse of the various types of national legal instruments that may embed procedural rules; and
- taking stock of the provisions related to sanctioning procedures that are set out in international labour standards.

This brief also includes five country studies (see appendixes) that describe national OSH sanctioning procedures with a view to providing food for thought and inspiration for states that are willing to develop or review their procedural rules. With respect to the five countries covered – Finland, France, Spain, Great Britain (United Kingdom) and the United States of America – the main criteria for country selection was to offer a diversity of legal traditions and approaches.[2]

2 *Disclaimer:* The national studies and examples of provisions from national legislation presented in this brief constitute neither an endorsement by the ILO nor a suggestion that any of them should be followed as a model or best practice. Their role for the purposes of this brief is solely to provide examples of how procedural principles and rules can be regulated.


Judicial Procedure Act
Civil Procedure Act
Administrative Procedure Act
Labour Procedure Act
Labour Act
Criminal Procedure Act
Occupational Safety and Health Act

II. Sanctioning procedural rules in national legislation

While Convention No. 81 establishes the baseline functions and powers that labour inspectors shall have in any Member State (Articles 3 and 12), other enforcement aspects such as the imposition of penalties and other sanctioning activities vary across countries: some countries have in place both an administrative sanctioning procedure (that is, sanctions can be applied or proposed by the labour inspectorate) and a judicial sanctioning procedure, while in other countries only the latter exists.

A variety of legal instruments can be used to regulate the administrative and judicial sanctioning procedure. Countries may decide to include provisions regulating the administrative sanctioning procedures in the primary labour law (for example, France's Labour Code) or OSH law for any specific OSH-related procedures (for example, Australia's Work Health and Safety Act, 2011, which includes procedural provisions in various instances throughout the law).

Alternatively, countries may regulate the administrative sanctioning procedure in a separate law that only contains labour- or OSH-related procedural rules (for example, Finland's Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces Act No. 44, 2006). A country may also decide to issue a specific set of procedural rules that are applicable solely to the sanctioning of labour law infractions, or it may approve rules that are generally applicable to any dispute resolution on any issue between a person or a legal entity and the public administration (for example, Spain's Common Administrative Procedure of Public Administration Act No. 39/2015).

Ultimately, a country can choose a mixture of these approaches by developing a specific law on labour enforcement/sanctioning and dispute resolution, which is supplemented by a generic law that is applicable to all public administrations. However, this option presents an important challenge: ensuring that all the pieces of legislation that regulate procedures are consistent and coherent.

Judicial procedures are usually regulated in laws that govern solely proceedings before the courts. Judicial procedures can be regulated in a law that contains procedural rules that are related exclusively to labour law (for example, the United Kingdom's Employment Appeal Tribunal Rules 1993; Spain's Labour Jurisdiction Act No. 36, 2011) or in a law that governs any kind of judicial procedures (for example, The Swedish Code of Judicial Procedure, 2015; Finland's Code of Judicial Procedure). Also, countries usually have different sets of applicable procedures, depending on the matter being enforced, such as whether it is an administrative, civil, labour or criminal matter, and also depending on their judicial system and architecture.


INAUGURATION
1926

III. Sanctions and sanctioning procedures in international labour standards

▶ Sanctions

According to article 19(5)(d) of the ILO Constitution, Member States are required, once a Convention is ratified, to take "such action as may be necessary to make effective the provisions of such Convention". These supervision measures, which accompany implementation measures, can take various forms, such as labour inspections; disciplinary or criminal penalties; the right of recourse to judicial or administrative procedures; the maintenance of registers and records; the requirement to obtain permits, licences or certificates; or a combination of these.[3]

3 ILO, Manual for Drafting ILO Instruments, 2006.

Many international labour standards[4] explicitly include the requirement for Member States to establish an enforcement system that features adequate penalties. For example, Article 9(2) of the Occupational Safety and Health Convention, 1981 (No. 155) establishes that "the enforcement system shall provide for **adequate penalties** for violations of the laws and regulations". Similarly, Article 35(a) of the Safety and Health in Construction Convention, 1988 (No. 167) and Article 16(a) of the Safety and Health in Mines Convention, 1995 (No. 176) require Member States to "take all necessary measures, including the provision of **appropriate penalties and corrective measures**, to ensure the effective enforcement of the provisions of the Convention".

To be effective, such penalties should be sufficiently dissuasive. In this regard, **the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has repeatedly emphasized that it is essential for the credibility and effectiveness of regulatory systems that penalties are sufficiently dissuasive and that they are defined in the national legislation in proportion to the nature and gravity of the offence.** In this context, the CEACR has noted that the legislation of most countries provides for penalties in cases of the violation of the legal provisions enforceable by labour inspectors, including both fines and terms of imprisonment (ILC.106/III/1B, para. 471).

However, practice shows that while Member States usually include penalties in national legislation, these are often not sufficiently dissuasive and are therefore neither adequate nor effective.

The CEACR has indicated that penalties should not only be prescribed to punish violations of legal provisions relating to conditions of work and protection of workers, as is the case in most countries, but

4 Conventions that feature references to penalties include:
- Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), Art. 4.
- Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), Art. 12.
- Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32), Art. 17(2).
- Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 33), Art. 7.
- Holidays with Pay Convention, 1936 (No. 52), Art. 8.
- Holidays with Pay (Sea) Convention, 1936 (No. 54), Art. 9.
- Food and Catering (Ships' Crews) Convention, 1946 (No. 68), Art. 9(2).
- Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76), Art. 9(a).
- Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93), Art. 9.
- Labour Clauses (Public Contracts) Convention, 1949 (No. 94), Art. 5(1).
- Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99), Art. 4(1).
- Plantations Convention, 1958 (No. 110), Arts 25, 35(c) and 83.
- Guarding of Machinery Convention, 1963 (No. 119), Art. 15.
- Minimum Age (Underground Work) Convention, 1965 (No. 123), Art. 4(1).
- Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124), Art. 4(1).
- Labour Inspection (Agriculture) Convention, 1969 (No. 129), Art. 24.
- Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), Art. 16(a).
- Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), Art. 41(b).
- Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153), Art. 11(b).
- Indigenous and Tribal Peoples Convention, 1989 (No. 169), Art. 18.
- Home Work Convention, 1996 (No. 177), Art. 9(2).
- Recruitment and Placement of Seafarers Convention, 1996 (No. 179), Art. 4(1)(e).
- Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180), Art. 15.
- Safety and Health in Agriculture Convention, 2001 (No. 184), Art. 4(3).

Conventions that make specific references to penal sanctions include:
- Forced Labour Convention, 1930 (No. 29), Art. 25.
- Fee-Charging Employment Agencies Convention, 1933 (No. 34), Art. 6.
- Officers' Competency Certificates Convention, 1936 (No. 53), Art. 6.
- Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93), Art. 9.
- Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), Arts 8 and 13.
- Fishermen's Competency Certificates Convention, 1966 (No. 125), Art. 15.
- Minimum Wage Fixing Convention, 1970 (No. 131), Art. 2(1).
- Seafarers' Annual Leave with Pay Convention, 1976 (No. 146), Art. 6(1).
- Worst Forms of Child Labour Convention, 1999 (No. 182), Art. 7(1).

should also, according to the instruments, be effectively enforced. The available information suggests, however, that they are only rarely imposed and that an effective enforcement procedure is generally conducted only if the violation resulted in serious harm to health or safety. In general, the annual reports of labour inspectorates that contain information on the outcomes of procedures for non-compliance indicate that legal proceedings mainly concern violations of provisions that cover illegal employment, the failure to pay social contributions and (more rarely) the conditions of work. In this regard, **the Committee considers that in order for the system of inspection to be consistent with its objectives, it is essential for the penalties imposed on persons guilty of violations of any kind to be effectively enforced, in conformity with the Conventions** (ILC.95/III/1B, para. 303).

The CEACR has recalled those principles in its most recent General Surveys. For example, in 2017, **the Committee encouraged Member States to ensure that the penalties established in the national legislation (whether they are of an administrative, civil or penal nature) are sufficiently dissuasive to deter OSH violations and that they are defined in proportion to the nature and the gravity of the offence, and to take measures to ensure that penalties for violations in the area of OSH are effectively enforced** (ILC.106/III/1B, paras 475 and 478). The CEACR noted that obstacles to the enforcement of penalties include, for example, time-consuming court proceedings, the lack of political commitment and inadequate cooperation between the labour inspection services and the justice system (ILC.106/III/1B, para. 476).

▶ Sanctioning procedural rules

The effective enforcement of penalties requires sound, legally defined procedures. International labour standards that refer to sanctioning procedures, however, do not define such procedures. Consequently, there is little or no harmonization of procedural rules among Member States; these vary substantially from one legal tradition to another.

For example, Convention No. 81, Article 17, Convention No. 129, Article 22, and Convention No. 110, Article 82 establish that:

> 1. Persons who violate or neglect to observe legal provisions enforceable by labour: inspectors **shall be liable to prompt legal proceedings without previous warning**: Provided that exceptions may be made by national laws or regulations in respect of cases in which previous notice to carry out remedial or preventive measures is to be given.
>
> 2. It shall be left to the discretion of labour inspectors to give warning and advice instead of instituting or recommending proceedings.

Furthermore, Convention No. 129, Article 23 stipulates that where "labour inspectors in agriculture are not themselves authorised to institute proceedings, they shall be empowered to refer reports of infringements of the legal provisions directly to an authority competent to institute such proceedings".

The Maritime Labour Convention, 2006, as amended (MLC, 2006), article V(2) requires each Member State to "effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws".

As shown above, international labour standards require Member States to have in place a system that allows for appropriate legal proceedings to enforce legal provisions and impose sanctions; however, international labour standards are silent with regard to the relevant procedural rules that should be followed.


PRINCIPLES
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IV. Overview of key procedural principles

Although it is left to the discretion of Member States to determine their own procedural rules and although, as seen above, the legislative architecture may vary significantly from one country to another, there are a number of commonly accepted good governance principles that underpin procedural rules. Policymakers may find below a non-exhaustive list of such principles, explained and accompanied by examples of national legal provisions that capture them.

Although these principles are not always codified or embedded in laws, they are usually applicable across different legal systems, with some caveats. They are sometimes established or confirmed though case law. Incorporating them in legal provisions may help users to locate and invoke them more easily when pleading their rights in sanctioning procedures. It may also assist justice administrators to apply them more systematically and consistently.

Not all of these principles may be considered as universal. Also, although some principles are typically of a procedural nature, others may be applicable to substantial law as well. Yet some of these principles may be applicable to administrative proceedings and others typically underlie the judicial procedure. In jurisdictions in which the sanctions for OSH violations are exclusively of a criminal nature (see, for example, the United Kingdom's Health and Safety at Work etc Act 1974), the procedural principles adopted are those that are generally applicable to criminal law.

Due procedure principle

Sanctioning procedures, whether administrative or judicial, cannot be initiated and conducted on an ad hoc basis. They should be duly regulated by law, including all procedural phases, steps and elements, and should be conducted in compliance with such rules.

Example: Peru

▶ Law on the General Administrative Procedure Nº 27444 of 10 April 2001

> *Article 230. Principles of administrative sanctioning power*
>
> The sanctioning power of all entities is also governed by the following special principles: (...) Due procedure. Entities will apply sanctions subject to the established procedure with respect to the guarantees of due procedure.

Good faith principle

This principle is also referred to by the Latin term "bona fides". It requires the parties to the sanctioning procedure to act in a way that is socially admitted as accurate, ethical and honest and therefore without engaging in fraud or deception. This is an overarching principle in the legal architecture and is thus applicable to both substantive and procedural law. Depending on national legislation, non-compliance with this principle should result in any fraudulent proceedings being declared void.

Example: Peru

▶ Labour Process Act, No. 29497, 2010

> *Article 3. Fundamentals of the labour process*
>
> In any labour process, judges should prevent inequality between the parties from affecting the development or result of the process and to that end should seek to achieve real equality of the parties; favour substance over form; interpret procedural requirements and budgets in a sense favourable to the continuity of the process; follow due procedure; and ensure competence and the principle of reasonableness. In particular, these duties are especially important when the parties to the process are pregnant women, minors and persons with disabilities. Labour judges play a leading role in the development and dynamics of the process. They prevent and sanction misconduct contrary to the duties of veracity, probity, loyalty and good faith of the parties, their representatives, their lawyers and third parties. (...)

Ex officio action principle

This principle imposes a responsibility on the State to initiate and conduct the sanctioning procedure when laws that protect inalienable citizens' rights are breached. It implies the obligation of the State not only to initiate the sanctioning procedure but also to make sure that it advances without undue delay and is completed within the established deadlines.

Example: Costa Rica

▶ General Law No. 6227 of the Public Administration of 2 May 1978

> *Article 222(1)*
>
> The administrative procedure will be carried out *ex officio*, without prejudice to the parties' actions.

Principle of promptness

This principle requires the process to be completed as quickly as possible. It favours both the parties to the process (who obtain a prompt decision) and the public authorities (who may thereby save procedural costs and increase the number of cases they can hear in a certain period of time). Therefore, any process-delaying tactics that may be employed by the parties go against this principle. The law should articulate the consequences of fraudulent practices that seek undue procedural delay, such as hampering a notification to be served, faking a medical condition to avoid compliance with a deadline, and so on.

Example: United Kingdom

▶ The Employment Tribunals Rules of Procedure 2013 (as amended)

> *Rule 41*
>
> The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to **the principles contained in the overriding objective**.
>
> *Rule 2*
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> ... (d) avoiding delay, so far as compatible with proper consideration of the issues."

Example: Canada (Quebec)

▶ Rules of evidence and procedure of the Administrative Labour Tribunal

> *Article 1*
>
> These rules apply to all the matters brought before the Tribunal.
>
> Their purpose is to ensure the simple, flexible and prompt processing of applications, particularly with the cooperation of the parties and their representatives and the use of available technological means by the parties and the Tribunal, in accordance with the rules of natural justice and the equality of parties.

Example: Uruguay

▶ General Procedural Code, Law No. 15982 of 18 October 1988

> *Article 3. Procedural promptness*
>
> Once proceedings have been initiated, the court will, on its own initiative, take the necessary steps to avoid its paralysis and to advance its proceedings as quickly as possible.

PrInciple of simplicity, concentration of acts and procedural economy

The process should be as simple and brief as possible. Depending on the issue at stake, the law may specify a simplified procedure to be followed. As many actions as possible should be accomplished in each procedural phase or step with a view to shortening the process and eliminating unnecessary bureaucratic procedures. This implies grouping related law violations under the same sanctioning procedure to avoid the dispersion of proceedings and extending the process or the imposition of inconsistent sanctions. The principle of procedural economy aims to achieve the best possible results, that is, to complete the process in full observance of the applicable legal provisions while expending the least possible time and resources. It seeks to answer the question "How to achieve more with less?"

Example: Mexico

▶ Federal Administrative Procedure Law of 4 August 1994

> *Article 13*
>
> The administrative procedural actions will be conducted in accordance with the principles of economy, promptness, efficiency, legality, publicity and good faith.

Example: Uruguay

▶ General Procedural Code, Law No. 15982 of 18 October 1988

> *Article 9. Prompt and efficient administration of justice*
>
> The court – and under its direction, the auxiliaries of the Jurisdiction ¬– will take the necessary measures to achieve the most prompt and efficient administration of justice, as well as the greatest economy in the conduct of the proceedings.
>
> *Article 10. Procedural focus*
>
> Procedural acts will be carried out without delay, seeking to shorten deadlines, when empowered to do so by law or by agreement between the parties, and to concentrate in the same act all the proceedings that need to be taken.

Principle of publicity

The various procedural phases should be public, unless this is forbidden by the law on the grounds of security, for moral reasons or for the protection of any of the parties to the process. Publicity translates into procedural transparency, which in turn guarantees due procedure since it allows civil society and the administration of justice to control the lawfulness of the process.

Example: Chile

▶ Labour Code, edition of 8 October 2018

> *Article 425*
>
> Labour procedures will be oral, public and concentrated. The following principles will prevail: immediacy, *ex officio* procedural action, promptness, good faith, bilaterality of hearings and the provision of services free of charge.

Example: Uruguay

▶ General Procedural Code, Law No. 15982 of 18 October 1988

> *Article 7. Publicity of the process*
>
> All processes will be public, except when the law expressly provides otherwise or the court decides so for reasons of security, morals or protection of the personality of any of the parties.

Principle of statute of limitations: Periods of prescription and expiration/lapsing of legal action

Legal actions and prosecution can be conducted only within a certain period of time after an infraction has taken place. This is usually referred to as a "statute of limitations" in common law countries or as "periods of prescription" in civil law countries.

Limiting the time period within which legal action can be undertaken has the purpose of protecting the defendant, who may have lost the evidence that could prove their diligence and overturn the claim when a long time has elapsed after the alleged breach. Moreover, a plaintiff (a person or the competent institution, such as the labour inspectorate) is expected to be diligent and initiate actions within a reasonable time after the offence has occurred.

The time period provided for initiating a legal action should be reasonable and of sufficient duration and usually should depend on the seriousness of the offence. For example, the time limit for taking legal action in the case of a homicide due to a lack of mandatory OSH measures will not be the same as the time limit for taking legal action in the case of a failure to conduct a risk assessment or provide training on OSH.

If the statute of limitations for the violation has expired, it cannot usually be prosecuted, as this is the primary objective of the statute of limitations or period of prescription. However, if a sanctioning procedure is launched before the statute of limitations for the violation has expired, it is important that the rules governing the statute of limitations do not give rise to situations in which the sanction for a demonstrated violation cannot ultimately be executed because the deadline for issuing such a decision has passed. The sanctioning procedure may be envisaged as an interruption of the limitation or prescription deadline. However, if the administrative or judicial authority has failed to respect the deadlines imposed for issuing its decision, that is a different issue, in which case new proceedings should be initiated to issue a decision, with the interested parties having the right to seek compensation.

The law may establish that the statute of limitations or period of prescription for any given offence can be interrupted by any related legal action, in which case the statute of limitations or period of prescription will be restarted.

In the civil law tradition, there is another legally imposed time limitation that is referred to as "caducity". The difference between caducity and a prescribed period is that a caducity deadline cannot be interrupted by proceedings and it can be declared ex officio (that is, by the authorities). Once the caducity deadline has passed, the proceedings to which it applies can no longer be conducted. This time limitation follows the same rationale as that of periods of prescription.

Example: Spain

▶ Labour Infractions and Sanctions Law, approved by Royal Legislative Decree No. 5/2000 of 4 August

Article 4(3)

OSH-related infractions shall be prescribed as follows: starting from the date of the infraction, minor infractions shall expire after one year, serious infractions after three years and very serious infractions after five years.

Principle of veracity / primacy of reality

The process should seek to uncover the truth of the various facts at stake. The material truth has primacy over the formal truth; that is, the judge should seek the actual truth and prioritize it over the formal or apparent truth that arises from documents. In fact, the Employment Relationship Recommendation, 2006 (No. 198) is based on this principle. It provides guidance to determine whether an employment relationship exists de facto by including criteria to distinguish between employed and self-employed workers. Therefore, a transaction that a priori looks like it is of a commercial nature may in reality be an employment relationship. Recommendation No. 198 invites constituents to seek and prioritize the actual status quo rather than the apparent one.

Example: Peru

▶ General Labour Inspection Law No. 28806

Article 2(1)

Primacy of reality. In the event of a discrepancy between the established facts and the facts reflected in formal documents, the established facts should always take precedence.

Principle of inalienability of rights

Under this principle, a party to the process cannot renounce the rights that the law confers to them. There may be jurisdictions in which this principle may not be applicable to all procedural rules, because some legal traditions allow for certain rules to be negotiated between the parties. However, fundamental rights are in principle inalienable in any legal tradition as they are embedded in the DNA of modern democratic states.

For example, a fundamental right related to due procedure is the right to appeal. This right is inalienable because a person cannot be allowed to renounce this right before the appealable decision has been taken. A person can of course decide not to appeal a decision. However, a court cannot accept their renunciation of this right at the beginning of a process and then enforce that renunciation by denying them the right to appeal the decision.

Principle of effective judicial protection

All persons should have the right to effective access to justice, including due process and the right to appeal administrative and judicial decisions before the competent courts. This translates into the right of any party to a process to require the review of procedural actions, steps and phases if the party considers that the procedural rules have not been respected, thereby creating a state of defencelessness for that party. This is a universal principle and right and has been widely established not only at national level but also in international instruments such as the European Union (EU) Charter of Fundamental Rights (see example below). Therefore, this principle is closely linked with the previous one as effective judicial protection is an inalienable right.

▶ **Figure 1. Example of different levels of judicial instances that can be competent to hear trials and appeals against administrative or judicial decisions**

Example: EU Charter of Fundamental Rights

Article 47. Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice

Example: Albania

▶ The Code of Administrative Procedures, Law No. 8485 of 12 May 1999

Article 18

The administrative activity, in order to protect constitutional and legal rights of private persons, is subject to:

a) the internal administrative review, in compliance with provisions of this Code regarding the administrative appeal; and

b) the judicial review, in compliance with provisions of the Civil Procedure Code.

Example: Uruguay

▶ General Procedural Code, Law No. 15982 of 18 October 1988

> *Article 11(1)*
>
> Anyone has the right to go to court, to raise a specific legal issue or to oppose the proposed solution and to exercise all procedural acts concerning the defence of any procedural position and the requested Court has the duty to respond to their requests.

Principle of legality

This principle is also referred to by the Latin term "nulla poena sine lege". It means that a person can only be prosecuted for conduct that is prohibited by law and can only be subject to a sanction that is prescribed by law. This is why it is important to define precisely not only what constitutes a violation of any given law but also what the corresponding sanctions are and which is the competent authority for imposing them. The principle of legality thus constitutes the foundation for sanctioning and defines the limits within which authorities can issue sanctions (that is, authorities cannot sanction an individual for conduct that is not defined by law as an infraction and cannot impose sanctions that are not legally established or that exceed the maximum penalty – such as a fine or imprisonment that is fixed by law). This principle is closely linked to the principle of legal certainty, which requires a legal system to be predictable and transparent.

When enshrining violations in the law, it is important to take into consideration the following basic notions.

Violations are composed of two main constitutive elements:

- **the objective element** (also known as *actus reus*): an action or omission that contravenes an obligation laid down in a law; and
- **the subjective element** *(mens rea)*: a guilty or culpable mind (discussed in more detail below).

In order for a duty holder to be sanctioned for committing a violation, they should in principle be guilty. This requires exhibiting a culpable mind (mens rea), which means having some degree of awareness that the action or omission in question constitutes a wrongdoing. Countries may envisage different degrees of guilt. At a minimum, countries tend to make a difference between intention and negligence. It is to be noted that the accused party cannot generally claim ignorance of the law as the justification for an action or omission.

The level of the sanction is usually correlated with the seriousness of the conduct or outcome and the degree of the culpable mind. *Mens rea* is particularly relevant in criminal law, which requires a culpable mind in order to qualify an action or omission as a crime.

Nevertheless, a culpable mind may not always be required to sanction an action or omission that violates the law. This is known as "strict liability". In fact, violations of OSH law that do not qualify as a crime under criminal law are in some countries treated mostly as strict liability violations.

▶ **Figure 2. Types of culpability**

***Connection between the objective and subjective element**

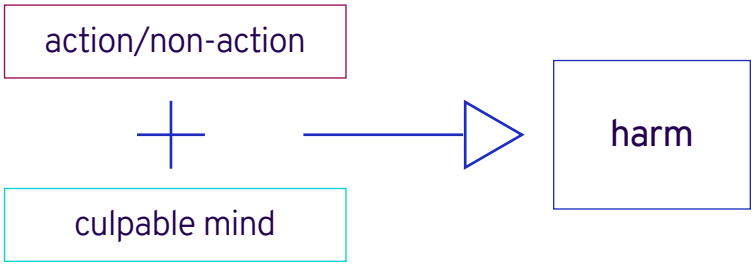
The objective and the subjective elements should be linked; that is, the culpable mind should be related to the action or non-action.

A **conduct violation** is one in which the duty holder has not fulfilled a required action without it resulting in a harm.
An **outcome violation** (see figure 3) is one in which the non-fulfilment of a required action has resulted in a specific harm (for example, the death of a worker, injury, illness).

Violations can be classified as either a **conduct violation** or an **outcome violation**. The above-mentioned constitutive elements are present in both of them. However, in an outcome violation, two additional constitutive elements are present:

- **the outcome or result of the action or non-action:** this outcome is a negative result that translates into harm being done; and
- **causation:** there is a direct linkage between the action or non-action and culpable mind and the result.

▶ **Figure 3. Outcome violation**



Example: Switzerland

▶ Criminal Code of 21 December 1937

> *Article 1. No penalty without a law*
>
> A penalty or measure may only be imposed for an act that is expressly prohibited by law.

Example: Italy

▶ Criminal Code, approved by Royal Decree No. 1398 of 19 October 1930

> *Article 1. Crimes and punishments*
>
> No one shall be punished for an act which is not expressly prescribed as an offence by law, nor shall they be subject to a penalty that is not prescribed by law.

▶ Constitution of the Italian Republic of 22 December 1947

> *Article 25(2)*
>
> No punishment may be inflicted except by virtue of a law in force at the time the offence was committed.

Principle of *non bis in idem*

This principle prohibits sanctioning the same person twice (or more) for the same violation. Therefore, any given person can be sanctioned only once for any given violation that they have committed. There are three aspects that determine the identity of a violation: (a) the objective element (s) (conduct/outcome) of the violation; (b) the person who has committed the violation; and (c) the legal foundation/rationale for establishing such violation (that is, the legally protected right or good). This principle has two dimensions: the prohibition against imposing more than one applicable penalty/set of penalties (for example, imprisonment and a fine); and the prohibition against dual or multiple sanctioning procedures.

A criminal process has supremacy over an administrative processes. Therefore, any sanction imposed through a criminal process will take precedence over a sanction imposed through an administrative process. The institution of a criminal process should have a suspensive effect on any administrative sanctioning proceedings that have been initiated for the same violation and defendant. If the defendant pleads not guilty of criminal non-compliance, however, the administrative sanctioning proceedings may resume.

Example: Armenia

▶ Criminal Procedure Code of 1 September 1998

> *Article 21. Inadmissibility of Repeated Convictions and Criminal Prosecution for the Same Crime*
>
> 1. No one can be convicted twice for the same offence.
>
> 2. After the judgment of the court enters into legal force, the person involved shall be guaranteed, with respect to the same event, against any resumption of criminal prosecution or any replacement of the charge or the penalty with a more severe one.

Principle of presumption of innocence

As the title of this principle reads, everyone is presumed to be innocent unless proven otherwise. The plaintiff should demonstrate the wrongdoing of the defendant in order for the latter to be sanctioned. However, the law may reverse the burden of proof in some instances. Usually, the labour inspectorate and the prosecutor bear the burden of proving each element of the identified violation, including the applicability of the cited legal standard; non-compliance; knowledge or awareness; serious, repeat or wilful action; and workers' exposure to the violation. However, the facts in the inspection report may be considered as true unless proven otherwise. The duty holder, in turn, normally bears the burden of proving their innocence by demonstrating that an exception to the legal standard was applicable, that they acted in good faith and that any legally required actions were taken, among other considerations.

Example: United Kingdom

▶ Health and Safety at Work etc. Act 1974

Section 40

When an employer is cited for violating an OSH standard that mandates adoption of certain prevention measures "so far as is practical" or "so far as is reasonably practical," OSH legislation shifts the burden of proof to the employer to prove that it was not practicable or reasonably practicable to do more than was, in practice, done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

Section 17

Similarly, if a cited employer fails to follow a provision in HSE's Approved Code of Practice, which provides employers guidance on complying with OSH law, a court will treat the failure as evidence of violation, unless the employer can show that the requirement was satisfied through suitable alternative measures.

Example: United States of America

▶ United States Code, 2011 Edition, Title 29 – LABOR

§ 660(a)

Findings of fact from final, binding orders of an administrative court or the OSH Review Commission must be accepted if they are "supported by substantial evidence on the record considered as a whole".

Example: Italy

▶ Constitution of 22 December 1947

Article 27

A defendant shall be considered not guilty until a final sentence has been passed.

Principle of proportionality

the type of sanction to be imposed for a given infraction should be proportionate to the degree of severity of the infraction; that is, the more serious the infraction, the higher the sanction should be and vice versa. A number of factors may be taken into account by the competent authority to determine the exact type and amount of a sanction to be imposed, such as:

- the severity of the outcome or conduct (for example, a fatal accident);
- the degree of culpable mind (for example, intentional or gross negligence);
- a pattern of repeated violations of different or same nature (known as recidivism);
- a pattern of persistency (for example, a significant duration of the violation);
- the vulnerability of the victims exposed to the violation (for example, workers under 18 years of age); or
- the specific work context or type of work (for example, high-risk industries and assignments).

However, imposed sanctions cannot exceed the limits established by law (principle of legality).

Example: Spain

- Law 40/2015 of 1 October of the Public Sector Legal Regime

> *Article 29: Principle of proportionality*
>
> 1. Administrative sanctions, whether or not of a pecuniary nature, may in no case imply, directly or indirectly, the deprivation of liberty.
>
> 2. The establishment of pecuniary sanctions must provide that the commission of the offences typified is not more beneficial for the offender than compliance with the rules violated.
>
> 3. In the normative determination of the sanctioning regime, as well as in the imposition of sanctions by the Public Administration, the due suitability and necessity of the sanction to be imposed and its aptness to the seriousness of the act constituting the infringement must be observed. The following criteria will be considered in deciding the level of the sanction:
>
> a) the degree of culpability or the existence of intent;
>
> b) the continuity or persistence of the offence; and
>
> c) the nature of the damage caused.
>
> d) the recidivism, by commission within one year of more than one infringement of the same kind, where this has been declared by a final decision in administrative proceedings.
>
> 4. When justified by the due aptness of the sanction to be applied to the seriousness of the act constituting the offence and the current circumstances, the competent body to resolve may reduce the severity of the sanction.
>
> 5. When the commission of an offence necessarily results in the commission of another or others, only the sanction corresponding to the most serious offence committed should be imposed.
>
> 6. Performing a plurality of actions or omissions that violate the same or similar administrative precepts, in execution of a preconceived plan or taking advantage of the same occasion, will be punishable as a continuous infringement.

Principle of immediacy

This principle refers to the close relationship between the parties to the process and the judge. It has two dimensions: that the judge who takes the decision shall be the one who has interviewed/questioned the parties and heard the case; and that the judge shall be present at all phases of the judicial procedure (hearings, presentation of evidence and so on), hear the case at first hand and therefore not use any kind of intermediary.

Example: Peru

▶ Labour Process Act, No. 29497 of 30 December 2009

> *Article I*
>
> The labour process is inspired, among other things, by the principles of **immediacy**, verbal proceedings, concentration of acts, promptness and veracity.

Principle of verbal proceedings

This principle applies traditionally to the judicial process, in particular to criminal trials. The process should be verbal as far as possible; that is, the procedural actions among parties (defendant, prosecutor, witnesses and judge) should be conducted face to face rather than through written exchanges.

Example: Spain

▶ Law No. 36/2011 of 10 October governing the labour courts

> *Article 74. Procedural principles*
>
> The judges and courts of the labour jurisdiction and the clerks of the courts (...) will interpret and apply the regulatory norms of the ordinary labour process according to the principles of immediacy, **verbal proceedings**, concentration and promptness.

Principle of mandatory justification of judicial and administrative decisions

Judicial and administrative decisions should include the legal rational and justification that the judge has applied to underpin their decision. This is a good governance principle that allows for exercising control over such decisions through the right to appeal in order to ensure that they are not taken arbitrarily and unfairly.

Example: Spain

▶ Judicial Power Organic Law No. 6/1985 of 1 July

> *Article 248(3)*
>
> The judgments will be formulated to express, after a heading, in separate and numbered paragraphs, the factual background; the proven facts, where appropriate; the legal grounds; and finally, the ruling.

▶ Law No. 39/2015 of 1 October on the Common Administrative Procedure of the Public Administration

Article 35

The acts that result in sanctioning procedures shall be specified, with a brief reference to the facts and legal grounds.

Principle of impartiality

Public servants should be impartial, including labour inspectors, other ministry officials and judges. They should take objective and fair decisions, taking into account the circumstances of each case and without favouring any of the parties. Convention No. 81 refers to the impartiality of labour inspectors by requiring that "any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers"(Article 3(2)).

Example: Albania

▶ The Code of Administrative Procedures, Law No. 8485 of 12 May 1999

Article 12

The Public Administration, in exercising its functions, treats fairly and impartially all subjects with whom it has relationships.

Example: United Kingdom

▶ The Employment Tribunals Rules of Procedure of 2013

41. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to **the principles contained in the overriding objective**.

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing …

Example: Armenia

▶ Criminal Procedure Code of 1 September 1998

Article 25. Independent Assessment of Evidence

1. The judge, as well as the agency for inquest, the investigator, or the prosecutor shall assess the evidence independently, relying on their own beliefs.

2. No evidence shall have a pre-determined force in criminal proceedings. The judge, as well as the agency for inquest, the investigator, or the prosecutor shall not deal with the evidence in a biased way or give more or less significance to any evidence in comparison with any other evidence, before the examination of all available evidence in accordance with the due process of law.

Principle of non-rectroactivity of sanctions

according to this principle, the applicable sanctions are those established by the law at the time when the violation has been committed. This means that changes to the sanction that are made on or after the date that the violation was committed and while it is being tried are not applicable.

Example: Spain

▶ Law No. 40/2015 of 1 October on the Public Sector Legal Regime

Article 26(1)

The sanctioning provisions that are in force at the time of the occurrence of the events that constitute an administrative offence will be applicable.

Adversarial principle

This principle is also referred to by the Latin term "audi alteram partem". It establishes the right of any party to a process to be heard and given the opportunity to respond to any charges made against them. This implies the possibility of challenging any evidence that may have been presented by calling witnesses and producing counter-evidence. With regard to evidence in administrative sanctioning, the facts established in labour inspectors´ reports are usually deemed to be true in the absence of any proof to the contrary. In these instances, the adversarial principle allows the individual being sanctioned an opportunity to prove that the labour inspectors' report is inaccurate.

Example: France

▶ Labour Code

Article L8113-7

The findings of the labour inspectorate are considered valid unless proven otherwise.

Example: Mali

▶ Code on civil, commercial and social procedure, Decree No. 99-254 of 15 September 1999

Article 14

No party can be judged without having been duly heard or called on beforehand.

V. Key legislative drafting techniques

Efficient drafting makes legal instruments, including instruments that regulate sanctioning procedures, more user-friendly and accessible as they can be easily understood, navigated and followed. It is highly recommended that policymakers and lawmakers give due consideration to adopting efficient techniques when drafting and amending legal instruments.

This chapter provides a short overview of the following key legislative drafting techniques:

- **Appropriateness**. The rule responds to the problems it seeks to resolve.
- **Clarity**. The rule is easy to understand and unambiguous.
- **Simplicity**. The rule does not include any unnecessary elements.
- **Precision**. The rule leaves no uncertainty in the mind of the reader.
- **Coherence**. The rule is easy to navigate.
- **Internal consistency**. The rule does not present contradictions, misconceptions and misleading language.
- **External consistency**. The rule is aligned with the existing legal framework.
- **Gender inclusive language**. The rule does not use gender-specific terms or pronouns.
- **Style**. The rule is drafted with uniform language and symbols.

▶ Appropriateness

A legal instrument is appropriate when it sufficiently addresses the problems and satisfactorily meets its objectives.

It is important to note that while a comparative analysis of labour law and related procedural rules may showcase good practices and useful food for thought for lawmakers, the transplantation of provisions and approaches from one country to another may not always work, especially when the legal, political, economic or social context of those countries differs. In order to determine whether any given rule is appropriate, the legislator would ideally conduct an assessment, involving relevant stakeholders, to check whether the application of the rule would have the intended effect. For example, setting up a three-day deadline for presenting evidence in a sanctioning procedure may be inappropriate as it may be largely insufficient to allow for the parties to obtain such evidence and would therefore fail to secure at least one aspect of its purpose: the presentation of relevant evidence.

▶ Clarity, simplicity and precision

The following techniques contribute to achieving clarity, simplicity and precision:

- Include a table of contents at the beginning of the legal instrument.
- Structure articles appropriately and group articles on similar topics together.
- Use short sentences, ideally with one concept per sentence.
- Avoid complex phrases with many different ideas or concepts.
- Order sentences in a way that logically reflects the progression of the reasoning.
- Use everyday language and avoid jargon and outdated terms.
- Use the present tense and the active voice rather than the passive voice.
- Use positive rather than negative statements. Respect grammatical rules, including punctuation.
- Avoid the excessive use of acronyms and abbreviations.
- Spell out acronyms and abbreviations the first time they are used.
- Do not include provisions of a non-normative nature, such as recommendations, declarations or wishes.
- Use auxiliary verbs that clearly differentiate an obligation (for example, “shall”) from a possibility (for example, “should” or “may”).
- Do not include provisions that reproduce, repeat or rephrase passages from other laws, articles or titles of law.
- Reference other articles or laws so that they can be identified by the user and avoid serial or chain references (that is, a provision that references another provision that contains further references).
- Use references only when (i) they simplify the text; (ii) they do not make the provision more difficult to understand; (iii) the act referred to has been published or is sufficiently accessible to the public; and (iv) the consequences of possible amendments of the act referred to have been considered.
- Give a title to the law that reflects the subject matter of the text and does not mislead users.

▶

▶ Coherence

The following techniques contribute to achieving coherence:

- Ensure that the law is set out in a logical structure consisting of several levels (higher-level, basic and lower-level units) as indicated in the table below:

Level	Common law	Civil law
Higher-level units	chapter, part, division, subdivision	book, title, chapter, subchapter, section
Basic units	section	article
Lower-level units	subsection, paragraph, subparagraph, item, sub-item	number, indent

Note: partly based on European Union, Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation (2015).

- Group similar ideas together at each structural level.
- Include a preamble, definitions, transitory and final provisions and a schedule/annex(es), where needed.
- Feature final provisions to clarify the external consistency of the legal instrument.

▶ Internal consistency

The following techniques contribute to achieving internal consistency:

- Use the same terms to refer to the same concepts throughout the text.
- Use defined terms throughout the text in a uniform manner; that is, use them as defined and to represent the meaning that they have been given.
- Respect the scope of the legal instrument throughout.
- Any requirements – that is, rights and obligations – should be coherent and not contradictory.

▶ External consistency

The following techniques contribute to achieving external consistency:

- Ensure that the new law does not contradict or conflict with laws of higher rank (for example, the Constitution, international law) or laws of the same rank.
- Ensure that the relationship or interaction with other acts is addressed and set out to avoid confusion.

▶ Gender-inclusive language

It is important to ensure that the language used in legislation reflects gender equality. It should be inclusive and equally applicable to both men and women, unless otherwise intended for a valid reason. Legislation should not use discriminatory language that gives a sense of hierarchy of one sex over the other (usually men over women) and thereby gives rise to or perpetuates gender stereotypes and bias.

The following techniques contribute to achieving gender-inclusive language:

- Replace gender-specific terms with neutral terms and formulas. For example, replace "man" with "person" or "individual" and replace "citizen" (which has singular and feminine variations in Latin-based languages) with "citizenship" (an inclusive term in various languages, including English, French and Spanish).
- Replace single pronouns with plural forms. For example, replace "he" and/or "she" with "they"; replace "him" and/or "her" with "their". This technique also helps to avoid being exclusive of non-binary people.
- Repeat nouns instead of using gender-specific pronouns. For example, repeat the noun "the labour inspector" instead of replacing it with "him" or "her".
- Use gender-neutral occupational titles (for example "police officer" instead of "policeman").
- Rephrase to avoid using gender-specific terms and pronouns or avoid unnecessary references to "his", "him", etc. For example, rephrase "evidence that proves **his innocence**" to "evidence to prove **the innocence of the defendant**" or "evidence **that supports innocence**".
- Use passive, infinitive and gerund forms instead of masculine or feminine nouns (particularly useful for translation to Latin languages, in which plural forms remain masculine or feminine). For example, change "plaintiffs can file a claim by ..." to "a claim can be filed by...". However, this option should be used with caution and only when it is clear from the rest of the text who the active subject is, that is **who can file the claim** in the example provided.
- Use both feminine and masculine forms. For example, say "she or he" or "he or she" (the use of slashes and hyphens, as in "he/she" or "s/he", is not recommended). However, this approach is not a preferred option given the repetition and also because it may not be inclusive of non-binary people.
- If the language authority allows the use of the masculine form as an inclusive term that refers to both men and women[5], it may be prudent to provide a note expressly stating that the masculine form refers to both men and women in order to avoid any misunderstanding in this regard.

5 For example, see Real Academia Española, Informe de la Real Academia Española sobre el lenguaje inclusivo y cuestiones conexas (report of Royal Spanish Academy on inclusive language).

▶ Style

A commonly applied style can be set up by predefining rules on the use of:

- acronyms;
- abbreviations;
- upper and lower case;
- numbers;
- dates;
- currencies; and
- other symbols.

Selected guidelines on legislative drafting techniques

- Manual for Drafting ILO Instruments, 2006
- ILO House Style Manual, Sixth Edition, 2020
- Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation, 2015 (available in several languages)
- United Nations Guidelines for Gender-Inclusive Language (available in several languages)
- UN-Women Gender-Inclusive Language Guidelines (available in several languages)

N.B. For country-specific legislative drafting rules, see International Association of Legislation.

Appendices

▶ Appendix I. Study of occupational safety and health enforcement procedures in Finland

▶ **Author: Mr Jarno Virtanen**

Initiating Formal Action—triggered by administrative finding of or allegation to judicial authorities of violation

1. Types of Formal Actions:

a. Administrative (triggered by administrative finding of violation)

- In practice, an official enforcement procedure begins usually from an administrative OSH inspection conducted by visiting the workplace or on the basis of documentation by requesting written reports. However, it is not uncommon that communication from workplace leads to an inspection (Enforcement Act, sections 5 and 6). The inspection may be carried out at the initiative of authorities or it may be conducted because of a notification or information submitted to the OSH authorities (labour inspectorate), in practice at the request of an employee or an OSH representative.
- In practice, the administrative enforcement procedure is the most common one.

b. Civil/labour court (triggered by administrative finding of or allegation to judicial authorities of violation)

- An occupational safety matter can be processed as a civil matter between the employee and the employer (in practice, as a compensation for damages claim, Employment Contracts Act, Chapter 12), first in a District Court.
- The Workers' Compensation Act lays down provisions on the employee's right to compensation for occupational accidents and occupational diseases. The employer is obliged to insure their employees against occupational accidents and diseases. Insurance against accidents at work and occupational diseases compensation is not based on liability for damages. Insurance does not necessarily cover all employees' injuries. The employee has the right to claim damages from the employer to the extent that he has not received compensation through accident insurance. For example if the caused damage is higher than the statutory compensation.
- If the collective agreement includes provisions on occupational safety and if a dispute concerning their interpretation arises between the labour market parties of the agreement, occupational safety issues may also be processed in the Labour Court (Collective Agreements Act, section 1 and Act on the Labour Court, section 1). See 13d below.
- The OSH authorities are not party to either of the above-mentioned court proceedings. The compensation trial and the Labour Court proceedings are therefore not explained widely in this study. See 13b below.

c. Criminal (triggered by administrative finding of or allegation to judicial authorities of violation)

- Failure to comply with occupational safety legislation can be processed as a criminal matter in the District Court. The matter proceeds from a notification made to the police by the OSH authorities, then to the prosecutor for the consideration of charges and finally, to a court of justice for criminal proceedings (Enforcement Act, section 50). See 9 below.

2. Criteria for determining what Formal Action should be taken:

a. Type of violation or alleged violation (examples: willful, repeated, failure to take required actions/ remediation, criminal)

- For the purposes of administrative OSH enforcement, the different types of violations committed by the employer have been defined in legislation according to their severity. In case of minor violations, the inspector shall issue a written advice to the employer to eliminate or remedy the non-complying conditions. (Enforcement Act, sections 13 to 16)
- If the hazard or harm arising from non-complying conditions is greater than minimal, instead of written advice, the inspector shall issue an improvement notice obliging the employer to eliminate or remedy the non-complying conditions. Likewise, the inspector may issue an improvement notice if the employer does not follow the written advice.
- If the non-complying condition is also considered to be criminal matter then the OSH authority may notify the police even if the condition is already remedied.
- In an improvement notice, the time limit must be specified within which the employer must make the conditions comply, if this is not immediately possible. (Enforcement Act, section 13)
- The inspector shall oversee that the employer has followed the improvement notice within the specified time limit. The inspector must conduct follow-up enforcement based on practical instructions within one month of the end of the time limit. Time limit is not based on legislation.
- If the necessary measures have not been taken, the inspector shall without delay transfer the matter to the OSH authorities. (Enforcement Act, section 14)
- If the employer has not remedied the non-complying conditions during the consideration of the matter by the OSH authorities, the authorities may issue an administrative decision obliging the employer to remedy or eliminate the non-compliant conditions by a certain time limit. (Enforcement Act, section 15)
- When setting a time limit, the authorities must take account of the time limit previously set in the improvement notice.
- A binding administrative decision issued by the OSH authorities binds the employer and it can be appealed to the Administrative Court. (Enforcement Act, section 44)
- If the inspector notices that issuing written advice or an improvement notice will obviously not lead to remedying or eliminating the non-complying conditions or the matter brooks no delay, the inspector may submit the matter to occupational safety and health authorities without issuing written advice or an improvement notice.
- In practice, the inspector must examine and assess the degree of seriousness of non-compliance with legislation and consider whether the hazard or harm arising from it is minimal or greater than minimal.
- When considering this, the inspector takes into account whether the circumstances and the situation have been repeating, and the possible previous steering given by the authorities in the same matter. The proportionality principle also plays a role in the consideration.
- In addition, the inspector should consider whether the act observed possibly amounts to some kind of crime. If this is the case, the inspector transfers the matter to the OSH authorities for consideration of whether there are probable grounds for reporting the offence to the police.

- An administrative enforcement procedure, the decision-making process of the OSH authorities and reporting the matter to the police as a criminal matter are not mutually exclusive. Administrative enforcement and a criminal matter can proceed simultaneously.
- The inspector and the OSH authorities use their administrative competence to bring the conditions at the workplace to the level required by the law. The consideration of punishment under criminal law is targeted at the past, to violations that have already taken place.

b. degree of violation or alleged violation (examples: minor, serious, imminent danger)

- A time limit is not set for written advice issued to the employer by the inspector, nor is compliance enforced within a time limit. Instead, compliance is controlled in connection with the next workplace inspection. The starting point of enforcement is that the employer will on his or her own initiative remedy the minor defects because of which the written advice has been issued.
- As explained above in section a, the inspector will issue an improvement notice if the hazard or harm is greater than minimal.
- On the other hand, if a defect or shortcoming at the workplace causes an immediate risk to the life or health of an employee, the inspector may issue a prohibition notice as a temporary prohibition notice. (Enforcement Act, section 16.2)
- The prohibition notice may apply to the use of a machine, work equipment or other technical device, product or work method or it may prohibit the continuation of work. A temporary prohibition notice shall be complied with immediately. The inspector shall without delay submit the matter to the OSH authorities, which will confirm or not confirm the decision.
- Immediate risk means a concrete and imminent, often great danger or risk of a serious accident or damage to health. Temporary prohibition notices may be issued, for example, when there are seriously hazardous defects in the guarding of machines or in the protection against falls. On the other hand, immediate danger does not mean that its consequences should be visible immediately. The consequences may sometimes be revealed after a long period of time (for example work with asbestos without required personal protective equipment).
- The inspector transfers a temporary prohibition notice to the OSH authorities for the preparation of an administrative decision.
- Within one week (time limit is not based on legislation) of the end of the period of hearing, the OSH authorities must take a decision to confirm the prohibition notice or state that it has lapsed.
- A decision on the lapse is made if a report has been received according to which the matter has been remedied.
- In situations in which there is no immediate risk to life or health, a prohibition notice issued by the OSH authorities is used instead of a temporary prohibition notice. (Enforcement Act, section 16.1)
- The deficiency must in that case cause a risk to life or health, but the situation does not require immediate action. Prohibition notices are used in situations such as monitoring indoor air issues.
- A prohibition notice lapses automatically when the perceived defects have been remedied. No separate decision is made regarding this, but the lapse is assessed by the obligated party itself.
- Conditional fines are used as sanctions with temporary prohibition notices and prohibition notices (Enforcement Act, section 15, and Act on Conditional Fines).

Administrative process for establishing Formal Actions triggered by administrative finding of violation

3. Form and content of notice of Formal Action:

a. Description of violation (examples: summary of factual findings and supporting evidence)

- The inspector shall without delay draw up a written report of each inspection. The inspection report must reveal the inspection process and the most essential observations made by the inspector. In addition, it must contain the above-mentioned written advice and improvement notices, a description of the purpose of the written advice and improvement notice and the possible further actions. (Enforcement Act, section 11)
- An inspection report is always drawn up of the inspection and this initiates an official enforcement procedure, if necessary. However, an inspection report is also drawn up in situations in which no non-compliant conditions or procedures have been observed and no written advice or improvement notices have been issued.
- The recording of the inspection process means that the object, time and place of the inspection, the names of the people present in the inspection and other necessary identification details are recorded. Additionally, the inspection report includes a description of the facts observed in the inspection that are the reason for issuing the written advice or improvement notice.
- Deviating views on the issues inspected are also information that needs to be recorded in the inspection report. The inspection report must be compact and to the point and it must contain information that is essential in terms of the object of inspection and further processing of the matter.
- The inspection report must describe the defect or other non-compliant condition in the working conditions at a sufficiently concrete level and the written advice or improvement notice issued in it must define the level required by legislation that the employer must meet.
- The obligation, the actual written advice or improvement notice, must be detailed clearly enough in the inspection report. The obligation includes a heading, the observation, the requirements laid down in legislation for the remediation of the matter and a citation to legislation.
- The inspector has also comprehensive rights to access information to gather evidence. For example right to take samples of raw materials or other materials used at the workplace, or carry out hygiene measurements and for a cause justified by enforcement purposes, take photographs there. For more information, see section 4 of the Enforcement Act. (Enforcement Act, section 4)

b. Identification of legal provisions violated (examples: citation to law or regulation violated, citation to general duty requirement(s))

- The written advice or improvement notice issued in the inspection report must be detailed clearly enough and so that the heading, the observation, the legal requirements and the citation to the applicable point in legislation are visible.
- A separate individualised written advice or improvement notice is issued for each violation. One inspection report may thus include many items of written advice and/or improvement notices.
- It is not the duty of the inspector or even of the OSH authorities, nor is it within their competence, to issue a detailed order describing the measures that are to be complied with when eliminating the defect observed by the inspector. The employer can choose which measures to take to meet the requirements of the written advice or improvement notice.

- Administrative enforcement of occupational safety strives to influence the obligated party so that it will take measures to change the conditions at the workplace. The aim is to achieve an acceptable level that meets the minimum requirements in the legislation. This level may in an individual case be indicated as a numerical value, as a description of the system or as a list of measures to be taken. Compliance with the obligation must be possible to verify objectively.
- The written advice and the improvement notice must be sufficiently unambiguous to enable monitoring of compliance afterwards and to enable the OSH authorities to make a binding administrative decision later, if necessary. The identification and explanation of the observations described in the inspection report often play a significant role in further proceedings in the Administrative Court or when the matter is pursued as a criminal matter in the District Court.

c. Gravity of violation (examples: minor, serious, imminent danger)

- See 2 above.

d. Degree of violation (examples: willful, repeated)

- The inspector assesses how the employer has previously taken care of occupational safety and health matters, in other words, the previous operation of the employer must be examined using the enforcement and other information ICT systems available for OSH inspectors.
- The employer's previous operation and non-compliance with legislation affect the selection of the enforcement measures and, for example, the assessment of deliberate criminal action and carelessness. See also sections 2a and 7b.

e. Required actions/remediation (examples: stop work, remove workers from danger area, take dangerous machine out of usage, eliminate hazard)

- See section 2.

f. Imposition or proposed imposition of sanctions/penalties (examples: monetary penalties, revocation of license or permits, removal from approved list for government contracts)

- The competence of the OSH inspector in matters concerning occupational safety and health includes administrative steering of the employer by means of the inspection report, which means issuing either a written advice or an improvement notice. (Enforcement Act, section 13)
- If necessary, the inspector may issue a temporary prohibition notice, as explained above. (Enforcement Act, section 15.2)
- The OSH authorities may as a sanction for their binding decision or prohibition notice impose a conditional fine and order it to be paid if the necessary measures have not been taken. (Enforcement Act, section 15 and Act on Conditional Fines)
- A conditional fine is also issued as a sanction for the temporary prohibition notice and the confirming decision by the OSH authorities.
- In practice, a conditional fine is always used as a sanction for a binding decision and the amount is always set as a fixed amount.
- The quality and scope of the set obligation, the obligated party's ability to pay and other factors affecting the matter must be taken into account when considering the amount of the conditional fine. (Act on Conditional Fines, section 8) The fine must be large enough to persuade the party obligated by the decision to comply with the decision.
- No administrative pecuniary sanctions can be issued as a punishment by the OSH authority in occupational safety and health matters. However, an administrative pecuniary sanction is possible in the enforcement of some other labour legislation matters within the competence of the OSH authorities.

- The OSH authorities themselves grant some licences related to work safety, such as the asbestos removal licence (Act on Certain Requirements Concerning Asbestos Removal Work). A granted licence may also be cancelled as a result of violations of occupational safety regulations that have been observed in administrative enforcement. (Act on Certain Requirements Concerning Asbestos Removal Work, section 9)

g. Mitigating or aggravating factors for calculating sanctions/penalties (examples: number of violations, number of workers exposed, good faith actions by duty holder, size of business, history of violations)

- In addition to the quality and scope of the violation, the level of authority used by the inspector is most affected by the employer's previous history of violations, the repeatability of the matter. The number of violations is also significant when it is considered whether there is reason to suspect a criminal employment offence.
- In the first stage, the inspector's task is only to determine whether a written advice or an improvement notice is required and to investigate whether the case may also amount to some kind of criminal employment offence.
- If necessary, the inspector will issue a temporary prohibition notice.
- Regarding the factors affecting the amounts of conditional fines, see 3f above.

h. Information about right/opportunity to deny/object/appeal finding of violation, required actions/ remediation, and/or imposition of sanctions and process for exercising right/opportunity

- The inspection report always includes a standard appendix (see annex SLIC evaluation 2014, page 61.) explaining the possible enforcement measures. The inspection report is not a conclusive and judicially binding administrative decision, and cannot therefore be appealed against.
- According to the law, it is possible to submit a complaint about the inspection report to the OSH authorities (Enforcement Act, section 45). The employer, the competent occupational safety and health representative, and any employee have the right to complain in writing that an occupational safety and health inspection has not been carried out in compliance with the legislation. See section 8 a.
- A binding decision made by the OSH authorities may be appealed to an Administrative Court. (Enforcement Act, section 44). Appeal instructions indicating the appellate authority and the appeal period and its start date must always be attached to the decision (Administrative Procedure Act, section 47 and Administrative Judicial Procedure Act, section 14). See 3f above.

i. Timeframes/deadlines for taking required actions/remediation, payment of sanctions/penalties, and exercising right/opportunity to deny/object/appeal

- The inspector sets a time limit for complying with the improvement notice if it is not possible immediately. The time limit is set to actually and reasonably enable remediation of the non-complying conditions.
- When taking a binding administrative decision, the OSH authorities take into consideration the deadline previously set in the matter by the inspector. The timeframe is considered on a case by case basis, taking into account the measures needed to reach the required level and the estimated time.
- If the binding decision also includes setting a conditional fine, the decision of the OSH authorities must clearly state what the party is obliged to do and when, the date by and the date starting from which the main obligation must be complied with. (Act on Conditional Fines, section 6)
- When considering the time limit, the quality and scope of the main obligation, the possibilities of the obligated party to comply with it and other factors affecting the matter must be taken into account. (Act on Conditional Fines, section 6)

- The appeal period for a decision made by the OSH authorities is 30 days from the notice of the decision. (Administrative Judicial Procedure Act, section 22) The appeal period can be found in the appeal instructions enclosed to the decision.

j. Required documentation/ certification of compliance with required actions/remediation

- In the follow-up monitoring of the obligations set by the inspector or the OSH authorities, a monitoring method is chosen that enables a reliable way to verify that the necessary measures have been taken.
- The inspector does not always conduct a new inspection in the workplace to observe the remedied conditions. A written report of the remediation of the defects can also be accepted. The information may be oral, written, photographs or a video recording.
- For example, information may be requested from or verified with the OSH representative.
- Legislation gives the inspector and the OSH authorities extensive rights to access information. See section 4 of the Enforcement Act.
- The inspector assesses on a case by case basis which reports he or she considers sufficient.

4. Issuance of notice of Formal Action:

a. Entity issuing notice

– issued by labour inspector
(examples: immediately upon completion of inspection of workplace)

– issued by labour inspectorate authorities
(examples: upon receipt and consideration of inspection report from inspector)

– issued by other administrative government authority

- In the final meeting of the inspection, the inspector presents an oral summary of his or her main observations, the defects that require remediation in the management of occupational safety or working conditions and other non-compliance with legislation. The inspector explains what obligations he or she is considering for the employer and reserves the opportunity for the employer's and the workers' representatives to present their views and ensure they have understood what is required. (Enforcement Act, section 7 and 11).
- The inspector discusses the timetable for the implementation of the issued written advice and improvement notices and the monitoring method with the employer or the employer's representative. In addition, the inspector states that an inspection report will be drawn up and explains the significance of the written advice and improvement notice.
- The inspector records the initiation of the enforcement procedure in the inspection report and the matter is also explained in more detail to the employer in the appendix of the inspection report. The inspector shall without delay draw up a written report of each inspection. The inspection report must be sent within 30 days of the workplace inspection or the date on which all necessary material was made available. The inspector takes care of sending the inspection report to the employer and to the OSH representative.
- A temporary prohibition notice is given orally at the inspection or immediately after it and this is mentioned in the inspection report. The inspector will later draw up a separate document on the temporary prohibition notice and this will be delivered to the workplace immediately.
- If the necessary measures have not been taken when the inspector afterwards controls compliance with the issued improvement notice, the inspector informs the employer informally that the matter will be transferred from the inspector to the OSH authorities.
- The OSH authorities inform the employer about the progress of the enforcement procedure in connection with an official hearing based on law (Enforcement Act, section 17). This applies to situations in which the inspector has transferred the matter to the OSH authorities.

- The other authorities (police, prosecutor and courts of justice) involved in enforcement at a later stage inform and hear the object of enforcement according to their own legislation (Criminal Investigation Act, Act on the Publicity of Administrative Court Proceedings or Criminal Procedure Act) if the matter has been transferred to them. The details of these procedures are not described in this report.

b. Process for issuing notice

– in-person

– by mail

– electronically

- See 4a above.
- The inspection report is sent to the employer officially by post. The inspector may also agree on informal distribution, for example, by email. Currently we have an ICT development project that will expand the possibility to electronically distribute the report.

c. Mechanism for documenting receipt of notice

- The receipt of the inspection report does not need to be signed.
- Even the official letter informing the employer of the hearing is mailed by the OSH authorities as an ordinary notification (Administrative Procedure Act, chapter 9). The letter must inform the party concerned that non-compliance with the set time limit for the hearing does not prevent the authorities from making a decision in the matter.
- Only binding decisions by the OSH authorities are served using the post office's notice of receipt or through a judicial official. (Administrative Procedure Act, chapter 9).

d. Parties to whom notice is issued or provided a copy of the notice

– Employer or duty holder

– Workers/worker representatives

– Other interested parties (examples: owner of workplace, general contractor, other employers on multi-employer worksite)

– Other relevant government agencies

- The inspection report shall be submitted to the employer and to the OSH representative. (Enforcement Act, section 11) Other distribution of the inspection report can be agreed with the employer.
- If necessary, a copy of the inspection report will be sent to the occupational health services of the workplace.
- In inspections at multi-employer workplaces, the inspection report is sent to the employer concerned, who is required to take measures as a result of the written advice or improvement notices, and to the representative of the employees of the workplace in question.
- In addition, a copy of the inspection report is sent to the employer that exercises the main authority at the workplace and to the representative of its employees. If necessary, a copy of the inspection report is also delivered to other employers in the multi-employer workplace and to the representatives of their employees.

e. Timeframe for issuing notice after inspection/investigation

- A report must be drawn up without delay after the inspection. In practice, a timeframe of 30 days from the workplace inspection or from the date on which all necessary documents were made available to the inspector has been agreed. (Enforcement Act, section 11)

f. Posting/publication of notice (examples: posting at workplaces near cited violations, publication on labour inspectorate website)

- In the absence of an occupational safety and health representative, the employer shall notify the employees of the inspection report in an appropriate manner at the workplace, for example, by posting the inspection report at the workplace. (Enforcement Act, section 11)
- The inspection report or the initiation of an enforcement procedure is not published to outsiders in any other way.
- However, as a rule, the inspection report is a public document, which means that everyone has the right to request to be notified of it.

5. Process for verifying compliance with required actions/remediation:

a. Follow-up inspections/investigation (examples: in cases of serious violations or inadequate documentation/certification)

- Legislation does not lay down provisions on the way follow-up enforcement is implemented. The monitoring method depends on the content and nature of the matter monitored. For example, non-compliance with the obligation to provide occupational health services is monitored by requesting a written copy of the agreement between the employer and the occupational health services unit.
- The monitoring method is chosen so as to be able to reliably verify compliance with the improvement notice issued by the inspector or the binding decision of the OSH authorities.
- A new workplace inspection is not always necessary. Copies of the missing documents are requested and other possible ways provided by legislation can be used to obtain information from the employer. In addition, information can be requested from the OSH representative. The information may be oral, written, photographs or video files, among other things.
- However, if it is not possible to reliably assess compliance with the obligation on the basis of documents or some other kind of review, a new inspection will be conducted at the workplace.
- The inspector assesses what kind of review he or she considers adequate.

b. Confirmed submission of mandatory documentation/certification of compliance

- The law does not lay down general or specific provisions on particular documents or certifications that would be the only way to prove compliance with legislation in certain matters.
- If the law requires the employer to draw up or hold a specific document in writing, enforcement of compliance with this obligation naturally requires that the document in question be shown.
- If the observed defect is related to the periodic inspection of machines used in work (such as a tower crane) and when such an inspection can according to the law only be conducted by a competent expert community or a competent independent expert, the employer must provide the OSH inspector with the inspection record drawn up by the competent inspector in question. (Government Decree on the Safe Use and Inspection of Work Equipment, chapter 37)
- Otherwise, there are no specific provisions in legislation on only certain documents or reports being accepted as proof of fulfilling obligations. The required report depends on the matter and is considered on a case by case basis.

c. Other

- Not relevant.

6. Processes for modifying timeframes and/or required actions/remediation:

a. Demonstration by duty holder of good-faith effort to comply with timeframes and/or required actions/remediation

b. Agreement to provide additional time to eliminate hazards

- Only the OSH authorities have the possibility to decide whether additional time is allowed for complying with the improvement notice issued by the inspector. Additional time is only possible in exceptional circumstances.
- It is therefore not possible for the inspector to extend the time limit for complying with the improvement notice he or she has issued.
- The OSH authorities may at their discretion extend the time limit for responding to the hearing before the decision is taken if this is required for reviewing the matter.
- The time limits set in binding decisions of the OSH authorities are not separately extended. If the set obligation has been met after the time limit has passed, but before a new binding decision is made, a previously set obligation is no longer applicable and, for example, a conditional fine will not be ordered for payment only because the time limit has been exceeded.
- The employer presents his or her opinion on whether the time limit is reasonable in his or her response to the hearing before the decision is made.
- As a result of an appeal, the court may have to, for example, extend the time limit set by the OSH authorities.

c. Agreement to modify required actions/remediation

- The employer considers and decides independently how he or she will reach the level of occupational safety and health required by the inspector or the OSH authorities.
- The OSH authorities or the inspector do not separately agree with the employer on the measures required to meet the obligation. The inspector and the OSH authorities take a stand on the adequacy of the employer's measures in the follow-up monitoring.

d. Other agreement terms

- None.

e. Timing: before or after denial/objection/appeal

- Additional time for complying with an improvement notice can be requested before the time limit ends.
- Additional time for responding to the hearing can be requested until the OSH authorities have made a decision in the matter.
- In its appeal to the court, the employer may, for example, demand that the time limit be extended.

7. Actions and consequences for duty holder failure to demonstrate/certify compliance with required actions/remediation:

a. Increased civil/administrative penalties (examples: imposition of additional penalties with daily multiplier for each day violation continues)

- If an improvement notice issued by the inspector has not been complied with, the matter will be transferred to the OSH authorities. The OSH authorities start the preparation for a binding decision by hearing the employer and the OSH representative.
- Non-compliance with a binding decision of the OSH authorities will result in a new decision in which payment of the earlier conditional fine will be ordered. At the same time, a new, higher conditional fine will be imposed and a new time limit will be set. (Act on Conditional Fines, section 10 and 12.)

- If necessary, this process will continue until the necessary measures have been taken.
- According to the Act on Conditional Fines, the conditional fine may also be periodic, but in practice this is not used in OSH enforcement because of the complicated nature of enforcement. (Act on Conditional Fines, section 6 and 9)
- (A periodic conditional fine is set by determining a fixed basic amount and an additional amount for each time period determined in the decision by the end of which the main obligation has not been complied with.
- In practice, conditional fines are therefore set and ordered for payment as a fixed amount.

b. Referral to judicial system for criminal prosecution and sanctions/penalties

- The OSH authorities assess whether non-compliance with the obligation set in administrative enforcement has been deliberate. The violation must in that case also be assessed as a possible employment offence and must be reported to the police, if necessary.
- A matter may simultaneously undergo criminal proceedings and administrative enforcement. Administrative enforcement focuses on bringing the conditions at the workplace in line with the law while the criminal proceedings focus on the assessment of the committed violation and the assessment of liability.

8. Opportunity/right to deny/object/appeal Formal Action – (finding of violation, required actions/remediation and/or imposition of sanctions/penalties):

a. Process for exercising opportunity/right

- Written advice and improvement notifications issued by the inspector in the inspection report are not judicially binding administrative decisions. It is therefore not possible to appeal them to a court of justice. Instead, a person who is not satisfied with the inspection may make a complaint about the inspection.
- The employer, the competent OSH representative, and any employee have the right to complain in writing that an occupational safety and health inspection has not been carried out in compliance with the law. (Enforcement Act, section 45)
- The complaint shall be made within two months of the occupational safety and health inspection or other enforcement measure.
- Because of the complaint, the OSH authorities will examine the enforcement measures that have been taken and order a new inspection, if necessary. Within a reasonable time, the complainant shall be informed of the measures taken in response to the complaint. The decision made by the OSH authorities as a result of a complaint is not an administrative decision that can be appealed to a court of justice. (Enforcement Act, section 45)
- A binding administrative decision made by the OSH authorities may be appealed to an Administrative Court. This applies to all forms of decisions: binding decisions, prohibition notices or decisions confirming a temporary prohibition notice issued by an inspector. (Enforcement Act, section 44)
- Any person to whom a decision is addressed or whose right, obligation or interest is directly affected (party) by the decision of the OSH authorities may appeal against the decision. (Administrative Judicial Procedure Act, section 6)
- In most cases, this party is the employer to whom the decision has been addressed. The decision does not directly affect the rights and responsibilities of individual employees. Employees are therefore not a party and do not have the right to appeal.
- The competent OSH representative at the workplace may appeal against a decision that grants exemption from a provision protecting the employee. In practice, this means situations such as an exemption from compliance with certain qualification requirements for crane drivers. (Enforcement Act, section 44)

- Otherwise the OSH representative does not have the right to appeal to a court.

b. Parties who have opportunity/right (examples: duty holder, workers/worker representatives)

- See answer for section 8a.

c. Timeframe for exercising opportunity/right

- See answer for sections 8a and 8d.

d. Consequence of failure to deny/object/appeal within timeframe (examples: Formal Action becomes final and not subject to appeal)

- An appeal shall be lodged within 30 days of notice of the decision. (Administrative Judicial Procedure Act, section 22). When calculating this period, the day of notice shall not be included. If the decision has not been appealed, it becomes legally valid and the decision made by the OSH authority becomes final.

Judicial process for establishing Formal Action

9. Process for initiating proceedings:

a. Transfer of case by administrative authorities (examples: labour inspectors, labour inspectorates)

– timeframes/deadlines for transfer

– standard of review of administrative notice (examples: if supported by substantial evidence on the record)

- If there are probable grounds for suspecting that an act has been committed that is punishable under any act enforced by the OSH authorities or under the Criminal Code, the OSH authorities shall notify the police of the act for preliminary investigation. (Enforcement Act, section 50)
- In practice, the inspector transfers the matter to the OSH authorities also for consideration of whether an offence should be reported.
- However, there is no need to notify the police if the act is minor considering the circumstances, and the public interest does not require a notification. (Enforcement Act, section 50)
- Notifications to the police are typically related to occupational accidents. In addition, deliberate and gross violations of labour law obligations must be notified even if no accident has occurred.
- The inspector and the OSH authorities must investigate the matter and notify it to the police so fast that the right to bring a charge for the possible employment offence will not become time-barred. See 14a below.

b. Expedited action sought by administrative authorities to eliminate imminent danger (examples: temporary injunction, temporary restraining order, stop-work order)

- Such expedited actions are not used and sought from court. A temporary prohibition notice is issued by the inspector when necessary, as explained above.
- The OSH authorities may in an administrative decision order that the decision must be complied with regardless of an appeal process. (Enforcement Act, section 15)
- When an appeal against a decision of the OSH authorities has been lodged, the Administrative Court may prohibit the execution of the decision, order a stay or issue another order relating to the execution of the decision. (Administrative Judicial Procedure Act, section 32)

c. Right of private action (examples: workers/worker representatives)

circumstances causing termination of right of private action (examples: when judicial proceedings initiated by administrative authorities)

- The court proceedings referred to in the question are not available to private parties.

- If work causes immediate and serious danger to an employee's life or health, the OSH representative is entitled to interrupt such work in so far as persons represented by them are concerned (Enforcement Act, section 36). The OSH representative must inform the employer of any interruption of work, in advance and in any case immediately when this is possible without any danger. After making sure that there is no danger, the employer may order the work to be continued. The procedure described here will not proceed to a court or to the OSH authorities.
- Employees may independently bring an action for damages in occupational safety matters in court. See answers to section 1b.
- If the OSH authorities do not notify the police, the plaintiff himself or herself may request the police to investigate the suspected occupational safety offence.

d. Criminal prosecution (examples: cases referred for prosecution by administrative authorities or brought directly by prosecutor)

- When a criminal matter has been transferred to a pre-trial investigation of the police, an opportunity must be provided for the OSH authorities to be heard (Enforcement Act, section 50). After the pre-trial investigation, the police will transfer the matter to the prosecutor for the consideration of charges.
- The public prosecutor shall provide the occupational safety and health authority with an opportunity to give a statement before the consideration of charges is completed. (Enforcement Act, section 50)

10. Pre-hearing processes:
(examples: notification and disclosure of witnesses, disclosure of other evidence, filing of motions and briefs)

– government authority responsible for managing processes

– timeframes/deadlines for processes

- The appeal process in the Administrative Court mainly takes place in writing. The Administrative Court requests the parties to provide written reports. The Administrative Court may arrange an oral hearing to review the matter. Witnesses who have been called by a party or the administrative authority that made the decision, or the hearing of whom the appellate authority considers necessary, may be heard in an oral hearing. (Administrative Judicial Procedure Act, chapter 7)
- The Administrative Court is responsible for reviewing the matter. Where necessary, it shall inform the party or the administrative authority that made the decision of the additional evidence that needs to be presented. (Administrative Judicial Procedure Act, chapter 7)
- The appellate authority shall on its own initiative obtain evidence in so far as is the impartiality and fairness of the procedure and the nature of the case so require. (Administrative Judicial Procedure Act, chapter 7)
- In addition to the main hearing, criminal proceedings in the District Court include a written or oral preparation hearing. The court shall conduct the preparation in such a manner that the case can be dealt with in a continuous main hearing. The emphasis of the oral preparation is on reviewing which issues are contested and which are not. The party presenting evidence must name its evidence in the preparatory hearing and notify the court of the evidence themes. (Code of Judicial Procedure, chapters 5 and 6, 14, 17 and 24)

11. Admissible evidence:

a. Witness testimony and statements:

– fact witnesses

– expert witnesses

b. OSH expert reports

c. Other evidence (examples: samples, photographs, videos, test results, seized machinery, documents)

- A party or the prosecutor may with certain limitations present any kind of evidence, so all of the sub-sections a-c in this question are possible. In practice, the inspection report of the OSH inspector also plays a significant role in the court proceedings.
- The court is as a rule not bound by any formal provisions in its consideration of evidence, but is free to consider the value of the evidence for the matter in question.
- After having considered the presented evidence and other facts that have emerged in the proceedings, the court must decide what has and what has not been proven in the matter. The court must thoroughly and fairly assess the value of the evidence and other facts as proof in a free appraisal of the truth of the evidence.
- A criminal judgment of guilty may be made only on the condition that there is no reasonable doubt regarding the guilt of the defendant. (Code of Judicial Procedure chapter 17, section 3)
- In addition to other things, the court must reject any proof concerning facts that do not affect the matter or are otherwise unnecessary.
- In addition to witnesses, experts may also be heard. Experts are heard regarding general rules that require special knowledge and their application to the facts that have emerged in the matter.
- (For all above see Administrative Judicial Procedure Act chapter 7, Code of Judicial Procedure, chapter 17 and Criminal Procedure Act)

12. Timeframes/Deadlines for issuance of judicial order:

a. Cases of transfer by administrative authorities (examples: to civil court of first instance or criminal court)

b. Cases of expedited action sought to eliminate imminent danger

c. Cases of the exercise of private right of action

d. Cases of criminal prosecution

- The law does not lay down provisions on specific time limits for the decision-making by the court.
- Administrative appeals concerning occupational safety must be processed urgently.

Appeals process for challenging Formal Action

13. Type of proceeding and adjudicative body:

a. Administrative (examples: higher levels within labour ministry, administrative law judge, administrative review board/commission)

- A binding decision made by the OSH authorities may be appealed to the Administrative Court. (Enforcement Act section 44)

b. Civil court of first instance (examples: district court, trial court)

- A criminal matter concerning occupational safety is processed in the District Court. The process generally progresses from the OSH authorities to the police for a pre-trial investigation, then to the prosecutor for the consideration of charges and finally to the District Court. The police may also on its own initiative investigate, for example, an occupational accident, in which case it will request expert help and opinions from the OSH authorities during the investigation.
- Matters concerning administrative enforcement of occupational safety are thus not processed as civil or criminal matters in the District Court, but in the Administrative Court.

- The employee may independently demand compensation for damages from the employer on the ground that he or she has suffered damage as a result of a deliberate or negligent violation of occupational safety regulations that can be considered the fault of the employer or a representative of the employer (see answer 1 b). If the employer or a representative of the employer has been charged also with an occupational safety offence, the claim for compensation can be made in connection with this trial (Criminal Procedure Act chapter 3)
- Taking care of occupational safety is the employer's contractual obligation (Employment Contracts Act chapter 2 section 3). If the employee is of the opinion that the employer has breached his or her contractual obligation and as a result, damage has been caused to the employee, the employee can file a claim for compensation for damages against the employer even if no one is prosecuted. (see answer 1 b).
- When a claim for compensation is based on a contract, the employer is always liable for the damage suffered by the employee as a result of a neglected contractual obligation.
- **c. Court of appeals** (examples: circuit court, civil or criminal court of second instance/appeals)
- The judgement of an Administrative Court in an occupational safety matter may be appealed to the Supreme Administrative Court. (Administrative Judicial Procedure Act, sections 9 and 13)
- There are seven local administrative courts and above them – the Supreme Administrative Court. The Supreme Administrative Court has four chambers (see: http://www.kho.fi/en/index/organization/chambers.html). Administrative courts have also chambers. They are based on working order of each court. None on the administrative courts (local or supreme) have chamber that specializes only on OSH matters. This is due to the fact that there are a few appeals that concern OSH. There are 28 justices in the Supreme Administrative Court and a President.
- For civil and criminal procedures Finland has 27 District Courts, 5 Courts of Appeal and one Supreme Court. Visit: http://korkeinoikeus.fi/en/index/ennakkopaatokset.html and http://www.kho.fi/en/index.html.
- The judgement of a District Court in a criminal matter may be appealed to a Court of Appeal (Code of Judicial Procedure, chapter 25). When a decision taken by a District Court is appealed, a permission for continued consideration in the matter is required. Permission for continued consideration is granted by the Court of Appeal. (Code of Judicial Procedure, chapter 25 a, section 5)
- The defendant of a criminal matter who has been sentenced to more than eight months of imprisonment does not, however, need a permission for continued consideration in the matter in any respect if the appeal concerns the offence or punishment for which he or she is held accountable. (Code of Judicial Procedure chapter 25 a, section 5)
- The judgement of a Court of Appeal is appealed to the Supreme Court. Leave to appeal against a decision of the Court of Appeal must be applied to the Supreme Court. (Code of Judicial Procedure, chapter 30)
- Leave to appeal can only be granted if, with regard to the application of the act in other similar cases or because of the uniformity of legal praxis, it is important to bring the matter to the Supreme Administrative Court for decision or there is specific reason for this due to an obvious procedural or other error in the matter; or there is another important reason for granting leave to appeal. (Code of Judicial Procedure chapter 30, section 3)

d. Labour court (see 1b above for references)

- If a collective agreement contains contractual provisions on occupational safety and a dispute arises from their interpretation, occupational safety matters can, in principle, also be processed in the Labour Court.

- The Labour Court is special court that hears and takes decisions on civil matters concerning collective agreements and collective agreements for public servants when they deal with: 1) the validity, validity period, content or scope of a collective agreement or a collective agreement for public servants and the interpretation of a specific point in the agreement; 2) conformity of a certain procedure with the collective agreement or the collective agreement for public servants; or 3) the consequences of non-compliance with the collective agreement, collective agreement for public servants or the above-mentioned statutes, except for punishments or disciplinary consequences.
- The unions party to a collective agreement or a collective agreement for public servants or similar parties have to right to pursue a claim in the Labour Court. An individual organised employer, employee or public servant may file a claim only if the organisation party to the agreement has given permission to it or has refused to pursue the claim.

14. Timeframes/deadlines for proceedings:

a. For initiation

- The right to bring charges for occupational safety offences becomes time-barred two years after the date on which the offence was committed (Criminal Code, chapter 8, section 1 and chapter 47). The prosecutor therefore has to bring a charge in the matter within two years.
- The possibility to request a corporate fine in the District Court becomes time-barred in five years Criminal Code, chapter 8, section 7), although the period after which the right to bring charges for occupational safety offences becomes time-barred is two years.
- In occupational safety offences, special attention must be paid to continual offences because neglect of occupational safety and health regulations is only rarely restricted to one day or moment.
- The right to bring criminal charges does not become time-barred as such if the non-compliant conditions at the workplace persist (Criminal Code, chapter 8, section 2).
- An Administrative Court can deal with an appeal against a decision of the OSH authorities as long as the appeal has been lodged before the deadline.
- Specific time frames concern claims for compensation for damages. They will not be discussed here.

b. For each stage of review process

- Not relevant.

c. For issuance of ruling/order

- The law does not lay down time limits for the decision-making in the courts.

15. Standing to appeal Formal Action:
(examples: duty holder, workers/worker representatives)

See answer in section 8.

16. Parties to the proceeding:
(examples: labour inspectors or other administrative labour authorities, workers/worker representatives, duty holder)

- Any person to whom a decision is addressed or whose right, obligation or interest is directly
- Affected by a decision may appeal against the decision (Administrative Judicial Procedure Act, section 6). The parties to a matter dealt with by an Administrative Court are the obliged employer and the OSH authorities that took the decision
- The parties to a criminal matter are the prosecutor and the defendant.
- When a criminal matter is handled in court, the OSH authorities have the right to be present and speak. The OSH authorities act as an independent expert party.

17. Burden of proof:
(examples: government has initial burden of proof to establish violations, duty holder has burden of proof to establish acted in good faith). See 11 above.

- An appeal against a decision made by the OSH authorities is processed in the Administrative Court.
- The Administrative Court examines the matter and assesses the legality of the OSH authorities' decision. The Administrative Court must in its decision provide a solution to the demands made in the matter. The Administrative Court must consider all facts that have emerged and decide which of them the decision can be based on.
- There are no provisions on the burden of proof regarding the proceedings of occupational safety issues in the Administrative Court. See 11 above.
- In a criminal matter, the burden of proof is always on the prosecutor, who must present proof of essential elements of crime exceeding the standard of proof and prove that there are no grounds for mitigation or justification. There is a presumption of innocence in criminal matters and the defendant is thus not obliged to contribute to the determination of his or her guilt of or to present proof to support his or her innocence. A criminal conviction can also not be based on the fact that the defendant remains silent.

18. Standard and scope of review of Formal Actions:
(examples: review only conclusions of law, upheld if violation is demonstrated by a preponderance of the evidence, upheld if violation is supported by substantial evidence on the record)

- There are no specific rules regarding this question.
- The decisive factor is whether the matter is disputed or not. In the first stage, the court deals with factual issues and points of law.
- A straightforward criminal matter can be decided by the District Court through a written procedure without a main hearing. The matter can be decided through a written procedure if the sanction specified for any of the individual offences referred to in the prosecutor's charge under the circumstances mentioned in the charge is not more than a fine or not more than two years of imprisonment. An additional requirement is that the defendant pleads guilty to the act described in the prosecutor's charge and with a specific notification informs the District Court that he or she gives up the right to have an oral hearing and agrees to the matter being decided through a written procedure. There are also some other boundary conditions for the written procedure. (Criminal Procedure Act, chapter 5a)
- In principle, it is possible to deal with an occupational safety offence through the written procedure, but the cases are often so quarrelsome and the guilt is denied that the written procedure is out of the question.

19. Procedure for initiating proceedings:
(examples: submitting denial/objection/ appeal, review directed by administrative entity)

- An appeal to the Administrative Court must be submitted by the time limit. The appeal shall be lodged in writing.
- The appeal document, which shall be addressed to the appellate authority, shall indicate: 1) the decision challenged; 2) the parts of the decision that are challenged and the amendments demanded to it; and 3) the grounds on which the challenge is based. See section 10. (Administrative Judicial Procedure Act, section 23)
- In a criminal matter, the prosecutor is to bring a charge by delivering a written application for a summons to the registry of the District Court. The law lays down provisions on the content of the application for a summons. (Criminal Procedure Act, chapter 5)
- After this, the court shall issue a summons without delay. In the summons the defendant is exhorted to respond to the claims made against him or her, either in writing within a deadline set by the court or orally at a hearing. (Criminal Procedure Act, chapter 5)

20. Impact of appeal on Formal Action:

a. Stay of sanction/penalty collection

- When an administrative appeal is being processed, the decision qualifying for appeal must not be enforced before it has become final.
- However, the decision may be enforced before it has become final if there is a provision to this effect in an Act or a Decree, if the decision is of such a nature that it requires immediate enforcement, or if its enforcement cannot be delayed for reasons of public interest. (Administrative Judicial Procedure Act, section 31)
- The OSH authorities may in their decision order that the decision must be observed despite a possible appeal. The law lays down provisions on this. See section 9b. (Enforcement Act, section 15)
- When an appeal has been lodged, the Administrative Court may prohibit the execution of the decision, order a stay or issue another order relating to the execution of the decision. (Administrative Judicial Procedure Act, section 32)

b. Temporary relief or restraining order

- See section 20a.

21. Decision/order of adjudicative body:

a. Content and form of decision/order (examples: sanction/penalty, required actions/remediation order)

- Administrative Courts have wide discretionary powers regarding the content of decisions.
- The Administrative Court investigating an administrative appeal may either keep in force the OSH authorities' decision that has been appealed against or overturn a decision it deems unlawful. The decision may also be returned for a new consideration. It is also possible to change the content of the decision because of the administrative appeal. For example, the Administrative Court may change a negative decision into a positive decision or change the conditions included in the decision as a result of an administrative appeal.
- In a criminal matter, the judgement of a District Court is either a conviction or an acquittal. (Criminal Procedure Act, chapter 11, section 4) The punishment for an occupational safety offence may be a fine or imprisonment of a maximum of one year. See chapter 47 of Finnish Penal Code.
- In a criminal matter, the court may pass a sentence only for the act for which the prosecutor has requested the punishment. The description of the act in the charge is therefore binding to the court. However, the court is not bound by the heading or the reference to the applicable provisions in the charge. (Criminal Procedure Act, chapter 11, section 3)
- In occupational safety offences, apart from a natural person, a corporation, foundation or other legal entity in the operations of which an offence has been committed can on the request of the public prosecutor be sentenced to a corporate fine. See chapter 9 of Finnish Penal Code.
- Furthermore, any benefit gained from the offence (for example, the savings made by not erecting scaffolding) may have to be forfeited from the company. See chapter 10 of Finnish Penal Code.

b. Issuance-notification of decision/order

- Where an appeal period or some other set period affecting the rights of the parties begins from the service of a decision made by an Administrative Court, that decision is verifiably served on the recipient. Verifiable service may be used also otherwise, if for some other reason necessary for the safeguarding of the rights of the parties. (Administrative Judicial Procedure Act, section 55)
- In a criminal matter, the deliberations of the court must take place immediately after the conclusion of the main hearing or, at the latest, on the following day. The judgment must be handed down after the conclusion of the deliberations.

- If in an extensive or complex case the deliberations or the drawing up of the judgment so require, the judgment may be made available in the court registry within 14 days of the conclusion of the main hearing. If, for a special reason, the judgment cannot be made available within this deadline, it is to be made available as soon as possible. The parties present at the conclusion of the hearing must be notified of the time when the judgment will be available. (Criminal Procedure Act, chapter 11, section 7)
- The parties are given copies of the judgment of the District Court in the form of court instruments.

Appeals process for challenging decision/order

22. Appeal of decision/order:

a. Timeframes/deadlines for initiating appeal

- As a rule, decisions of Administrative Courts may be appealed to the Supreme Administrative Court. There are separate provisions on when decisions of Administrative Courts are not open to appeal or when a leave to appeal is required for appealing to the Supreme Administrative Court. (Administrative Judicial Procedure Act, section 9 and 13)
- Decisions of Administrative Courts on occupational safety matters may be appealed to the Supreme Administrative Court without leave to appeal.
- An appeal shall be lodged within 30 days of notice of the Administrative Court's decision.
- A party to a criminal matter must first give a notification of his or her intent to appeal to the District Court within one week of the decision. The appellant must then submit an appeal document to the court within 30 days of the decision. If the notification of intent to appeal and the appeal document are not received by the District Court by the deadline, its decision becomes final. (Code of Judicial Procedure chapter 25)

b. Standing to appeal decision/order (examples: duty holder, workers/worker representatives, labour inspector or other administrative authorities)

- Any person to whom a decision is addressed or whose right, obligation or interest is directly affected by a decision of the Administrative Court may appeal against the decision. See also answer 8a. Administrative Judicial Procedure Act section 6)
- Also the OSH authorities that have taken the decision against which an appeal has been made, may appeal against the decision of the Administrative Court. (Enforcement Act section 44)
- In criminal matters, an appeal can be lodged by a party and the prosecutor.

c. Standard and scope of review (examples: only review questions of law, upheld if not arbitrary, capricious, or abuse of discretion)

- See also 18 and 13c.
- Leave for continued consideration in the Court of Appeal must be granted if there is reason to doubt the correctness of the decision of the District Court or the correctness of the decision of the District Court cannot be assessed without granting leave for continued consideration, or it is important with regard to the application of law in other similar cases to grant leave for continued consideration or there is some other weighty reason to grant it.

d. Number and levels of appeal (examples: court of appeals)

- Administrative matters are dealt with at one level of appeal, in the Supreme Administrative Court.
- Criminal matters are dealt with at two levels of appeal, in the Courts of Appeal and in the Supreme Court.

e. Impact of appeal on decision/order (examples: stay of sanction/penalty collection, stay of timeframes/deadlines for taking required actions/remediation)

▶ See answer 20.

f. Timeframes/deadlines for issuing decision/order

▶ The law provides no specific time limits for the decision-making of courts.

▶ Matters concerning occupational safety must take priority in the Administrative Court.

Execution of final decision/order

23. Process for execution of a final decision/order:

a. Imposition of sanction/penalty (examples: closure of enterprise, withdrawal of licences, suspension of undertaking's activity)

▶ A decision of the OSH authorities that has become final after the Administrative Court proceedings is executed with the sanction set in the original decision – in practice, under a threat of conditional fine – within a deadline set by the Administrative Court.

▶ The OSH authorities thus ensure that the decision is executed.

▶ Sanctions such as the ones referred to in the question are not used. Concerning withdrawal of licence, see answer 3f.

b. Collection of fine (examples: block bank account, embargo assets, establish payment instalments)

▶ A conditional fine or criminal fine that has legally been ordered for payment is charged from the obligated party. The Legal Register Centre is responsible for the execution of the conditional or criminal fine.

▶ The Legal Register Centre sends a due conditional fine to the enforcement authorities if a formal notice has not led to payment. The matter will proceed to enforcement if the due payment has not been paid within 30 days of the formal notice. Enforcement is carried out by a separate enforcement office.

▶ The Legal Register Center is a separate public authority from court system or OSH authorities. Legal Register Centre is an agency in the administrative sector of the Ministry of Justice. For more information see also: http://www.oikeusrekisterikeskus.fi/en/index.html.

▶ Collection of fines: https://www.oikeusrekisterikeskus.fi/en/index/rekisterit/enforcementoffinesandothersanctions.html.

▶ All categories of property and wealth can be distrained. There is separate legislation for enforcement, including different protected portions for the debtor.

▶ An unpaid conditional fine that has not been possible to recover must not be converted to imprisonment. However criminal fine may be converted to imprisonment. See also: https://www.oikeusrekisterikeskus.fi/en/index/rekisterit/enforcementoffinesandothersanctions/conversionsentenceforunpaidfines.html.

c. Verification of required actions/remediation (examples: follow-up inspections/investigation)

▶ The task of the OSH authorities and the inspectors is to enforce and monitor compliance with the obligation set in the decision. See 3f.

d. Imprisonment

▶ In criminal matters, a custodial sentence must be executed without delay when the judgement concerning the custodial sentence has become final.

- The court may order the person sentenced to imprisonment to be kept detained or to be arrested when the sentence for imprisonment it passed. In that case, the court will send the convicted person to prison.
- In other situations, the Criminal Sanctions Agency (https://www.rikosseuraamus.fi/en/index.html) must set a prison and a date on which the convict must report to this prison. The Criminal Sanctions Agency may issue a warrant for the convict in order to start the execution of the sentence if the convict cannot otherwise be reached and it is not possible to find him or her.
- For procedure see Imprisonment Act: https://www.finlex.fi/en/laki/kaannokset/2005/en20050767.

24. Duty holder failure to comply with final decision/order:

a. Penalty for failure to pay fine (examples: interest assessed, delinquent charges added, referral to debt collection, referral to criminal court of first instance)

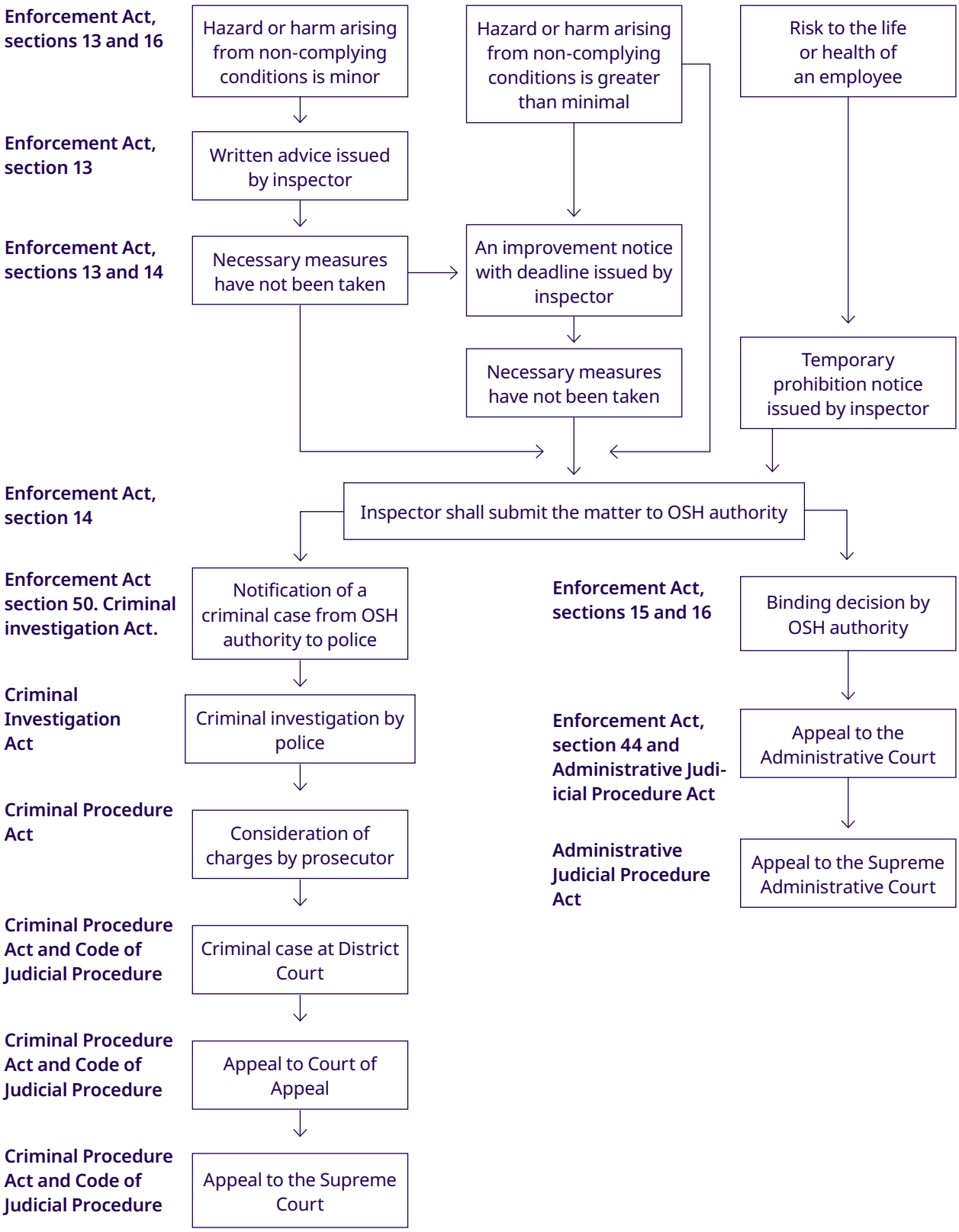
- See section 23c and 24b.
- Failure to pay the conditional fine is not a criminal offence as such.

b. Penalty for failure to take required actions/remediation (examples: contempt of court, daily penalties, additional fines, incarceration)

- If the necessary measures have not been taken, the OSH authorities order the payment of the conditional fine. At the same time, a new, higher conditional fine is imposed. The process continues until the necessary measures have been taken and the conditions at the workplace have been remedied. See 7a above.
- Non-compliance with administrative obligations based on final decisions of courts can also be assessed as a deliberate occupational safety offence that may initiate a crime reporting process. See 7b above.

Annex 1.

▶ OSH enforcement procedures and main applicable Acts



Annex II. Resources

- Diagram - OSH enforcement procedure and applicable Acts
- Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (also referred to as "Enforcement Act")
  https://www.finlex.fi/en/laki/kaannokset/2006/en20060044.pdf
- Administrative Procedure Act
  https://www.finlex.fi/en/laki/kaannokset/2003/en20030434.pdf
- Workers Compensation Act
  https://www.finlex.fi/en/laki/kaannokset/2015/en20150459
- Act on Condition Fines
  https://www.finlex.fi/en/laki/kaannokset/1990/en19901113
- Administrative Judicial Procedure Act
  https://www.finlex.fi/en/laki/kaannokset/1996/en19960586.pdf
- Criminal Code of Finland (Chapters 47, 8 and 9)
  https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf
- Code of Judicial Procedure
  https://www.finlex.fi/en/laki/kaannokset/1734/en17340004.pdf
- Criminal Investigation Act
  https://www.finlex.fi/en/laki/kaannokset/2011/en20110805.pdf
- Criminal Procedure Act
  https://www.finlex.fi/en/laki/kaannokset/1997/en19970689.pdf
- Employment Contracts Act
  https://www.finlex.fi/en/laki/kaannokset/2001/en20010055
- Collective Agreements Act
  https://www.finlex.fi/en/laki/kaannokset/1946/en19460436
- Act on the Labour Court
  https://www.finlex.fi/en/laki/kaannokset/1974/en19740646
- Act on Certain Requirements Concerning Asbestos Removal Work
  https://www.finlex.fi/en/laki/kaannokset/2015/en20150684
- Government Decree on the Safe Use and Inspection of Work Equipment
  https://www.finlex.fi/en/laki/kaannokset/2008/en20080403
- Enforcement Code
  https://www.finlex.fi/en/laki/kaannokset/2007/en20070705
- OSH administration in Finland
  http://www.tyosuojelu.fi/web/en/about-us/functions; https://oshwiki.eu/wiki/OSH_system_at_national_level_-_Finland#OSH_authorities_and_inspection_services

▶ Appendix II. Étude sur l'assurance de l'application des dispositions légales relatives à la sécurité et santé au travail en France

▶ **Auteur: M. Niklas Vasseux**

Initiation d'une procédure déclenchée par une constatation administrative ou une allégation de violation aux autorités judiciaires

1. Types des démarches

a. Administrative (constatation administrative d'une violation)

Actes administratifs pouvant être adressé par les agents de contrôle:

Ces actes sont des demandes formelles adressées aux employeurs en cas de non-respect d'obligations particulières en matière de santé et sécurité au travail:

- demandes de vérification et de mesurage sur la conformité d'équipements de travail (telles que des machines, des équipements de sécurité et les installations prévues à l'article L8113-9 du code du travail, exemples: vérification de la ventilation des locaux de travail en fonction de la présence de pollution ou non (articles L. 4722-1, R. 4722-1, R. 4222-10 à R. 4222-14, R. 4222-16, R. 4222-20 et R. 4222-21 du code du travail).
- mises en demeures préalables à verbalisation sur les conditions d'hygiène et de travail (exemple: éclairage des locaux, sanitaires, article R.4223-2 du code du travail). L'agent de contrôle demande la régularisation formelle avant de constater une infraction et la relever par procès-verbal adressé aux autorités judiciaires.
- mise en demeure émise sur rapport d'un agent de contrôle prononcé par l'autorité hiérarchique supérieure (niveau régional) afin de faire cesser soit un risque que l'employeur n'a pas pris en compte dans son évaluation telle qu'elle procède de l'article L4121-1 du code du travail qui pose les principes généraux de la prévention (exemple: risques liés aux manutentions de charges, aménagements des locaux de travail). Cette action est prévue aux articles L. 4721-1 2°, L. 4721-2, et R. 4721-1 du code du travail.

Une action similaire est prévue pour les situations d'exposition des travailleurs au risque psycho-social (souffrance morale au travail, harcèlement moral, même références juridiques que *supra*).

- décisions d'arrêts d'activité en cas de violation caractérisée d'une obligation légale ou réglementaire, et d'exposition à un danger grave et imminent d'un travailleur. Dans des situations limitativement prévues: exposition à l'amiante, exposition à un risque de chute de hauteur, utilisation d'un équipement de travail dangereux, exposition à un risque de choc électrique, exposition à un produit chimique dangereux (cancérigène, mutagène, neurotoxique (articles L.4731-1 et R.4731-1 du code du travail).

b. Tribunal civil / du travail (constatation administrative ou une allégation de violation aux autorités judiciaires)

Actions devant les tribunaux civils appelés « référé ». L'inspecteur du travail peut saisir le juge des référés pour qu'il ordonne la suspension de l'activité dangereuse par la mise en œuvre d'une mesure d'urgence telle que mise hors service, immobilisation des machines, saisie d'un produit, fermeture d'un chantier

ou d'un atelier. Le juge peut également ordonner la fermeture temporaire d'un atelier ou d'un chantier (C. trav., art. L. 4732-1 ; C. trav., art. L. 4732-2).

Les mesures énumérées dans les articles L. 4732-1 et L. 4732-2 du Code du travail ne sont pas exhaustives et le juge des référés peut apprécier librement la mesure qui lui semblera la plus adéquate pour faire cesser le danger.

Cette mesure peut être imposée à l'employeur sous astreinte financière. Dans cette procédure, l'inspecteur du travail intervient directement devant le juge et c'est à lui qu'incombe de citer l'employeur et d'exposer les faits. On notera que ce qui est exigé ici c'est un risque sérieux, c'est-à-dire d'une certaine importance, mais sans pour autant que soit exigé un risque grave ou imminent. Le risque sérieux peut résulter de la violation d'une disposition impérative touchant la santé ou la sécurité.

L' article L. 4732-2 du Code du travail prévoit également la saisine du juge des référés par l'inspecteur du travail, lorsqu'un risque sérieux d'atteinte à l'intégrité physique d'un intervenant sur un chantier résulte ou peut résulter ultérieurement de l'inobservation des dispositions incombant au maître d'ouvrage prévues au titre Ier du livre II et de celles du titre III du livre V ainsi que des textes pris pour son application: ce sont les dispositions relatives à la prévention et à la coordination lors des opérations de bâtiment et de génie civil. Le juge des référés peut alors ordonner toutes mesures propres à faire cesser ou à prévenir ce risque: mise en œuvre effective d'une coordination, détermination de délais de préparation et d'exécution des travaux compatibles avec la prévention, ou même toutes mesures tendant à provoquer la concertation des maîtres d'ouvrage et la rédaction d'un plan général de coordination (C. trav., art. L. 4732-2).

L'inspecteur du travail n'intervient jamais devant le conseil des prud'hommes (tribunal spécialisé en matière de droit du travail), qui est compétent pour trancher les contentieux entre salariés et employeurs.

c. Criminel (constatation administrative ou une allégation de violation aux autorités judiciaires)

Action pénale générale (article L8113-7 du code du travail): Les agents de contrôle de l'inspection du travail française ont des pouvoirs judiciaires. Ils sont habilités à constater de manière formelle les infractions aux règles prévues par le code du travail et passibles de sanction, en établissant un document, le « procès-verbal » qui sera adressé à l'autorité judiciaires (le Procureur de la République) qui décidera des poursuites (procès pénal).

- Verbalisation des infractions en matière d'hygiène, sécurité et conditions de travail prévues par le code du travail
- Poursuites pénales en cas de non-respect des décisions de l'inspection du travail pour protéger les travailleurs d'un risque grave pour leur santé et leur sécurité: le non-respect des décisions est constitutif d'infractions spécifiques pouvant donner donnant lieu à verbalisation et saisine de l'autorité judiciaire.

2. Critères pour déterminer quelles démarches procèdent

a. Type de violation (exemples: délibérée, répétée, criminelle, etc.)

Il n'existe pas de critère qui permet à un agent de contrôle de décider de quel type de suite il donnera à une situation qu'il aura constaté. Le principe est de laisser l'opportunité des suite à donner aux constats opérés par l'agent de contrôle. Il s'agit d'une application de l'article 17 de la convention 81 de l'OIT.

Il y a toutefois une pratique habituelle qui consiste à suivre un processus progressif. L'agent de contrôle va généralement adresser à l'entreprise une lettre de recommandation suite à sa visite. L'employeur doit répondre aux recommandations, ce qui qui donnera lieu à une contre visite de l'agent.

Toutefois en fonction de la gravité des infractions constatées notamment en cas d'exposition des travailleurs à un danger grave et imminent ou en cas d'accident du travail l'agent de contrôle utilisera ses pouvoirs de contraintes. Ainsi en cas de risque de chute de hauteur il pourra ordonner l'arrêt de l'activité en cause. En cas d'accident du travail grave et à l'issue d'une enquête il établira un procès-verbal de constat d'infraction qu'il va adresser au procureur de la République.

Certaines infractions sont soumises à une mise en demeure préalable avant verbalisation (art. R8113-4 du code du travail). Il s'agit d'infractions relatives à la sécurité et à l'aménagement des locaux de travail. Exemples: issues de secours non conformes, absence ou non-conformité de la ventilation des locaux, non-conformité ou absence de sanitaires.

b. Degré de la violation (exemples: mineur, grave, danger imminent)

- Pour les infractions délictuelles (les plus graves prévues par le code du travail), il est nécessaire de démontrer l'intention de ne pas respecter l'obligation légale. Cela peut être matérialisé par, la connaissance de l'employeur de son obligation rappelée par l'agent de contrôle dans un courrier de recommandation, ou bien par les alertes émises par les représentants du personnel lorsqu'ils sont présents dans l'établissement.
- Pour les infractions de type contraventionnelle (infractions mineures), il n'est pas nécessaire de démontrer le caractère intentionnel de la violation de la disposition légale ou règlementaire.

Dans ces deux cas la répétition (récidive légale ou réitération), des faits est un facteur qui démontre, l'intention de violer l'obligation ou en cas de condamnation sur des mêmes faits, peut être une circonstance aggravante.

L'agent de contrôle pour les infractions les plus légères et prévues par le code du travail dispose d'un droit de suite à donner, entre la possibilité de dresser un procès-verbal de constat d'infraction adressé à la justice (procureur de la république) ou une poursuite administrative, adressée à la hiérarchie locale de l'administration du Travail (art. L8115-1 du code du travail). .

NB/ il existe dans le droit du travail français une obligation de résultat pesant sur l'employeur en matière de protection de la santé et de la sécurité des travailleurs (article L4121-1 du code du travail). Cette obligation pose le principe d'une présomption irréfragable de connaissance par l'employeur de ses obligations légales et règlementaires. Ceci a pour conséquence d'entrainer en matière civile et en cas d'accident du travail ou de maladie professionnelle de faire peser sur l'employeur le risque de se voir qualifier ses manquements en « faute inexcusable » entrainant sa responsabilité immédiate des dommages et conséquences physiques ou morales (arrêt de la chambre sociale de la Cour de cassation du 11 avril 2002).

En matière pénale, l'employeur pourra être poursuivi sur le fondement d'infractions délictuelles particulièrement graves, tel que l'homicide involontaire, du fait de ses manquements au respect d'obligations de sécurité qu'il ne pouvait ignorer (art. 221-6 du code pénal). Les peines pouvant être prononcées à son encontre seront plus lourdes que celles prévues pour les infractions contenues au code du travail, soit 5 ans d'emprisonnement et 75000€ d'amende au maximum en cas de violation manifestement délibérée d'une obligation de sécurité (alinéa 2 art. 221-6 code pénal).

Processus administratif pour l'établissement des démarches déclenché par un constat administratif de violation

3. Forme et contenu de la notification de la démarche

a. Description de la violation (exemples: résumé des constatations et preuves)

Deux types d'infractions font l'objet de suites administratives possibles:

- Les infractions pour lesquelles la réglementation prévoit expressément la possibilité d'infliger des pénalités financière par l'administration (article L8115-1 °5 du code du travail relatives aux installations sanitaires, à la restauration sur le lieu de travail, et à l'hébergement des travailleurs, et aux prescriptions techniques de protection durant l'exécution de travaux de bâtiment et génie civil).
- Celles pour lesquelles la règlementation prévoit la possibilité de prononcer des arrêts d'activité immédiats par l'agent de contrôle lui-même du fait de l'exposition des salariés à un danger grave et imminent (cf. *supra*).

- ▶ Les situations de non-respect par l'employeur de ses obligations en matière d'évaluation des risques professionnels (cf. *supra*).

Attention, l'engagement de la procédure administrative exclue de facto la possibilité d'engager des poursuites pénales.

b. Identification des dispositions légales violées (exemples: citation de la loi ou règlementation)

Il existe un texte d'incrimination général qui vise les infractions commises par un employeur ou son délégataire en matière de règles de santé et sécurité l'article L4741-1 du code du travail qui prévoit que *sont punies d'une amende de 10 000 euros, les faits pour l'employeur de méconnaître par sa faute personnelle les dispositions légales et réglementaires prévues au code du travail relatives, à la santé, la sécurité et l'hygiène au travail. La récidive est punie d'un emprisonnement d'un an et d'une amende de 30 000 euros. L'amende est appliquée autant de fois qu'il y a de travailleurs de l'entreprise concernés indépendamment du nombre d'infractions relevées dans le procès-verbal prévu à l'article L. 8113-7.*

Le non-respect des décisions prises par un agent de contrôle (exemple: arrêts d'activité) est puni d'une amende de 10000€ maximum (article L4752-1 du code du travail).

Le non-respect par un employeur des demandes de vérification prononcées par un agent de l'inspection du travail est puni d'une amende de 10000€ maximum (article L4752-2 du code du travail).

c. Gravité de la violation (exemples: mineur, grave, danger imminent)

La constatation d'un danger grave et imminent par l'agent de contrôle entraine la possibilité de décider des arrêts d'activité immédiats sur les lieux de travail par la remise sur place d'un ordre d'arrêt remis en main propre).

Le constat d'infractions mineures (contraventions) prévues par le code du travail, permet à l'administration régionale de l'inspection du travail, d'infliger des amendes en application de l'article L. 8115-1du code du travail. Elle prononce cette sanction financière peut, sur rapport de l'agent de contrôle de l'inspection du travail et sous réserve de l'absence de poursuites pénales. Les cas prévus autorisés pour ces sanctions sont les manquements aux dispositions relatives aux installations sanitaires, à la restauration et à l'hébergement, ainsi qu'aux mesures relatives aux prescriptions techniques de protection durant l'exécution des travaux de bâtiment et génie civil prévues et ce qui concerne l'hygiène et l'hébergement. L'agent de contrôle n'inflige donc pas lui-même la sanction pécuniaire. Depuis la loi du 10 août 2018 relative à « l'Etat au service d'une société de confiance » la hiérarchie régionale a possibilité de prononcer un simple avertissement pour les manquements visés à l'article L8115-1, et ainsi ne pas infliger de sanction pécuniaire.

d. Degré de la violation (exemples: mineur, grave, danger imminent)

Pour les situations de danger grave et imminent, il n'est pas recherché le caractère volontaire de la commission de l'infraction. Le simple constat par l'agent de contrôle de l'exposition à une des situations prévues par la règlementation et le caractère grave et imminent du risque, suffisent à l'agent de prononcer l'arrêt d'activité. Il y a nécessité toutefois de constater l'exposition directe des travailleurs au danger Les cas sont listés plus bas.

Au contraire pour les infractions permettant l'application d'amendes administratives, il doit être démontré que l'employeur n'a pas cherché à régulariser l'infraction ou se conformer aux recommandations de l'agent de contrôle suite à la lettre de recommandation qu'il lui a adressé. Ainsi il est nécessaire de demander à l'employeur de régulariser la situation et vérifier lors d'une contre-visite que la situation reste inchangée. Seulement suite à cela, l'agent de contrôle pourra solliciter une amende administrative à la hiérarchie régionale. La démonstration de la volonté délibéré et constante de transgresser la loi est prise en compte pour déterminer le montant de l'amende par application des critères légaux dont celui du « comportement de l'auteur » (articles L. 1264-3 et L. 8115-4 du code du travail).

e. Actions / réparations nécessaires (exemples: arrêt de travail, retirer les travailleurs de la zone dangereuse, mettre hors service la machine dangereuse, éliminer les dangers)

Les décisions d'arrêt d'activités dangereuses sont précisément prévues par la règlementation. En dehors de la liste ci-dessous il n'est pas possible de décider d'un arrêt d'activité (articles L4731-1 à L4731-5 du code du travail et articles R4731-9 et suivants du même code):

- Exposition au risque de chute de hauteur grave (absence de protection).
- Exposition un à un produit chimique dangereux.
- Exposition à des matières contenant de l'amiante sans protection adaptée pour le travailleur.
- Exposition à un risque lié au courant électrique.
- Exposition à un équipement de travail dangereux (machine défectueuse)

f. Imposition ou proposition d'imposition de sanctions / pénalités (exemples: sanctions pécuniaires, révocation de licence ou de permis, retrait de la liste approuvée pour les contrats de l'état)

Les sanctions pécuniaires pouvant être prononcées par l'administration locale de l'inspection du travail, sont limitativement prévues par le code du travail et ont été listées plus haut. En dehors de ces sanctions l'administration de l'inspection du travail ne peut pas infliger d'autres mesures administratives. Elle pourra infliger une sanction pénale dans certains cas qui seront exposés plus bas dans la partie consacrée aux suites pénales.

g. Facteurs atténuants ou aggravants pour le calcul des sanctions / pénalités (exemples: nombre de violations, nombre de travailleurs exposés, actions de bonne foi du titulaire de droits, taille de l'entreprise, antécédents de violations)

L'agent de contrôle de l'inspection du travail suite à ses contrôles et à ses recommandations écrites, constate que les infractions persistent. Il peut alors rédiger un rapport dans lequel il décrit la situation constatée, les infractions présentes, et sollicite l'application de sanctions pécuniaires. Il l'adresse à l'autorité hiérarchique régionale de l'inspection du travail. Celle-ci demande des explications écrites à l'employeur. En fonction de la situation du contrevenant, l'autorité décide de lui infliger une amende dans le délai de deux mois suivant la réception du rapport de l'agent de contrôle.

Le calcul du quantum des amendes pouvant être infligées à l'employeur se fait sur la base d'un montant prévu pour l'infraction considérée multipliée par le nombre de travailleurs concernés

Pour fixer l'amende il est pris en compte, les moyens financiers de l'entreprise, et également l'attitude générale de l'employeur (présence au dossier de courriers antérieurs, volonté exprimée de régulariser, inertie, plaintes de travailleurs), quant au respect de ses obligations légales et réglementaires en droit du travail. Le dossier de l'entreprise est consulté dans la base informatique « WIKIT » qui contient l'ensemble des actions menées par l'inspection du travail vis-à-vis d'un établissement.

h. Informations sur le droit / l'opportunité de refuser / d'objecter / de faire appel du constat de violation, des actions / mesures correctives requises et / ou de l'imposition de sanctions et du processus d'exercice du droit / opportunité

Les employeurs sont en droit de faire valoir leurs arguments à tout moment auprès de l'agent de contrôle, sur les décisions prises à leur encontre.

Ils peuvent exercer un droit de recours contre les mises en demeure et les demandes de mesurages ou de mise en conformité dans un délai de deux mois. Ce recours est exercé devant l'autorité hiérarchique régionale de l'inspection du travail. Elle étudiera les arguments de l'employeur, les éléments nouveaux tels que les preuves de régularisation. Par la suite elle prendra une nouvelle décision qui viendra confirmer ou non la décision initiale de l'agent de contrôle.

Pour les sanctions pécuniaires, l'employeur est informé par écrit dans un document officiel, par l'agent de contrôle qu'une action est engagée afin de lui infliger une sanction pécuniaire. Une instruction du dossier est alors menée par les services régionaux de l'inspection du travail. Dans ce cadre l'employeur peut présenter ses arguments par écrit. A ce stade les droits de la défense sont garantis. A l'issu de la procédure, si l'employeur est condamné par l'administration à payer une amende, il pourra la contester devant le tribunal administratif compétent localement dans un délai de deux mois suivant la notification de la décision de sanction (article R. 312-1 du code de justice administrative).

i. Délais pour la prise des mesures / mesures correctives requises, le paiement des sanctions / pénalités et l'exercice du droit / de l'opportunité de refuser / d'objection / d'appel

L'employeur pourra contester la décision de sanction de l'administration devant le tribunal administrative dans un délai de deux mois suivant la notification de la décision. C'est le seul recours admis, il n'y a pas de recours hiérarchique possible contre les décisions pécuniaires. Le recours est introduit devant le tribunal par un avocat sous la forme d'un mémoire introductif d'instance (pas de formulaire).

Il est possible de contester: la réalité de l'infraction, et/ou le montant de l'amende ou encore la légalité de la décision de sanction. Ce recours n'est pas suspensif, il devra dans l'attente d'une décision de justice qui lui serait favorable, payer sa pénalité au bénéfice du Trésor Public.

Le recours en plein contentieux aussi appelé de pleine juridiction (Conseil d'Etat, assemblée, 16/02/2009, Société ATOM, n° 274000), est un recours dans lequel le juge administratif dispose des pouvoirs les plus étendus.

Le recours contentieux est toujours possible pour toutes les décisions administratives émises par l'inspection du travail (arrêt d'activité, demande de vérification, de mise en conformité). Il doit être présenté devant le tribunal dans un délai de deux mois suivant la décision initiale.

j. Documentation requise / certification de la conformité avec les actions / mesures correctives requises

L'employeur peut apporter la preuve de la régularisation de l'infraction constatée par tout moyen. Ces éléments seront appréciés par l'administration en fonction des obligations juridiques.

4. Délivrance d'un avis sur la démarche

a. Entité émettant un avis

Les décisions de demande de vérification (articles R4721-5 et suivants et R4722-1 et suivants du code du travail), et d'arrêt d'activité (art. R4731-1 et suivants) sont rédigées sous la forme administrative et adressées par courrier recommandé avec accusé de réception à l'employeur (. Un délai est indiqué sur ces décisions pour les exécuter (variable entre 8 jours minimum et sans délai maximum fixé par l'agent de contrôle). L'agent de contrôle établit un rapport adressé à sa hiérarchie dans lequel il sollicite l'application d'une amende administrative à l'encontre de l'employeur contrevenant. Le niveau régional de la structure administrative instruit la demande émanant de l'agent de contrôle.

b. Processus d'émission de l'avis

Les décisions de sanction sont notifiées au contrevenant par courrier recommandé avec accusé de réception. La décision est réputée notifiée dès lors que les services postaux ont été en capacité de délivrer la lettre ou de déposer une notification de mise à disposition de pli recommandé au bureau postal le plus proche. Dans ce cas à charge pour l'employeur d'aller chercher cette décision à la poste. Si il ne le fait pas, iles réputé être averti et devra quand même exécuter ce qui lui est demandé.

c. Parties à qui l'avis est émis ou a fourni une copie de l'avis

Les décisions administrative de l'inspection du travail, y compris de sanction **ne sont notifiées qu'à l'intéressé c'est-à-dire à l'employeur seul**. Pour les décisions de sanction pécuniaire, elle est également portée à la connaissance du Parquet) et à celles des représentants du personnel concernés (article L. 8115-2 du code du travail).

d. Délai pour l'émission d'un avis après inspection/enquête

Le traitement est variable en fonction des régions, il doit en général être fait rapidement, soit dans les deux mois au plus tard.

e. Affichage/publication d'un avis (exemples: affichage sur les lieux de travail à proximité des infractions citées, publication sur le site Web de l'inspection du travail)

Les décisions prises par l'administration du travail à l'encontre d'un employeur, ne font jamais l'objet d'aucune publication ou information publique.

5. Processus de vérification du respect des actions/remédiations requises

a. Inspections/enquêtes de suivi (exemples: en cas de violations graves ou de documentation/certification inadéquate)

Afin de vérifier que l'employeur s'est mis en conformité il lui est demandé de produire par écrit des éléments de prévue de la régularisation. Une inspection est généralement opérée afin de constater cette régularisation sans qu'un délai ne soit prévu par les textes.

b. Soumission confirmée de la documentation obligatoire/certification de conformité

Pour les situations d'infractions liées à une conformité d'une machine par exemple (article R4722-5 du code du travail) , il sera demandé à l'employeur de prouver la régularisation par la production d'un certificat de conformité délivré par un organisme privé de vérification certifié par le ministère du travail (art. 4722-29 du code du travail). Il pourra prouver par tout moyen qu'il a régularisé l'infraction qui a été constatée (production de factures de travaux, d'attestations d'organismes, de rapports d'analyses, carnets d'entretien). Il n'est rien d'indiqué de formel dans la règlementation outre les rapports exigés dans les demandes formels de contrôle que les agents peuvent ordonner (exemple: rapport de vérification des installations électriques des locaux de travail).

6. Processus de modification des délais et/ou des actions/remédiations requises:

a. Démonstration par le titulaire de l'obligation d'efforts de bonne foi pour se conformer aux délais et/ou aux mesures/mesures correctives requises

La bonne foi peut être évoquée par l'employeur quant au respect de ses obligations ou sa volonté de respecter ses obligations. Toutefois cela doit reposer sur des engagements écrits et des preuves matérielles et non de simples déclarations.

b. Accord pour donner plus de temps pour éliminer les dangers

L'employeur peut toujours demander à l'agent de contrôle un délai d'application. Il lui sera accordé de manière discrétionnaire en fonction de ce que l'employeur prendra comme engagement à respecter les demandes de l'inspection du travail.

Dans le cadre d'un recours à l'autorité hiérarchique habilitée (généralement le niveau régional), l'employeur peut solliciter un délai d'application des décisions prises par les agents de contrôle pour les mises en conformité qu'ils ordonnent. Il n'y a aucune obligation à lui accorder.

c. Accord pour modifier les actions/remédiations requises

L'autorité administrative supérieure peut accepter au vu des arguments avancés par l'employeur de revoir les demandes de l'agent de contrôle. Cela vaut par exemple sur les demandes formelles (mise en demeure), d'aménagement des locaux de travail (ex: installations sanitaires, escaliers), qui peuvent faire l'objet d'une adaptation en fonction des engagements pris par l'employeur.

d. Autres conditions de l'accord

L'employeur peut demander à l'agent de contrôle émetteur de la demande de revoir la décision lui imposant des modifications (exemple, aménagement de sanitaires, de locaux, mis en conformité). Il s'agit d'un recours gracieux que l'agent de contrôle n'est pas obligé d'accepter.

e. Temps: avant ou après refus/objection/appel

Les recours administratifs hiérarchiques contre les décisions des agents de contrôle de l'inspection du travail (mises en demeure, demandes de vérification, demande de mise en conformité) sont aménagés par la règlementation. Ils sont variables en fonction de ce que prévoit le code du travail pour un type de demande. Les recours sont toujours indiqués sur la décision. Généralement le recours de droit commun est de deux mois. L'employeur peut également saisir d'un recours judiciaire le tribunal administratif aussi dans un délai de 2 mois.

7. Actions et conséquences de l'omission par le titulaire de l'obligation de démontrer/certifier la conformité aux actions/mesures correctives requises

L'absence de justifications apportées par l'employeur quant à la mise en conformité avec les demandes entrainera soit des poursuites pénales constatées par l'agent de l'inspection du travail soit l'engagement d'une procédure de sanction administrative.

a. Des sanctions civiles/administratives accrues (exemples: imposition de sanctions supplémentaires avec multiplicateur quotidien pour chaque jour de violation continue)

Le fait pour l'employeur de ne pas se conformer aux mesures ordonnées par l'agent de contrôle afin de soustraire immédiatement un travailleur qui ne s'est pas retiré d'une situation de danger grave et imminent pour sa vie ou sa santé, ou à la décision d'arrêt de l'activité prise en cas d'exposition à un agent cancérigène, mutagène ou reprotoxique. D'autre part, l'employeur pourra faire l'objet de sanctions s'il ne se conforme pas à certaines demandes de vérifications, de mesures ou d'analyses prises par l'agent de contrôle. L'autorité régionale de l'inspection du travail pourra alors prononcer une amende d'un montant pouvant aller jusqu'à 10 000 euros par travailleur concerné.

Pour les infractions relatives aux installations sanitaires, à la restauration et à l'hébergement des travailleurs dans les entreprises et sur les chantiers de bâtiment et de génie civil.

L'autorité régionale peut prononcer une amende de 2 000 euros par travailleur concerné par le manquement. Le montant est porté à 4 000 euros en cas de réitération dans un délai d'un an à compter du jour de la notification de l'amende relative à un précédent manquement.

b. Renvoi au système judiciaire pour des poursuites pénales et des sanctions/peines

Les agents de l'inspection du travail constateront les infractions par voie de procès-verbaux qui seront transmis à l'autorité judiciaires (procureur de la république) qui décidera ou non de poursuivre les infractions constatées. Le tribunal décidera de la culpabilité et de l'application de sanctions.

8. Possibilité/droit de refuser/d'objecter/de faire appel de la démarche (constat de violation, actions requises/réparation et/ou imposition de sanctions/pénalités)

a. Processus d'exercice de l'opportunité/du droit

Les recours pouvant être formulés par l'employeur sont de deux ordres, **soit** administratif devant la hiérarchie supérieure sur les décisions de mise en conformité et/ou de vérification des équipements de travail. Il sera formulé par courrier libre (pas de formulaire) adressé en recommandé avec accusé de réception. **Soit** le recours contentieux est déposé devant le tribunal administratif par un avocat sous la forme d'un mémoire. Il est possible de formuler un recours contentieux après un recours hiérarchique en attaquant la décision de l'autorité régionale si elle n'a pas donné satisfaction.

Concernant les décisions de sanction pécuniaires, seul le recours devant la juridiction administrative est possible.

b. Parties qui ont l'opportunité/le droit (exemples: titulaire de droits, travailleurs/représentants des travailleurs)

Seul l'employeur peut exercer un recours quand une décision lui est défavorable. Aucun tiers n'est recevable (syndicat, représentants du personnel).

c. Délai pour exercer l'opportunité / droit

Les recours s'exercent dans le délai de droit commun fixé à deux mois. Les recours ne sont pas suspensifs, l'employeur est tenu jusqu'à une décision lui donnant éventuellement raison d'exécuter les décisions administratives.

d. Conséquence du défaut de rejet / d'objection / d'appel dans le délai imparti (exemples: la démarche devient définitive et sans appel)

L'absence de recours exercé dans les temps impartis n'a aucune conséquence. L'employeur reste tenu des demandes formulées par l'agent de contrôle. Les recours n'étant de toute manière pas suspensifs, la décision de demande est toujours applicable directement.

Processus judiciaire pour établir une démarche

9. Processus d'ouverture de la procédure

a. Transfert de dossier par les autorités administratives (exemples: inspecteurs du travail, inspections du travail)

Les agents de contrôle de l'inspection du travail française ont un rôle qui leur permet de constater des infractions pénales prévues au code du travail et de permettre l'engagement de poursuites judiciaires. Il s'agit d'une activité centrale de l'inspection du travail en France (art. L8113-7 du code du travail). Les infractions pénales constatées font l'objet d'un écrit appelé « procès-verbal ». La date de clôture marque le commencement du délai de prescription de l'action publique (qui permet d'engager les poursuites). Pour les infractions délictuelles la procédure doit être engagée dans un délai de 6 ans maximum et pour les infractions contraventionnelles (mineures) le délai est fixé par le code pénal à 1 an.

b. Norme de révision de l'avis administratif (exemples: si étayée par des preuves substantielles au dossier)

Les procédures initiées par les agents de l'inspection du travail, font l'objet d'une relecture interne destinée à vérifier que les faits constatés correspondent bien aux infractions relevées, et que les éléments de preuves sont suffisants (instruction DGT n° 11 du 11 septembre 2012). Ces éléments sont de toute nature autorisés par la loi.

Les constats de l'agent de l'inspection du travail font foi jusqu'à preuve du contraire (article L8113-7du code du travail). Ce qui leur confère une force probante renforcée mais pas irréfragable. L'employeur peut apporter la preuve contraire.

c. Action accélérée demandée par les autorités administratives pour éliminer un danger imminent (exemples: injonction temporaire, ordonnance d'interdiction temporaire, ordre d'arrêt des travaux)

En cas de danger grave et imminent pour les travailleurs les agents de l'inspection du travail, utilisent plus couramment les procédures administratives qui leur sont offertes par le code du travail (art L4731-1 du code du travail). Néanmoins, dans certains domaines, ils peuvent solliciter le tribunal civil (tribunal de grande instance) sous la forme accélérée des référés afin de solliciter l'arrêt de l'activité et l'adoption de mesures destinées à faire cesser le danger grave et imminent, sous astreintes (somme pécuniaires fixées par le tribunal – voir *supra*). Il s'agit d'un pouvoir propre de l'inspecteur du travail et aucune autre personne ne peut s'y substituer.

d. Droit d'action privée (exemples: travailleurs / représentants des travailleurs)

e. Circonstances entraînant la fin du droit d'action privée (exemples: lors d'une procédure judiciaire engagée par des autorités administratives)

Les représentants du personnel, les syndicats de travailleurs, et les victimes d'accident du travail, peuvent se porter partie-civiles à l'occasion des instances pénales initiées par l'inspection du travail. (Articles 418 à 426 du code de procédure pénale). En matière civile, en matière de référé, les syndicats et représentants du personnel peuvent intervenir librement à l'instance et faire valoir leurs demandes, en générale la réparation d'un préjudice subi (art. 325 du code de procédure civile).

f. Poursuites pénales (exemples: affaires renvoyées aux fins de poursuites par les autorités administratives ou portées directement par le procureur)

Les poursuites pénales sont engagées par le Procureur de la République qui reçoit l'ensemble des procès-verbaux que l'administration de l'inspection du travail lui adresse. Il dispose de l'opportunité des poursuites. **Il décide ainsi d'engager ou non une procédure à l'encontre de l'employeur** mis en cause par l'inspection du travail dans son procès-verbal.

En cas de plainte directe déposée par un travailleur, ou les représentants du personnel, le Procureur peut solliciter l'avis de l'inspection du travail sur le contenu de la plainte et par la suite engagé ou non des poursuites devant le tribunal compétent.

10. Processus préalables à l'audience: (exemples: notification et divulgation des témoins, divulgation d'autres éléments de preuve, dépôt de requêtes et de mémoires)

Les éléments de la procédure initiée par l'inspection du travail ne sont pas communicables par l'administration du travail. Seule l'autorité judiciaire lors de son enquête préalable à l'audience pénale communiquera à la personne mise en cause et aux parties civiles, les éléments dossier. Les services de Police réalisent généralement une enquête complémentaire à celle de l'inspection en particulier pour les infractions les plus graves (délits) et les accidents du travail mortels ou graves.

11. Preuve recevable

a. Témoignages et déclarations de témoins

Les déclarations des témoins sont présentes dans le dossier du procureur de la République. Lors de l'audience devant le tribunal, les juges déterminent librement qui ils entendront lors du procès. Généralement l'agent de l'inspection du travail est convoqué à l'audience en qualité de rédacteur du procès-verbal. Il sera interrogé sur les faits et apportera à la demande du tribunal les éclairages nécessaires à la compréhension du dossier. Le tribunal peut interroger les témoins et l'agent de l'inspection du travail, tout comme l'employeur. Les avocats de la défense et le représentant du Procureur peuvent également poser des questions.

b. Rapports d'experts en SST

Les services régionaux de l'inspection du travail disposent de l'expertise d'ingénieurs qui peuvent sur demande de l'agent de contrôle rendre un rapport technique sur les faits et/ou les éléments du dossier. Ce rapport pourra être joint à la procédure et valeur de constat (article L. 8123-4 du code du travail). Les ingénieurs de prévention des directions régionales lorsqu'ils assurent un appui technique aux agents de contrôle de l'inspection du travail dans leurs contrôles, enquêtes et missions, jouissent du droit d'entrée et du droit de prélèvement. Leurs constats peuvent être produits dans les actes et procédures des agents de contrôle. Ils peuvent se faire présenter les documents obligatoires détenus par l'employeur, lorsqu'ils concernent la santé, la sécurité et les conditions de travail.

c. Autres preuves (exemples: échantillons, photographies, vidéos, résultats d'essais, machines saisies, documents)

Les agents de l'inspection du travail peuvent produire à l'appui de leurs constats tous éléments utiles (documents, photos, attestations). En particulier les documents détenus par l'employeur, et rendus obligatoires par le code du travail (art. L8113-4 du code du travail). Les agents de contrôle de l'inspection du travail ont qualité, concurremment avec les officiers de police judiciaire pour procéder, aux fins d'analyse, à tous prélèvements portant sur les matières mises en œuvre et les produits distribués ou utilisés (L. 8113-3 du code du travail).

12. Délais de délivrance d'une décision judiciaire

a. Cas de transfert par les autorités administratives (exemples: au tribunal civil de première instance ou au tribunal pénal)

Il n'existe pas de délai pour les actions civiles. Pour les instances pénales, les délais de prescription des infractions doivent être respectés (cf. supra).

b. Les cas d'action accélérée visant à éliminer un danger imminent

Pas de délai prescrit. L'action doit être immédiate.

c. Cas d'exercice du droit privé d'action

Les victimes d'accidents du travail ou de maladies professionnelles peuvent engager des actions en responsabilité civile devant le Conseil des Prud'hommes (tribunal civil spécialisé en droit du travail) ou agir devant le tribunal pénal si une infraction a été relevée par l'Inspection du travail et que des poursuites sont engagées. La victime demandera la réparation des dommages physiques, matériels et moraux.

d. Cas de poursuites pénales

Les actions pénales doivent être transmises dans les délais de prescription de l'action publique à compter de la date des constats réalisés pas l'agent de l'inspection du travail (6 ans pour les délits et 1 an pour les contraventions).

13. Type de procédure et instance juridictionnelle

a. Administrative (exemples: échelons supérieurs du ministère du Travail, juge administratif, commission/commission d'examen administratif)

Les juridictions compétentes en matière de santé, sécurité au travail sont les suivantes:

Les juridictions pénales: elles sont saisies par le Procureur de La République, suite à une plainte directe d'une victime d'une infraction pénale ou suite à une affaire portée par l'inspection du travail.

Le tribunal de police pour les infractions mineures (amendes inférieures à 3750€), et le tribunal correctionnel pour les infractions punies d'une peine de prison pouvant aller jusqu'à 10 ans et les amendes à partir de 3750€. Les travailleurs victimes d'accidents et de maladies professionnelles peuvent demander des réparations au moment des procès.

Les juridictions administratives: le contentieux s'exerce contre les décisions de demandes de l'inspection du travail ou les décisions de sanctions pécuniaires.

C'est le tribunal administratif qui est compétent en 1er ressort, il doit être saisi dans les deux mois suivant la notification de la décision dont l'employeur est l'objet.Ces recours ne sont pas suspensifs. Les décisions de l'inspection du travail doivent être appliquées par les employeurs jusqu'à ce qu'une nouvelle décision soit prise ou que je juge annule la décision initiale.

b. Tribunal civil de première instance (exemples: tribunal de district, tribunal de première instance)

Les juridictions civiles: le conseil des prud'hommes (art. L1411-1 du code du travail), qui est la juridiction civile spécialisée en droit du travail. Les travailleurs peuvent saisir le Conseil pour demander des réparations suite à un manquement de leur employeur en matière de protection de la santé au travail (suite à un accident, une maladie, ou un dommage moral et/ou physique). Une faute de l'employeur doit être démontrée. Le conseil peut aussi être saisi pour obtenir des réparations suite à un accident du travail grave ou une maladie professionnelle grave ayant engagé des frais médicaux (hospitalisation, soins) pour lesquels le travailleur victime va demander des indemnités à son employeur. La sécurité sociale demandera aussi remboursement des frais à l'employeur qui a commis une faute.

c. Cour d'appel (exemples: tribunal de grande instance, tribunal civil ou pénal de deuxième instance/appel)

Les décisions de justice de première instance peuvent faire l'objet d'un appel devant la cour d'appel du ressort de la juridiction du fond (tribunal correctionnel ou tribunal de police) dans un délai d'un mois.

Il en va de même pour les juridictions civiles (conseil des Prud'hommes et Tribunal des affaires sociales). Pour les juridictions administratives, c'est la cour administrative d'appel qui est compétente.

d. Cour de travail

Le conseil des prud'hommes n'est pas compétent pour traiter des affaires de l'inspection du travail. Toutefois il intervient pour régler les litiges entre les travailleurs et les employeurs. En matière de santé et sécurité au travail, il sera saisi lorsqu'une faute de l'employeur pourra être démontrée quant à son obligation générale de protections de la santé et la sécurité physique et psychique de ses salariés.

14. Délais de procedure

a. Pour l'initiation

Les recours administratifs hiérarchiques et contentieux doivent s'exercer dans les deux mois suivant la notification de la décision à l'employeur.

L'autorité supérieure de l'inspection du travail (le niveau régional) dispose d'un délai de 4 mois pour rendre une nouvelle décision. Le tribunal administratif n'est contraint à aucun délai pour traiter une affaire.

Les Cours d'appels doivent être saisies par les parties non satisfaites du jugement de 1ere instance des tribunaux judicaires dans un délai d'un mois à compter de la signification du jugement sauf en matière de référé où le délai d'appel est de 15 jours.

b. Pour chaque étape du processus d'examen

Pas de délai prévu pour les procédures d'appel judiciaire ou de contentieux devant les Cours administratives.

c. Pour l'émission d'une décision

Pour les décisions relevant de l'administration, le délai est de 4 mois suivants le recours.

Pour les instances judiciaires, il n'existe pas de délai pour les tribunaux pour rendre leur décision.

15. Personnes qui peuvent faire appel
(exemples: titulaire de droits, travailleurs / représentants des travailleurs)

Les parties pour lesquelles la décision n'est pas satisfaisante sont fondées à former les recours ou des appels. Cela peut être l'employeur, le salarié, voir les représentants des travailleurs si ils sont intervenus dans une affaire.

16. Parties à la procédure
(exemples: inspecteurs du travail ou autres autorités administratives du travail, travailleurs / représentants des travailleurs, titulaire de droits)

Suite à un recours administratif ou contentieux contre une décision de l'inspection du travail par une des parties, les services de l'inspection du travail rédigent un mémoire en réponse au recours. Ce mémoire sera produit devant le tribunal. Dans le cas d'un recours administratif une instruction est menée par le 1er niveau d'inspection du travail, qui rendra un rapport à l'autorité supérieure chargée de rendre une nouvelle décision.

17. Charge de la preuve
(exemples: le gouvernement a la charge initiale de la preuve pour établir les violations, le titulaire de l'obligation a la charge de la preuve d'établir qu'il a agi de bonne foi)

L'ensemble des éléments matériels et preuves sont produits dans le cadre du recours. Le requérant peut demander à l'administration toutes les pièces utilisées dans le cadre du dossier. Il pourra à l'appui de son recours produire tous les éléments matériels (preuves tels que des constats, rapports techniques, expertises) pour appuyer son recours.

18. Norme et portée de l'examen des démarches
(exemples: examiner uniquement les conclusions de droit, confirmer si la violation est démontrée par une prépondérance de la preuve, confirmer si la violation est étayée par des preuves substantielles au dossier)

L'ensemble des éléments de fait et de droit peut être contesté par le requérant. Ainsi le requérant peut attaquer des éléments juridiques: sur la forme de l'acte de l'inspection du attaqué (erreur de forme de l'acte), mais également les éléments de légalité (cadre légal utilisé qui ne serait pas conforme à la situation). Il peut aussi attaquer les faits en considérant que l'Inspection du travail n'a pas apprécié correctement sa situation.

19. Ouverture de la procédure
(exemples: soumission d'un refus / opposition / appel, révision dirigée par une entité administrative)

Les recours administratifs sont formés devant l'autorité supérieure de l'inspection du travail au niveau régional.

Un simple courrier adressé en recommandé avec accusé de réception dans le délai de recours (2mois) est valable. Les recours contentieux sont formés devant la juridiction compétente dans le même délai de 2 mois maximum. En matière administrative, c'est le tribunal administratif géographiquement compétent qui connaît de l'instance. La Cour Administrative d'appel peut être saisie dans un délai de 2 mois suivant la notification du jugement. Il est nécessaire d'avoir recours à un avocat.

Pour la matière judiciaire les appels sont formés devant la Cour d'appel du ressort de la juridiction de 1er instance. Le délai d'appel est de 1 mois maximum suivant la signification (la réception) du jugement. Les éléments de fait et de droit peuvent être attaqué par la partie interjetant l'appel. En appel il est nécessaire d'avoir recours à un avocat.

20. Impact de l'appel sur la démarche

a. Suspension de la sanction / recouvrement des pénalités

Les recours ne sont jamais suspensifs en matière administrative. Les sanctions éventuellement prononcées sont applicables.

En matière civile ou pénale, les appels sont suspensifs. Les condamnations ne seront pas applicables tant que la juridiction d'appel n'a pas rendu une décision éventuellement contraire à celle de la première instance.

b. Respect des délais pour prendre les mesures correctives requises

En matière civile, administrative ou pénale, les juridictions n'assortissent pas l'exécution des jugements d'un délai. Sauf exception suite à une action en référé où le juge peut ordonner l'exécution de mesures dans un délai qu'il fixe discrétionnairement, avec astreinte, c'est-à-dire une somme à payer tant que l'obligation de faire, n'a pas été levée. Les obligations sont maintenues pour l'employeur.

c. Suspension de la démarche

Comme indiqué les recours administratifs n'ont pas d'impacts sur les actions menées et les obligations qui end écoulent pour l'employeur. Seules les condamnations civiles ou pénales sont « suspendues » en cas d'appel.

d. Ordonnance de redressement temporaire ou d'ordonnance d'interdiction

N'existe pas en matière pénale et administrative. N'existe qu'en matière civile

Il est possible d'obtenir l'exécution du jugement avant que celui-ci ne soit devenu définitif. Si l'exécution provisoire est prononcée, la décision est exécutée immédiatement, sans attendre l'expiration des délais de recours.

L'exécution provisoire peut porter sur tout ou partie de la décision. L'exécution provisoire est prononcée en même temps que le jugement.

Il existe des cas dans lesquels l'exécution provisoire est accordée sans que les parties aient à en faire la demande. Il en va ainsi notamment pour l'exécution:

- des ordonnances de référé,
- des ordonnances du juge de la mise en état accordant au créancier une provision (exemple: si le juge demande au débiteur de rembourser une partie de sa dette).

Lorsque l'exécution provisoire n'est ni interdite, ni de plein droit, elle peut être demandée: soit par les parties, soit par le juge, qui l'ordonne d'office s'il l'estime nécessaire et compatible avec la nature de l'affaire.

Le tribunal peut exiger que le demandeur verse une garantie. Elle vise à couvrir d'éventuelles restitutions ou réparations au profit de la partie perdante si la justice (le juge d'appel, par exemple) revenait sur la décision exécutée provisoirement.

Il s'agit le plus souvent d'une somme d'argent.

21. Décision de l'organe juridictionnel

a. Contenu et forme de la décision (exemples: sanction/pénalité, actions requises/ordre de correction)

La nouvelle décision prise prend la même forme que la décision initiale. Elle est motivée en droit et en fait et vient ou réformer la décision contestée ou la confirmer.

Elle peut soit alléger ou annule les sanctions prises, soit les alourdir.

b. Délivrance-notification de décision

La décision prise suite à un recours prend les mêmes voies de notification que la décision originale. Elle est notifiée aux parties concernées en lettre recommandée avec accusé de réception et applicable dès la notification effective. Il n'existe pas de formulaire, ou de forme prescrite. La notification d'une décision par mail n'est pas autorisée.

Il en va de même pour les actes judiciaires qui sont notifiées de manière très formelle. Les parties reçoivent les décisions judiciaires en main propres par la voie d'un huissier de justice ou à défaut si la remise n'a aps été possible, elles doivent venir en personne ou par leur avocat chercher ces décisions dans les bureaux de l'huissier.

Processus d'appel pour contester une décision

22. Appel de la décision

a. Délais pour introduire un appel

Le délai pour interjeter appel d'un jugement du tribunal administratif est de deux mois à compter de la notification du jugement. Le délai est d'un mois pour les décisions judiciaires.

b. Personnes qui peuvent faire appel d'une décision (exemples: titulaire de droits, représentants des travailleurs/travailleurs, inspecteur du travail ou autres autorités administratives)

Les parties au procès peuvent faire appel si elle a succombé à la cause.

En matière pénale l'employeur condamné peut faire appel, ou les services du procureur si le tribunal n'a pas condamné l'employeur. L'inspection du travail simple intervenant ou témoin n'a pas la possibilité de faire appel directement.

En matière civile, la partie perdante (employeur ou salarié) peut faire appel.

En matière de contentieux administratif, l'employeur ou le représentant de l'Etat (qui représente l'administration de l'inspection du travail, généralement par l'intermédiaire d'un avocat), peut faire appel en cas de non satisfaction.

c. Norme et portée de l'examen (exemples: examiner uniquement les questions de droit ou abus de pouvoir discrétionnaire)

L'appel porte sur l'ensemble des éléments de l'affaire, en fait et en droit.

d. Nombre et niveaux d'appel (exemples: cour d'appel)

Il n'existe qu'un niveau d'appel, il s'agit de la Cour d'appel administrative pour le contentieux administratif ou la Cour d'appel pour les affaires civiles et pénales. Pour contester un arrêt de cour d'appel, il convient de se pourvoir en cassation. Ce recours portera uniquement sur des moyens de droit. Il existe un niveau supérieur à l'appel, qui est dénommé « cassation » en doit français et qui la seule voie de recours éventuelle suite à une décision d'appel défavorable. La Cour de Cassation (ou le Conseil d'Etat en matière administrative) ne se prononcent que sur des aspects de droit et non de faits.

e. Impact de l'appel sur la décision (exemples: suspension de la sanction/du recouvrement des pénalités, suspension des délais pour prendre les mesures requises/mesures correctives)

L'appel en droit administratif n'est pas suspensif contrairement à la procédure judiciaire. Sauf demande d'exécution provisoire qui intervient de manière très limitée en matière civile uniquement, et jamais en matière pénale.

f. Délais pour rendre la décision

Il n'existe pas de délai en droit français. Les juridictions décident souverainement du délai dans lequel elles rendent leurs décisions.

Exécution de la decision finale

23. Processus d'exécution d'une décision finale

a. Imposition d'une sanction/peine (exemples: fermeture de l'entreprise, retrait des licences, suspension de l'activité de l'entreprise)

Les peines prononcées par les juridictions de l'ordre judiciaires sont des sanctions pénales ou civiles. Au pénal des peines complémentaires peuvent être prononcées par le tribunal, il s'agit au principal d'interdiction de gérer une entreprise, l'interdiction d'exercer une profession, l'affichage de la décision de justice ou sa publication dans la presse, voir la fermeture de l'entreprise.

b. Imposition d'une sanction (exemples: fermeture de l'entreprise, retrait des licences, suspension de l'activité de l'entreprise)

Les amendes prononcées sont recouvrées par l'administration fiscale qui délivre un titre de paiement ou font l'objet d'une décision d'exécution prononcée par le juge de l'exécution. Un huissier de justice sera désigné pour recouvrer la sanction pécuniaire. En cas de non-paiement, il pourra être procédé à des saisies sur les comptes bancaires de la société et/ou de son représentant légal, voir à une saisie des biens immobiliers.

Il est à noter que suite à une verbalisation, l'inspection du travail peut avec l'accord du procureur de la République mener elle-même une procédure dite de « transaction » avec l'employeur fautif. Les conditions sont:

- La reconnaissance de l'infraction par son auteur ;
- La mise à la charge de l'auteur d'une amende transactionnelle, et, s'il y a lieu,
- l'exécution d'obligations en vue de faire cesser l'infraction, d'éviter son renouvellement ou de remettre en conformité les situations de travail ;
- la fin des poursuites pénales.

Cette procédure est circonscrite selon deux critères:

- ▶ Critère de moindre gravité de la peine encourue: elle concerne les infractions constituant une contravention ou un délit puni d'une peine d'emprisonnement de moins d'un an de prison.
- ▶ Critère thématique: sont ciblées certaines parties du code du travail.

La fiche DGT n° 2016-04 relative au champ d'application de la transaction pénale détaille les infractions pour lesquelles une transaction est possible.

Le Procureur homologue les conventions de transaction, ou décide de poursuivre pénalement.

c. Vérification des actions requises/ remédiation (exemples: inspections de suivi / enquête)

Les services de l'inspection ne sont pas chargés de l'exécution des décisions de justice. Cela appartient en matière pénale au procureur de la République. Toutefois, ils pourront procéder à de nouveaux contrôles et dans la situation où la même infraction est relevée, une nouvelle action judiciaire pourra être entreprise, et la situation de récidive sera constatée.

En matière civile c'est la partie qui gagne le procès qui sera chargée de l'exécution et devra recourir à un Huissier de Justice pour que sommes soient récupérées.

En matière administrative, c'est l'administration fiscale qui sera saisie pour récupérer les sommes éventuelles demandées, si l'administration gagne ou un huissier de justice si c'est l'employeur qui a gain de cause.

Seule la procédure de transaction pénale dépend du contrôle de l'inspection du travail.

La convention de transaction signée entre l'inspection du travail et l'employeur fautif peut prévoir des obligations ces dispositions doivent répondre à trois critères incontournables (article L. 8114-5 du code du travail:

- ▶ L'obligation fixée doit être précise et vérifiable.
- ▶ L'obligation doit être prévue par un texte,
- ▶ La mise en œuvre de l'obligation relève exclusivement de l'employeur.

L'inspection du travail vérifiera que les obligations et engagements sont respectés. Dans le cas contraire, le Procureur sera saisi et des poursuites pénales engagées.

d. Emprisonnement

Le code du travail ne prévoit pas de peine d'emprisonnement pour les infractions relatives à la santé, la sécurité, l'hygiène et les conditions de travail. Toutefois, les tribunaux peuvent retenir certains délits relavant du droit pénal général. Il s'agit par exemple de l'homicide involontaire (article 226-1 du code pénal puni d'une peine de prison de 3 ans et 45000€ d'amende) qui résultera d'un manquement grave et du défaut d'application d'une règle de sécurité par l'employeur et le harcèlement moral qui est puni de deux ans d'emprisonnement et de 30 000 € d'amende (article 222-33-2 du code pénal). Elles sont rarement prononcées par les tribunaux, sauf en cas de situation particulièrement grave ayant entrainé la mort. Les peines d'emprisonnement sont en général accompagnées du sursis.

24. Non-respect par le titulaire de l'obligation de se conformer à la décision finale

a. Pénalité pour défaut de paiement de l'amende (exemples: intérêts évalués, ajout de charges en souffrance, renvoi au recouvrement de créances, renvoi au tribunal pénal de première instance)

L'absence de paiement d'une peine, entraine des mesures de saisie (cf. *supra*). Le non-paiement d'une amende expose le contrevenant à des poursuites pénales.

b. Pénalité pour défaut de prendre les mesures correctives requises (exemples: pénalités quotidiennes, amendes supplémentaires, incarcération)

Le non-paiement des amendes prononcées peut aboutir à de nouvelles poursuites qui pourront mener à de nouvelles sanctions (plus lourdes) ou à des mesures de contraintes, telles que le paiement sous astreintes, des majorations voir dans les cas les plus graves à des peines de prison.

Pour les référés civils, lorsque l'employeur est condamné à prendre des mesures particulières, sous astreinte (somme d'argent), l'inspection du travail vérifiera la bonne exécution par l'employeur de l'ordre du tribunal. Si l'employeur ne le respecte pas, l'inspection du travail pourra saisir une nouvelle fois le tribunal afin de demander que les sommes soient payées au bénéfice du Trésor Public.

▶ Appendix III. Study of occupational safety and health enforcement procedures in Great Britain (United Kingdom)

▶ **Author: Mr Kevin Myers**

Introductory Background

1. The Health and Safety Executive (HSE) is a statutory body established by the Health and Safety at Work etc Act 1974 (HSWA). It is an Executive Non Departmental Public Body (NDPB) of the Department for Work and Pensions (DWP) and the respective roles and responsibilities of the DWP and HSE are set out in a Framework Document.

2. The DWP Secretary of State (SoS) has principal responsibility for HSE and one of his/her junior Ministers accounts for HSE's business in Parliament, including its use of resources and the policy framework within which HSE operates. (Although HSE's functions can and do extend beyond the responsibilities of the DWP SOS and, in these circumstances, administrative arrangements have been made for oversight and accountability). The SOS's powers are to:

- ▶ Approve HSE proposals for health and safety regulations, with or without modifications, before making them and laying them before Parliament:
- ▶ Make health and safety regulations independently of HSE proposals, having consulted HSE and other relevant bodies (this has never happened);
- ▶ Give or withhold consent to Approved Codes of Practice, which HSE proposes to approve and issue:
- ▶ Direct HSE in relation to its functions and in the interests of safety (a power that has never been exercised formally). However this power cannot be used for:
  - An intervention in any particular enforcement case.
  - Conferring new functions on HSE.

3. Although HSE has a degree of independence within these arrangements, as an NDPB it is expected to comply with various cross Government policies (eg Finance, HR, Procurement) and some more narrowly focussed such as policies on Regulation.

4. Within the Framework Document (between DWP and HSE described in para 1 above) the **HSE Board** is responsible for the Governance of HSE and accountable to the relevant Ministers for the administration of the 1974 Act.

5. HSE has a number of statutory functions set out in the 1974 Act. The main ones are to:

- ▶ Propose and set necessary standards for health and safety performance, including submitting proposals to the relevant SoS for health and safety regulations and codes of practice;
- ▶ Secure compliance with these standards, including making appropriate arrangements for enforcement;
- ▶ Make such arrangements as it considers appropriate for the carrying out of research and the publication of the results of research and encouraging research by others;

- Make such arrangements as it considers appropriate for the provision of an information and advisory service, ensuring relevant groups are kept informed of and adequately advised on matters related to health and safety; and
- Provide a Minister of the Crown on request with information and expert advice.

6. The Board sets HSE's long-term direction, strategy and objectives within the policy framework set by the responsible Minister. The HSW Act states that HSE Board cannot have a role in enforcement in individual cases. The Chief Executive of HSE, supported by the (executive) Management Board, is responsible for the delivery of the objectives and day-to-day management of HSE.

7. In the context of this study, the HSE Board has established an Enforcement Policy Statement for HSE (and other OSH regulators listed in para 6 below). However the HSE Board has no role in enforcement in individual cases (indeed are prohibited in the HSW Act from so doing).

8. Not all regulatory functions under the HSW Act are discharged by HSE.

- HSE is responsible for regulating higher risk sectors such as construction, agriculture, general manufacturing, engineering, food and drink, quarries, education, entertainment, health services, local and central government and domestic gas safety;
- Local Authorities (LAs - some 460 of them) are responsible for the regulation of OSH in predominantly lower risk sectors such as retailing, wholesale distribution, warehousing, hotel and catering premises, offices and the (some of the) consumer and leisure industries;
- The Office for Nuclear Regulation (ONR) regulates OSH (as well as more sector-specific legislation) in the Nuclear Industry. It is an NDPB accountable primarily to DWP (like HSE). It also has lines of accountability to the Department for Business, Energy and Industrial Strategy;
- The Maritime and Coastguard Agency regulates OSH in the maritime and fishing industries. It is an NDPB reporting to the Transport Minister in the Department for Transport;
- The Office for Rail and Road Regulation (ORR) regulates OSH in the railway industry. It is an NDPB reporting to the Transport Minister in the Department for Transport.

9. All these other Regulators are however expected to follow and apply the OSH enforcement policy framework as set by the HSE Board – in respect of matters covered by the HSW Act – however they also have regulatory functions under other legislation, for which they are not accountable to the HSE Board.

Initiating Formal Action—triggered by administrative finding of or allegation to judicial authorities of violation

1. Types of Formal Actions

The primary processes involved in Great Britain are:

a. Administrative (triggered by administrative finding of violation)

- Administrative I – these relate only to industrial sectors and/or processes which are subject to a "Permissioning" or Licensing regime. Please see Annex I for further information on what these terms mean in GB legislation. Under such regimes HSE can decide not to accept a safety case (or safety report), not to issue a license or to revoke a license once issued. This means that the applicant would not be able proceed with the planned activity.
- Admininstrative II – HSE Inspectors are empowered to issue enforcement notices which can either: stop work immediately (or after a period of time in circumstances where processes need to be closed down safely) – a Prohibition Notice; or an Improvement Notice which requires specific action to be taken to improve risk controls in a time scale set by the Inspector in the Notice.

b. Criminal (triggered by administrative finding of or allegation to judicial authorities of violation)

- Criminal – HSE Inspectors are prosecutors in respect of OSH matters and initiate formal legal proceedings for breaches of OSH legislation in England and Wales. Such proceedings can be heard in a Magistrates Court (cases heard by lay magistrates or a (legally qualified District Judge (formerly called Stipendiary Magistrates) or a Crown Court (cases heard by (legally qualified) Judges). Although the HSE Inspector initiates the prosecution, s/he cannot present the case in a Crown Court. Only Barristers can represent parties in the Crown Court. Additionally, Scotland has a separate legal system and prosecutions there are taken by the Procurator Fiscal (PF) – although HSE/LA Inspectors carry out the investigations and prepare the report for consideration of prosecution by the PF.
- In work-related fatal incidents there is liaison with the Police to consider whether the circumstances merit consideration of manslaughter or corporate manslaughter (culpable homicide and corporate homicide in Scotland). This liaison operates under the provisions of a "Work-related death protocol". See: http://www.hse.gov.uk/enforce/wrdp/

c. Other

- HSE introduced a process called "Fee for Intervention" (FFI) in 2012. In this, if an HSE inspector visits a workplace and find that the duty holder is in **material breach** of OSH law, that duty holder will have to pay for the time it takes HSE to identify what is wrong and to get things put right. It is therefore a cost recovery scheme - an OSH equivalent of "polluter pays" Duty holders who don't break the law are not required to pay anything. Further information may be found at Annex II. In Policy terms this is not seen as a formal action of the type envisaged in this report – however it may be perceived as such by those require to pay the FFI amount – or indeed by external observers of the system.

2. Criteria for determining what Formal Action should be taken

a. Type of violation or alleged violation (examples: willful, repeated, failure to take required actions/ remediation, criminal)

b. Degree of violation or alleged violation (examples: minor, serious, imminent danger)

These are set out in three key Documents:

- An Enforcement Policy Statement (EPS) -– which sets out the general principles and approach which HSE and LAs are expected to follow in deciding action – ranging from oral advice, through formal written advice, enforcement notices through to prosecution. It was originally agreed by the HSE Board at HSE's initiative. But the requirement has subsequently been legally required for all GB regulators under the Legislative and Regulatory Reform Act 2006. It was further amended in response to the Government's Regulators Code 2014. All LA and HSE staff who take enforcement decisions are required to follow HSE's Enforcement Policy Statement. The EPS is an open document available on the HSE website. See: http://www.hse.gov.uk/pubns/hse41.pdf.
- An Enforcement Management Model (EMM) - this gives HSE (and LA) inspectors guidance to help them decide if they should take enforcement action and, if so, what sort of enforcement action to take. The EMM was produced to complement the original EPS. It remains an HSE initiative and not a requirement of the Legislative and Regulatory Reform Act 2006 or Regulators Code 2014. It is a guide, not a strict set of rules that inspectors have to follow, as they need to exercise discretion to take account of the particular facts and circumstances as presented. It does however support consistency of decision-making and provides transparency to stakeholders and duty holders. It is a publicly available document. See: http://www.hse.gov.uk/enforce/emm.pdf.

- HSE (and LA) Inspectors, in making decisions concerning prosecutions, are also required to follow the Code for Crown Prosecutors (a public document, issued by the Director of Public Prosecutions) that sets out the general principles Crown Prosecutors should follow when they make decisions on cases. They need to apply two tests - *Is there enough evidence against the defendant?* (ie is the evidence to be used in court reliable and credible, and is there enough evidence to provide a "realistic prospect of conviction") and *Is it in the public interest to bring the case to court?* A prosecution will usually take place unless the prosecutor is sure that the public interest factors tending against prosecution outweigh those tending in favour). See: https://www.cps.gov.uk/publications/code_for_crown_prosecutors/introduction.html.

3. Form and content of notice of Formal Action

a. Description of violation (examples: summary of factual findings and supporting evidence)

b. Identification of legal provisions violated (examples: citation to law or regulation violated, citation to general duty requirement(s))

c. Gravity of violation (examples: minor, serious, imminent danger)

d. Degree of violation (examples: willful, repeated)

e. Required actions/remediation (examples: stop work, remove workers from danger area, take dangerous machine out of usage, eliminate hazard)

f. Imposition or proposed imposition of sanctions/penalties (examples: monetary penalties, revocation of license or permits, removal from approved list for government contracts)

g. Mitigating or aggravating factors for calculating sanctions/penalties (examples: number of violations, number of workers exposed, good faith actions by duty holder, size of business, history of violations)

h. Information about right/opportunity to deny/object/appeal finding of violation, required actions/remediation, and/or imposition of sanctions and process for exercising right/opportunity

i. Timeframes/deadlines for taking required actions/remediation, payment of sanctions/penalties, and exercising right/opportunity to deny/object/appeal

j. Required documentation/ certification of compliance with required actions/remediation

Permissioning/Licensing Regimes

There are several of these and, whilst there are subtle differences between them, their characteristics fall into two broad camps of Safety Cases and Licensing regimes.

Safety Cases regimes generally, for new installations, cover several phases from advance notification of intention to operate, through a more detailed "design" safety case, to an operational safety case. This process is intended to establish a dialogue between the duty holder and HSE so that there are no surprises and the regulator can ensure effective control and management of risk is "designed" in to the technical and operational aspects of the installation. Although HSE can refuse to accept a safety case (offshore) or prohibit use (onshore chemicals) this rarely happens because of the iterative process involved. If HSE refuses to accept a safety case, the enterprise in question would not have permission to operate.

A revised safety case is required every 5 years – or earlier if significant changes are made to the installation or its *modus operandi*. Once again, although HSE staff have powers to refuse the safety case (offshore) or to prohibit the installation from operating (onshore chemicals), these powers are rarely required to be exercised. If there is a need to "force" an issue by HSE, it would be more likely to use the general enforcement notice powers in the primary Act (see next section).

Licenses covers two types on situation. Firstly to activities - such as those involving asbestos (invariably removal because new use of asbestos is otherwise banned), use of genetically modified organisms or explosives. Secondly to the approval for use of particular chemicals or pesticides. It is assumed that, for the purpose of this study, the interest is primarily with the former category.

Duty holders wishing a license will apply to HSE. An assessment will be made of their competence and arrangements to carry out the proposed work and a license will only be issued once HSE is satisfied with these. The license will be valid for a number of years and may include a requirement to notify HSE of individual work activities so that these can be selectively monitored to assess performance. Licenses can be revoked if HSE forms an opinion that the dutyholder is not complying with the terms of the license or not managing the risk involved effectively.

Enforcement Notices

Items (f) and (g) opposite, are not relevant to enforcement notices in GB – although some of the considerations referenced at (g) are embedded in the EMM.

Before serving a notice an inspector should be of an (considered) opinion, based on reasonable grounds, that the notice is justified. Such a decision will follow the principles and processes set out in the EPS and EMM. Inspectors are not required to collect and present evidence to the same degree as would be the case for criminal proceedings. However, they are required to ensure that, before issuing a notice, the information/evidence available (or potentially available) will be strong enough to support the notice if the duty holder appeals.

The wording of any notice is required to be sufficiently clear as to: the location/situation/circumstances to which it applies, the relevant legislation that is considered in breach, the remedial action require to remedy the breach (this is normally set out in a schedule to the notice), and the date for compliance.

In serving any Notice an Inspector is required to advise the recipient of their right to appeal against it or its terms. This advice is also included in the body of the notice itself.

HSE policy is that the suggested methods for compliance contained in the notice schedule should be unambiguous but still allow that there may be other methods of achieving compliance and/or managing or controlling the risks.

In respect of issue (j) policy is that the dutyholder should be able to tell when they have achieved the standard required for compliance rather than the emphasis being placed on the HSE inspector to approve the steps taken. Inspectors are not formally required to check that the notice has been complied with, but administratively they need to "sign off" the notice so will require evidence of this through personal observation or assessment or securing evidence of such from the dutyholder.

There are no administrative or civil sanctions involved in a failure to comply with a notice. Such a failure is, in itself, a criminal offence (Section 33(1)(e) of HSWA) with no caveats about the nature of the issue addressed in the Notice. The issue will always be a serious one – otherwise a Notice would not have been issued in the first place. It is HSE policy that where this occurs a prosecution should normally follow.

HSE issues approximately 9000 notices /year, of these 0.5% are appealed, and approx. 20% of appeals are successful.

Criminal Proceedings

Items (e), (i) and (j) opposite, are not relevant to these in GB.

In England and Wales, such proceedings are commenced by the inspector laying a legal document termed an "information" in the magistrates' court. The "information" is normally accompanied by a summons, which is intended to secure the accused's attendance at court. As well initiating proceedings, the "information" informs the accused, in clear and unambiguous language, of the alleged offence(s) so that an accused can consider how s/he intends to plead and, if appropriate, commence preparation of their defence or mitigation.

Information:

- identify the defendant by giving full details of name and address.
- describe the offence in ordinary language, avoiding so far as possible the use of technical terms, (although it need not necessarily state all elements of the offence);
- give sufficient detail of the alleged offence to amount to "reasonable information" of the nature of the allegation; and
- refer to the statutory provision which creates the offence.

Prosecutors (and defendants) have the opportunity to comment on mitigating and aggravating factors prior to sentence. Prosecutors **may** make a proposal that a case should be referred to the Crown Court, but it is not custom and practice for the prosecuting authority to make explicit proposals as to appropriate sentence. However in its role of supporting and advising the court it will be drawing the courts attention to the relevant guidance. This has recently been revised and made more prescriptive (see answer to Q12 below).

It might be helpful to give a feel for the volumes involved in these regulatory processes. In the operational year 2016/17, HSE (including through the PF in Scotland in respect of prosecutions there):

- Completed 20,000 proactive inspections of individual workplaces
- Commenced investigation of 4,500 incidents or accidents or cases of ill health
- Investigated 4150 matters of concern raised by workers or others about OSH conditions
- Issued 9495 Enforcement Notices
- Completed 593 prosecution cases (securing convictions in 554 - 93%). This resulted in total fines of £69.6M

4. Issuance of notice of Formal Action

a. Entity issuing notices (for example, issued by labour inspector, labour inspectorate authorities, other administrative government authority)

b. Process for issuing notice (for example: in-person, by mail, electronically)

c. Mechanism for documenting receipt of notice

d. Parties to whom notice is issued or provided a copy of the notice (employer or duty holder, workers/ worker representatives, other interested parties, other relevant government agencies)

e. Timeframe for issuing notice after inspection/investigation

f. Posting/publication of notice (examples: posting at workplaces near cited violations, publication on labour inspectorate website)

Section 46 HSWA details ways by which a notice may be served. However there will be other ways to achieve service outside the scope of this as the section is permissive not prescriptive. Section 46 provides:

- for service by delivery or leaving at the recipient's proper address;
- for service on the company secretary or clerk of the body corporate or service on a partnership, by handing to a partner or person controlling or managing the partnership;
- that the address for service is the registered or principal office of the company or the principal office of the partnership;
- that the proper address of any person shall be his/her last known address. This does not apply to companies or partnerships;
- for service on the owner or occupier of premises.

Enforcement Notices are issued by the Inspector who carried out the inspection or investigation that led to the decision to issue the Notice.

Given their nature, Prohibition Notices tend to be delivered by hand, immediately on site (although where a Notice is served on an employee then Inspectors are required to also let a senior officer of the company know that a notice has been served).

Improvement Notices may also be issued on site, but are normally sent by email or post with a day or so.

If a notice is served by email it will normally be to a director of the company or an appropriate senior manager, with a request for a personal acknowledgement of receipt. If such an acknowledgement is not received the notice will be served either in person or (more normally) by post.

In GB law (Section 7 of the Interpretation Act 1978) any document served by post (properly addressed, prepaid and posted) will be deemed to have been served unless proved otherwise.

Notices are usually issued to the person in control of the risk or responsible for the deficiency the notice seeks to address. This can be an employer or another dutyholder – such as the owner or occupier.

A copy of any notice should normally be provided to employees or their representatives in accordance with section 28(8)(b) of HSWA.

There are no legal requirements requiring HSE to make Notices publicly available. However HSE's policy is to place all enforcement notices issued on a public register. To account for the appeals process, and quality assurance, the posting may be several weeks after the notice was issued (and indeed complied with). HSE allows up to 9 weeks after a notice is issued before it is posted. The register may be accessed at: http://www.hse.gov.uk/notices/.

5. Process for verifying compliance with required actions/remediation

a. **Follow-up inspections/investigation** (examples: in cases of serious violations or inadequate documentation/certification)

b. **Confirmed submission of mandatory documentation/certification of compliance**

c. **Other**

In GB law the responsibility for compliance with any Notice, and satisfying themselves of the fact, lies with the person on whom it is served. The policy is that the suggested methods for compliance contained in a notice schedule should be unambiguous but still allow that there may be other methods of compliance. The dutyholder should be able to tell when they have achieved the standard required for compliance rather than the emphasis being placed on the HSE inspector to approve the steps taken.

Verification of the fact of compliance by the Inspector will vary according to the particular circumstances. In respect of serious contraventions and/or a poor history of compliance (or attitude, or an inspector's opinion of the duty holders competence or commitment) this may well involve a follow up visit by the Inspector. However this is not necessary in all cases and the Inspector may accept compliance through evidence provided by the duty holder (eg provision of a risk assessment or method statement, photographic evidence of the site).

6. Processes for modifying timeframes and/or required actions/remediation

a. **Demonstration by duty holder of good-faith effort to comply with timeframes and/or required actions/remediation**

b. **Agreement to provide additional time to eliminate hazards**

c. **Agreement to modify required actions/remediation**

d. **Other agreement terms**

e. **Timing: before or after denial/objection/appeal**

Prohibition Notices are intended to address shortcomings involving a risk of serious personal injury. As such the activity or process is prohibited with immediate effect until the risk is eliminated or effectively managed and controlled. However in some circumstances (eg continuous process plant) stopping the activity immediately may create new and more significant risks. In these circumstances a deferred Prohibition Notice can be issued to allow a controlled shut down before the Notice takes effect.

HSE policy requires Inspectors to discuss the contents of a Notice (including the date to be given for compliance in respect of Improvement Notices), with the dutyholder with a view to resolving, if possible, any points of difficulty before the notice is issued. In respect of the time period for compliance, factors to be taken into consideration may include matters such as the time required to obtain new plant or equipment or prior knowledge of the breach. In all cases (other than Immediate PNs) the time period will be more than 21 days (the time period within which any appeal may be made by the dutyholder).

The period for compliance for an improvement notice or a deferred prohibition notice may be extended, or further extended, at any time when an appeal is not pending. So long as there are compelling reasons, and the request is made within the period for compliance set in the notice, Inspectors will not be unsympathetic to such a request. However, duty holders who fail to comply with a notice within the compliance period and do not seek an extension within that period would normally be considered for prosecution for failing to comply with the notice.

7. Actions and consequences for duty holder failure to demonstrate/certify compliance with required actions/remediation

a. Increased civil/administrative penalties (examples: imposition of additional penalties with daily multiplier for each day violation continues)

b. Referral to judicial system for criminal prosecution and sanctions/penalties

Where there is non-compliance with a notice HSE policy is that prosecution should normally follow for non-compliance. Such failure is, in itself, a specific offence under the HSW Act (S33(g)).

8. Opportunity/right to deny/object/appeal Formal Action – (finding of violation, required actions/remediation and/or imposition of sanctions/penalties)

a. Process for exercising opportunity/right

b. Parties who have opportunity/right (examples: duty holder, workers/worker representatives)

c. Timeframe for exercising opportunity/right

d. Consequence of failure to deny/object/appeal within timeframe (examples: Formal Action becomes final and not subject to appeal)

The HSW Act provides for appeals against Improvement or Prohibition Notices. In the case of the former, the Notice is suspended until the Appeal process is completed. Appeals are to Employment Tribunals (a type of "Labour Court", which normally comprise a legally qualified chairman (Employment Judge) and two other members, one representing employers, the other, employees (although a Tribunal hearing can proceed with just the chairman and one member if the parties consent. In that situation the chairman will have the casting vote).

Appeals must be lodged with 21 days of the Notice being issued. They can only be made by the 'person' who has been served the Notice in question.

Appeals outside the 21 days are not normally accepted by Employment Tribunals.

No sanctions or penalties can be levied in respect of any violation other than through the formal Court system (Magistrates or Crown Court) in GB. The normal checks and balances apply to such processes eg presumption of innocence until proven guilty, right to appeal against conviction and/or sentence.

Judicial process for establishing Formal Action

9. Process for initiating proceedings

a. Transfer of case by administrative authorities (examples: labour inspectors, labour inspectorates)

- **timeframes/deadlines for transfer**
- **standard of review of administrative notice** (examples: if supported by substantial evidence on the record)

b. Expedited action sought by administrative authorities to eliminate imminent danger (examples: temporary injunction, temporary restraining order, stop-work order)

c. Right of private action (examples: workers/worker representatives)

- **circumstances causing termination of right of private action** (examples: when judicial proceedings initiated by administrative authorities)

d. Criminal prosecution (examples: cases referred for prosecution by administrative authorities or brought directly by prosecutor)

(a) and (d) - HSE is a prosecuting Authority in its own right – so, other than in Scotland where legal proceedings can only be initiated by the Procurator Fiscal, cases are managed and overseen by it. It does use external, private, law firms to manage some cases on its behalf, but the responsibility for the conduct of the proceedings rests with HSE.

Cases are approved by HSE Inspectors – but some (serious, complex or sensitive) are subject to independent legal overview by HSE's Solicitor's team.

As explained in the introduction, Politicians and members of the HSE Board cannot intervene in the decision-making in relation to individual enforcement actions.

(b) in such circumstances Prohibition Notices are used (see above). These are issued by HSE Inspectors without recourse to judicial procedures.

(c) no such powers for private action are provided for through primary or secondary legislation. It is theoretically possible to use common law principles for this purpose, but there is no history of this actually occurring. It would be quite time-consuming and expensive – so workers would normally register a complaint with HSE if they had concerns of this nature

10. Pre-hearing processes
(examples: notification and disclosure of witnesses, disclosure of other evidence, filing of motions and briefs)

a. Government authority responsible for managing processes

b. Timeframes/deadlines for processes

HSE is required, by law, to serve "initial details" of the prosecution case upon both the defendant and the court.

The Initial details of the prosecution case must include:

- summary of the circumstances of the offence, **and**
- any account given by the defendant in interview, whether contained in that summary or in another document, **and**
- any written witness statement or exhibit that the prosecutor then has available and considers material to plea, or to the allocation of the case for trial, or to sentence, **and**
- the defendant's criminal record, if any, **and**
- any available statement of the effect of the offence on a victim, a victim's family or others.

By law, where a defendant requests such details, HSE must serve these as soon as practicable; and in any event, no later than the beginning of the day of the first hearing. However, in practice, HSE usually serve initial details on a defendant well before the first hearing date.

11. Admissible evidence

a. Witness testimony and statements (fact witnesses, expert witnesses)

b. OSH expert reports

c. Other evidence (examples: samples, photographs, videos, test results, seized machinery, documents)

For Legal Proceedings to be approved internally within HSE, the prosecution case must contain enough evidence to 'prove' the breach of law (and thus satisfy the tests set out in the Code for Crown Prosecutors). This is primarily achieved through witness statements. If the case goes to court and is defended the witness providing the statement may be called to give oral evidence.

Both witnesses of fact and expert witnesses (who may involve expertise in OSH, per se, or other areas – such as mechanical, electrical or construction engineering, occupational hygiene, forensic investigations etc) are admissible in court – subject to certain rules of evidence. These include that the evidence (of whatever type) must be both relevant (it logically goes to proving or disproving some fact at issue in the prosecution) and admissible (it relates to the facts in issue, or to circumstances that make those facts probable or improbable, and has been properly obtained). Account is also taken of the "weight" of the evidence (the reliance that can properly be placed on it by the court).

To be accepted in evidence a written statement must:

- be signed by the "maker", that is the person whose evidence it is;
- include a declaration of truth;
- give the witness's age if under 18.

If a statement refers to another document as an exhibit, that document must either be copied to all the parties, or they must be given sufficient information to enable them to inspect it.

Expert evidence may be given by way of a written report - whether or not the expert also gives oral evidence. The report is either be provided in the form of a formal statement or as a report with a covering formal statement. In certain circumstances, the court may give leave for the report to be admitted in evidence without the expert being called.

Other evidence that support a prosecution case must be under cover of a written statement by the person introducing the evidence.

12. Timeframes/Deadlines for issuance of judicial order

a. Cases of transfer by administrative authorities (examples: to civil court of first instance or criminal court)

This does not exist in GB law.

b. Cases of expedited action sought to eliminate imminent danger

There is no process for securing a judicial order of this type. But neither is there a need because of Inspectors' powers to issue Prohibition Notices.

c. Cases of the exercise of private right of action

There is a private "right' to initiate a prosecution under the GB Common Law system – but is only permissible in respect of the HSW Act with the agreement of the Director of Public Prosecutions under the auspices of the Ministry of Justice (HSWA S 39). There is no private right to issue enforcement notices – this is a power give to inspectors appointed under the HSW Act.

d. Cases of criminal prosecution

There are two types of OSH offences set out in statute in GB Law:

- summary offences, which are heard only in a magistrates' court; and
- "either way" offences, which can be heard in either the magistrates' court or the Crown Court.

Cases involving **"summary only"** offences have specific time limits set out in statute for commencing proceedings. Prosecutions will normally be time barred if Informations are laid more than six months after the date of the offence. However different time limits apply in some circumstances:

- in cases involving design, manufacture, import or supply of something, the time limit will be six months after the date when HSE has to its knowledge sufficient evidence to justify a prosecution.
- in cases involving a fatality, this must be done within 3 months of the Coroners' Inquest or the making of a report in the case of a Public Inquiry.

In cases involving **"either way"** offences, a decision must be made as to whether the case should be heard in the Magistrates' Court or the Crown Court. This is determined by an 'allocation procedure'.

Where a defendant has been charged with an offence which is triable either way, the magistrates' court proceeds with plea before deciding the appropriate "allocation".

If the defendant indicates a **guilty** plea, then the prosecutor opens the case fully and the court will proceed as if the defendant had been convicted of the offence and consider sentence. The court will then decide whether or not to deal with the case themselves or (if the court is of the opinion that the sentencing powers of the magistrates court are not sufficient) to commit for sentence to the Crown Court.

In determining the sufficiency of its sentencing powers it will take account of the "Definitive Guideline" issued by the Sentencing Council (Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Sentencing). See: https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf.

The Sentencing Council is an independent, NDPB of the Ministry of Justice. It was set up (in 2010) to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. The primary role of the Council is to issue guidelines on sentencing which the courts must follow unless it is in the interests of justice not to do so.

If the defendant pleads **not guilty** they, and the prosecutor are invited to make representations as to whether the case is suitable for summary trial. In reaching its decision the Magistrates, as well as referring to the Definitive Guidelines referred to above, will also apply the Sentencing Council's Allocation Guideline. to determine whether cases should be dealt with by a magistrates' court or the Crown Court. See: https://www.sentencingcouncil.org.uk/wp-content/uploads/Allocation_Guideline_2015.pdf.

In general, either way offences should be tried summarily unless:

- the outcome would clearly be a sentence in excess of the court's powers for the offence(s) concerned after taking into account personal mitigation and any potential reduction for a guilty plea; or
- for reasons of unusual legal, procedural or factual complexity, the case should be tried in the Crown Court. This exception may apply in cases where a very substantial fine is the likely sentence. Other circumstances where this exception will apply are likely to be rare and case specific; the court will rely on the submissions of the parties to identify relevant cases.

There are no specific time limits for bringing cases which are triable either way. However, under Common Law, if there has been substantial delay in bringing a prosecution, it is possible for defendants to claim an "abuse of process". If successful, the court may stay (halt) the case. Case law suggests that a stay of proceedings on the ground of unjustifiable delay will only be granted in exceptional circumstances.

To establish abuse of process based on delay, the defendant would need to prove that, because of the delay, s/he will suffer such serious prejudice that a fair trial cannot be held. In considering whether there is likely to be prejudice, the court will consider:

- the power of the judge/magistrates to regulate whether evidence is admissible;
- the fact that during the trial, factual issues relating to delay can be placed before the jury as part of the evidence;
- the power of the judge to direct the jury about delay before they consider their verdict.

Applications for abuse of process do occur periodically when cases can take several years to get to Court. This sometimes occurs in respect of fatal accidents – either because of the need to await the outcome of an Inquest, or a delay in the decision of the Police to transfer primacy to HSE.

Appeals process for challenging Formal Action

13. Type of proceeding and adjudicative body

a. Administrative (examples: higher levels within labour ministry, administrative law judge, administrative review board/commission)

b. Civil court of first instance (examples: district court, trial court)

c. Court of appeals (examples: circuit court, civil or criminal court of second instance/appeals)

d. Labour court

There are various administrative mechanisms for challenging actions by HSE Inspectors. These range from making representations to higher levels of HSE or to an independent Challenge Panel set up by HSE.

See the following:

http://www.hse.gov.uk/contact/complain-about-hse.htm

http://www.hse.gov.uk/contact/challenge-panel.htm

These mechanisms apply more to oral or written advice from HSE Inspectors (or occasionally advice issued by HSE more generally).

The Challenge Panel consists of independent members who will have the competence and experience to assess advice that has been given on regulatory matters. They were appointed by HSE after an open process inviting expressions of interest. There are 8 members on the panel covering a wide range of regulatory and technical competences. Three of these are chosen for any particular case – with the most appropriate experience in relation to the particular issue which is subject to challenge.

Since its establishment in 2011 the panel has dealt with two cases – both arising from LA regulatory activities

But these processes do not apply to formal "enforcement" action (involving permissioning decisions, the issue of improvement or prohibition notices or initiating criminal proceedings) each of which have their own 'appeal' process:

- Permissioning decisions - these vary but involve either an appeal to an Employment Tribunal or the DWP Secretary of State with overall responsibility for HSE. The route for appeal is set out the statute relating to the various regimes. See: http://www.hse.gov.uk/contact/regulatory-complaintshazard.htm
- Enforcement Notices - an appeal to an Employment tribunal (see above under Q8)
- Criminal proceedings - the court process works on the basis that the defendant is innocent until proven guilty by the prosecutor.

It is also possible to initiate a "Judicial Review" in which a judge reviews the lawfulness of a decision or action made by a public body. This is a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. Such action must be commenced within three months of the decision concerned.

14. Timeframes/deadlines for proceedings

a. For initiation

b. For each stage of review process

c. For issuance of ruling/order

Covered in the relevant sections elsewhere in this study.

15. Standing to appeal Formal Action (examples: duty holder, workers/worker representatives)

Only those in receipt of the Formal Action – the duty holder

16. Parties to the proceeding (examples: labour inspectors or other administrative labour authorities, workers/worker representatives, duty holder)

Those in receipt of the Formal Action and the party that issued the Action – the HSE or a named HSE Inspector.

17. Burden of proof (examples: government has initial burden of proof to establish violations, duty holder has burden of proof to establish acted in good faith)

In criminal proceedings the burden of proof is normally "beyond reasonable doubt". Acting in good faith is not a defence in criminal proceedings or grounds for appeal against enforcement notices.

In GB OSH legislation there is what is called "the reverse burden of proof". Section 40 of the HSW Act states that where a duty holder is required to do something 'so far as is practicable' or 'so far as is reasonably practicable' (the standard in most OSH legislation), the burden is on the defendant to prove that it was not practicable or reasonably practicable to do more than was in fact done. Similarly, under section 17 HSWA, if an accused is proved not to have followed a relevant provision in an Approved Code of Practice, the failure to do so will be taken by the court as proof of contravention of the legal requirement in question unless the accused can show that s/he satisfied the requirement by adopting suitable alternative measures.

However (a) the Prosecution will still need to "prove" its case (beyond reasonable doubt) and the defence burden of proof only becomes relevant once the *prima facie* breach has been established and (b) the burden of proof for the reverse burden is the balance of probabilities.

18. Standard and scope of review of Formal Actions (examples: review only conclusions of law, upheld if violation is demonstrated by a preponderance of the evidence, upheld if violation is supported by substantial evidence on the record)

This is primarily only relevant to Enforcement Notices. An Employment Tribunal may either cancel or affirm the Notice. If it affirms the Notice it may do so either in its original form or with such modifications as the Tribunal may, in the circumstances, think fit. In reaching decisions any technical difficulty with the Notice should lead to an amendment rather than cancellation – on the basis that the notice power and process is there to achieve effective risk control.

For appeals against Permissioning Decisions that are referred to Employment Tribunals, the same options are likely. But as there have been no such appeals it is difficult to set out what might happen if there were! The statute is largely silent on what the options might be.

19. Procedure for initiating proceedings (examples: submitting denial/objection/ appeal, review directed by administrative entity)

Appeals against an Improvement or Prohibition Notices are by application to an Employment Tribunal and must be lodged with 21 days of the Notice being issued.

In Criminal Proceedings, the defendant pleads Not Guilty in court.

20. Impact of appeal on Formal Action

a. Stay of sanction/penalty collection

b. Stay of timeframes/deadlines for taking required actions/remediation

c. Stay of Formal Action

d. Temporary relief or restraining order

If an appeal is made against an improvement notice the notice is suspended until the appeal is concluded.

A prohibition notice is not suspended by virtue of an appeal. But the appellant can apply to the Tribunal for a direction suspending the operation of the notice until the appeal is finally disposed of or withdrawn.

21. Decision/order of adjudicative body

a. Content and form of decision/order (examples: sanction/penalty, required actions/remediation order)

b. Issuance-notification of decision/order

The Tribunal may either cancel or affirm the Notice. If it affirms the Notice it may do so either in its original form or it can make modifications if it thinks these to be appropriate in the circumstances. This is sometimes used to address a technical difficulty with the Notice.

The decision of the Tribunal is delivered orally at the hearing – or with a short delay if it needed more time for reflection to reach its decision.

Decisions of Employment Tribunals are issued to both parties. Since 2017 all are published on a Government website at: https://www.gov.uk/employment-tribunal-decisions.

Appeals process for challenging decision/order

22. Appeal of decision/order

a. Timeframes/deadlines for initiating appeal

b. Standing to appeal decision/order (examples: duty holder, workers/worker representatives, labour inspector or other administrative authorities)

c. Standard and scope of review (examples: only review questions of law, upheld if not arbitrary, capricious, or abuse of discretion)

d. Number and levels of appeal (examples: court of appeals)

e. Impact of appeal on decision/order (examples: stay of sanction/penalty collection, stay of timeframes/ deadlines for taking required actions/remediation)

f. Timeframes/deadlines for issuing decision/order

Enforcement Notices

In respect of Enforcement Notices appeals, decisions of the Employment Tribunal may only be challenged by the parties involved (normally the Inspector or the duty holder). This may either be by way of:

- an application for a formal **reconsideration** of the decision by the Tribunal itself; or
- an **appeal** to the High Court.

An application for **reconsideration**, setting out why the party believes this is necessary, must be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties.

Any such application is considered by a Employment Tribunal Judge who can:

- refuse it if s/he considers that there is no reasonable prospect of the original decision being varied or revoked;
- send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application;
- be reconsidered at a further hearing (unless the Employment Judge considers, having regard to any views provided that a hearing is not necessary in the interests of justice).

On reconsideration, the original **decision may** be confirmed, varied or revoked. If it is revoked it may be taken again.

If either party is dissatisfied on a **point of law** with the decision of the Tribunal, it may **appeal** the decision to the High Court. Appeals must be made to the High Court within 21 days of the date of the decision (unless the Tribunal has directed a different time period within which to appeal).

Criminal Proceedings

Any party to proceedings (prosecution or defence) before a magistrates' court (or before the Crown Court, where the proceedings involve an appeal from a magistrates' court, such as an appeal against summary conviction) may (within 21 days) appeal the court's decision to the High Court 'by way of case stated' on the ground that a decision was wrong in law or in excess of the court's jurisdiction (but not, for example, on the ground that the decision was against the weight of the evidence).

'Case stated' is a statement of facts prepared by one court for the opinion of another on a point of law. The aggrieved party applies to the magistrates' (or Crown) court to 'state a case' for the opinion of the High Court on the particular question of law or jurisdiction involved.

The **prosecution** cannot appeal against a decision of fact. Exceptionally, a gross mistake of fact may be challenged if it amounts to an error of law, for example, where there is no evidence upon which the magistrates could have reached that decision.

The case stated is heard by a High Court Judge (or Judges). No evidence is considered - the hearing consists entirely of legal argument by counsel. No 'deference' is given to the conclusions of law reached by the lower court – indeed the appeal itself may be challenging that very issue. The court may reverse, affirm or amend the decision in respect of which the appeal has been made or give appropriate directions to the magistrates. This includes the power to order a rehearing before the same or different magistrates wherever such a course is appropriate and where a fair trial is still possible.

In cases heard in the **magistrates'** court, **Defendants** may (within 21 days) appeal to the Crown Court on a point of law or fact. If they pleaded not guilty, they can appeal against conviction or sentence; if they pleaded guilty, against sentence only.

Appeals are heard by a Crown Court Judge sitting with not less than two and not more than four magistrates. An appeal against conviction is a complete rehearing of the whole case. No "deference" is given to the findings of fact or conclusions of law on the Magistrate's court. An appeal against sentence is a rehearing of the sentencing process only.

The Crown Court may confirm, reverse or vary any part of the decision appealed against, remit the case to the magistrates with directions, or make any order it thinks just.

If the **defendant** has unsuccessfully appealed to the Crown Court from the magistrates' court, or was committed to the Crown Court for sentence, s/he may further apply to the High Court by **way of case stated** on the ground that it is wrong in law or is in excess of jurisdiction. The application must be made within 21 days of the decision appealed against.

If a **defendant** has been convicted on indictment by the Crown Court, there is a right of appeal against conviction, with the leave of the Crown Court or the Court of Appeal, on a point of law, on a point of fact, or on mixed law and fact. The question for the Court of Appeal to decide is whether the conviction is unsafe.

Such a defendant may also appeal to the Court of Appeal against sentence with the leave of either court. Any application must be made within 28 days of the conviction or sentence, although the court may extend this period on application.

In respect of appeals against enforcement notices or criminal proceedings, there are no set timetables for issuing the final determination of the appeal – but normally the parties are advised of the outcome at the conclusion of any hearing or within a few weeks. In either case written conformation of the rationale for the decision may take a few weeks.

Execution of final decision/order

23. Process for execution of a final decision/order

a. Imposition of sanction/penalty (examples: closure of enterprise, withdrawal of licences, suspension of undertaking's activity)

b. Collection of fine (examples: block bank account, embargo assets, establish payment instalments)

c. Verification of required actions/remediation (examples: follow-up inspections/investigation)

d. Imprisonment

In GB this section is only really relevant to Criminal Proceedings in the Courts. Responsibility for execution of any decisions of the Courts rest with the Court system – not the prosecuting body.

Annex I. Permissioning and licensing

Permissioning – is a term use to describe where HSE gives 'permission' for certain work activities involving significant hazard, risk or public concern, for example where there are risks of:

- multiple fatalities from a single or linked series of events
- widespread and significant adverse effects on human health

A permissioning regime means particular work activities can only start or continue when HSE gives:

- its consent
- a licence
- a letter of conclusion
- its acceptance (permission is required before such work activities can start) of:
  - a safety case prepared by operators or owners of offshore oil and gas installations; or
  - a safety report prepared by onshore major hazard sites eg refineries, large chemical of explosive premises.

A 'licence' is an authorisation from HSE to undertake a work activity which would otherwise be unlawful. It is only granted for very specific work activities:

- issuing licences for **explosives** manufacture and storage, and for stripping **asbestos**
- granting approvals (usually specifying working methods or equipment), eg for **chemical products such as pesticides**
- providing exemptions from legislation where HSE are satisfied that people's health and safety will not be affected

Further and better particulars may be found through the following links:

www.hse.gov.uk/enforce/permissioning.pdf

www.hse.gov.uk/enforce/permissioning-licensing.htm

Annex II. Fee for Intervention – extract from HSE website

What is FFI?

If we visit your workplace and find that you are in material breach of health and safety law, you will have to pay for the time it takes us to identify what is wrong and to help you put things right. This is called a fee for intervention (FFI).

If you don't break the law, you won't pay anything. Duty holders who comply with the law, or where there is no material breach, will not be charged FFI for any work that HSE does with them.

Who FFI applies to

It applies to duty holders where HSE is the enforcing authority. This will include:

- employers
- self-employed who put others at risk
- public and limited companies
- general, limited and limited liability partnerships
- Crown and public bodies.

What the law says?

The [relevant Regulations] say that a fee is payable to HSE if:

- a person is contravening or has contravened health and safety laws; and
- an inspector is of the opinion that the person is or has done so, and notifies the person in writing of that opinion.

What is a material breach?

A material breach is something which an inspector considers serious enough that they need to formally write to the business requiring action to be taken to deal with the material breach. If the inspector gives you a notification of contravention (NoC) after their visit, you'll have to pay a fee. The NoC must include:

- the law that the inspector considers has been broken
- the reason(s) for their opinion
- notification that a fee is payable to HSE.

Where an inspector simply gives you advice, either verbal or written, you won't have to pay anything for this advice.

How much it costs?

It currently costs £129 an hour. The fee will include the costs covering the time of the entire original visit. The total amount recovered will be based on the amount of time it takes HSE to identify the breach and help you put things right (including associated office work), multiplied by the hourly rate.

Your fee may include the inspector's time:

- at your business or workplace
- preparing reports
- getting specialist advice
- talking to you after the visit
- talking to your workers.

The fee can vary depending on:

- how long the original visit was
- the time the inspector spent helping you put things right
- the time it took the inspector to investigate your case
- any time we spend on taking action against you.

▶ Appendix IV. Estudio sobre aspectos procesales en la aplicación de la legislación de seguridad y salud en el trabajo en España

▶ **Autor: Mr Pablo Paramo**

Iniciación de un procedimiento en base a una comprobación administrativa o a una denuncia de una infracción ante la autoridad judicial

1. Tipos de procedimientos

Existen en España varios órdenes procesales fundamentales en materia laboral y, en concreto, en materia de seguridad y salud en el trabajo.

a. En primer lugar, **el orden administrativo**, que incluye tanto procedimientos de autorización, registro o licencia, como procedimientos sancionadores y cautelares. Los procedimientos administrativos sancionadores tienen por objeto reaccionar ante incumplimiento de la ley por el administrado y tienen una finalidad de prevención general mediante la utilización de la acción punitiva. En paralelo, existen otros procedimientos administrativos que tienen por objeto resolver reclamaciones de los trabajadores en torno a su relación prestacional con la Seguridad Social derivada de un accidente de trabajo o una enfermedad profesional. Es decir, reclamaciones que tienen por objeto la obtención de una acción declarativa o de reconocimiento por parte de la Administración de la seguridad Social (v.gr. declaración de una contingencia o accidente como profesional) o bien la obtención de una prestación para cubrir una determinada contingencia (v.gr. prestaciones de incapacidad por enfermedades o accidentes profesionales).

b. En tercer lugar, **los procedimientos judiciales**, que pueden ser tanto de orden social (con competencias en asuntos laborales incluyendo la seguridad y salud en el trabajo) como penal. Los procedimientos judiciales del orden social tienen por objeto revisar un acto o sanción dictado por la Administración o resolver una disputa entre empresario y trabajador.

c. Los **procedimientos penales** tienen, al igual que los procedimientos sancionadores administrativos, una finalidad punitiva preventiva, pero la diferencia con éstos estriba en la gravedad de la infracción. Se entiende que cuando la ley opta por la persecución penal de un determinado hecho se basa en que este hecho resulta de una mayor gravedad y que requiere una sanción más ejemplarizante como puede ser la prisión.

d. En cuarto lugar, existe una cuarta vía de reclamación en relación con la seguridad y salud en el trabajo, aunque es mucho menos frecuente. Es la del **procedimiento judicial civi**l, a la que un trabajador puede acudir para reclamar la indemnización de los daños sufridos en su relación extracontractual con el empresario.

2. Criterios para determinar el tipo de procedimiento

a. La elección de uno u otro procedimiento depende de distintos elementos (fase procedimental, sujeto interesado que lo inicia, tipo de reacción, gravedad de los hechos, existencia o no de una relación contractual, etc.). Con carácter general, la elección de un procedimiento se realiza de conformidad con los siguientes criterios:

- **Por sujeto que inicia el procedimiento**. La Administración puede iniciar procedimientos de revisión de autorizaciones o sancionadores. Los trabajadores y empleadores pueden iniciar procedimientos administrativos y también judiciales del orden social y/o penales. Y el Ministerio Fiscal puede iniciar procedimientos penales.
- **Por el tipo de hecho comprobado**. Los hechos que dan lugar al procedimiento pueden determinar la elección de uno u otro. Un hecho que constituye una infracción más o menos grave puede dar lugar a un procedimiento administrativo sancionador simple. Pero si ese hecho constituye un riesgo grave e inminente, se puede abrir un procedimiento administrativo y/o judicial cautelar.
- **Por la gravedad de la infracción**. De acuerdo a cómo se califique la infracción, puede proceder un procedimiento administrativo sancionador o un procedimiento penal para las infracciones más graves que pueden acarrear penas de prisión: los delitos
- **Por los resultados de la infracción y el tipo de reclamación**. Por ejemplo, cuando se causan daños al trabajador por un accidente de trabajo o enfermedad profesional, el mismo puede reclamar una prestación de Seguridad Social (procedimiento judicial del orden social) o puede reclamar una indemnización por daños y perjuicios (procedimiento civil).

Procedimientos administrativos consecuencia de la comprobación de un incumplimiento

3. Forma y contenido de la acción administrativa

a. Descripción de la infracción. Los inspectores de Trabajo y Seguridad Social en España, cuando en una inspección comprueban los hechos y determinan que hay una infracción de la ley, pueden adoptar en general dos **tipos de actuación**: emitir un **requerimiento** para la subsanación de la deficiencia o practicar un acta de infracción (o ambas). El requerimiento *(improvement notice)* constituye una exigencia de subsanación de la deficiencia o irregularidad. El acta de infracción es una propuesta de sanción dirigida al órgano superior jerárquico. En ambos documentos el inspector especifica con el máximo detalle los hechos que ha comprobado, los medios de comprobación (visita de inspección, testimonios de trabajadores, fotografías, etc.).

La norma (RD 928/98 –art.14-) requiere, asimismo, que el acta refleje los medios utilizados para la comprobación de los hechos que fundamentan el acta, y los criterios en que se fundamenta la graduación de la propuesta de sanción. En relación con las evidencias en las que se fundamenta el acta de infracción, cualquier prueba puede ser tenida en cuenta, ya que en el procedimiento sancionador administrativo rige el principio de libre apreciación de las pruebas. Una singularidad es que la Ley Ordenadora de la Inspección de Trabajo y Seguridad Social (art. 23) establece que "los hechos constatados por los funcionarios de la Inspección de Trabajo y Seguridad Social[1] que se formalicen en las actas de infracción (o en informes), observando los requisitos legales pertinentes, tendrán presunción de certeza, sin perjuicio de las pruebas que en defensa de los respectivos derechos o intereses pueden aportar los interesados". En teoría este precepto viene a invertir la carga de la prueba, pero tal inversión en realidad no existe, ya que en el Derecho español y en los procedimientos sancionadores rige, por analogía con los procedimientos penales, el principio de presunción de inocencia y el de libre apreciación de la prueba. Lo

1 La Inspección de Trabajo y Seguridad Social en España tiene competencias no sólo en materia de seguridad y salud en el trabajo, sino también en áreas de empleo, trabajo no declarado, relaciones laborales y Seguridad Social. Aunque el nombre completo de la institución es "Inspección de Trabajo y Seguridad Social", para abreviar nos referiremos a la misma en adelante como "Inspección de Trabajo".

que quiere decir es que el acta de infracción es en sí misma una prueba más, y como tal debe ser rebatida por el sujeto responsable (art. 77 Ley Procedimiento Administrativo).

b. En el acta, además, **el inspector debe expresar y destacar los hechos relevantes y las normas infringidas a efectos de la determinación y tipificación de la infracción y de la graduación de la sanción** (art 53 Ley Infracciones y Sanciones en el Orden Social). El acta de infracción debe igualmente reflejar la infracción o infracciones presuntamente cometidas, con expresión del precepto o preceptos vulnerados, y su calificación (art. 14 RD 928/98). Las actas de infracción de la Inspección de Trabajo deben reflejar el precepto vulnerado, la calificación de la infracción, en su caso la graduación de la sanción, la propuesta de sanción y su cuantificación (art. 53 Ley Infracciones y sanciones en el orden social).

c. Gravedad de la infracción. En la Ley de Infracciones y Sanciones del Orden Social (sección II, arts. 11 y ss) aparecen todas las posibles infracciones en las que el empresario puede incurrir en materia de seguridad y salud en el trabajo y clasificadas en función de su gravedad. Este precepto incluye un elenco muy amplio de infracciones distinguiendo entre las leves (v.gr. falta de limpieza general), graves (v. gr. falta de protección colectiva de una máquina) o muy graves (v.gr. falta de protección que implica un grave e inminente riesgo para el trabajador, trabajo de un menor o mujer en maternidad en trabajos prohibidos, incumplir una orden de paralización, etc.). Las infracciones graves están relacionadas, en general, con incumplimientos de la empresa que crean un riesgo grave para la integridad física o la salud de los trabajadores afectados. Y las infracciones muy graves están relacionadas, aparte de situaciones de trabajadores vulnerables, con la no adopción de medidas por el empresario cuando existe un riesgo grave e inminente (arts. 12 y 13 de la Ley de Infracciones y Sanciones del orden Social).

d. Grado de la violación. En el Derecho español sólo pueden ser sancionadas por hechos constitutivos de infracción administrativa las personas físicas y jurídicas que resulten *responsables de los mismos a título de dolo o culpa* (artículo 28 Ley 40/2015). Es decir, no cabe una responsabilidad objetiva sin dolo o negligencia culpable. La reincidencia, es decir, cuando se comete una infracción del mismo tipo y calificación que la que motivó una sanción anterior en el plazo de los 365 días siguientes a la notificación de ésta, una vez firme, implica aumentar la cuantía de la sanción hasta el duplo del grado de la sanción correspondiente a la infracción cometida (con ciertos límites) -artículo 41 de la Ley de Infracciones y Sanciones en el Orden Social-.

e. La ley, además de sanciones, prevé **procedimientos de remedio**:

- Requerimiento *(improvement notice)*. El inspector de Trabajo actuante puede advertir o requerir, en vez de iniciar el procedimiento sancionador, cuando las circunstancias del caso así lo aconsejen y no se deriven perjuicios directos a los trabajadores (art. 49 Ley Infracciones y Sanciones del Orden Social y art. 17.2 Convenio OIT 81). Tal advertencia o requerimiento se comunica por escrito, señalando las irregularidades o deficiencias apreciadas con indicación del plazo para su subsanación bajo el correspondiente apercibimiento (art. 11 RD 928/98).
- Ordenar la paralización inmediata de trabajos o tareas por inobservancia de la normativa sobre seguridad y salud en el trabajo, de concurrir riesgo grave e inminente para la salud de los trabajadores (art. 44 de Ley Prevención de Riesgos Laborales). La Inspección de Trabajo no tiene la posibilidad de ordenar la retirada o cambio de una máquina. Sólo la de pararla en tanto en cuanto no se proteja adecuadamente o se sustituya por una segura y que cumpla con la normativa.

f. La Inspección de Trabajo, **además de sanciones económicas, puede instar otro tipo de sanciones no pecuniarias o iniciar directa o indirectamente otros procedimientos y medidas cautelares**:

- Proponer recargos o reducciones en las primas de aseguramiento de accidentes de trabajo y enfermedades profesionales, en relación a empresas por su comportamiento en la prevención de riesgos y salud laborales (RD 231/2017).
- Requerir la adscripción de trabajadores a puestos de trabajo cuyas condiciones sean compatibles con sus características personales o psicofísicas (art. 22 Ley Ordenadora de la Inspección de Trabajo y Seguridad Social y art.12 Ley de Infracciones y Sanciones del Orden Social).

- El acta de infracción de la Inspección de Trabajo por una infracción muy grave en materia de seguridad y salud en el trabajo puede derivar en un limitación a la facultad de contratar con la Administración (artículo 54 Ley Prevención Riesgos Laborales, arts. 60, 61, 61 bis Ley de Contratos del Sector Público).
- Igualmente, la Inspección de Trabajo puede proponer, por infracción grave o muy grave, la cancelación de la acreditación otorgada por la autoridad laboral a los servicios de prevención ajenos a la empresa, entidades auditoras del sistema de prevención y entidades acreditadas para el desarrollo y certificación de la formación en prevención de riesgos laborales. Estas infracciones pueden ser, por ejemplo, facilitar a la autoridad laboral competente datos de forma o con contenidos inexactos, incumplir sus obligaciones legales o tener intereses comerciales o financieros con las empresas clientes (Ley de Infracciones y Sanciones en el Orden Social, arts.40.2, 12.21, 12.22, 13.11 y 13.12).
- La inspección de Trabajo también puede proponer la suspensión o cierre del centro de trabajo (art. 53 Ley Prevención de Riesgos Laborales y art.26 RD 928/98 y art. 15 del RD 1398/93). En este procedimiento el Gobierno o, en su caso, los órganos de gobierno de las Comunidades Autónomas, cuando concurran circunstancias de excepcional gravedad en las infracciones en materia de seguridad y salud en el trabajo, pueden acordar la suspensión de las actividades laborales por un tiempo determinado o, en caso extremo, el cierre del centro de trabajo correspondiente, sin perjuicio, en todo caso, del pago del salario o de las indemnizaciones que procedan y de las medidas que puedan arbitrarse para su garantía. El procedimiento se inicia mediante comunicación del Jefe de la Inspección Provincial de Trabajo al órgano administrativo competente al objeto de que se apruebe la suspensión temporal o el cierre del establecimiento.
- La Inspección de Trabajo puede también proponer, y se hace habitualmente, un recargo (del 30% al 50%) de pensiones de Seguridad Social a la que tuviera derecho el trabajador accidentado (incapacidad) o sus causahabientes (viudedad) cuando la causa de un accidente de trabajo o una enfermedad profesional ha sido un incumplimiento de la normativa de seguridad y salud en el trabajo (art. 164 Ley General de la Seguridad Social). Se trata de una institución híbrida sanción-responsabilidad civil, ya que relaciona responsabilidades de orden administrativo (infracción administrativa) y civil o laboral (recargo sobre la pensión) a un tiempo.

g. Circunstancias que agravan o atenúan la responsabilidad del sujeto responsable. En las sanciones por infracciones en materia de seguridad y salud en el trabajo, a efectos de su graduación, en la legislación española se tienen en cuenta una serie de criterios, que, por otra parte, son los que aplican los inspectores de Trabajo en las propuestas contendidas en sus actas de infracción (art 39 Ley Infracciones y Sanciones del Orden Social):

- La peligrosidad de las actividades desarrolladas en la empresa o centro de trabajo.
- El carácter permanente o transitorio de los riesgos inherentes a dichas actividades.
- La gravedad de los daños producidos o que hubieran podido producirse por la ausencia o deficiencia de las medidas preventivas necesarias.
- El número de trabajadores afectados.
- Las medidas de protección individual o colectiva adoptadas por el empresario y las instrucciones impartidas por éste en orden a la prevención de los riesgos.
- El incumplimiento de las advertencias o requerimientos previos de la Inspección de Trabajo.
- La inobservancia de las propuestas realizadas por los servicios de prevención, los delegados de prevención o el comité de seguridad y salud de la empresa para la corrección de las deficiencias legales existentes.
- La conducta general seguida por el empresario en orden a la estricta observancia de las normas en materia de prevención de riesgos laborales.

Los citados criterios no se aplican en virtud de una jerarquía, sino de forma indistinta, en función de su concurrencia en cada caso concreto. A mayor elevación del grado de la sanción, no basta con un solo criterio, sino que es necesaria la concurrencia de varios.

h y i. Derecho de alegaciones y plazos frente al procedimiento sancionador y administrativo.

- **Notificación del acta**. El acta de infracción levantada por el inspector de Trabajo es notificada al sujeto responsable en el plazo de diez días hábiles contados a partir del término de la actuación inspectora, entendiéndose por ésta la de la fecha del acta. El sujeto responsable o presuntamente responsable puede formular escrito de alegaciones en el plazo de quince días hábiles contados desde el siguiente a su notificación, acompañado de la prueba que estimen pertinente, ante el órgano instructor del expediente. Cuando el acta de infracción afecte a solicitantes y beneficiarios de prestaciones, se comunica de forma simultánea, al órgano o entidad gestora correspondiente, a efectos de una posible adopción de suspensión cautelar (artículo 17 RD 928/98).
- **Alegaciones**. El sujeto o sujetos responsables que formulen alegaciones frente al acta tienen derecho a vista de los documentos obrantes en el expediente, sin más excepciones que las necesarias para asegurar la confidencialidad del origen de cualquier queja (conforme al artículo 15.c del Convenio número 81 de la Organización Internacional del Trabajo y art. 10 Ley Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social).
- **Tramitación e instrucción**. La tramitación e instrucción del expediente sancionador, a consecuencia de las transferencias competenciales en materia de seguridad y salud en el trabajo a las Comunidades Autónomas, se desarrollan en el ámbito de éstas y de conformidad con normas específicas (similares a la genérica del RD 928/98). En la fase de instrucción, el órgano instructor del expediente remite la propuesta de resolución al órgano competente para resolver con una antelación mínima de quince días al vencimiento del plazo para dictar resolución (artículo 18 del RD 928/98).
- **Informes a las alegaciones**. Si no se formaliza escrito de alegaciones por el interesado, continua la tramitación del procedimiento hasta dictar la propuesta de resolución que corresponda. Si se formulasen alegaciones en plazo contra el acta de infracción, el órgano instructor puede recabar informe ampliatorio al inspector actuante, que se emite en quince días. El citado informe es preceptivo si en las alegaciones se invocan hechos o circunstancias distintos a los consignados en el acta, hay insuficiencia del relato fáctico de la misma, o indefensión por cualquier causa. En dicho informe se valoran expresamente las pruebas aportadas o que se hubiesen practicado, y las alegaciones producidas.
- **Fase probatoria y audiencia**. Recibidas las alegaciones, o transcurrido el plazo señalado para efectuar las mismas, el instructor puede acordar la apertura del período de prueba. Cuando de las diligencias practicadas se desprenda la invocación o concurrencia de hechos distintos a los reseñados en el acta, el órgano instructor, antes de emitir su propuesta de resolución, debe dar audiencia al supuesto responsable por término de ocho días con vista de lo actuado.
- **Últimas alegaciones y propuesta de resolución**. Realizado el trámite de audiencia, el sujeto responsable podrá formular nuevas alegaciones por término de otros tres días, a cuyo término quedará visto para la propuesta de resolución (art. 18 RD 928/98).
- **Resolución y notificación**. La resolución debe dictarse en el plazo de 10 días a contar desde la fecha de terminación de la tramitación del procedimiento y debe notificarse en un plazo de 6 meses desde la iniciación del procedimiento administrativo por acta de infracción. La sanción caduca si no se notifica en 6 meses desde la fecha del acta de inspección (RD 928/98, art.20.3).
- **Recurso de alzada**. Una vez dictada la resolución en primera instancia, el interesado puede interponer recurso de alzada (artículo 23 RD 928/98) contra la resolución sancionadora en el plazo de un mes ante el órgano administrativo superior competente por razón de la materia, que en las Comunidades Autónomas son los Directores Generales, Consejeros del Gobierno autonómico o el propio Gobierno autonómico, en función de la cuantía de la sanción (art 20 Rd 928/98).

j. Documentación o certificaciones requeridas. La ley española no requiere especiales documentos o certificaciones para presentar alegaciones, salvo el escrito de alegaciones, poder notarial si las alegaciones son presentadas por un representante, así como los documentos o testimonios que quieran hacerse valer como pruebas.

k. Otros procedimientos singulares:

k.1. Procedimiento de inspección o administrativo de naturaleza transfronteriza.

Existe en España, y posiblemente en otros países de la Unión, un procedimiento de inspección y sanción transfronterizo (R.D. 928/1998, conforme a R.D. 772/2011). En los supuestos en que la actuación inspectora afecta a empresas establecida en otros países de la Unión Europea y que los hechos comprobados puedan ser también sancionados por el Estado miembro de origen de la empresa, el inspector de Trabajo actuante, una vez concluidas las actividades comprobatorias, puede proponer al Jefe de la Inspección Provincial la comunicación de los hechos y el envío de la documentación a la autoridad competente del otro país de la Unión Europea para que inicie el procedimiento sancionador y solicitar la comunicación del resultado en el plazo de dos meses. En caso que dicha autoridad no adoptara medidas sancionadoras, o transcurriera el plazo de dos meses sin recibir comunicación del resultado, la Inspección de Trabajo podría retomar el procedimiento sancionador. Estos casos pueden aplicarse a empresas y trabajadores que se desplazan temporalmente entre los Estados Miembros en Europa en el marco de una prestación de servicios. Este procedimiento se ve ahora reforzado con la adopción de la Directiva 2014/67/UE del Parlamento Europeo y del Consejo, de 15 de mayo de 2014, llamada Directiva Enforcement, que estableció la posibilidad de ejecución transfronteriza de sanciones firmes, así como la notificación entre Estados Miembros de los actos previos a la sanción administrativa firme. Esta Directiva se ha transpuesto al Derecho español a través del Real Decreto-ley 9/2017, de 26 de mayo.

k.2 Procedimiento administrativo especial de actuación de la Inspección de Trabajo en materia de seguridad y salud en el trabajo en el ámbito de la Administración General del Estado (art.3.1 Ley de Prevención de Riesgos Laborales y RD 707/2002).

- En España, las Administraciones Públicas son responsables de la seguridad y salud del personal a su servicio, es decir, el personal funcionario o estatutario (sanidad). El órgano competente para realizar el control e inspección es la Inspección de Trabajo, salvo que para las Administraciones de las Comunidades Autónomas y la Administración Local (ayuntamientos), se atribuya esta función a otros órganos (Disposición Adicional tercera de Ley 31/1995).
- El procedimiento se inicia siempre de oficio por la Inspección de Trabajo, bien por orden superior, bien por propia iniciativa o a petición de los representantes del personal. El Inspector de Trabajo actuante puede solicitar informe al Comité de Seguridad, Salud y Bienestar. Posteriormente, una vez concluidas las comprobaciones, se procede por el inspector de Trabajo a emitir una propuesta de subsanación de irregularidades (si las hay).
- Más tarde, si hay discrepancias respecto al requerimiento, hay un trámite de alegaciones y un requerimiento definitivo, que puede revisarse ante los órganos superiores del Departamento competente (Subsecretaría o Ministro).
- En el curso de la inspección, el inspector de Trabajo actuante puede, si comprueba la existencia de un riesgo grave e inminente para la seguridad y salud del personal, ordenar la paralización de la actividad del centro, dependencia o lugar de trabajo afectado, que será inmediatamente ejecutiva, aunque podrá ser revisada la decisión por órganos administrativos superiores (Autoridad Central de la Inspección).
- Este procedimiento "no sancionador" es similar al del modelo inglés, cuyo principio fundamental es que *"the Crown cannot prosecute the Crown"*, modelo diferente a otros países en los que la Administración o sus miembros pueden ser objeto de sanción (Australia, Nueva Zelanda).

4. Emisión de los actos administrativos

a. Entidad emisora. La entidad que emite los actos administrativos es en primera instancia la Inspección de Trabajo, que formula acta de infracción tras realizar la inspección de la empresa (art. 52 Ley Infracciones y Sanciones del Orden Social). Las actuaciones normalmente requieren visita al centro de trabajo, salvo que sean comprobaciones de carácter meramente documental, y tras la visita al centro el inspector puede adoptar distintas diligencias:

- El requerimiento *(improvement notice)* es exclusivamente emitido por el inspector de Trabajo actuante.
- La propuesta de sanción contenida en el acta de infracción debe ser realizada por el inspector de Trabajo y resuelta por la autoridad laboral competente (procedimiento regulado en el RD 928/98).
- La orden de paralización inmediata por riesgo grave e inminente debe ser emitida por el inspector de trabajo actuante, aunque, en caso de recurso por el empresario, debe resolver la autoridad laboral competente (art. 44 de Ley Prevención de Riesgos Laborales y art. 11 del RD 928/98, de 14 de mayo).
- La aprobación de recargos y/o reducciones en las primas de aseguramiento de accidentes de trabajo y enfermedades profesionales es realizada por la Dirección General de Ordenación de la Seguridad Social, que dictará resolución pudiendo solicitar informe a la Inspección de Trabajo (art. 7Real Decreto 231/2017).
- La limitación de la facultad de contratar se resuelve por los órganos competentes del Departamento o Ministerio competente (artículo 54 Ley Prevención Riesgos Laborales, arts. 60, 61, 61 bis Ley de Contratos del Sector Público).
- La cancelación de la acreditación otorgada por la autoridad laboral a un servicio de prevención se resuelve por la autoridad laboral competente (art. 27 Real Decreto 39/1997)
- Y la decisión de publicar una sanción por infracción muy grave en materia de seguridad y salud en el trabajo corresponde al órgano competente que dictó la primera resolución en el procedimiento sancionador, o, en su defecto, aquel que determine la Comunidad Autónoma (art. RD 597/2007).

b y c. La **notificación de los distintos actos administrativos** se realiza mediante correo ordinario certificado del acta o resolución en papel (art. 42 Ley 39/2015). Está prevista en toda la Administración la notificación por medios electrónicos mediante comparecencia en la sede electrónica del Departamento o autoridad correspondiente, aunque todavía no se utiliza en todas las administraciones -en general autonómicas- (art. 43 Ley 39/2015). Por último, en caso de que la notificación sea defectuosa (no recoger el interesado el aviso de correos o correo devuelto) o imposible mediante los medios señalados anteriormente, la Ley establece que la notificación debe realizarse en todo caso mediante la publicación de la misma en el Boletín Oficial del Estado y, en su caso y complementariamente, en el de la Comunidad Autónoma. Se entiende recibida la notificación si el interesado acusa recibo y consta éste en el expediente. En caso de ausencia (no hallarse en su domicilio el interesado), el servicio de correo tiene que hacer dos intentos de notificación con una hora al menos de separación.

d. Partes en el procedimiento. El acta de infracción y, en su caso, la resolución sancionadora que confirma el acta, se notifican sólo al empresario, salvo que hubiera legítimos intereses de los trabajadores en juego, en cuyo caso se notifica también a éstos y/o a sus representantes (art.20 Ley 23/2015 Ordenadora de la Inspección de Trabajo y Seguridad Social). Cuando el acta de infracción afecte a solicitantes y beneficiarios de prestaciones, se comunica, de forma simultánea, al órgano o entidad gestora correspondiente, a efectos de la adopción de la suspensión cautelar prevista en la normativa aplicable (art. 17 RD 928/98).

Por otra parte, el art. 42 de la Ley de Infracciones y Sanciones en el Orden Social establece que la empresa principal (comitente o contratista) responde solidariamente de las infracciones (en materia de seguridad y salud en el trabajo) cometidas por los subcontratistas cuando ambas empresas coinciden en el mismo centro de trabajo y la infracción se comete en éste. En este caso el acta de infracción se notifica a ambas empresas.

Los demás actos administrativos se notifican a los sujetos responsables o interesados. Por ejemplo, la resolución cancelando la acreditación de un servicio de prevención se notifica a éste.

e. Plazo para la emisión del acta de infracción. La actividad inspectora previa destinada a comprobar el cumplimiento de las disposiciones legales y que da lugar al acta de infracción puede desarrollarse por un plazo máximo de 9 meses, aunque este plazo puede ampliarse por espacio de otros nueve meses cuando la dilación sea imputable al sujeto a inspección o cuando concurran especiales circunstancias de complejidad (artículo 8 RD 928/98). El acta de infracción debe notificarse en el plazo máximo de diez días hábiles contados a partir del término de la actuación inspectora, entendiéndose por ésta la de la fecha del acta (artículo 17 RD 928/98).

f. Registro o publicación del acto. Cuando el acta de infracción se refiere a infracciones muy graves, la normativa en España (art. 40.2 Ley Infracciones y Sanciones del Orden Social y RD 597/2007) prevé que la resolución sancionadora, una vez firme y no susceptible de recurso administrativo o judicial alguno, sea publicada. La norma establece un **procedimiento especial para hacer públicas las sanciones correspondientes a estas infracciones**. La publicación se inicia, de oficio, mediante propuesta contenida en acta de infracción de la Inspección de Trabajo. En dicha propuesta, así como en la resolución del órgano competente para resolver, debe hacerse constar que dicha sanción será hecha pública. La publicación de la sanción se realiza en todo caso en el Boletín Oficial del Estado y, facultativamente y de forma complementaria, en el de la Comunidad Autónoma de acuerdo con el correspondiente ámbito de competencia. Es fundamental que la sanción sea firme ya que, de otro modo, podría ocasionarse un daño irreparable en la imagen de la empresa si finalmente se terminara anulando la sanción.

5. Procedimiento para verificar el cumplimiento de un requerimiento

a. Seguimiento para verificar cumplimiento. Los inspectores de Trabajo realizan parte de su trabajo comprobando que la empresa ha cumplido con el requerimiento formulado en caso de deficiencias en materia de seguridad y salud en el trabajo. No existe un procedimiento muy formal a estos efectos, aunque sí se establecen ciertas exigencias formales. Así, el art. 43 de la Ley de Prevención de Riesgos Laborales establece los siguientes requisitos:

- Cuando el Inspector de Trabajo comprueba la existencia de una infracción a la normativa sobre prevención de riesgos laborales, requiere al empresario para la subsanación de las deficiencias observadas.
- Este requerimiento es independiente de una posible paralización de trabajos (riesgo grave e inminente) o una propuesta de sanción.
- El requerimiento debe formularse por escrito al empresario (en el Libro de Visitas –hoy hoja de diligencia- art. 11 RD 928/98) detallando las anomalías o deficiencias apreciadas y con indicación del plazo para su subsanación.
- Dicho requerimiento se pone, asimismo, en conocimiento de los Delegados de Prevención.
- Si se incumple por el empresario el requerimiento formulado, persistiendo los hechos infractores, el Inspector de Trabajo y Seguridad Social, de no haberlo efectuado inicialmente, levantará la correspondiente acta de infracción por tales hechos.

Los inspectores de Trabajo suelen realizar lo que se llama una **"segunda visita"** al centro para comprobar el cumplimiento de sus requerimientos. Existen objetivos de inspección específicos sobre *"segundas visitas"*, resultando que las actuaciones de comprobación de cumplimiento de un requerimiento forman parte, junto a otros, de los objetivos que se planifican anualmente por parte de la Dirección General de la Inspección de Trabajo y Seguridad Social.

El sistema de comprobación del cumplimiento también reúne algunas exigencias formales en el caso de que el Inspector de Trabajo y Seguridad Social compruebe la existencia de un riesgo grave e inminente para la seguridad y la salud de los trabajadores y ordene la paralización inmediata de tales trabajos o tareas. La empresa, además de comunicarlo a los órganos de representación de los trabajadores en materia de seguridad y salud en el trabajo, debe dar cuenta al Inspector de Trabajo del cumplimiento de esta notificación. La paralización de los trabajos en principio sólo puede levantarse por el inspector de Trabajo que la hubiera decretado, pero también por el empresario tan pronto como se subsanen las causas que la motivaron, debiendo, en este último caso, comunicarlo inmediatamente a la Inspección de Trabajo (art. 44 Ley Prevención Riesgos Laborales), que procederá a comprobar tal cumplimiento *in situ*. En todo caso es necesaria la presencia del inspector en el lugar de trabajo para poder realizar las comprobaciones.

b y c. Documentación obligatoria, certificación de cumplimiento y otras medidas. La inspección de Trabajo puede realizar múltiples comprobaciones documentales (p.ej. verificar la evaluación de riesgos de la empresa, el plan o estudio de seguridad de una obra, el plan de manipulación de amianto, etc.). También puede requerir al empresario que envíe prueba de las medidas adoptadas, especialmente en algunos requerimientos que no exijan una segunda visita al centro laboral (v.gr. medidas relativas a una determinada máquina o equipo de trabajo). En principio, el empresario puede remitir al inspector cualquier tipo de documentación, ya sean fotografías o una certificación del propio empresario o de los servicios de prevención, documentos, etc. A veces se solicita una certificación sobre el estado de seguridad de un determinado equipo o sobre profesionalidad (p.ej. plan de montaje de un andamio, certificado de profesionalidad de un gruista, certificado de examen «CE de tipo» de un aparato a presión, etc.) No existe un procedimiento específico para la notificación del cumplimiento, aunque lo habitual es la segunda visita del inspector. También el inspector puede reflejar en una diligencia escrita, con copia para el empresario, que éste ha subsanado la deficiencia o irregularidad, lo que sirve a modo de certificado para el empresario.

6. Procedimiento para modificar plazos o requerimientos

a. Compromiso de cumplimiento por el empresario. Los inspectores pueden establecer plazos que sean coherentes con las posibilidades de compromiso que tengan las empresas, tanto técnicas como económicas, para cumplir con los requerimientos del inspector. En la medida en que existen dificultades técnicas o económicas, los inspectores ofrecen plazos más laxos, siempre considerando y sopesando el riesgo. A mayor riesgo, mayor urgencia de la subsanación de las deficiencias. Sin embargo, no existe un procedimiento específico regulado en la ley a este respecto y que establezca plazos y/o la posibilidad de graduar estos. La ley no regula un sistema de plazos de cumplimiento de los requerimientos en función, por ejemplo, de la gravedad de la infracción o deficiencia. El establecimiento de plazos para remediar o subsanar deficiencias en el lugar de trabajo es discrecional por parte de los inspectores. Sólo cuando la medida a adoptar se considera urgente, el plazo es muy breve.

b. Acuerdo para modificar los plazos de subsanación. Los inspectores pueden ampliar los plazos ya concedidos atendiendo a las circunstancias y dificultades que justifique el empresario. También existe discrecionalidad por parte de los inspectores para atender la petición de una ampliación de plazo por el empresario. Cuando los representantes de los trabajadores están involucrados en la cuestión, a veces se pacta un plazo entre las dos partes con supervisión del inspector de Trabajo. Puede ocurrir que no se modifique el plazo, sino el sentido del requerimiento. Es decir, circunstancias que no se han tendido en cuenta pueden aconsejar que se modifique el tipo de medida requerida.

c. Otros acuerdos. No se regula en la ley un procedimiento formal de acuerdo con el empresario, sin perjuicio de que el inspector determine un plazo y el empresario esté de acuerdo con el mismo, pero son acuerdos informales que se traducen en el requerimiento del inspector que se plasma en una diligencia (hoja en la que se detalla la deficiencia y el plazo para remediarla, con copia para el empresario y para el inspector). En general, la seguridad y salud en el trabajo en España se considera una normativa de derecho necesario y no es susceptible de amparar acuerdos formales entre empresa e inspector o disponerse a través de tales acuerdos. Cuestión distinta son los acuerdos a los que pueda llegar el empresario con los representantes de sus trabajadores. La materia de seguridad y salud en el trabajo puede negociarse en convenio colectivo, aunque sometiendo las provisiones convencionales al principio de jerarquía normativa, ya que la seguridad y salud en el trabajo es norma imperativa o de policía. En España están terminantemente prohibidos los pactos entre empresas para trasladar la responsabilidad derivada de un incumplimiento de seguridad y salud en el trabajo a otros empresarios o a los trabajadores.

d. Plazos. En la ley española no existe una regulación de plazos previos o posteriores al requerimiento del inspector y/o al cumplimiento o incumplimiento del empresario de la medida requerida. Si el empresario cumple con la medida requerida, se cierra la inspección. Si el empresario incumple, el inspector puede dar nuevo plazo si el incumplimiento está justificado, o puede iniciar el procedimiento sancionador mediante acta de infracción.

7. Procedimiento y consecuencias de un incumplimiento de un requerimiento efectuado por el inspector de Trabajo

a. Incremento de las sanciones. Aunque existe la posibilidad legal de iniciar un procedimiento sancionador y simultáneamente requerir la subsanación de las deficiencias, es práctica habitual que los inspectores no inicien el procedimiento sancionador hasta que no comprueban que efectivamente se ha incumplido su requerimiento. El incumplimiento del requerimiento en general es la causa de inicio de un procedimiento sancionador, pero además constituye una circunstancia de agravación de la sanción (art. 37 Ley Infracciones y sanciones en el orden Social). La única posibilidad que tiene el inspector de Trabajo, en caso de que la empresa incumpla el requerimiento, es de practicar acta de **infracción agravada**. El incumplimiento del requerimiento tiene la consecuencia de la elevación del grado, de mínimo a medio o máximo, dependiendo de las circunstancias. Sin embargo, no existe en el ordenamiento español para este sector normativo –laboral y de seguridad y salud en el trabajo- posibilidades de multas coercitivas o multiplicador diario de la sanción mientras se mantenga la infracción o deficiencia sin subsanar, etc.

b. Comunicación a la autoridad judicial. Para el caso de incumplimiento por la empresa de un requerimiento tampoco existe un procedimiento específico para comunicar o informar a la autoridad judicial. No obstante, si el incumplimiento por parte del empresario expusiera a los trabajadores a **graves riesgos**, se puede optar por remitir informe al Ministerio Fiscal, por si los hechos fueran constitutivos de delito y/o decretar una orden de paralización de los trabajos si el peligro es inminente. El Ministerio Fiscal, si viera fundada la denuncia, podría excitar la actuación judicial.

8. Oportunidad o derecho para recurrir la actuación inspectora o administrativa

a. Derecho de recurrir.

a.a Requerimiento. Aunque la ley no establece de forma específica los requisitos de contenido que debe cumplir el requerimiento de la Inspección de Trabajo, por lo general y en la práctica, éste contiene:

- La disposición o precepto concretos en que se apoya.
- El plazo para cumplimentar el requerimiento.
- La advertencia sobre las consecuencias de su incumplimiento.

Sobre la posibilidad de recurrir el requerimiento el Criterio Técnico núm. 50/2007 de 28 de junio de 2007 de la Inspección de Trabajo y Seguridad Social señala que los requerimientos que formula la Inspección de Trabajo no son resoluciones administrativas, sino actos administrativos de trámite, y que no producen indefensión, no ponen término a procedimiento alguno, no deciden directa o indirectamente el fondo del asunto y no causan perjuicio irreparable, por lo que no serían susceptibles de impugnación mediante recurso independiente, en virtud de lo dispuesto en la ley (art. 112 Ley 39/2015 de Procedimiento Administrativo). No obstante, resulta aceptable que el empresario pueda presentar al inspector actuante las alegaciones y discrepancias que estime oportunas en relación con el requerimiento, y que el inspector, a modo de cuestión incidental en reposición, pueda atender las alegaciones cuando el objeto del requerimiento vaya más allá de lo que se considera razonablemente factible y práctico, tanto desde el punto de vista técnico como económico. La autoridad competente para resolver el recurso que se interpusiera ha de ser la autoridad superior en el ámbito en que opere el inspector actuante (en la actualidad, según los diversos supuestos, el Jefe de la Inspección Provincial o el Jefe de la Unidad especializada en Prevención de Riesgos Laborales, el Director de la Dirección Especial adscrita a la Autoridad Central, o el Director General de la Inspección de Trabajo y Seguridad Social).

Debe finalmente señalarse que la interposición de un recurso contra la advertencia o requerimiento no puede tener efectos dilatorios, por lo que no es obstáculo para que el funcionario de la Inspección levante el acta de infracción que corresponda.

a.b. Acta de infracción. El acta de infracción puede recurrirse ante el órgano administrativo superior competente. Las fases procedimentales se regulan en el art 52 Ley Infracciones y Sanciones en el Orden Social y en el RD 928/98 -arts. 18-20- (ver detalle en el apartado 3 h y i de este estudio). El sujeto responsable que recurre tiene derecho a utilizar los medios de defensa admitidos por el Ordenamiento Jurídico, y a aportar documentos en cualquier fase del procedimiento anterior al trámite de audiencia, que deberán ser tenidos en cuenta por el órgano competente al redactar la propuesta de resolución (art 64 Ley Procedimiento Administrativo Común).

b. La partes en el procedimiento sancionador: Aparte del empresario, también puede ser parte en el procedimiento el trabajador cuando esté afecto por un interés legítimo, pues puede resultar perjudicado en sus derechos si el acta de infracción no refleja adecuadamente el fondo de la cuestión. En efecto, la Ley Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social –art. 20- establece que la acción de denuncia del incumplimiento de la legislación de orden social es pública y que el denunciante no puede alegar la consideración de interesado en la fase de investigación (inspección). Sólo tiene derecho a ser informado del estado de tramitación de su denuncia, de los hechos comprobados y de las medidas adoptadas, pero sólo si el resultado de la investigación afecta a sus derechos individuales o colectivos. Este mismo derecho lo tienen los representantes unitarios (elegidos) o sindicales de los trabajadores. No obstante, si la denuncia da lugar al inicio de un procedimiento sancionador, el denunciante (trabajador o representantes de los trabajadores como titulares de intereses legítimos) puede tener, en su caso, la condición de interesado (o parte en el procedimiento).

Igualmente, cuando el acta de infracción afecta a solicitantes y beneficiarios de prestaciones de Seguridad Social, el acta se comunica, de forma simultánea, al órgano o entidad gestora correspondiente a efectos de la adopción de la suspensión cautelar prevista en la normativa aplicable (art. 17 RD 928/98). En relación con este punto, podrán ser parte en este procedimiento sancionador los solicitantes y beneficiarios de prestaciones si les afecta el acta de infracción y/o la resolución administrativa (por ej. un acta de infracción por falta de medidas de seguridad en relación con un accidente de trabajo).

Para que un sindicato pueda ser tenido como parte en un procedimiento sancionador administrativo, debe existir una dimensión de interés colectivo y que la infracción objeto de controversia y la eventual sanción tengan incidencia en ese interés colectivo (Sentencia Tribunal Constitucional 215/2001, de 29 de octubre de 2001). Se requiere también que haya un vínculo especial entre el objeto del procedimiento y los fines del sindicato, así como que exista una ventaja o beneficio que redunde en favor del interés profesional o económico del sindicato y el de los trabajadores representados (véase sentencias del Tribunal Constitucional 28/2005, de 14 de febrero, 210/1994, 101/1996, 24/2001. Y esta concepción

se recoge también en las sentencias de los tribunales ordinarios: por ejemplo, en un procedimiento sancionador cuyo objeto era la no adopción de medidas por el empresario para evitar riesgo de enfermedades graves de los trabajadores, se ha considerado al sindicato parte en el procedimiento sancionador (sentencia Tribunal Superior de Justicia de Castilla y León de 31 de marzo de 2003.

c. Plazo para recurrir. El acta de infracción puede recurrirse en un plazo de 15 días desde el día siguiente a su notificación (art. 17 RD 928/98). Posteriormente se dicta resolución en primera instancia.

d. Consecuencias de no recurrir la acción administrativa.

d.1. El requerimiento es un acto declarativo, de apercibimiento o conminatorio, con eventual fijación de un plazo. Pero un acto que no impide el inicio de cualquier ulterior procedimiento, sino que sólo puede condicionarlo como circunstancia agravante en caso de su incumplimiento. La principal consecuencia de no recurrir un requerimiento es que se presume la conformidad del empresario y, por lo tanto, su cumplimiento. El incumplimiento de un requerimiento será tenido en cuenta en la agravación del acta de infracción. Sin embargo, siempre queda expedita para el empresario la vía de impugnación del requerimiento por la vía de recurso del acta de infracción, en la que se incluye tal incumplimiento del requerimiento como circunstancia agravante.

d.2 El acta de infracción, en caso de no ser recurrida, da lugar a la resolución sancionadora por el órgano administrativo competente. Si no se formalizase escrito de alegaciones, continua la tramitación del procedimiento hasta dictar la propuesta de resolución que corresponda (art 18 RD 928/98). El órgano competente para resolver, previas las diligencias que estime necesarias, dicta la resolución motivada que proceda en el plazo de diez días desde el momento en que finalizó la tramitación del expediente, bien confirmando, modificando o dejando sin efecto la propuesta del acta. Si se deja sin efecto el acta, se ordena el archivo del expediente y, en su caso, el levantamiento de las medidas de carácter provisional o cautelar (por ejemplo, cierre de centro de trabajo por infracciones muy graves o suspensión de un servicio de prevención). La resolución sancionadora acuerda la anulación del acta cuando ésta carece de los requisitos imprescindibles para alcanzar su fin o por defectos de forma que den lugar a la indefensión de los interesados y no se hubiesen subsanado en la tramitación previa a la resolución. En otro caso, se confirma la sanción

d.3 En los procedimientos de paralización de trabajos por riesgo grave e inminente por el inspector de Trabajo, el empresario debe comunicar dicha medida a los trabajadores afectados, al Comité de Seguridad y Salud, al Delegado de Prevención o, en su ausencia, a los representantes del personal. La empresa responsable está obligada a dar cuenta al inspector de Trabajo del cumplimiento de esta notificación. El inspector de Trabajo debe dar traslado de su decisión de forma inmediata a la autoridad laboral. La empresa debe cumplir con la medida, aunque pueda impugnarla ante la autoridad laboral en el plazo de tres días hábiles. La autoridad laboral debe resolver tal impugnación en el plazo máximo de veinticuatro horas (art. 44 de Ley Prevención de Riesgos Laborales y art. 11 del RD 928/98, de 14 de mayo). Tal resolución es ejecutiva, sin perjuicio de los recursos administrativos y ante la jurisdicción social que proceda. Si el empresario no recurre la orden, se presume su conformidad y cumplimiento.

Procedimientos judiciales

9. Proceso de iniciación de los procedimientos judiciales

La Ley de Jurisdicción Social establece (art. 2) establece que los órganos jurisdiccionales del orden social conocen de aquellas reclamaciones que persigan garantizar el cumplimiento de las obligaciones legales y convencionales en materia de prevención de riesgos laborales, tanto frente al empresario como frente a otros sujetos obligados legal o convencionalmente.

a. Transferencia del litigio por la autoridad administrativa. Los procedimientos administrativos en España, sancionadores o no, pero relacionados con la materia de seguridad y salud en el trabajo, pueden ser en todo caso **revisados por la jurisdicción social**. La jurisdicción social está integrada por jueces y tribunales especializados en materia laboral o juzgados de lo social. Los sujetos responsables de una infracción que han sido sancionados pueden recurrir la decisión primero en vía administrativa y después en vía judicial ante los juzgados del orden social (art. 2 de la Ley 36/2011, de 10 de octubre). De esta manera, son los sujetos responsables, y no la Administración, quienes desplazan el litigio a un procedimiento judicial.

Están legitimados para interponer la demanda y ser parte en el proceso los empresarios (destinatarios de la sanción) o aquellas personas (trabajadores y/o sus representantes) que ostenten un interés legítimo (art. 151 Ley de Jurisdicción Social). En los procedimientos que tienen por objeto revisar un acto o sanción administrativa, la Administración asume el papel de parte demandada. Una vez iniciado el procedimiento judicial, el juez habitualmente requiere a la Inspección de Trabajo el envío del expediente o de cuantos informes obren en el mismo.

El demandante debe acreditar que ha agotado la vía administrativa y el plazo de presentación de la demanda es de 2 meses desde la terminación de la vía administrativa. Se aplica a los plazos en principio **"pro actione"**, quedando suspendidos si la notificación de la resolución administrativa ha sido defectuosa.

b. Acción expeditiva de la Administración para eliminar un riesgo inminente. Las **órdenes de paralización de trabajos por riesgo grave e inminente** adoptadas por la Administración competente, en concreto la Inspección de Trabajo, pueden también ser objeto de impugnación ante los órganos judiciales del orden social (art. 152 Ley Jurisdicción Social). Los trabajadores afectados, sus representantes elegidos o sindicales, así como el propio empresario, pueden iniciar el procedimiento solicitando al juez de lo social el alzamiento, mantenimiento o adopción de la paralización (art. 152 Ley Jurisdicción Social).

c. Derecho a la acción privada. En general, entienden los juzgados del orden social igualmente de la **impugnación de sanciones dictadas por la Administración** en materia de seguridad y salud laboral que sean firmes en vía administrativa (agotados todos los recursos administrativos). Se excluyen las cuestiones litigiosas suscitadas entre el empresario, los coordinadores de seguridad y salud en el trabajo y los servicios de prevención. También entienden los juzgados de lo social de las **impugnaciones de los actos administrativos de formalización de la protección frente a riesgos profesionales y el establecimiento de tarifas de cotización** por accidentes de trabajo y enfermedades profesional o **actas de liquidación por cuotas de seguridad social por riesgo de accidentes de trabajo y enfermedades profesionale**s.

La declaración de hechos probados que contenga una sentencia firme del orden jurisdiccional contencioso-administrativo, relativa a la existencia de infracción a la normativa de prevención de riesgos laborales, vinculará al orden social de la jurisdicción, en lo que se refiere al recargo, en su caso, de la prestación económica del sistema de Seguridad Social (art. 42.5 Ley de Infracciones y Sanciones en el Orden Social).

Por otra parte, la Inspección de Trabajo suele abstenerse de seguir el procedimiento de inspección y, en su caso, de sanción si existe una demanda judicial sobre el mismo objeto interpuesta por el trabajador. De acuerdo con lo establecido en el art. 20.5 de la Ley Ordenadora del Sistema de Inspección de Trabajo no se dará curso a aquellas denuncias cuyo objeto coincida con asuntos de los que esté conociendo un órgano jurisdiccional cuyo pronunciamiento pueda condicionar el resultado de la actuación inspectora. Asimismo, una vez que sea firme la sentencia y sea esta comunicada a la Inspección de Trabajo, se iniciará la tramitación del expediente sancionador.

Por otra parte, tienen derecho a iniciar el procedimiento mediante una acción privada tanto el destinatario de la sanción, el empresario, como los trabajadores y/o sus representantes. Los trabajadores y sus representantes están en general legitimados para **promover otros procesos judiciales del orden social**, siempre y cuando ostente derechos o intereses legítimos lesionados. Los intereses legítimos pueden ser de carácter económico, social o para velar por el cumplimiento de las normas vigentes. Pueden, además, personarse en el juicio y ser tenidos como parte. Los sindicatos pueden actuar en nombre y

representación de los trabajadores afiliados. Trabajadores y/o sindicatos pueden iniciar, además de los ya descritos, otros tipos de procedimientos judiciales:

c.1 Procedimiento de tutela de derechos fundamentales, entre los cuales podría encontrarse el derecho a la vida e integridad física (en caso de riesgo grave para la salud). En estos procedimientos, que se tramitan con carácter urgente, es parte, además del trabajador o sindicato demandante, el Ministerio Fiscal (art. 177 Ley Jurisdicción Social). La víctima de la lesión de derechos fundamentales puede dirigir su pretensión tanto contra el empresario como contra cualquier otro sujeto que resulte responsable. La demanda, además de los requisitos generales establecidos en la presente Ley, debe expresar con claridad los hechos constitutivos de la vulneración, el derecho o libertad infringidos y la cuantía de la indemnización pretendida. Puede el demandante solicitar la adopción de medidas cautelares- art. 180 Ley Jurisdicción Social- (v.gr. la paralización de trabajos). Cuando la sentencia declare la existencia de vulneración, el juez debe fijar también una indemnización (art. 183 Ley Jurisdicción Social).

c.2 Proceso judicial del orden social por accidentes de trabajo y/o enfermedades profesionales. Los trabajadores o sus causahabientes pueden iniciar un procedimiento de reclamación contra el empresario o contra aquéllos a quienes se les atribuya legal, convencional o contractualmente responsabilidad por los daños originados en el ámbito de la prestación de servicios o que tengan su causa en accidentes de trabajo o enfermedades profesionales. Los trabajadores pueden demandar tanto al empresario como a la entidad aseguradora, Mutua Colaboradora de Accidentes de Trabajo y Enfermedades Profesionales, o a los servicios de prevención (art. 2 Ley Jurisdicción Social).

c.3 Proceso judicial ante los juzgados de lo social en reclamación o litigio sobre la valoración, reconocimiento y calificación del grado de discapacidad de los trabajadores. El juzgado social puede revisar los procedimientos administrativos de calificación de una determinada contingencia (v.gr. si una dolencia procede de una enfermedad común o de una enfermedad profesional o accidente de trabajo) o de reconocimiento o valoración de una determinada situación laboral (v.gr. incapacidad permanente o absoluta) con la correspondiente consecuencia en el cobro de una pensión de Seguridad Social (art 2 Ley Jurisdicción Social)

c.4 Proceso judicial en reclamación de un recargo de prestaciones o de la indemnización en los supuestos de accidentes de trabajo o enfermedad profesional cuando su causa ha sido una falta de medidas de seguridad en el trabajo imputable al empresario. También puede iniciarse este procedimiento de oficio si el recargo fue propuesto por la Inspección de Trabajo (art. 2 b Ley Jurisdicción Social).

c.5 Proceso judicial ante los juzgados de lo social en reclamación de responsabilidad civil derivada del incumplimiento del contrato por parte del empresario (responsabilidad civil contractual ex-art. 1.101 Código Civil). En este tipo de procedimientos puede declararse la responsabilidad civil del empresario y la obligación de indemnizar por daños y perjuicios causados si empresario incurrió en incumplimiento de sus obligaciones mediando dolo, negligencia o morosidad (art. 1101 Código Civil). Se exige: a) Incumplimiento de una obligación (de seguridad y salud en el trabajo) y/o contrato (laboral) por una de las partes; b) Haber incurrido en acto culposo o negligente (sentencia Tribunal Supremo de 18 de julio de 2008, Rec. 2277).c) Haberse producido un daño o perjuicio y que exista una relación de causalidad entre la conducta empresarial y el daño sufrido por el trabajador, como por ejemplo las lesiones causadas por un accidente de trabajo (puede concurrir culpa de ambos, empresario y trabajador). Este procedimiento judicial también puede iniciarse por el empresario para resarcirse de un incumplimiento contractual del trabajador. Los tribunales competentes para conocer de estas acciones de naturaleza civil son por lo general los juzgados del orden social, aunque han existido conflictos competenciales entre la jurisdicción social y la civil. Pero en general, se inicia el procedimiento con el ejercicio de la correspondiente acción civil ante el juzgado de lo social, que es competente (Tribunal Supremo Auto Sala de Conflictos 4 de abril de 1994).

d. Procedimiento penal. La iniciación de un procedimiento penal puede realizarse de las siguientes maneras:

d.1 Procedimientos penales a instancia de la comunicación de la Inspección de Trabajo. En el curso de un procedimiento sancionador administrativo hay casos en los que el órgano instructor o resolutorio advierte que los hechos que están siendo sancionados son constitutivos de delito. En tal caso se suspende el procedimiento administrativo y se pasa el tanto de culpa al Ministerio Fiscal (art. 3 Ley de Infracciones y sanciones del orden social). Tal suspensión también procede si el órgano administrativo advierte que los mismos hechos objeto de procedimiento administrativo sancionador están siendo simultáneamente enjuiciados en un proceso penal. La norma reglamentaria (art. 5 del Real Decreto 928/1998) establece que cuando el funcionario actuante considere que los hechos que han dado lugar al inicio del procedimiento administrativo sancionador pudieran ser constitutivos de ilícito penal, remitirá al Jefe de la Inspección de Trabajo informe con expresión de los hechos y circunstancias y de los sujetos que pudieran resultar afectados. Si el Jefe de la Inspección de Trabajo estimase la concurrencia de ilícito penal, lo comunicará al órgano competente para resolver, quien acordará, en su caso, la remisión del expediente al Ministerio Fiscal y se abstendrá de seguir el procedimiento administrativo sancionador hasta que el Ministerio Fiscal, en su caso, resuelva no interponer acción o le sea notificada la firmeza de la sentencia o auto de sobreseimiento que dicte la autoridad judicial.

Con la remisión del expediente administrativo sancionador, se solicita de la autoridad judicial, la notificación de la resolución que ponga fin al procedimiento penal (artículo 270 de la Ley Orgánica Poder Judicial) para, en su caso, archivar definitivamente el expediente (si hubo sentencia condenatoria) o para continuarlo (si hubo sobreseimiento y no se apreció existencia de delito -RD 928/1998, arts.5 y 20). También se suspende el procedimiento administrativo cuando, no mediando dicha comunicación, se venga en conocimiento de la existencia de actuaciones penales por los mismos hechos y fundamento en relación al mismo presunto responsable. La comunicación al Ministerio Fiscal no afecta al inmediato cumplimiento de la orden de paralización de trabajos (artículo 44 de la Ley de Prevención de Riesgos Laborales), ni a la eficacia de los requerimientos formulados por la Inspección de Trabajo, cuyo incumplimiento se comunicará a través del órgano correspondiente al Juzgado competente, por si fuese constitutivo de ilícito penal.

La condena por delito en sentencia firme excluirá la imposición de sanción administrativa por los mismos hechos que hayan sido considerados probados siempre que concurra, además, identidad de sujeto y fundamento (principio *non bis in idem*). Por otra parte, los hechos declarados probados por resolución judicial penal firme vinculan a los órganos administrativos en sus procedimientos sancionadores. Si finalmente se sobresee la causa penal o los hechos no son constitutivos de delito, se levanta la suspensión del procedimiento sancionador administrativo, que prosigue de conformidad con los trámites ordinarios para la persecución de la infracción administrativa (art. 54 Ley de Infracciones y Sanciones del Orden Social).

El requisito fundamental para la citada suspensión es que exista identidad de sujeto, hecho y fundamento entre la infracción administrativa y la infracción penal. La identidad de hechos y fundamentos no plantea por lo general problemas. La identidad de sujeto es más complicada cuando se trata de una infracción que en el procedimiento administrativo se imputa a una persona jurídica y en el procedimiento penal se imputa a una persona física. En principio, no existe identidad de sujetos cuando en el proceso penal son sancionados, por ejemplo, los técnicos de la empresa y ésta en el procedimiento administrativo (sentencia del Tribunal Supremo de 31 de marzo de 2010). No obstante, dependiendo de la posición de dicha persona física en la persona jurídica podría entenderse que hay coincidencia de personalidad si la misma persona física –responsable penal- también actuó como representante de la jurídica (directivos, consejero delegado, etc.), aunque esto la jurisprudencia no lo ha resuelto con claridad. Un posicionamiento al respecto también depende de cómo se articule el principio de culpabilidad en torno a las personas jurídicas (y debe articularse, aunque de forma diferente conforme a la sentencia del Tribunal Constitucional 246/1991, de 19 de diciembre).

d.2 Procedimientos penales iniciados a instancia de parte. En España cualquier persona está legitimada para interponer una acción penal, pues es pública. Todos los ciudadanos españoles podrán ejercitarla con arreglo a las prescripciones de la Ley de Enjuiciamiento Criminal -art 101-. Existen algunas excepciones como, por ejemplo, las relacionadas con familiares que pudieran denunciarse o querellarse entre sí, etc. Por lo tanto, cualquier trabajador o sus representantes pueden presentar una querella contra el empleador en caso de que estimen que éste ha incurrido en un delito. Los delitos por los que se puede demandar al empresario relacionados con la seguridad y salud en el trabajo son diversos: delito de acoso moral o sexual (arts. 173 y 184 Código Penal), delitos de homicidio y de lesiones por imprudencia (arts.142, 152, 617, 621.2 y 3 Código Penal) o delito de riesgo y peligro para la vida e integridad física de los trabajadores con incumplimiento de las normas de seguridad y salud en el trabajo (art. 316 Código Penal). Las penas aplicadas a estos delitos pueden ser de prisión de 1 a 4 años en casos de muerte (delito de homicidio) y de 1 a 3 años de prisión en casos de delito de lesiones graves por imprudencia grave (arts. 142 y 152 del Código Penal). En la normativa española también se tipifica el delito de riesgo (no se ha producido un accidente pero se ha puesto en riesgo grave la vida o integridad física de los trabajadores), aplicándose una pena de prisión de entre 6 meses y 3 años (art 316 Código Penal).

No obstante, la acción penal o querella puede igualmente presentarse de oficio. La Inspección de Trabajo en España trabaja en estrecha colaboración con los Fiscales especiales para seguridad y salud en el trabajo. Esta coordinación se regula en la Instrucción 1/2007 sobre profundización de las relaciones de la *Inspección de Trabajo y Seguridad Social con la Fiscalía General del Estado en materia de ilícitos penales contra la Seguridad y Salud Laboral*[2]. De acuerdo con esta instrucción, la Inspección de Trabajo comunica siempre a la Fiscalía todos los casos de infracciones muy graves, incumplimiento reiterado por el empresario de los requerimientos realizados por la Inspección de Trabajo o de las propuestas realizadas por los servicios de prevención, los delegados de prevención o el comité de seguridad y salud de la empresa, casos de accidentes mortales o graves que hayan generado lesiones permanente, supuestos de riesgo para menores, de trabajadores especialmente sensibles (v.gr. maternidad) o de incumplimiento de orden de paralización de trabajos, entre otros. Asimismo, si un juez de instrucción tiene conocimiento de la perpetración de un delito, lo debe poner en conocimiento de forma inmediata del Fiscal de la respectiva Audiencia (artículo 308 Ley Enjuiciamiento Criminal).

e. Otros procedimientos penales y civiles para exigir responsabilidad civil

e.1 Responsabilidad civil subsidiaria. En el sistema judicial español una persona puede exigir responsabilidad civil en un procedimiento penal (responsabilidad civil subsidiaria *ex delicto*, conforme al Código Penal - arts.109 y ss). El procedimiento penal es una vía para el resarcimiento económico de la víctima o de los perjudicados por la comisión del delito, siempre que se reconozca esa responsabilidad civil como una consecuencia de la penal. Se exige la existencia de un daño o perjuicio que resarcir.

e.2 Responsabilidad civil extracontractual. Se trata de una responsabilidad exigible al empresario, pero que no deriva del contrato de trabajo con el trabajador. Se encuentra regulada en el art. 1902 Código Civil, que establece que el que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, está obligado a reparar el daño causado. Este procedimiento es menos frecuente y residual, ya que la mayoría de las reclamaciones judiciales se encauzan por la vía de la los tribunales del orden social. Cuando se trata de una culpa extracontractual de esta naturaleza, son competentes los juzgados del orden civil (Auto Sala de Conflictos Tribunal Supremo de 28 de julio de 2007).

2 Esta instrucción deriva del "Protocolo Marco, de 19 de septiembre de 2007, de colaboración entre el Consejo General del Poder Judicial, el Ministro de Trabajo y Asuntos Sociales y la Fiscalía General del Estado para la investigación eficaz y rápida de los delitos contra la vida, la salud y la integridad física de los trabajadores y la ejecución de las sentencias condenatorias

10. Procedimientos de audiencia previa

Tanto en los procedimientos ante el juzgado de lo social (arts. 87, 90 y 94 Ley Jurisdicción Social) como en los procedimientos penales (arts. 410 y ss de la Ley de Enjuiciamiento Criminal) se regulan fases de prueba en las que pueden llamarse a testigos. Igualmente se regula la posibilidad en los procedimientos judiciales sociales de que el juez llame a declarar a peritos (art. 93 Ley Jurisdicción Social) y también en los procedimientos penales (arts. 456 y ss de Ley de Enjuiciamiento Criminal).

Un **ejemplo de procedimiento de audiencia previa** es el proceso judicial de impugnación de una orden de paralización de trabajos por riesgo grave e inminente decretada por un inspector de Trabajo. Una vez interpuesta la correspondiente demanda e iniciado el proceso, el juez cita al empresario y a los trabajadores afectados o a sus representantes a una audiencia preliminar en el día y hora que se señale dentro de las cuarenta y ocho horas siguientes. El juez o tribunal igualmente requiere de la Inspección de Trabajo la aportación dentro del mismo plazo de las actuaciones que hubiera practicado al respecto. También, en caso de considerarlo necesario, el juez puede solicitar la presencia en la audiencia del inspector que hubiera ordenado la paralización, así como de los técnicos que le hubieren asistido. En el procedimiento pueden personarse, además de los trabajadores y sus representantes, las entidades gestoras, colaboradoras y servicios públicos de salud (ya que, en caso de accidente, habría traslado de la responsabilidad de la eventual pensión del trabajador al empresario si hubiera incumplido la orden de paralización- art. 152 Ley Jurisdicción Social-).

11. Pruebas admisibles

En relación con las pruebas en los **procesos judiciales del orden social** –competentes en materia de seguridad y salud en el trabajo-, en el derecho español rige el **principio dispositivo de aportación de parte e iniciativa probatoria**, que no puede ser sustituida por el juez, salvo que lo disponga la ley (art. 282 Ley Enjuiciamiento Civil). Y la ley a veces lo dispone, como por ejemplo cuando establece que el juez puede solicitar informes de peritos o expertos, que en los procesos derivados de accidente de trabajo y enfermedad profesional se recaban a la Inspección de Trabajo y a otros organismos públicos competentes en materia de prevención y salud laboral, así como a las entidades e instituciones legalmente habilitadas al efecto (artículo 95 Ley Jurisdicción Social). Igualmente, en los procesos para la determinación de contingencia profesional (accidentes de trabajo y/o enfermedad profesional), el juez interesa de la Inspección Provincial de Trabajo, si no figurase ya en el expediente o en los autos, informe relativo a las circunstancias en que sobrevino el accidente o enfermedad, trabajo que realizaba el accidentado o enfermo, salario que percibía y base de cotización, que será expedido necesariamente en el plazo máximo de diez días. Con antelación de al menos cinco días a la celebración del juicio, el secretario judicial debe reiterar la remisión de dicho informe si éste no hubiere tenido todavía entrada en los autos (art 142 Ley Jurisdicción Social).

Por otra parte, en el sistema español de valoración de la prueba se distingue entre **pruebas tasadas** (interrogatorio de parte que intervino en los hechos -art.316 Ley Enjuiciamiento Civil- documento público o privado -arts.319 y 326 Ley Enjuiciamiento Civil) y pruebas de libre apreciación por el juez. Se admite cualquier medio de prueba válido en Derecho tales como fotografías, muestras, vídeos, documentos, procedimientos de reproducción de la palabra, de la imagen y del sonido o de archivo y reproducción de datos, que deben ser aportados por medio de soporte adecuado y poniendo a disposición del órgano jurisdiccional los medios necesarios para su reproducción y posterior constancia en autos (art. 299 y ss Ley Enjuiciamiento Civil y art. 90 Ley Jurisdicción Social).

En cuanto a **testigos y peritos**, durante el juicio, tanto el juez como las partes en el proceso pueden hacer tantas preguntas como estimen necesarias a los testigos (art. 87 Ley Jurisdicción Social). Los peritos igualmente pueden ser interrogados, además de tener que ratificarse en su informe (art. 93 Ley Jurisdicción Social).

Los inspectores de Trabajo a veces incorporan en sus informes o actas fotografías tomadas en el centro de trabajo inspeccionado que pueden valorarse en el correspondiente proceso judicial.

No se admiten pruebas que tengan su origen o que se hubieran obtenido, directa o indirectamente, mediante procedimientos que supongan violación de derechos fundamentales o libertades públicas (art 90 Ley Jurisdicción Social)

En relación con los **procedimientos penales**, la ley regula con mayor detalle y garantías las declaraciones de testigos y peritos (arts. 410 y ss y 456 y ss). En los procedimientos originados por un accidente de trabajo o enfermedad profesional, es muy habitual que el juez cite al inspector de Trabajo que realizó actuación inspectora y elaboró el informe sobre el accidente o enfermedad. Se le cita, bien como testigo o bien como perito, y se le pide en todo caso ratificar el contenido de su informe, que suele ser un documento clave para la determinación de la responsabilidad del imputado (arts. 410 y ss y 456 y ss de la Ley de Enjuiciamiento Criminal). Además las partes en el proceso, así como Fiscalía, pueden y habitualmente realizan preguntas al inspector sobre las circunstancias en las que sobrevino el accidente y sobre cuestiones legales o técnicas relacionadas con el mismo.

12. Plazos para iniciar los procedimientos y para la emisión de sentencia o fallo judicial

a. Transferencia del litigio por la Autoridad administrativa. Como se ha explicado, es fundamentalmente el ciudadano, empresario o trabajador, el que desplaza el litigio a la jurisdicción social. En los **procedimientos específicos ante la jurisdicción social que impugnan sanciones administrativas**, el plazo de interposición de la demanda es de dos meses (art 69 Ley Jurisdicción Social), una vez notificada la denegación de la reclamación previa administrativa o transcurrido un mes sin haber sido notificada la misma, o desde que se deba entender agotada la vía administrativa en los demás casos (151.7 Ley Jurisdicción Social).

b. En **los procedimientos de paralización de trabajos por riesgo grave e inminente** adoptada por la Inspección de Trabajo, tras el correspondiente recurso administrativo, en la fase judicial, el juez cita al empresario y a los trabajadores afectados o a sus representantes en el plazo cuarenta y ocho horas para decidir, mismo plazo que da a la Inspección de Trabajo para aportar las actuaciones que hubiera practicado al respecto y, en su caso, presentarse él o los técnicos que le hubieran asistido en la audiencia (art. 152 Ley Jurisdicción Social).

c. Los plazos para ejercer una acción judicial vienen recogidos en el apartado 14 a. de este estudio.

d. No existe un plazo específico para que la Administración pase el tanto de culpa al Ministerio Fiscal cuando observa que unos hechos pueden ser constitutivos de delito (art. 3 de Ley de Infracciones y Sanciones en el Orden Social). Los plazos para ejercer una acción judicial penal vienen recogidos en el apartado 14 a. de este estudio.

Recursos contra las resoluciones administrativas y judiciales

13. Tipo de procedimiento y órgano resolutorio

a. Procedimiento y autoridad judicial administrativa.

Las resoluciones sancionadoras administrativas pueden recurrirse en primer lugar en vía administrativa conforme a lo descrito en los subapartados h) e i) del apartado 3 y en el apartado 8. Una vez firmes en vía administrativa, estas resoluciones, así como cualquier otro acto dictado por la Administración laboral en materia de seguridad y salud en el trabajo, anteriormente se recurrían ante tribunales judiciales administrativos (juzgados contencioso administrativos), pero a partir de la entrada en vigor de la Ley de Jurisdicción Social de 2011, se establece que la competencia corresponde a los juzgados de los social. La resolución, pues, puede recurrirse ante la jurisdicción social competente conforme a lo explicado en el apartado 12 a.

b y d. Juzgados de primera instancia y juzgados de lo social.

Los **juzgados civiles** de primera instancia no tienen competencias en España en la materia de seguridad y salud en el trabajo, salvo en casos de reclamación de responsabilidad civil extracontractual, conforme a lo explicado en el apartado 9.e.2. Son, en cambio, competentes los **juzgados de lo social** en función de diversos criterios, como el del lugar de prestación de los servicios o el del domicilio del demandado, a elección del demandante, o el del lugar de ejecución del contrato de trabajo, si hallándose en él el demandado pudiera ser citado, o el del domicilio del demandado (art. 10 Ley Jurisdicción Social). El proceso del orden social, en sus distintas modalidades, se resuelve en primera instancia en los Juzgados de lo Social, sin perjuicio de las distintas posibilidades de apelación ante los órganos jurisdiccionales superiores (Tribunal Superior de Justicia, Audiencia Nacional, Tribunal Supremo, Tribunal Constitucional).

c.1 Tribunales de apelación frente a las sentencias judiciales del orden social:

c.1.1 Tribunales Superiores de Justicia de las Comunidades Autónomas: conocen del recurso de suplicación contra las sentencias de los juzgados del orden social dictadas en procesos de impugnación de actos administrativos en materia laboral (en los que se incluyen los relativos a la seguridad y salud en el trabajo), siempre que el litigio no sea susceptible de valoración económica o cuando su cuantía litigiosa exceda de dieciocho mil euros (v.gr. importe de la sanción, importe de la pensión de Seguridad Social reclamada en caso de accidente de trabajo y en cómputo anual, importe de la indemnización reclamada, etc.) -artículo 191 Ley Jurisdicción Social-. Asimismo, la Audiencia Nacional (Sala de lo Social) conoce de los recursos contra actos dictados por Ministro o Secretario de Estado o de litigios con dimensión territorial superior a la de una sola Comunidad Autónoma.

c.1.1 El Tribunal Supremo (Sala de lo Social) conoce del recurso de casación contra las sentencias y otras resoluciones dictadas en única instancia por los Tribunales Superiores de Justicia de las Comunidades Autónomas (Sala Social) y por la Audiencia Nacional. Son susceptibles de este tipo de recurso: 1) las sentencias recaídas en el ejercicio de la potestad sancionadora (sanciones) y demás impugnaciones de otros actos de las Administraciones públicas sujetos al Derecho Administrativo (v.gr. cierre de empresa) ; 2) los actos administrativos dictados en el ejercicio de potestades y funciones en materia de Seguridad Social, y siempre que la valoración económica de la cuantía litigiosa exceda de ciento cincuenta mil euros -art 206 Ley de Jurisdicción Social-.

c.1.2 Tribunal Supremo (Sala de lo Social) conoce igualmente del recurso de casación para unificación de doctrina contra las sentencias dictadas en suplicación por las Salas de lo Social de los Tribunales Superiores de Justicia -artículo 218 Ley Jurisdicción Social-. La finalidad de este recurso es la unificación de doctrina cuando dos o más sentencias dictadas por los Tribunales Superiores de Justicia son contradictorias entre sí o con sentencias del Tribunal Supremo, respecto de los mismos litigantes u otros diferentes en idéntica situación y respecto a hechos, fundamentos y pretensiones sustancialmente iguales -artículo 219 Ley de Jurisdicción Social-.

c.2 Tribunales de apelación en los procedimientos penales:

c.2.1 Audiencias Provinciales: Conocen de la **impugnación de sentencias** dictadas por los juzgados de lo penaI en los procedimientos abreviados (condenas de menos de 9 años de prisión, que son las correspondientes a los delitos relacionados con la seguridad y salud en el trabajo). La Audiencia Nacional (Sala de lo Penal) conoce de las sentencias dictadas por el Juez Central de lo Penal (art.790 Ley Enjuiciamiento Criminal).

c.2.2 Los Tribunales Superiores de Justicia de las Comunidades Autónomas (Sala Penal) conocen del **recurso de apelación** contra las sentencias dictadas por las Audiencias Provinciales.

c.2.3 Tribunal Supremo (Sala Segunda) conoce del recurso de casación por infracción de ley y por quebrantamiento de forma contra las sentencias dictadas en única instancia o en apelación por los Tribunales Superiores de Justicia (o la Audiencia Nacional), y en algunos casos tasados contra las sentencias dictadas en apelación por las Audiencias Provinciales -artículo 847 Ley de Enjuiciamiento Criminal-.

14. Plazos procedimientos

a.Iniciación.

En **los procedimientos judiciales de orden social en los que se impugna una resolución o acto administrativo**, el plazo para interponer la demanda ante el juzgado de lo social es de dos meses desde que se deba entender agotada la vía administrativa (art. 69 Ley Jurisdicción Social). Si se interpuso recurso de alzada en vía administrativa, puede recurrirse la resolución ante la jurisdicción social competente transcurridos 3 meses desde la interposición de dicho recurso sin que recaiga resolución, entendiéndose en este caso desestimado y quedando expedita la vía jurisdiccional social. En las reclamaciones de prestaciones de Seguridad Social (relacionadas con accidentes de trabajo o enfermedades profesionales), el plazo de interposición de la demanda es de 30 días desde la notificación de la denegación de la reclamación administrativa previa (art.71 Ley Jurisdicción Social)[3].

En **los procedimientos penales**, no hay un plazo específico para que la Administración comunique la posible concurrencia del orden administrativo y el penal ni para que comunique un delito del que tenga conocimiento. Por otra parte, el plazo para la interposición de la querella está ligado al plazo de prescripción de los delitos, dependiendo éste de la pena aplicada. En todo caso, el Ministerio Fiscal siempre está obligado a comunicar cualquier delito del que tenga conocimiento al juez de instrucción. El procedimiento propiamente dicho se inicia mediante el auto de incoación de la instrucción. La formación del sumario puede iniciarse de oficio, a instancia del Ministerio Fiscal, o a instancia de parte, correspondiendo su desarrollo al juez de instrucción (art. 303 Ley de Enjuiciamiento Criminal).

b. Plazos en cada fase del proceso

En los **procedimientos del orden social en los que se impugna una resolución o acto administrativo** el juzgado puede dar un plazo de 4 días para subsanar defectos en la presentación de la demanda, y posteriormente hay un plazo de 3 días para admitirla a trámite (arts. 80 y 151 Ley Jurisdicción Social). El juez reclama el expediente administrativo a la Administración competente para su remisión al juzgado en el plazo de 10 días. Posteriormente se notifica la demanda a aquellas personas que puedan tener un interés legítimo en el proceso, para que conozcan el emplazamiento al proceso al menos con 5 días de antelación al juicio. Admitida la demanda, se inician las diligencias y se cita para conciliación (art 84 Ley Jurisdicción Social) y juicio (art 85 Ley Jurisdicción Social). La acción para impugnar la validez de la conciliación caduca a los treinta días de la fecha de su celebración (84 Ley Jurisdicción Social).

En los **procedimientos penales abreviados**, ya iniciado el proceso a consecuencia de la comunicación, en su caso, al Ministerio Fiscal por parte de la Administración, el juez de instrucción inicia las diligencias previas, de las que da traslado al Ministerio Fiscal y a las acusaciones personadas, para que, en el plazo común de diez días, soliciten la apertura del juicio oral formulando escrito de acusación o el sobreseimiento (art. 780 Ley Enjuiciamiento Criminal). Las diligencias de instrucción se practican durante un plazo máximo de seis meses desde la fecha del auto de incoación del sumario, pero si la instrucción es declarada compleja el plazo de duración de la instrucción será de dieciocho meses. El juez da por concluida la instrucción cuando entienda que ha cumplido su finalidad y dicta auto de conclusión del sumario (artículo 324 Ley Enjuiciamiento Criminal) y se remiten las actuaciones al tribunal competente para celebrar el juicio. Posteriormente se manda abrir el juicio oral, y el Secretario judicial comunica la causa al Fiscal dándole un plazo de cinco días para calificar por escrito los hechos. Si también se hubiese presentado querella, el juez de instrucción, después de admitirla si fuere procedente, manda practicar las diligencias que correspondan (art 312 Ley Enjuiciamiento Criminal). Después se abren distintos plazos para la personación en juicio del acusado, para la práctica de pruebas e informes, fase de intento de sentencia de conformidad y, en su caso, sentencia.

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3 En los demás casos de interposición de una demanda ante los juzgados del orden social hay que atender a los plazos generales dispuestos en la ley (art. 59 del Estatuto de los Trabajadores). La regla general es que las acciones derivadas del contrato de trabajo que no tenga señalado plazo especial prescribirán al año de su terminación. Si la acción se ejercita para exigir prestaciones económicas o para el cumplimiento de obligaciones de tracto único, que no puedan tener lugar después de extinguido, el plazo de un año se contará desde el día en que la acción pudiera ejercitarse.

Contra los autos del juez de instrucción y del juez de lo penal caben recursos de reforma y de apelación (art. 766 Ley Enjuiciamiento Criminal). El recurso de apelación se tiene que presentar dentro de los cinco días siguientes a la notificación del auto recurrido (art. 766 Ley Enjuiciamiento Criminal).

c. Plazos para dictar o resolución o sentencia

c.1 En los procedimientos ante el juzgado de lo social el juez o tribunal debe dictar sentencia en el plazo de cinco días desde la terminación del juicio, publicándose inmediatamente y notificándose a las partes o a sus representantes dentro de los dos días siguientes (artículo 97 Ley Jurisdicción Social).

c.2 En los procedimientos penales abreviados la sentencia se dicta dentro de los cinco días siguientes a la finalización del juicio oral (art. 789 Ley Enjuiciamiento Criminal).

15. Posiciones para recurrir

En los **procedimientos judiciales ante el juzgado social contra una resolución o acto administrativo** pueden, con carácter general, recurrir tanto el sujeto responsable (empresario), como las personas afectadas por la resolución o acto administrativo (empresario y trabajadores). En concreto, en esta jurisdicción social pueden recurrir las decisiones administrativas los trabajadores y sindicatos (estos últimos si tienen un interés legítimo, representan a un colectivo de trabajadores o ejercen la defensa de intereses económicos y sociales que les son propios –arts. 16 y 17 de Ley Jurisdicción Social-). Los recurrentes deben ser destinatarios del acto o resolución impugnada y/o deben ostentar derechos o intereses legítimos en su revocación o anulación. Éstos pueden ser los empresarios y los trabajadores afectados o los causahabientes de ambos, así como aquellos afectados con responsabilidades o perjudicados por la decisión administrativa (art. 151 Ley Jurisdicción Social). El demandado es siempre la Administración o Entidad pública autora del acto. No obstante, la Administración puede actuar como demandante impugnando un acto administrativo propio declarativo de derechos, previa su declaración de su lesividad para el interés público (art. 151 Ley Jurisdicción Social.

En los **procedimientos penales**, son aquellas personas que han sido parte en el proceso las que están legitimadas para recurrir la decisión judicial. El Ministerio Fiscal está en todo caso legitimado para recurrir la decisión (arts. 790, 846 bis, 859 y 873, entre otros de la Ley de Enjuiciamiento Criminal).

16. Partes en el procedimiento

En los **procedimientos judiciales del orden social**, en general son parte en estos procedimientos judiciales el empleador demandado y el trabajador demandante o sus representantes, es decir, aquellas personas que son titulares de un derecho subjetivo o un interés legítimo, así como los sindicatos de trabajadores y las asociaciones empresariales para la defensa de los intereses económicos y sociales que les son propios. Un sindicato puede representar a un trabajador si cuenta con su autorización (art. 20 Ley Jurisdicción Social). El Ministerio Fiscal también está legitimado para intervenir en todos aquellos supuestos previstos en la Ley (artículo 17 Ley Jurisdicción Social). En los **procedimientos judiciales por accidentes de trabajo y enfermedades profesionales** las partes en el proceso pueden ser los empresarios, los trabajadores afectados por aquéllos y sus causahabientes, terceros que hayan incurrido en responsabilidades legales o contractuales por los daños causados o la entidad aseguradora. En los procedimientos de impugnación de actos administrativos es parte demandada la Administración cuyo acto o resolución se impugne.

En los **procedimientos penales**, dado que la acción penal es pública (art. 100 Ley Enjuiciamiento Criminal) cualquier ciudadano puede constituirse como parte, aunque no basta la denuncia, sino que tiene que ejercitar la acción penal o querella (art. 270 Ley Enjuiciamiento Criminal). El Ministerio Fiscal también puede constituirse en parte mediante el ejercicio de la acción penal (art. 271 Ley Enjuiciamiento Criminal). Además, el art. 110 Ley Enjuiciamiento Criminal establece que los "perjudicados por un delito o falta que no hubieren renunciado a su derecho podrán mostrarse parte en la causa si lo hicieran antes del trámite de calificación del delito y ejercitar las acciones civiles que procedan". En la otra parte, son parte el encausado, procesado o acusado (art. 118 Ley Enjuiciamiento Criminal) y el responsable civil subsidiario, en su caso (arts. 117 y ss y art. 615 Ley Enjuiciamiento Criminal).

Los inspectores de Trabajo, así como cualquier otro funcionario competente en materia de seguridad y salud en el Trabajo (técnicos de institutos, técnicos habilitados, subinspectores de seguridad y salud laboral) no tienen la condición de parte ni pueden constituirse en ella, sin perjuicio de que sea habitual que el juez, de oficio o a instancia de parte, llame a estos funcionarios para que declaren como testigos o peritos, en especial en los delitos de homicidio o lesiones por imprudencia grave.

17. Carga de la prueba

En los **procedimientos judiciales del orden social**, la carga de la prueba corresponde a las partes en el proceso (Ley Enjuiciamiento Civil -art.217-). Puede haber inversión de la carga probatoria en algunos casos especiales (discriminación de un trabajador), y, en el área de seguridad y salud en el trabajo, en los casos de responsabilidades derivadas de accidente de trabajo y enfermedad profesional se invierte también la carga de la prueba, correspondiendo acreditar al deudor de seguridad (el empresario) que cumplió las medidas de prevención (art. 96. 2 Ley de Jurisdicción Social). También en estos procedimientos se sigue una regla similar a la de la presunción de certeza de los funcionarios de inspección de Trabajo, ya que en la propia Ley de Jurisdicción Social (art. 151.8) se establece que los hechos constatados por los inspectores de Trabajo por los Subinspectores de Empleo y Seguridad Social actuantes que se formalicen en las actas de infracción observando los requisitos legales pertinentes, tendrán presunción de certeza, sin perjuicio de las pruebas que en defensa de los respectivos derechos e intereses puedan aportar los interesados. El mismo valor probatorio tendrán los hechos constatados por los funcionarios a los que se reconoce la condición de autoridad, y que se formalicen en documento público observando los requisitos legales pertinentes. Debe, no obstante, incluirse en este apartado la misma salvedad señalada respecto a los procedimientos administrativos sancionadores si el objeto del proceso judicial social es una sanción impuesta por la Administración.

En los **procesos sobre responsabilidades derivadas de accidentes de trabajo y enfermedades profesionales** corresponde a los deudores de seguridad y a los concurrentes en la producción del resultado lesivo probar la adopción de las medidas necesarias para prevenir o evitar el riesgo, así como cualquier factor excluyente o minorador de su responsabilidad. No puede apreciarse como elemento exonerador de la responsabilidad la culpa no temeraria del trabajador ni la que responda al ejercicio habitual del trabajo o a la confianza que éste inspira (art. 96.2 Ley Jurisdicción Social).

18. Tipo y ámbito de revisión administrativa o judicial

En los **procedimientos del orden social de impugnación de actos o resoluciones administrativas**, la sentencia debe pronunciarse sobre los siguientes extremos:

- Declarar, en su caso, la inadmisibilidad de la demanda (carencia de jurisdicción, acto que no es susceptible de impugnación, demanda fuera de plazo, etc.) o desestimar la misma por entender que el acto impugnado se ajusta a derecho.
- Estimar la demanda porque el acto recurrido 1. Ha incurrido en una infracción del ordenamiento jurídico o desviación de poder; 2. Omisión de requisitos de forma que hayan ocasionado indefensión (art. 151 Ley Jurisdicción Social).
- En el caso de procedimientos sancionadores, la revisión por el tribunal se extiende a los hechos o circunstancias contenidos en la resolución sancionadora (y por ende en el acta de infracción confirmada) o verifica si ha habido situaciones en las que se ha producido indefensión por cualquier causa o se ha aplicado indebidamente el ordenamiento jurídico (art. 18 RD 928/1998). Los actos administrativos en general, y los sancionadores en particular, también pueden revisarse cuando lesionan los derechos y libertades fundamentales, por incompetencia del órgano resolutorio, si se dictan prescindiendo total y absolutamente del procedimiento legalmente establecido o si se dictan con infracción de la ley o incurren en desviación de poder (art. 47 Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas).

En los **procedimientos judiciales del orden social:**

- El **recurso de suplicación** tiene por objeto revisar los supuestos en los que pudiera haber infracción de normas o garantías del procedimiento que haya producido indefensión, revisar los hechos declarados probados a la vista de las pruebas documentales y periciales practicadas, o también examinar las infracciones de normas sustantivas o de la jurisprudencia (artículo 193 Ley Jurisdicción Social).
- El **recurso de casación** tiene por objeto revisar si se ha producido una situación de abuso, exceso o defecto en el ejercicio de la jurisdicción, posible incompetencia o inadecuación de procedimiento, quebrantamiento de las formas esenciales del juicio por infracción de las normas reguladoras de la sentencia o de las que rigen los actos y garantías procesales, siempre que, en este último caso, se haya producido indefensión para la parte, error en la apreciación de la prueba, infracción de las normas del ordenamiento jurídico o de la jurisprudencia que fueren aplicables para resolver las cuestiones objeto de debate (artículo 207 Ley de Jurisdicción Social).
- El **recurso de casación para la unificación de doctrina** tiene por objeto unificar doctrina con ocasión de sentencias dictadas en suplicación por las Salas de lo Social de los Tribunales Superiores de Justicia, que fueran contradictorias entre sí o con las del Tribunal Supremo, respecto de los mismos supuestos, fundamentos y pretensiones sustancialmente iguales (art. 219 Ley Jurisdicción Social).

En los **procedimientos penales abreviados** (los que son aplicables a los supuestos de delitos en materia de seguridad y salud en el trabajo), el recurso o impugnación de la sentencia del juez penal tiene por objeto revisar situaciones de posible quebrantamiento de las normas y garantías procesales, error en la apreciación de las pruebas o infracción de normas del ordenamiento jurídico (art. 790.2 Ley Enjuiciamiento Criminal).

19. Procedimiento para iniciar un procedimiento

Mientras el **procedimiento administrativo sancionador** se inicia de oficio siempre por la Administración (artículo 13 RD 928/98), el procedimiento judicial ante la jurisdicción social puede iniciarse por la Administración (procedimientos en materia de discriminación, falsos autónomos, regulación de empleo en fraude, etc.), pero para la materia de seguridad y salud en el trabajo se inicia bien por el empresario, bien por los trabajadores o sus representantes.

En los **procedimientos judiciales del orden social**, el procedimiento se inicia mediante la interposición de la demanda y su admisión a trámite. La demanda se formula por escrito, pudiendo utilizar los formularios y procedimientos facilitados al efecto en la oficina judicial donde deba presentarse, y habrá de contener los siguientes requisitos generales y su admisión (arts. 80 y 81 Ley de Jurisdicción Social). En **procedimientos de impugnación de resoluciones de la autoridad laboral sobre paralización de trabajos por riesgo grave e inminente** para la seguridad y la salud, el trabajador o trabajadores afectados, su representación unitaria o sindical y el empresario interesado pueden iniciar el procedimiento mediante la presentación de la solicitud de alzamiento, mantenimiento o adopción de la medida (art. 152 Ley Jurisdicción Social)

En los **procedimientos penales** el procedimiento se inicia mediante la interposición de la acción penal o la querella (art. 100 Ley Enjuiciamiento Criminal) ejercitada por cualquier ciudadano o por el Ministerio Fiscal (art. 105, 270 y 271 Ley Enjuiciamiento Criminal), y la formación del sumario, ya empiece de oficio, ya a instancia de parte, que corresponde al juez de instrucción competente (art. 303 Ley Enjuiciamiento Criminal).

20. Impacto de un recurso o apelación en la decisión administrativa o judicial

a. Suspensión de la ejecución de la sanción. En los **procedimientos administrativos sancionadores** el impacto que tiene un recurso contra una decisión administrativa o judicial es la suspensión de la ejecución de la sanción en base a que en el Derecho español no se aplica el principio *solve et repete*. Esta suspensión persiste hasta que la resolución sea firme, bien en el ámbito administrativo por falta de alegaciones o por no interposición de un recurso judicial, bien en sede judicial cuando se agoten las posibilidades de recurso. Este principio deriva de la jurisprudencia del Tribunal Constitucional (por todas, sentencias núms. 110/1993, de 25 de marzo y 78/1996, de 20 de mayo) en el sentido de que la no suspensión de la decisión sancionadora puede ser contraria al derecho de tutela judicial efectiva y presunción de inocencia.

En relación con los **procedimientos en materia de prestaciones de seguridad Social**, la reclamación administrativa previa interrumpe los plazos de prescripción y suspende los de caducidad, reanudándose estos últimos al día siguiente al de la notificación de la resolución o del transcurso del plazo en que deba entenderse desestimada (artículo 73 Ley Jurisdicción Social).

La r**evocación definitiva de la acreditación de un servicio de prevención** (o suspensión temporal) – art. 26 RD 39/97- puede declararse si, a propuesta de la Inspección de Trabajo, se ha sancionado por la autoridad laboral al servicio de prevención por la comisión de una infracción grave o muy grave. Aunque la revocación del servicio de prevención es ejecutiva inmediatamente, se exige que la multa administrativa que ampara la revocación sea firme, por lo que el recurso contra la multa puede aplazar la ejecución de la suspensión o revocación hasta que aquélla sea firme en sede administrativa o judicial (conforme arts. 26 y 27 del RD 39/1997).

En los **procedimientos judiciales del orden social**, cuando se adoptan medidas cautelares, los interesados pueden solicitar, en cualquier estado del proceso, la suspensión del acto o resolución administrativos recurridos y en general cuantas medidas aseguren la efectividad de la sentencia, cuando la ejecución del acto impugnado pudiera hacer perder su finalidad legítima a la demanda. El juez o tribunal dicta auto, resolviendo sobre la suspensión, una vez oídas las partes por tres días, salvo que concurran razones de especial urgencia, en cuyo caso se puede anticipar la medida sin perjuicio de la posterior audiencia de las partes. La medida cautelar puede denegarse cuando de ésta pudiera seguirse perturbación grave de los intereses generales o de terceros que el juez o tribunal ponderará en forma circunstanciada (artículo 152 Ley Jurisdicción Social).

b. Suspensión de plazos. En los **procedimientos administrativos sancionadores**, tanto el acta de infracción como la resolución sancionadora debidamente notificadas interrumpen los plazos de prescripción de las infracciones. Igualmente, el inicio de actuación administrativa con conocimiento formal del sujeto pasivo conducente a la comprobación de la infracción, cualquier actuación del sujeto responsable que implique reconocimiento de los hechos constitutivos de la infracción, o la interposición de reclamación o recurso de cualquier clase por parte de los afectados o sus representantes también interrumpe el plazo de prescripción de las infracciones. Por último, la comunicación trasladando el tanto de culpa al órgano judicial competente o al Ministerio Fiscal, cuando las infracciones pudieran ser constitutivas de delito, interrumpe la prescripción de la infracción hasta que se notifique a la Administración la resolución judicial que recaiga, o hasta que el Ministerio Fiscal comunique su decisión de no ejercitar la acción penal (art. 7 RD 928/98).

En los **procedimientos penales**, cuando un procedimiento penal se dirige contra una persona, y se incoa el procedimiento o se dicta resolución judicial atribuyendo a una persona su participación en unos hechos delictivos, o también cuando se presenta una querella contra una persona determinada, se suspende el cómputo de la prescripción del delito por un plazo máximo de seis meses, a contar desde la misma fecha de presentación de la querella o de formulación de la denuncia. El cómputo de la prescripción continúa desde la fecha de presentación de la querella o denuncia si, dentro del plazo de seis meses, recae resolución judicial firme de inadmisión a trámite de la querella o denuncia (art. 132 Código Penal).

El recurso contra una **orden de paralización de los trabajos por riesgo grave e inminente** no suspende la ejecución de la orden (art. 44 de Ley Prevención de Riesgos Laborales y art. 11 del RD 928/98).

c. Compensaciones o restricciones temporales. Cuando el proceso verse sobre la **impugnación de otros actos de las Administraciones públicas**, pueden adoptarse medidas cautelares (por ejemplo, suspensión del acto administrativo o caución o garantía para asegurar, en su caso, la indemnización de daños y perjuicios (art. 79 Ley Jurisdicción Social, en relación con el art 133 de Ley Jurisdicción Contencioso Administrativa).

En los **procedimientos en materia de prestaciones de seguridad Social**, la Ley de Jurisdicción Social (apartado 5 del art. 79) permite medidas cautelares señalando que en reclamaciones derivadas de accidente de trabajo y enfermedad profesional podrán acordarse las referidas en el apartado 1 del artículo 142 (es decir, embargo de bienes del empresario en cantidad suficiente para asegurar el resultado del juicio y cuantas medidas cautelares se consideren necesarias) en relación con el aseguramiento empresarial al respecto, así como el embargo preventivo y demás medidas cautelares respecto de cualquier clase de responsabilidades empresariales y de terceros derivadas de dichas contingencias.

En los **procedimientos penales** se prevén medidas restrictivas o cautelares como la detención del acusado (art. 489 y ss Ley Enjuiciamiento Criminal), su prisión preventiva (art. 502 Ley Enjuiciamiento Criminal), registros (arts. 563 y ss Ley Enjuiciamiento Criminal) o fianzas y embargos (arts. 589 y ss Ley Enjuiciamiento Criminal).

21. Decisión del órgano resolutorio

a. Contenido y forma de la decisión. En los **procedimientos judiciales del orden social** la sentencia se pronuncia sobre la pretensión contenida en la demanda (revocación de una sanción o de una orden de paralización, pronunciamiento sobre la suspensión o retirada de licencia de un servicio de prevención, calificación de un accidente en la demanda como accidente de trabajo, etc.). La sentencia debe reflejar una serie de puntos (art.97 Ley Jurisdicción Social):

- Los antecedentes de hecho, así como los hechos que se estiman probados y los elementos de convicción.
- Los fundamentos de derecho y razonamientos que se tienen en cuenta para las conclusiones y para el pronunciamiento del fallo.
- En el texto de la sentencia debe indicarse si la misma es o no firme y, en su caso, los recursos que proceden, el órgano ante el que deben interponerse y el plazo y los requisitos para ello, así como los depósitos y las consignaciones que sean necesarios y la forma de efectuarlos.

En los **procedimientos penales**, las sentencias se pronuncian sobre la existencia o no del delito y/o sobre la culpabilidad del acusado, así como sobre la posible existencia de responsabilidad civil subsidiaria. Igualmente, en el procedimiento penal abreviado la sentencia no puede imponer pena más grave de la solicitada por las acusaciones (art. 789 Ley Enjuiciamiento Criminal). Las sentencias penales se redactan con sujeción a las reglas siguientes (art. 142 Ley Enjuiciamiento Criminal):

- Lugar y la fecha de la sentencia, los hechos que hubieren dado lugar a la formación de la causa, los nombres y apellidos de los actores particulares, si los hubiere, y de los procesados.
- Los Resultandos de los hechos y de los que se estimen probados.
- Las conclusiones definitivas de la acusación y de la defensa.
- Los fundamentos doctrinales y legales de la calificación de los hechos que se hubiesen estimado probados.
- Los fundamentos doctrinales y legales determinantes de la participación que en los referidos hechos hubiese tenido cada uno de los procesados.
- Los fundamentos doctrinales y legales de la calificación de las circunstancias atenuantes, agravantes o eximentes de responsabilidad criminal, y los de la calificación de los hechos que se hubiesen estimado probados con relación a la responsabilidad civil en que hubiesen incurrido los procesados.
- La cita de las disposiciones legales que se consideren aplicables.

Recursos contra decisiones judiciales

22. Recurso contra las decisiones judiciales

a. y f. Plazos para recurrir y para emitir decisión. Con independencia de los recursos que pueden interponerse contra los actos de trámite (reposición contra providencias, autos, diligencias de ordenación y decretos) o recursos de queja, en los **procedimientos ante el juzgado de lo social**:

- **El recurso de suplicación** contra una sentencia debe anunciarse en el plazo de 5 días desde la notificación de la sentencia (y 10 días para interponerlo desde la puesta a disposición del recurrente de los autos –arts. 194 y 195 de Ley de Jurisdicción Social-). Interpuesto el recurso en tiempo y forma, se traslada a la otra parte en el plazo de dos días, y tiene 5 días para impugnarlo (artículo 197 Ley Jurisdicción Social). Hay un plazo suplementario de 5 días para subsanar defectos u omisiones y para aportar documentos omitidos (artículo 199 Ley Jurisdicción Social). Si se admite a trámite el recurso, se dicta sentencia, previa fase de deliberación, votación y fallo, en el plazo de diez días (art. 201 Ley Jurisdicción Social).
- **El recurso de casación** debe anunciarse en el plazo de 5 días desde la notificación de la sentencia (y 15 días para interponerlo formalmente desde la fecha del anuncio y puesta a disposición de autos –art. 209 Ley Jurisdicción Social-). Una vez formalizado el recurso o recursos dentro del plazo concedido y con los requisitos exigidos, el secretario judicial traslada el recurso a las partes en el plazo de dos días, que tienen un plazo de diez días para su impugnación. Se concede igualmente un plazo suplementario de cinco días para subsanar defectos y para aportar documentos omitidos. La Fiscalía de lo Social del Tribunal Supremo tiene un plazo de diez días para informar sobre la procedencia o improcedencia de la casación pretendida (art. 211 Ley de Jurisdicción Social). Finalmente, la Sala competente del Tribunal Supremo dicta sentencia en el plazo de diez días contados desde el siguiente al de la terminación de la vista o al de la celebración de la votación (art.214 Ley de Jurisdicción Social).
- **El recurso de casación en unificación de doctrina** puede interponerse por las partes interesadas (o en su caso por el Ministerio Fiscal) en el plazo de los diez días siguientes a la notificación de la sentencia impugnada. El secretario judicial da traslado de los autos a la Fiscalía de lo Social del Tribunal Supremo para que en el plazo de diez días informe sobre la procedencia o improcedencia de la casación pretendida. (arts. 219, 220 y 221 de la Ley de Jurisdicción Social). Preparado en tiempo y forma el recurso, el secretario judicial, dentro de los dos días siguientes, concede a las partes recurrentes el plazo común de quince días para interponer el recurso ante la misma Sala de suplicación (Artículo 223 Ley Jurisdicción Social). De apreciarse defectos subsanables en la tramitación del recurso, o en su preparación e interposición, se concede a la parte recurrente un plazo suplementario de diez días para la aportación de los documentos omitidos o la subsanación de los defectos apreciados (art 225 Ley Jurisdicción Social). Devueltos los autos por el Ministerio Fiscal, junto con su informe, la Sala acuerda señalar, dentro de los diez días siguientes, día para deliberación, votación y fallo. La sentencia debe dictarse en el plazo de diez días, contados desde el siguiente al de la celebración de la votación (artículo 227 Ley Jurisdicción Social)

En los **procedimientos penales abreviados**:

- El plazo para **impugnar la sentencia** del juzgado penal es de diez días siguientes a aquel en que se les hubiere notificado la sentencia -artículo 790 Ley Enjuiciamiento Criminal-. Se da traslado del escrito de impugnación a las demás partes por un plazo común de diez días. Dentro de este plazo se han de presentar los escritos de alegaciones de las demás partes. La sentencia de apelación se dicta dentro de los cinco días siguientes a la vista oral, o dentro de los diez días siguientes a la recepción de las actuaciones por el tribunal competente (Audiencia) cuando no hubiere resultado procedente su celebración (art 792 Ley Enjuiciamiento Criminal).

- El **recurso de apelación** lo puede interponer tanto el Ministerio Fiscal como el condenado y las demás partes, dentro de los diez días siguientes a la última notificación de la sentencia. Se establece un plazo para impugnar el recurso de 5 días (846 bis d Ley de Enjuiciamiento Criminal). Celebrada la vista, debe dictarse sentencia en el plazo de 5 días (artículo 846 bis f Ley de Enjuiciamiento Criminal)
- El **recurso de casación** por infracción de ley o por quebrantamiento de forma se interpone en el plazo de 15 días desde que se emplace a las partes por el Secretario judicial (artículo 859 y 873 Ley Enjuiciamiento Criminal). El Tribunal debe aceptar o no el recurso en el plazo de tres días (art 858 Ley de Enjuiciamiento Criminal), regulando la ley distintos plazos para tener por preparado el recurso, comparecencia de las partes, juicio y sentencia.

b. Posición para recurrir. Tanto en los procedimientos judiciales ante el orden social como en los procedimientos penales, pueden interponer recursos todas aquellas personas que sean parte en el procedimiento, así como en los casos tasados por la ley el Ministerio Fiscal.

c. Ámbito y motivos del recurso. Tanto en los procedimientos administrativos sancionadores como en los procedimientos judiciales, el órgano instructor o resolutorio, ya sea administrativo o judicial, deben valorar tanto la prueba de los hechos como la correcta aplicación de la ley y las normas de procedimiento.

En los **procedimientos del orden social**:

- El **recurso de suplicación** puede interponerse por: a) infracción de normas o garantías del procedimiento que haya producido indefensión; b) para revisar los hechos declarados probados, a la vista de las pruebas documentales y periciales practicadas; y c) para examinar las infracciones de normas sustantivas o de la jurisprudencia (art 193 Ley Jurisdicción Social).
- El **recurso de casación** sólo puede interponerse por los siguientes motivos (art. 207 Ley de Jurisdicción Social): a) Abuso, exceso o defecto en el ejercicio de la jurisdicción; b) Incompetencia o inadecuación de procedimiento; c) Quebrantamiento de forma o de garantías procesales, siempre que se produzca indefensión para la parte; d) Error en la apreciación de la prueba; e) Infracción de ley o de la jurisprudencia aplicables al caso.
- El **recurso es la unificación de doctrina** se interpone cuando existe contradicción entre dos sentencias de los Tribunales Superiores de Justicia respecto de los mismos litigantes u otros diferentes en idéntica situación y respecto a hechos, fundamentos y pretensiones sustancialmente iguales -artículo 219 Ley de Jurisdicción Social-.

En los **procedimientos penales**:

- El **recurso de apelación** puede interponerse por: a) quebrantamiento de normas y garantías procesales en el proceso o sentencia, que hayan causado indefensión, infracción de precepto constitucional o legal en la calificación jurídica de los hechos o en la determinación de la pena; c) disolución indebida de un jurado; e) vulneración el derecho a la presunción de inocencia - arts. 846 bis a, b y c Ley Enjuiciamiento Criminal-.
- El **recurso de casación** procede por infracción de ley y por quebrantamiento de forma contra (art.847 Ley Enjuiciamiento Criminal).

d. Fases y niveles del recurso.

1. Juzgados de primera instancia: juzgados de lo social y juzgados penales y de instrucción.
2. Recurso ante el órgano judicial superior (Audiencias Provinciales en procesos penales, Tribunales Superiores de Justicia de Comunidades Autónomas en procesos penales y de orden social) Audiencia Nacional en ambos tipos de procesos cuando la cuestión litigiosa tiene un ámbito territorial superior al de Comunidad Autónoma).
3. Tribunal Supremo (recursos de casación y de unificación de doctrina).
4. Tribunal Constitucional (recursos en los que alega vulneración de la Constitución).
5. Tribunal Europeo de Justicia, a través de una cuestión prejudicial cuando se alega una vulneración de los Tratados de la Unión.

e. Impacto del recurso (ver apartado 20).

Ejecución de la decisión final

23 y 24. Proceso de ejecución de la decisión final o firme y consecuencias en caso de incumplimiento por parte del sujeto responsable

A la ejecución de una decisión final o firme en materia de seguridad y salud se le aplican las normas generales previstas tanto en la **Ley de Jurisdicción Social** (proceso ante los juzgados de lo social) como en la **Ley de Enjuiciamiento Criminal** (si se trata de un proceso penal). La **Ley de Enjuiciamiento Civil** también establece normas generales aplicables con carácter supletorio.

a. Aspectos generales. Una vez que la sentencia deviene firme, se ejecuta cumpliendo el condenado con lo ordenado por la sentencia. La ejecución puede realizarse a instancia de parte o de oficio -en procedimientos de oficio-. En general, la ejecución no dineraria (regulada en el art. 700 y siguientes LEC) prevé el embargo para indemnizaciones sustitutorias, embargo y traba de bienes, subastas, apremio de bienes, compensación sustitutoria, cambios en las inscripciones registrales de bienes inmuebles, encargo de hacer a un tercero y multas coercitivas.

Si se trata de una suspensión o limitación de derechos (suspensión de autorización o licencia, limitación de contratar con la Administración), es al órgano competente de la Administración el que adopta la medida de ejecución que corresponda.

En todos los casos anteriores, el empresario puede ser forzado a la ejecución de la decisión judicial mediante multas pecuniarias coercitivas, cumplimiento a través de un tercero o apremios personales (arts. 237 y 241 Ley Jurisdicción Social y arts. 699, 706, 709 y 711 Ley Enjuiciamiento Civil).

b. Sanción económica. Si se trata de una sanción pecuniaria, debe pagarla el sujeto responsable en los plazos y lugar que dispongan el despacho o auto de ejecución y/o la providencia de apremio. El despacho de ejecución debe incorporar el título ejecutivo o providencia de apremio. Y en las ejecuciones dinerarias deben incluirse la cantidad líquida reclamada como principal, así como la que se estime para intereses de demora y costas. Igualmente deben detallarse los bienes del ejecutado susceptibles de embargo de los que se tuviera conocimiento y, en su caso, debe analizarse si se consideran suficientes para el fin de la ejecución (art 239 y ss Ley Jurisdicción Social). La ley prevé las fases de embargo, tasación de bienes, subasta o venta judicial (arts.261 y ss Ley Jurisdicción Social). Hay notas específicas para la ejecución ante las Administraciones públicas (identificación del órgano administrativo que debe cumplir, medios de cumplimiento, plazo, etc. -art 287 Ley Jurisdicción Social-).

c. Obligación de hacer. Si se trata de una obligación de hacer (cierre de centro de trabajo), puede interesarse por el juez al órgano administrativo competente la comprobación del cumplimiento de la sentencia, sin perjuicio de que los inspectores de Trabajo puedan realizar, a petición del órgano administrativo competente, la comprobación del cierre efectivo de la empresa. Si se trata de una paralización de trabajos, igualmente los inspectores de Trabajo pueden verificar, a instancia del juez o del órgano administrativo competente, si se ha procedido a dar cumplimiento a la orden decisión judicial confirmatoria de la paralización. En caso de incumplimiento, el juez puede decretar indemnizaciones sustitutorias o multas coercitivas, conforme al apartado a.

d. Prisión. Las personas que pueden incurrir en responsabilidad penal grave, y consecuentemente en prisión, suelen ser el empresario de cualquier sector que haya infringido la normativa de seguridad, en especial si ha concurrido un accidente de trabajo con consecuencias en la salud o integridad física del trabajador. Junto al empresario, es en el sector de la construcción en el que puede haber otros responsables respecto de los cuales llevar a cabo la ejecución de sentencia. Así, los coordinadores de proyecto o ejecución de obra o los arquitectos en los casos de grave incumplimiento de la normativa de seguridad en el trabajo y de sus obligaciones legales pueden ser afectados por un expediente de prisión provisional (arts. 502 y ss LECRIM) siempre que la pena de prisión prevista sea de más de dos años, haya riesgo de fuga o de alteración de pruebas, entre otros motivos.

Anexo I. Relación de disposiciones legales y reglamentarias

Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social

https://www.boe.es/buscar/act.php?id=BOE-A-2000-15060

Real Decreto 928/1998, de 14 de mayo, por el que se aprueba el Reglamento general sobre procedimientos para la imposición de sanciones por infracciones de Orden social y para los expedientes liquidatorios de cuotas de la Seguridad Social

https://www.boe.es/buscar/doc.php?id=BOE-A-1998-12816

Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8168

Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas.

https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565

Convenio OIT núm. 81 relativo a la inspección del trabajo en la industria y el comercio

http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C081

Ley 31/1995, de 8 de noviembre, de prevención de Riesgos Laborales

https://www.boe.es/buscar/act.php?id=BOE-A-1995-24292

Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público

https://www.boe.es/buscar/act.php?id=BOE-A-2011-17887

Real Decreto 1398/93

Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social

https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724

Real Decreto 772/2011, de 3 de junio, por el que se modifica el Reglamento General sobre procedimientos para la imposición de sanciones por infracciones de orden social y para los expedientes liquidatorios de cuotas de la Seguridad Social, aprobado por el Real Decreto 928/1998, de 14 de mayo

https://www.boe.es/buscar/doc.php?id=BOE-A-2011-10784

Directiva 2014/67/UE del Parlamento Europeo y del Consejo, de 15 de mayo de 2014, Real Decreto-ley 9/2017, de 26 de mayo

http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex%3A32014L0067

Real Decreto 707/2002, de 19 de julio, por el que se aprueba el Reglamento sobre el procedimiento administrativo especial de actuación de la Inspección de Trabajo y Seguridad Social y para la imposición de medidas correctoras de incumplimientos en materia de prevención de riesgos laborales en el ámbito de la Administración General del Estado

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2002-15456

Real Decreto 231/2017, de 10 de marzo, por el que se regula el establecimiento de un sistema de reducción de las cotizaciones por contingencias profesionales a las empresas que hayan disminuido de manera considerable la siniestralidad laboral

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2017-3125

Real Decreto 39/1997, de 17 de enero, por el que se aprueba el Reglamento de los Servicios de Prevención

https://www.boe.es/buscar/act.php?id=BOE-A-1997-1853

Real Decreto 597/2007, de 4 de mayo, sobre publicación de las sanciones por infracciones muy graves en materia de prevención de riesgos laborales

https://www.boe.es/buscar/doc.php?id=BOE-A-2007-9190

Criterio Técnico núm. 50/2007 de 28 de junio de 2007 de la Inspección de Trabajo y Seguridad Social

Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social

https://www.boe.es/buscar/act.php?id=BOE-A-2011-15936&p=20120714&tn=2

Código Civil (Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil)

https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763&p=20151006&tn=2

Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial

https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666

Código Penal (Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal)

https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444

Instrucción 1/2007 sobre profundización de las relaciones de la Inspección de Trabajo y Seguridad Social con la Fiscalía General del Estado en materia de ilícitos penales

Ley de Enjuiciamiento Criminal (Real decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal)

https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036

Ley Enjuiciamiento Civil (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil)

https://www.boe.es/buscar/act.php?id=BOE-A-2000-323

Ley Jurisdicción Contencioso Administrativa (Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa)

https://www.boe.es/buscar/act.php?id=BOE-A-1998-16718

Convenio OIT Nº 161

http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C161

Directiva 89/391/CEE del Consejo, de 12 de junio de 1989, relativa a la aplicación de medidas para promover la mejora de la seguridad y de la salud de los trabajadores en el trabajo

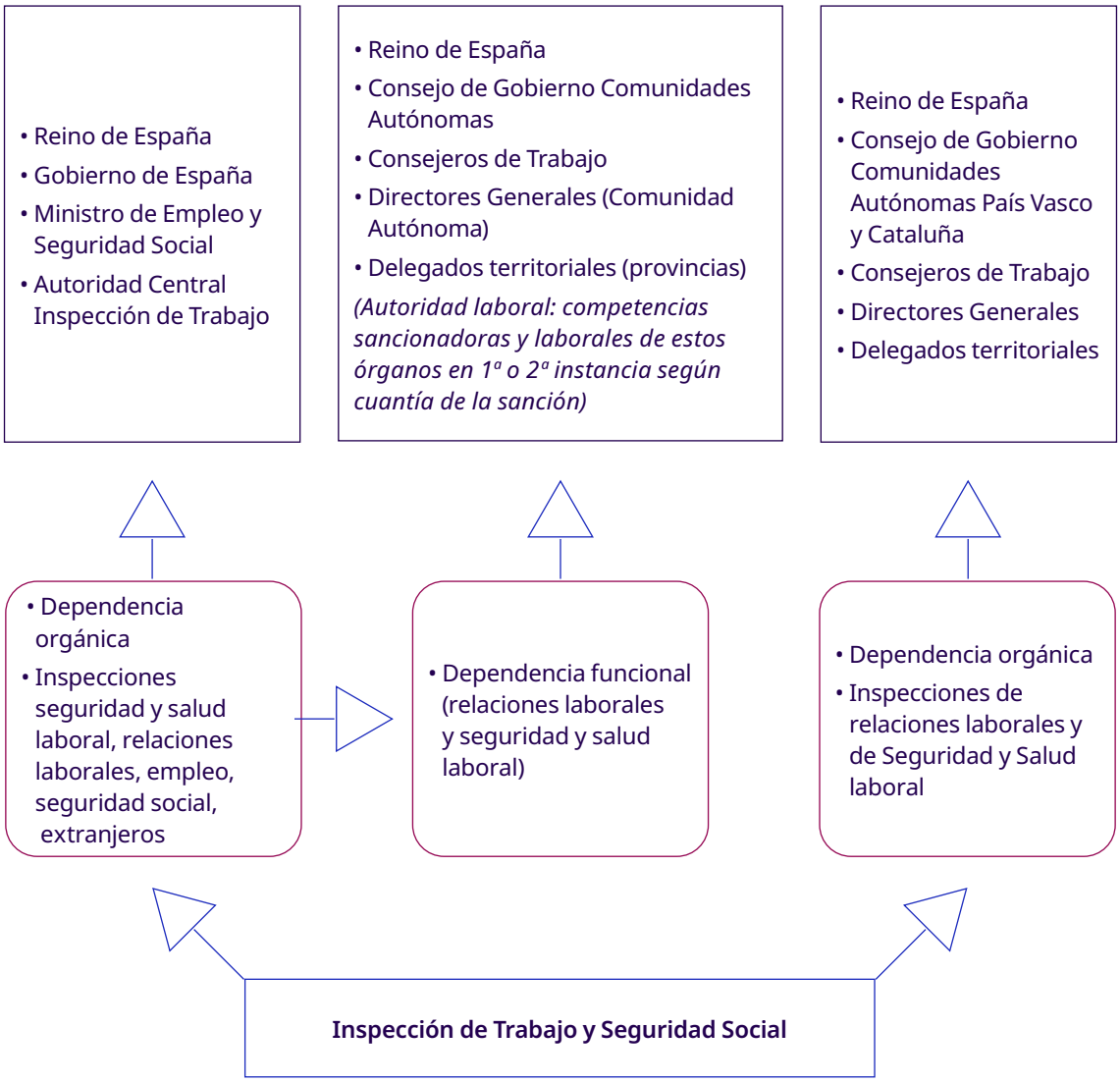
http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=uriserv:OJ.L_.1989.183.01.0001.01.SPA

Ley 31/1995, de 8 de noviembre, de prevención de Riesgos Laborales

https://www.boe.es/buscar/act.php?id=BOE-A-1995-24292

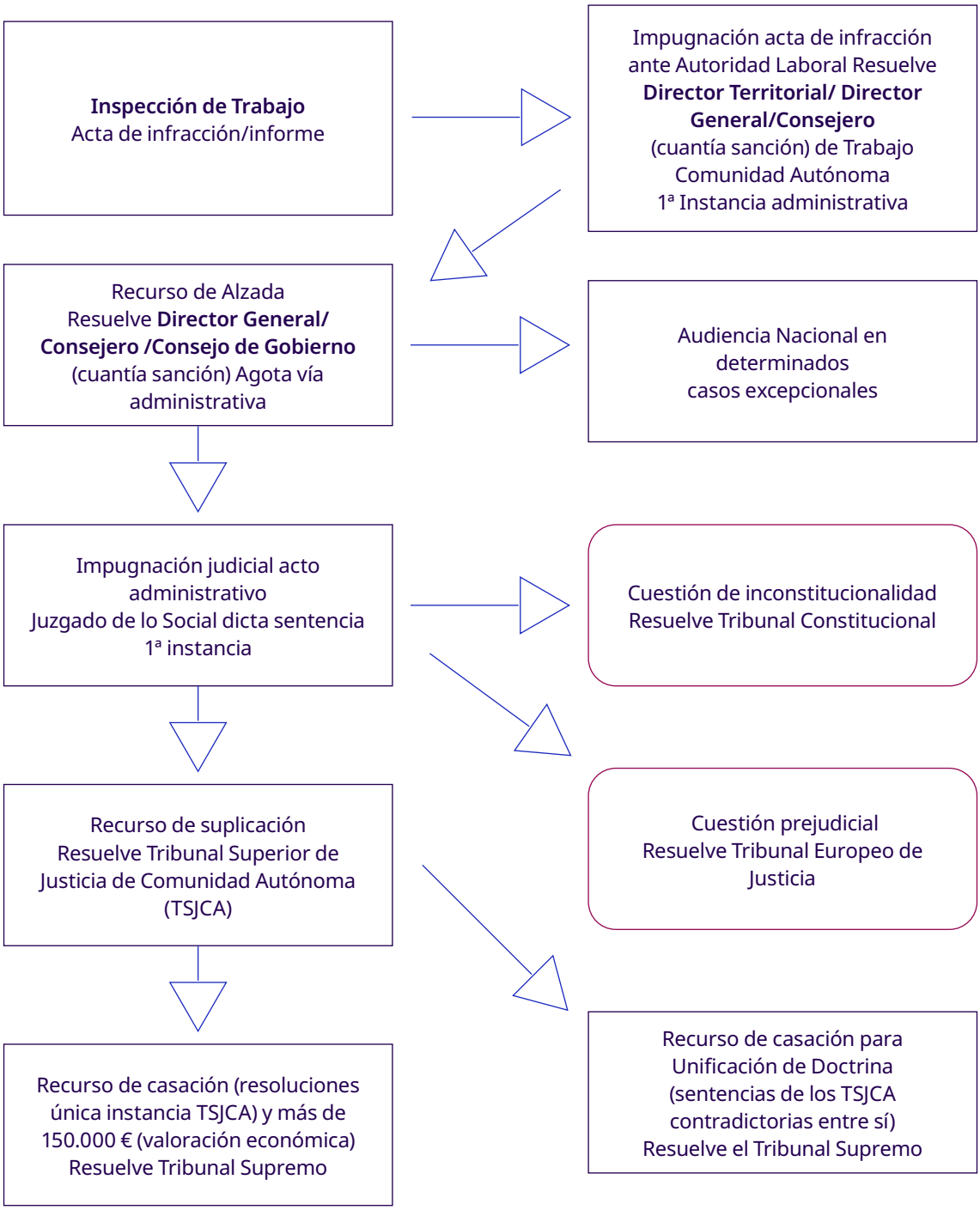
Anexo II.

▶ Organización competencial de la Inspección de Trabajo y Seguridad Social



Anexo III.

▶ Resumen de fases procedimentales y recursos del orden social



▶ Appendix V. Study of occupational safety and health enforcement procedures in the United States of America

▶ **Authors: Ron Bailey, Davis Jenkins, Noah Connell**

Initiating Formal Action triggered by administrative finding of or allegation to judicial authorities of violation

1. Types of Formal Actions:

a. Administrative (triggered by administrative finding of violation)[4]

- If, upon inspection of a covered workplace, the Secretary of Labor or his authorized representatives believes an employer has violated the OSH Act or a regulation promulgated thereunder, the Secretary issues a citation to the employer. 29 U.S.C. § 658(a); 29 C.F.R. § 1903.14(a). Along with the citation, the Secretary of Labor may also issue a notice of proposed penalty. 29 U.S.C. 659(a); 29 C.F.R. § 1903.15(a).
- If an employer timely contests a citation and/or proposed penalty, the Secretary shall immediate notify the Commission and the Commission will afford an opportunity for a hearing by an administrative law judge (ALJ). 29 U.S.C. § 659(c).
- The decision of an ALJ shall become a final order of the Commission, unless any Commission member directs review of the judge's decision within thirty days. 29 U.S.C. § 661(j).

b. Civil/labour court (triggered by administrative finding of or allegation to judicial authorities of violation)

- There is no Labor Court in the United States.
- The Commission has authority to assess all civil penalties provided in the OSH Act. 29 U.S.C. § 666(j). Civil penalties owed shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States. The Secretary may enforce payment of civil penalties in a civil action brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office. 29 U.S.C. § 666(l).

4 The Occupational Safety and Health Administration (OSHA) is a federal agency that is part of the United States Department of Labor. OSHA is responsible for implementing the OSH Act on behalf of the Secretary of Labor by setting and enforcing federal standards and regulations for workplace safety and health. The Occupational Safety and Health Review Commission (OSHRC or the Commission) is an independent executive agency responsible for adjudicating actions initiated under the OSH Act between the Department of Labor and employers. The OSH Act precludes state governments from enforcing federal OSHA standards unless the state has an OSHA-approved state plan. The procedures described in this outline are those pertaining to the enforcement and adjudication of OSH-related actions at the federal level.

Note that safety and health rules with respect to mines are not governed by the OSH Act but, rather, by the Federal Mine Safety and Health Act of 1977, as amended (the Mine Act), which can be accessed at: http://arlweb.msha.gov/REGS/ACT/ACTTC.HTM. The Mine Safety and Health Administration (MSHA), a separate agency of the United States Department of Labor, enforces that statute and standards promulgated thereunder. The Federal Mine Safety and Health Review Commission (FMSHRC), an independent executive agency, is responsible for adjudicating Mine Act proceedings brought by the Department of Labor against mine operators. OSHA and MSHA have a Memorandum of Understanding (MOU) to address situations where jurisdiction between the two agencies is not clear. The MOU is available at https://arlweb.msha.gov/MOU/1979mshaoshammu.HTM. For more information regarding the Mine Act or MSHA, including regulations and compliance documents, please visit MSHA's website at https://www.msha.gov/. For more information regarding the FMSHRC, please visit the FMSHRC's website at http://www.fmshrc.gov/.

c. Criminal (triggered by administrative finding of or allegation to judicial authorities of violation)

- The Commission does not have jurisdiction over criminal prosecutions under the OSH Act. Criminal actions are initiated in United States District Courts by the Department of Justice on behalf of the Secretary of Labor.
- Criminal sanctions provided by the OSH Act may be initiated against:
  - (1) an employer who willfully violates any standard or regulation promulgated under the OSH Act causing death to any employee shall, upon conviction, be punished by a fine of not more than $10,000 and/or imprisonment of not more than six months. Subsequent convictions for willful violations causing death to an employee are punishable by a fine of not more than $20,000 or imprisonment of not more than one year. 29 U.S.C. § 666(e).
  - (2) any person giving advance notice of any inspection to be conducted under the OSH Act without authority from the Secretary of Labor may be punished by fine of not more than $1,000 and/or imprisonment for not more than 6 months. 29 U.S.C. § 666(f).
  - (3) any person who knowingly makes a false statement or representation in any document filed or required to be maintained under the OSH Act shall, upon conviction, be punished by a fine of not more than $10,000 and/or imprisonment for not more than six months. 29 U.S.C. § 666(g).[5]

2. Criteria for determining what Formal Action should be taken:

a. Type of violation or alleged violation (examples: willful, repeated, failure to take required actions/ remediation, criminal)

- OSHA, as the entity responsible for all enforcement functions of the OSH Act and regulations, is responsible for making the initial determination of which type of formal action should be taken for violations of the OSH Act or regulations.
- Types of Violations
  - **Repeated Violations:** a violation of the OSH Act or regulations is considered a "repeated" violation if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Secretary of Labor v. Potlach Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). Violations are "substantially similar" if the two violations resulted in substantially similar hazards. *Secretary of Labor v. Stone Container Corp.*, 14 BNA OSHC 1757 (No. 88-310, 1990). Repeated violations may be issued for serious and non-serious violations.
  - **Willful Violations:** The OSH Act does not define a willful violation, but the Commission has held that "a violation is willful if the employer acted with "an intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2222 (No. 09-0004, 2014) (consolidated). "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *Id*. Willful violations may be serious or non-serious.
  - **Failure to Abate:** an employer who fails to correct a violation for which a citation was issued within the period permitted may be assessed a penalty of not more than $7,000 for each day during which such failure or violation continues. 29 U.S.C. § 666(d). A notice of failure to correct a violation may be issued at any time after the abatement date, even during the fifteen-day period in which the employer may contest the initial citation.

5 The Department of Justice may also file charges if there are other criminal violations, such as making a materially false statement to the government during the investigation (see 18 U.S. § 1001, https://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap47-sec1001.pdf; https://www.justice.gov/usam/criminal-resource-manual-908-elements-18-usc-1001).

b. Degree of violation or alleged violation (examples: minor, serious, imminent danger)

- **De minimis Violations:** When violations have no direct or immediate relationship to safety and health, OSHA may issue a notice of the violation in lieu of a citation. 29 U.S.C. § 658(a). The employer does not have to post the notice, there are no penalties, and no abatement is required.
- **Non-serious (or "other-than-serious") Violations:** a violation in which there is a direct and immediate relationship between the violative condition and occupational safety and health, but not of such relationship that a resultant injury or illness is death or serious physical harm. *Secretary of Labor v. Crescent Wharf & Warehouse Co.*, 1 BNA OSHC 1318 (No. 2806, 1973).
- **Serious Violations:** a violation for which there is "a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k).
- **Imminent Danger:** The Secretary of Labor may petition a United States District court to restrain (through a temporary restraining order) any working conditions or practices posing a danger "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter." 29 U.S.C. § 662(a).
  - Whenever a Compliance Officer concludes that a practice or condition of the workplace could reasonably be expected to cause death or serious injury, he/she is to inform the affected employees/employers of the danger and that he/she is recommending civil action to restrain the practice or condition. "[C]itations and notices of proposed penalties may be issued . . . even though . . . the employer immediately eliminates the imminence of danger . . . ." 29 C.F.R. § 1903.13.[6]
- **Gravity of Violation:** The gravity of the violation is an important factor for purposes of determining the penalty to be assessed for the types of violations described above (i.e., non-serious, serious, repeated, and willful). Gravity involves considering the number of employees exposed to the hazard, the duration of exposure, whether any precautions have been taken against injury, the probability that an accident would occur, and the likelihood of injury. *Secretary of Labor v. Capform, Inc.*, 19 BNA OSHC 1374 (No. 99-0322, 2001).

3. Form and content of notice of Formal Action:

a. Description of violation (examples: summary of factual findings and supporting evidence)

- A citation must "describe with particularity the nature of the violation, including reference to the provision of the [OSH] Act, standard, rule, regulation, or order alleged to have been violated." 29 U.S.C. § 658(a). Thus, the citation must provide fair notice to the employer of the nature and location of the violation, and the standard alleged to have been violated.
- Every citation shall state that the issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Review Commission. 29 C.F.R. § 1903.14(e).

b. Identification of legal provisions violated (examples: citation to law or regulation violated, citation to general duty requirement(s))

- Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. 29 U.S.C. § 658(a).

6 In Mine Act cases, if an MSHA inspector determines that an imminent danger exists, he/she shall issue an order requiring withdrawal of miners from the areas of danger, and prohibiting the miners' return until the danger no longer exists. 30 U.S.C. § 817. (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title30/pdf/USCODE-2011-title30-chap22-subchapI-sec817.pdf).

c. Gravity of violation (examples: minor, serious, imminent danger)

▶ Gravity of the violation is considered by the OSHA Area Director for the regional OSHA office with jurisdiction over the area in which the violation occurred. 29 C.F.R. § 1903.15(d). See Section 2b above.

d. Degree of violation (examples: willful, repeated)

▶ Degree of the violation (non-serious, serious, willful, repeated) is stated in the citation.

e. Required actions/remediation (examples: stop work, remove workers from danger area, take dangerous machine out of usage, eliminate hazard)

▶ Any citation shall also fix a reasonable time or times for the abatement of the alleged violation. 29 C.F.R. § 1903.14(b). Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by OSHA during an inspection. 29 C.F.R. § 1903.19(b)(1).

f. Imposition or proposed imposition of sanctions/penalties (examples: monetary penalties, revocation of license or permits, removal from approved list for government contracts)

▶ OSHA proposes civil penalties for violations, but the Commission is the final arbiter of civil penalty assessment. Other than the criminal context, where imprisonment is a potential sanction, the OSH Act and implementing regulations do not provide for sanctions/penalties other than monetary penalties. 29 U.S.C. § 666.

g. Mitigating or aggravating factors for calculating sanctions/penalties (examples: number of violations, number of workers exposed, good faith actions by duty holder, size of business, history of violations)

▶ OSHA proposes the amount of the penalty, and OSHRC decides the penalty, giving consideration to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations, in accordance with the provisions of section 17 of the OSH Act and 29 C.F.R. § 1903.15(d).

h. Information about right/opportunity to deny/object/appeal finding of violation, required actions/remediation, and/or imposition of sanctions and process for exercising right/opportunity

▶ Under the OSH Act, if the Secretary issues a citation (or has reason to believe the employer has failed to correct a previously cited violation) the Secretary must notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of the OSH Act, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. 29 U.S.C. § 659(a),(b).

▶ Every citation shall state that the issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Review Commission. 29 C.F.R. § 1903.14(e).

▶ Any notice of proposed penalty shall state that the proposed penalty shall be deemed to be the final order of the Review Commission and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notice, the employer notifies the Area Director in writing that he intends to contest the citation or the notification of proposed penalty before the Review Commission. 29 C.F.R. § 1903.15(a).

i. Timeframes/deadlines for taking required actions/remediation, payment of sanctions/penalties, and exercising right/opportunity to deny/object/ appeal

▶ The citation must fix a reasonable time for abatement of the violation. 29 U.S.C. § 658(a). What constitutes a "reasonable time" varies depending on the circumstances of the violation. Generally, a "reasonable" abatement period "requires giving the employer the opportunity to evaluate the violation, formulate plans for correction, and have time to implement the corrective plans." *Secretary of Labor v. Matthews and Fritts, Inc.*, 2 BNA OSHC 1149 (No. 3998, 1974).

▶ An employer's timely notice of contest of a citation will suspend the abatement period until there is a final order of the Commission. Reich v. Manganas, 70 F.3d 434 (6th Cir. 1995).

j. Required documentation/certification of compliance with required actions/remediation

▶ Within 10 calendar days after the abatement date, the employer must certify to OSHA (the Agency) that each cited violation has been abated, except as provided in 29 C.F.R. § 1903.19(c)(2). 29 C.F.R. § 1903.19(c)(1).

▶ The employer's certification that abatement is complete must include, for each cited violation, in addition to the information required by 29 C.F.R. § 1903.19(h), the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement. 29 C.F.R. § 1903.19(c)(3).

▶ The employer must submit to the Agency, along with the information on abatement certification required by 29 C.F.R. § 1903.19(c)(3), documents demonstrating that abatement is complete for each willful or repeat violation and for any serious violation for which the Agency indicates in the citation that such abatement documentation is required. 29 C.F.R. § 1903.19(d)(1). Documents demonstrating that abatement is complete may include, but are not limited to, evidence of the purchase or repair of equipment, photographic or video evidence of abatement, or other written records. 29 C.F.R. § 1903.19(d)(2).

▶ OSHA may require an employer to submit an abatement plan for each cited violation if the time permitted for abatement is more than 90 calendar days. 29 C.F.R. § 1903.19(e).

4. Issuance of notice of Formal Action:

a. Entity issuing notice

- **issued by labour inspector** (examples: immediately upon completion of inspection of workplace)

▶ OSHA's compliance officers conduct workplace inspections, but do not themselves issue citations.[7]

▶ However, at the end of their inspections, OSHA's compliance officers confer with employers (or their representatives) to informally advise them of the apparent safety or health violations disclosed by the inspection, and to give them an opportunity to provide additional information. 29 C.F.R. § 1903.7(e).

- **issued by labour inspectorate authorities** (examples: upon receipt and consideration of inspection report from inspector)

▶ Citations under the OSH Act are initiated by OSHA and its authorized representatives, including OSHA's Area Directors, (defined in 29 C.F.R. § 1903.22(e)), on behalf of the Secretary of Labor.

▶ The Area Director reviews the inspection report of the Compliance Safety and Health Officer. If, on the basis of the report the Area Director believes that the employer has violated a requirement of section 5 of the Act, of any standard, rule or order promulgated pursuant to section 6 of the Act, or of any substantive rule, he shall, if appropriate, consult with the Regional Solicitor, and he shall issue to the employer either a citation or a notice of de minimis violations which have no direct or immediate relationship to safety or health. 29 C.F.R. § 1903.14(a).

▶ For more details regarding OSHA's inspection and citations policies and procedures, please see OSHA's Field Operations Manual (FOM), available at OSHA's website at: https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf.

- **issued by other administrative government authority**

▶ Not applicable.

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7 Under the Mine Act, inspectors are required to issue citations for violations they find, and those violations are typically required to be corrected immediately. Penalties are assessed separately, by MSHA's Office of Assessments. See 30 U.S.C. §§ 814-815 and 30 C.F.R. Part 100. (http://arlweb.msha.gov/REGS/ACT/ACT1.HTM#8, https://www.ecfr.gov/cgi-bin/text-idx?SID=774840472e4e384e2f6de3a6e80506e3&mc=true&node=pt30.1.100&rgn=div5)

b. Process for issuing notice

- **in-person**

▶ The OSH Act does not mention in-person service of a citation or notice of proposed penalty. The Commission follows the Federal Rules of Civil Procedure and has concluded that certified mail is not the only method of effectuating service and in-person service may be permissible provided that the Federal Rules of Civil Procedure are followed. *Secretary of Labor v. Donald K. Nelson Construction, Inc.*, 3 BNA OSHC 1914 (No. 4309, 1976). See also Federal Rules of Civil Procedure 4(d).

▶ OSHA's regulations allow for personal service by the inspecting compliance officer of the proposed penalty. 29 C.F.R. § 1903.15(a).

- **by mail**

▶ The OSH Act specifically provides "if, after an inspection or investigation, the Secretary issues a citation under section he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed. 29 U.S.C. § 659(a).

▶ Typically, citations and notices of proposed penalties are sent together as one document.

- **electronically**

▶ The OSH Act and implementing regulations are silent on the electronic issuance of a citation or notice of penalty.

c. Mechanism for documenting receipt of notice

▶ Citations and notices of proposed penalties are sent to the employer via certified mail, which means that the sending and receipt of the citation and proposed penalties are recorded. Receipt is usually documented by a document called a "return receipt." See 29 C.F.R. § 1903.15(a).

d. Parties to whom notice is issued or provided a copy of the notice

- **Employer or duty holder**

▶ The Area Director issues the citation (or notice of de minimis violation) to the employer. 29 C.F.R. § 1903.14(a). The term "employer" is defined in 29 U.S.C. § 652(5). A cited employer must comply with the posting requirements to provide notice to employees.

- **Workers/worker representatives**

▶ If a citation or notice of de minimis violations is issued for a violation alleged in a request for inspection under §1903.11(a) or a notification of violation under §1903.11(c), a copy of the citation or notice of de minimis violations shall also be sent to the employee or representative of employees who made such request or notification. 29 C.F.R. § 1903.14(c).

▶ The employer must inform affected employees and their representative(s) about abatement activities in the citation by posting a copy of each document submitted to the Agency or a summary of the document near the place where the violation occurred. 29 C.F.R. § 1903.19(g)(1).

- **Other interested parties** (examples: owner of workplace, general contractor, other employers on multi-employer worksite)

▶ Not required.

- **Other relevant government agencies**

▶ Not required.

e. Timeframe for issuing notice after inspection/investigation

Citations must be issued with reasonable promptness after an inspection. 29 U.S.C. § 658(a). No citation may be issued after the expiration of six months following the occurrence of any violation. 29 U.S.C. § 658(c).

f. Posting/publication of notice (examples: posting at workplaces near cited violations, publication on labour inspectorate website)

- Each citation issued by OSHA (or a copy) shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred. 29 U.S.C. § 658(b); 29 C.F.R. § 1903.16(a).
- Each citation (or a copy) shall remain posted until the violation has been abated, or for 3 working days, whichever is later. The filing by the employer of a notice of intention to contest under 29 C.F.R. § 1903.17 shall not affect his posting responsibility under this section unless and until the Review Commission issues a final order vacating the citation. 29 C.F.R. § 1903.16(b).
- Failure to comply with the posting requirements may subject an employer to civil penalties in accordance with 29 U.S.C. § 666(i) and 29 C.F.R. § 1903.16(d).
- Employers may post a notice next to the citation indicating that the citation is being contested before the Review Commission. 29 C.F.R. § 1903.16(c).

5. Process for verifying compliance with required actions/remediation:

a. follow-up inspections/investigation (examples: in cases of serious violations or inadequate documentation/certification)

- In certain circumstances, OSHA conducts follow-up inspections to determine the abatement of violations for which the employer was previously cited.
- OSHA may also conduct monitoring inspections to enforce employee protections and abatement of hazards when an establishment needs a long period of time to come into compliance. OSHA's Field Operations Manual at 3-23.
- OSHA considers willful, repeated, and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations to be prime candidates for follow-up or monitoring inspections. Id.
- For more information regarding monitoring or follow-up inspections, please see OSHA's Field Operations Manual (FOM), available on OSHA's website at: https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf.

b. Confirmed submission of mandatory documentation/certification of compliance

- Within 10 calendar days after the abatement date, the employer must certify to OSHA that each cited violation has been abated, except as provided in paragraph (c)(2) of 29 C.F.R. § 1903. 29 C.F.R. § 1903.19(c)(1).
- The employer's certification that abatement is complete must include, for each cited violation, in addition to the information required by paragraph (h) of § 1903.19, the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement. 29 C.F.R. § 1903.19(c)(3).
- Documentation of abatement is required for each willful or repeat violation as well as serious violations for which OSHA indicates in the citation that such abatement documentation is required. 29 C.F.R. § 1903.19(d).

c. other

- The Agency may require an employer to submit an abatement plan for each cited violation (except an other-than-serious violation) when the time permitted for abatement is more than 90 calendar days. If an abatement plan is required, the citation must so indicate. 29 C.F.R. § 1903.19(e)(1).
- The employer must submit an abatement plan for each cited violation within 25 calendar days from the final order date when the citation indicates that such a plan is required. The abatement plan must identify the violation and the steps to be taken to achieve abatement, including a schedule for completing abatement and, where necessary, how employees will be protected from exposure to the violative condition in the interim until abatement is complete. 29 C.F.R. § 1903.19(e)(2).

6. Processes for modifying timeframes and/or required actions/remediation:

a. Demonstration by duty holder of good-faith effort to comply with timeframes and/or required actions/remediation

- **Petitions for Modification of Abatement Period (PMAs):** Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. 29 U.S.C. § 659(c).

b. Agreement to provide additional time to eliminate hazards

- Petitions for modification of abatement (PMAs) pursuant to 29 U.S.C. § 659(c) are filed with the OSHA Area Director who issued the citation. 29 C.F.R. § 2200.37(c). The Secretary or his duly authorized agent shall have the authority to approve any uncontested petition for modification of abatement date and such uncontested petitions shall become final orders pursuant to sections 10(a) and (c) of the Act, 29 U.S.C. 659(a) and (c). 29 C.F.R. § 2200.37(c)(3).
- Under, 29 C.F.R. § 2200.37(d), if a PMA is objected to by the Secretary or affected employees, the contested PMAs is forwarded to the Commission and resolved under expedited proceedings as provided by 29 C.F.R. § 2200.103.

c. Agreement to modify required actions/remediation

- **Settlement Agreements:** Settlement is permitted and encouraged by the Commission at any stage of the proceedings. No particular language is required to be included in a settlement agreement, but the agreement must specify the terms of settlement for each contested item, specify any contested item or issue that remains to be decided (if any remain), and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. 29 C.F.R. § 2200.100(a)-(b).
- This allows the Secretary and a cited employer to enter into a settlement agreement to modify the required action for abatement.

d. Other agreement terms

- Petitions for Modifications of Abatement Period: A copy of a PMA shall be posted in a conspicuous place where all affected employees will have notice thereof or near each location where the violation occurred. The petition shall remain posted for a period of 10 days. 29 C.F.R. § 2200.37(c)(1).
- For settlement agreements, the Commission does not require any particular language provided that the terms of settlement for each contested item, specify any contested item or issue that remains to be decided (if any remain), and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. 29 C.F.R. § 2200.100(b).

e. Timing: before or after denial/objection/appeal

- Petitions for modification of abatement (PMAs) must be filed no later than the close of the next working day following the date on which abatement was originally required. 29 C.F.R. § 1903.14a(c); 29 C.F.R. § 2200.37(c).
- For uncontested PMAs, the Secretary or his authorized representative shall not exercise his approval power until the expiration of 15 working days from the date the petition was posted. 29 C.F.R. § 2200.37(c)(4).

7. Actions and consequences for duty holder failure to demonstrate/certify compliance with required actions/remediation:

a. Increased civil/administrative penalties (examples: imposition of additional penalties with daily multiplier for each day violation continues)

- If an employer fails to correct an alleged violation for which a citation has been issued within the period permitted for its correction, the Secretary will notify the employer of such failure and may propose a penalty imposed 29 U.S.C. § 666(d). OSHA may assess a daily penalty for each day the alleged violation is not corrected.
- The OSH Act sets forth a $7,000 maximum daily penalty, but the Bipartisan Budget Act of 2015 (Pub. L. No. 114-74) requires OSHA to adjust that figure to account for inflation. Currently the maximum is $ 12,471 pursuant to 29 C.F.R. § 1903.15.

b. Referral to judicial system for criminal prosecution and sanctions/penalties

- The OSH Act only mentions the imposition of civil penalties for failure to correct a violation for which an employer has been cited. 29 U.S.C. § 666(d).

8. Opportunity/right to deny/object/appeal Formal Action – (finding of violation, required actions/remediation and/or imposition of sanctions/penalties):

a. Process for exercising opportunity/right

- **Contesting the Citation:** An employer may contest all or part of a citation. An employer has 15 working days, from the date of receipt of the citation and notice of penalty, to file a written notice of contest with the OSHA Area Director, indicating that the employer intends to contest the citation and/or proposed penalty or abatement before the Review Commission. 29 U.S.C. § 659(a); 29 C.F.R. § 1903.17(a). An uncontested citation (or the uncontested items in a citation) is "deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(a). The notice of contest must be in writing and display the employer's intent to contest the citation (or the notification of failure to correct a violation) and/or proposed penalty. *Herasco Contractors, Inc.*, 16 BNA OSHC 1401, 1402 (No. 93-1412, 1993).
- **Contesting Abatement:** An employer may file a petition for modification of abatement date when he has made a good faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond his reasonable control. 29 C.F.R. § 1903.14a(a). 29 C.F.R. § 2200.37.
- **Employee Contests**: any employee or representative of employees may file a notice of contest to challenge the reasonableness of the abatement date. 29 U.S.C. § 659(c). Contesting employees must also serve a copy of the notice of contest upon the employer. 29 C.F.R. § 2200.7(k). Proceedings for employee contests of the abatement are automatically expedited. 29 C.F.R. § 2200.103(b).

b. Parties who have opportunity/right (examples: duty holder, workers/worker representatives)

- The cited employer has the right to contest (1) a citation and/or proposed penalty, and (2) a notification and/or proposed penalty associated with a failure to correct a violation. 29 U.S.C. § 659(a), (c).

- An employee or an authorized employee representative has the right to contest the reasonableness of the time period fixed in the citation for abatement of the alleged violation. 29 U.S.C. § 659(c).

c. Timeframe for exercising opportunity/right

- The employer has 15 working days after receipt of the Citation and Notification of Penalty to notify the Secretary of Labor of its intent to contest the citation, notification, and/or proposed assessment of penalty. 29 U.S.C. § 659(a), (b).
- The employee/employee representative has 15 working days, after issuance of the citation, to notify the Secretary of its intent to contest the reasonableness of the time period fixed in the citation for abatement of the alleged violation. 29 U.S.C. § 659(c).

d. Consequence of failure to deny/object/appeal within timeframe (examples: Formal Action becomes final and not subject to appeal)

- If the employer's notice of contest is not received by the Secretary within 15 working days, the citation and proposed assessment of penalty will be deemed "a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(b).
- In some U.S. jurisdictions (i.e., where the pertinent U.S. Court of Appeals recognizes the Review Commission's authority to grant relief from a final order), an employer's late-filed notice of contest could be excused for one of the reasons set forth under Federal Rule of Civil Procedure 60(b), including "excusable neglect" by the employer. *Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2187 (No. 01-0830, 2003) (recognizing Commission's authority to entertain late notice of contest under Rule 60(b), but noting Second Circuit's decision that Commission lacks such jurisdiction).

From column titled "Singularities of certain representative countries": Formal or informal settlement agreements regarding the Formal Action are an option in some countries in certain non-egregious cases (United States)

- Following the issuance of citations, OSHA and the cited employers frequently enter into either full or partial settlement agreements to resolve issues concerning the citations, proposed penalties, and abatement.
- These settlement agreements are submitted to the Review Commission for consideration under 29 C.F.R. § 2200.100, which (1) sets certain limited requirements that a settlement agreement must meet before approval by an administrative law judge, and (2) allows for objections to the reasonableness of any abatement time from affected employees or authorized employee representatives and, in some instances, permits these individuals "to be heard and present evidence on the objection."
- Settlement is also encouraged once a case reaches the Review Commission, and specific procedures unique to the Review Commission are in place to direct this process. 29 C.F.R. § 2200.120.

Judicial process for establishing Formal Action

9. Process for initiating proceedings:

a. Transfer of case by administrative authorities (examples: labour inspectors, labour inspectorates)

- **timeframes/deadlines for transfer**

- Within 15 working days after receipt of a notice of contest, the Secretary is required to (1) notify the Review Commission of the receipt in writing, and (2) "promptly furnish to the Executive Secretary of the Commission the original of any documents or records filed by the contesting party and copies of all other documents or records relevant to the contest." 29 C.F.R. § 2200.33.

- **standard of review of administrative notice** (examples: if supported by substantial evidence on the record)

- ▶ Relying on the Federal Rules of Evidence, the administrative law judge acts as the factfinder in the first instance and, when necessary, makes credibility determinations to resolve conflicting evidence in the record. 29 C.F.R. §§ 2200.71, .90.
- ▶ If, upon issuance of the ALJ's decision, a party petitions the Commission for review and a Commissioner directs the case for review (a discretionary exercise of authority), the Commission conducts a de novo review of the case. 29 C.F.R. §§ 2200.91, .92. The Commission, however, typically defers to the judge's demeanor-based credibility determinations.

b. Expedited action sought by administrative authorities to eliminate imminent danger (examples: temporary injunction, temporary restraining order, stop-work order)

- ▶ When an OSHA inspector concludes that an imminent danger exists in any place of employment, the inspector must inform the affected employees and employers of the danger and that he or she is recommending to the Secretary that relief be sought. 29 U.S.C. § 662(c); 29 C.F.R. § 1903.13.
- ▶ The Secretary may petition a U.S. District Court (but not the Review Commission) "to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." 29 U.S.C. § 662(a).
- ▶ If the Secretary "arbitrarily or capriciously" fails to seek relief, any employee or representative of employees who could be injured by reason of such failure, may bring an action against the Secretary in the pertinent U.S. District Court for a writ of mandamus to compel the Secretary to seek an order and such relief as may be appropriate. 29 U.S.C. § 662(d).

c. Right of private action (examples: workers/worker representatives)

- ▶ There is no right of private action under the Occupational Safety and Health Act. However, a separate tort action could be pursued in the appropriate civil court. 29 U.S.C. § 653(b)(4).

- **circumstances causing termination of right of private action** (examples: when judicial proceedings initiated by administrative authorities)

- ▶ An action under the Occupational Safety and Health Act does not affect a litigant's ability to pursue a separate tort action in a civil court. 29 U.S.C. § 653(b)(4).

d. Criminal prosecution (examples: cases referred for prosecution by administrative authorities or brought directly by prosecutor)

- ▶ Depending on the circumstances of a case, OSHA may refer the case to the Department of Justice for investigation and possible criminal sanctions under 29 U.S.C. § 666(e), (f), or (g).
- ▶ The Department of Justice, if it prosecutes the case, would do so in the pertinent U.S. District Court in accordance with the Federal Rules of Criminal Procedure.
- ▶ The Review Commission does not have jurisdiction over criminal cases, but may stay a concurrent civil administrative proceeding until the criminal one is resolved. *Pitt-Des Moines, Inc.*, 17 BNA OSHC 1936, 1938-39 (No. 94-1355, 1997).

10. Pre-hearing processes:
(examples: notification and disclosure of witnesses, disclosure of other evidence, filing of motions and briefs)

- **government authority responsible for managing processes**

- ▶ In proceedings before the Review Commission and the U.S. Courts of Appeals, OSHA is represented by the Department of Labor's Office of the Solicitor. 29 U.S.C. § 663. The ALJ oversees these processes. 29 C.F.R. pt. 2200.

- **timeframes/deadlines for processes**

▶ Pre-hearing timelines and deadlines are set either in the Review Commission's procedural rules or by order of the ALJ when allowed by these rules. 29 C.F.R. pt. 2200.

11. Admissible evidence:

a. Witness testimony and statements:

- **fact witnesses**

▶ Hearings before the Review Commission's ALJs are typically governed by the Federal Rules of Evidence. 29 C.F.R. § 2200.71.

▶ Hearings conducted under Simplified Proceedings procedures—these may apply when a case is not complex, and involves low proposed penalty, no willful or repeat violations, and no fatality—are less formal and are not governed by the Federal Rules of Evidence. 29 C.F.R. 2200.200-.211. Under these procedures, testimony is permitted as long as it is "given under oath or affirmation" and it is "not irrelevant, unduly repetitious or unreliable." 29 C.F.R. § 2200.209(c).

- **expert witnesses**

▶ Hearings before the Review Commission's ALJs are typically governed by the Federal Rules of Evidence, 29 C.F.R. § 2200.71, including Federal Rules of Evidence 702, 703, and 705, which pertain to "Testimony by Expert Witnesses," "Bases of an Expert's Opinion Testimony," and "Disclosing the Facts or Data Underlying an Expert's Opinion," respectively.

b. OSH expert reports

▶ Hearings before the Review Commission's ALJs are typically governed by the Federal Rules of Evidence, 29 C.F.R. § 2200.71, including those rules pertaining to expert witnesses.

c. Other evidence (examples: samples, photographs, videos, test results, seized machinery, documents)

▶ Hearings before the Review Commission's ALJs are typically governed by the Federal Rules of Evidence. 29 C.F.R. § 2200.71.

▶ As to hearings conducted under Simplified Proceedings procedures, physical or documentary evidence is admissible as long as the judge determines that it "is not irrelevant, unduly repetitious or unreliable." 29 C.F.R. § 2200.209(c).

12. Timeframes/Deadlines for issuance of judicial order:

a. Cases of transfer by administrative authorities (examples: to civil court of first instance or criminal court)

▶ Not applicable. If an employer files a timely notice of contest following issuance of a citation, the matter would, in the first instance, be adjudicated before an ALJ of the Review Commission.

b. Cases of expedited action sought to eliminate imminent danger

▶ Cases adjudicated by the U.S. District Courts under 29 U.S.C. § 662(a) are subject to the requirements of Federal Rule of Civil Procedure 65 (Injunctions and Restraining Orders), "except that no temporary restraining order issued without notice shall be effective for a period longer than five days." 29 U.S.C. § 662(b).

c. Cases of the exercise of private right of action

▶ There is no right of private action under the Occupational Safety and Health Act. 29 U.S.C. § 653(b)(4).

d. Cases of criminal prosecution

▶ Criminal prosecutions under 29 U.S.C. § 666(e), (f), or (g) are governed by the Federal Rules of Criminal Procedure.

Appeals process for challenging Formal Action

13. Type of proceeding and adjudicative body:

a. Administrative (examples: higher levels within labour ministry, administrative law judge, administrative review board/commission)

▶ Once the ALJ issues a decision disposing of all the issues in the case, a party may petition the Commission—a three-member body, nominated by the President and confirmed by the Senate—for discretionary review. 29 U.S.C. § 661; 29 C.F.R. §§ 2200.91, .92.

▶ Except under "extraordinary circumstances," a party must file such a petition to exhaust administrative remedies before pursuing an appeal in the pertinent U.S. Court of Appeals. *Martin Constr., Inc.*, 22 BNA OSHC 1089,1091 (No. 06-0700, 2008) (discussing exhaustion requirement in 29 U.S.C. § 660(a)).

- When appeal is permitted, both the employer and Secretary may appeal to "the circuit in which the violation is alleged to have occurred or where the employer has its principal office," and the employer, but not the Secretary, also has the option of appealing to "the Court of Appeals for the District of Columbia Circuit," 29 U.S.C. § 660(a), (b).

b. Civil court of first instance (examples: district court, trial court)

▶ Not applicable. Under the OSH Act, a final order of the Review Commission may be appealed directly to the pertinent U.S. Court of Appeals. 29 U.S.C. § 660(a), (b).

c. Court of appeals (examples: circuit court, civil or criminal court of second instance/appeals)

▶ A final order of the Review Commission may be appealed directly to the pertinent U.S. Court of Appeals. 29 U.S.C. § 660(a), (b).

d. Labour court

▶ Not applicable.

14. Timeframes/deadlines for proceedings:

a. For initiation

▶ Once the ALJ prepares his or her final decision (1) the judge transmits the decision to the parties; (2) "[o]n the eleventh day after transmittal," the judge files his or her report (which includes the decision) with the Review Commission's Executive Secretary; and (3) the Executive Secretary "[p]romptly" dockets the report and notifies all parties of the docketing date. 29 C.F.R. § 2200.90(b).

▶ The judge's decision will become a final order of the Commission within 30 days after docketing, unless the Commission directs the case for review during that 30-day period. 29 U.S.C. § 661(j).

b. For each stage of review process

▶ If the Commission directs the case for review, there is no OSH Act or regulatory timeframe on the Commission's decision-making process.

▶ Once the Commission issues its decision, or the 30-day period expires without a direction for review, both the Secretary and any "person adversely affected or aggrieved" by the Commission's final order have 60 days to file a written petition with the pertinent U.S. Court of Appeals, requesting that the order be modified or set aside. 29 U.S.C. § 660(a), (b).

- A remand to the ALJ is not considered a final order of the Commission.

c. For issuance of ruling/order

▶ Once a case has been directed for review, the U.S. Court of Appeals exercising jurisdiction over an appeal is not limited by a statutory or regulatory timeframe.

15. Standing to appeal Formal Action:
(examples: duty holder, workers/worker representatives)

- ▶ Once the ALJ issues his or her final decision, "[a] party adversely affected or aggrieved by the decision of the Judge" has standing to petition the Commission for review. 29 C.F.R. § 2200.91(b).
  - A "party" for purposes of this provision would include the Secretary, the cited employer, and an affected employee or authorized employee representative who elected party status in accordance with 29 C.F.R. § 2200.20.

16. Parties to the proceeding:
(examples: labour inspectors or other administrative labour authorities, workers/worker representatives, duty holder)

- ▶ Before the Review Commission, parties to the proceeding may include (1) the Secretary, (2) the cited employer, and (3) affected employees or an authorized employee representative (29 C.F.R. § 2200.20).

17. Burden of proof:
(examples: government has initial burden of proof to establish violations, duty holder has burden of proof to establish acted in good faith)

- ▶ By a preponderance of the evidence, the Secretary bears the burden of proving each element of a violation—applicability of the cited standard, non-compliance, actual or constructive knowledge, and employee access to the violative conditions—and the employer bears the burden of proving the applicability of an exception set forth in the standard as well as any affirmative defense. *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129-31 (No. 78-6247, 1981), *vacated in part on other grounds*, 681 F.2d 69 (1st Cir. 1982); *Rockwell Int'l Corp.*, 17 BNA OSHC 1801 (No. 93-234, 1996) (consolidated); C.J. Hughes Constr., Inc., 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996).
- ▶ By a preponderance of the evidence, the Secretary bears the burden of proving serious, repeat, or willful characterization, and the employer bears the burden of proving any claim—in response to a *prima facie* case of wilfulness—that it acted in good faith. *Trinity Indus., Inc.*, 20 BNA OSHC 1051, 1066-67 (No. 95-1597, 2003).

18. Standard and scope of review of Formal Actions:
(examples: review only conclusions of law, upheld if violation is demonstrated by a preponderance of the evidence, upheld if violation is supported by substantial evidence on the record)

- ▶ If the Commission directs a case for review, it may at its discretion exercise *de novo* review over the entirety of the case, applying the burdens of proof discussed in topic 17.
  - As to the Secretary's interpretation of an OSHA standard at issue in a case, the Commission must apply the standard's plain meaning or, if ambiguous, in general must defer to any reasonable interpretation proffered by the Secretary. *Martin v. OSHRC*, 499 U.S. 144 (1991) (Supreme Court case discussing the relationship between OSHA and the Review Commission).
- ▶ If a case is appealed to the U.S. Court of Appeals, the court will accept findings of fact in the Commission's final order if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 660(a). The court will accept the Commission's other findings and conclusions if they are not arbitrary, capricious, an abuse of discretion, or contrary to law. *S.G. Loewendick & Sons, Inc.*, 70 F.3d 1291, 1294 (No. 94-1662, 1995) (citing 5 U.S.C. § 706(2)(A)).

19. Procedure for initiating proceedings:
(examples: submitting denial/objection/ appeal, review directed by administrative entity)

- ▶ The judge's decision will become a final order of the Commission within 30 days after docketing, unless the Commission directs the case for review during that 30-day period. 29 U.S.C. § 661(j).
- ▶ If the Commission directs a case for review—either *sua sponte* or at the request of a party—a briefing notice is often issued to the parties, identifying the issues on review and providing deadlines for filing briefs. 29 C.F.R. §§ 2200.92, .93.

20. Impact of appeal on Formal Action:

a. Stay of sanction/penalty collection

- A cited employer is not obligated to pay a penalty arising from an OSHA citation until the Commission's order becomes final. 29 U.S.C. § 659(b).
- Once the Commission's order becomes final, the cited employer is responsible for the assessed penalty, even if the order is appealed to the U.S. Court of Appeals within the 60-day filing period. 29 U.S.C. § 659(b).
- However, after the Commission issues its order, but while the Commission still retains jurisdiction (i.e., during that 60-day period, if the case has not already been appealed to the U.S. Court of Appeals), an aggrieved party may file a motion to stay the final order, which the Commission may grant if deemed appropriate. 29 C.F.R. § 2200.94.
  - The requested stay may be directed at the abatement date, the payment of the penalty, or both. *Ryder Truck Lines, Inc.*, 1 BNA OSHC 1326 (No. 391, 1973).

b. Stay of timeframes/deadlines for taking required actions/remediation

- The Secretary is required to fix a reasonable time for abatement in the citation, but this period of time does not begin to run until the Commission's order becomes final. 29 U.S.C. §§ 658(a), 659(b).
- Once the Commission's order becomes final, the timeframe fixed in the citation (if affirmed) begins to run even if the order is appealed to the U.S. Court of Appeals within the 60-day filing period. 29 U.S.C. § 659(b).
- However, in the manner discussed above, an aggrieved party may file a motion to stay the final order. 29 C.F.R. § 2200.94.

c. Stay of Formal Action

- In the manner discussed above, an aggrieved party may file a motion to stay the final order. 29 C.F.R. § 2200.94.

d. Temporary relief or restraining order

- Once a petition to review the Commission's final order is submitted to the U.S. Court of Appeals and the Commission files the case record with the court, the court will have jurisdiction to "grant such temporary relief or restraining order as it deems just and proper." 29 U.S.C. § 660(a).

21. Decision/order of adjudicative body:

a. Content and form of decision/order (examples: sanction/penalty, required actions/remediation order)

- **Administrative Law Judge's decision:**
  - The decision constituting final disposition of the proceeding must: (1) be in writing; (2) include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented on the record; and (3) include an order affirming, modifying or vacating each contested citation item and each proposed penalty, or directing other appropriate relief. 29 C.F.R. § 2200.90(a).
  - If the ALJ's decision relates to a petition for modification of the abatement period, the decision must contain an order affirming or modifying that period. 29 C.F.R. § 2200.90(a).
- **Commission decision:**
  - The Commission must explain its decision. 5 U.S.C. § 557(c) ("All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of ... findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record[.]"); see 29 U.S.C. § 659(c) (cross-referencing 5 U.S.C. § 554); 5 U.S.C. § 554(c) (cross-referencing 5 U.S.C. §§ 556 and 557).

- The decisions are in writing, but the content and form will vary depending on what the Commissioners agree the scope of review should be in each case.

b. Issuance-notification of decision/order

- Once the ALJ prepares his or her final decision (1) the judge transmits the decision to the parties; (2) "[o]n the eleventh day after transmittal," the judge files his or her report (which includes the decision) with the Review Commission's Executive Secretary; and (3) the Executive Secretary "[p]romptly" dockets the report and notifies all parties of the docketing date. 29 C.F.R. § 2200.90(b).
- The judge's decision will become a final order of the Commission within 30 days after docketing, unless the Commission directs the case for review during that 30-day period. 29 U.S.C. § 661(j).
- If the Commission directs the case for review, once the Commissioners sign a decision, a Notice of Decision will be served on the parties.
  - If the decision resolves all outstanding issues in the case, the Commission will retain jurisdiction for 60 days after issuance or, if appealed, until the Commission files the case record with the pertinent U.S. Court of Appeals—whichever occurs first. 29 U.S.C. §§ 659(c), 660(a).
  - If the decision directs that the case be remanded to the judge, then it is not considered a final order of the Commission.

Appeals process for challenging decision/order

22. Appeal of decision/order:

a. Timeframes/deadlines for initiating appeal

- **After proceedings before the Review Commission:** A party adversely affected or aggrieved by the decision of the Judge may seek the Commission's review by filing a petition for discretionary review within 20 days after docketing of the judge's report. 29 C.F.R. § 2200.91(b).
- **Judicial Review of Commission Decisions:** any person adversely affected by a Commission decision, including an unreviewed ALJ decision that has become a final order, may, within 60 days, appeal it to the U.S. Court of Appeals for the circuit. See 29 U.S.C. § 660(a).

b. Standing to appeal decision/order (examples: duty holder, workers/worker representatives, labour inspector or other administrative authorities)

- Any "person adversely affected or aggrieved" by an order of the Commission has standing to appeal to the pertinent U.S. Court of Appeals. In practice, this is generally the cited employer, or an affected employee or employee representative who was a party in the proceeding before the Commission. 29 U.S.C. § 660(a).
- The Secretary also has standing to appeal to the pertinent U.S. Court of Appeals. 29 U.S.C. § 660(b).

c. Standard and scope of review (examples: only review questions of law, upheld if not arbitrary, capricious, or abuse of discretion)

- If a case is appealed to a U.S. Court of Appeals, the court will accept findings of fact in the Commission's final order if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 660(a). A court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)). See also *S.G. Loewendick & Sons, Inc.* v. Reich, 70 F.3d 1291, 1294 (D.C. Cir. 1995) (citing 29 U.S.C. § 660(a) and 5.U.S.C. § 706(2)(A) with respect to the Commission).

d. Number and levels of appeal (examples: court of appeals)

- The Commission's rules of procedure provide for two levels of adjudication. The first level is the hearing before the ALJ who issues a decision affirming or vacating the citation. 29 C.F.R. § 2200.90(a),(d). The second level is the discretionary review of the ALJ's decision by the Review Commission's Commissioners. Review of the judge's decision by the Commissioner's is not a right. 29 C.F.R. § 2200.91(a).
- "Any person adversely affected or aggrieved by an order of the Commission . . . may obtain judicial review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside." 29 U.S.C. § 660(a).
- The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the U.S. Court of Appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b).
- Following issuance of the U.S. Court of Appeals' order, a party may petition the United States Supreme Court for a writ of certiorari which, if the Court exercises its discretion to grant, would result in review before the Court. 28 U.S.C. § 1254(1).

e. Impact of appeal on decision/order (examples: stay of sanction/penalty collection, stay of timeframes/deadlines for taking required actions/remediation)

- The commencement of proceedings in a U.S. Court of Appeals for judicial review of an order of the Commission shall not, unless ordered by the court, operate as a stay of the order of the Commission. 29 U.S.C. § 660(a).

f. Timeframes/deadlines for issuing decision/order

- The Commission does not have a pre-determined timeframe for issuing decisions.
- The U.S. Courts of Appeal do not have a pre-determined timeframe for issuing decisions.

Execution of final decision/order

23. Process for execution of a final decision/order:

a. Imposition of sanction/penalty (examples: closure of enterprise, withdrawal of licences, suspension of undertaking's activity)

- Section 11(b) of the OSH Act allows the Secretary to seek summary enforcement of a final order of the Commission in the U.S. Courts of Appeals. 29 U.S.C. 660(b). If a Court of Appeals issues a decree enforcing the final order, failure to obey it can lead the violator to be held in contempt of court, and thereby be potentially subject to multiple sanctions including: daily penalties; payment of the Secretary's costs for bringing the action; incarceration; and any other sanction the court deems necessary. Id.; 28 U.S.C. § 2412; 29 U.S.C. § 666; Fed. R. App. P. 39 (a) – (b).

b. Collection of fine (examples: block bank account, embargo assets, establish payment instalments)

- Civil penalties owed shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office. 29 U.S.C. § 666(l).

c. Verification of required actions/remediation (examples: follow-up inspections/investigation)

- Within 10 calendar days of the abatement date, the employer must certify to OSHA that the cited violation has been abated. 29 C.F.R. § 1903.19(c)(1). The employer's certification must include, for each cited violation, the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement. 29 C.F.R. § 1903.19(c)(3).

- OSHA may require the employer to submit an abatement plan for each cited violation (except for non-serious violations), when the time for abatement is more than 90 days. 29 C.F.R. § 1903.19(e)(1). An abatement plan may also require an employer to submit periodic progress reports. 29 C.F.R. § 1903.19(f).

d. Imprisonment

- Failure to obey court orders issued by the U.S. district courts or the U.S. Courts of Appeal may result in contempt proceedings in which imprisonment may be a sanction.

24. Duty holder failure to comply with final decision/order:

a. Penalty for failure to pay fine (examples: interest assessed, delinquent charges added, referral to debt collection, referral to criminal court of first instance)

- An employer that fails to pay court ordered penalties for violations of the OSH Act or regulations may be subject to civil contempt and imprisonment.
- The Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701, et seq.) allows for the assessment of interest and additional fines for the costs of pursuing collecting of debts owed.

b. Penalty for failure to take required actions/remediation (examples: contempt of court, daily penalties, additional fines, incarceration)

- Pursuant to the OSH Act, "any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 29 U.S.C. § 659 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues." 29 U.S.C. § 666(d).
- Pursuant to the Bipartisan Budget Act of 2015 (Pub. L. No. 114-74), OSHA is required to annually adjust the statutory maximum daily penalty of $7,000 to account for inflation. Currently the maximum is $12,471 pursuant to 29 C.F.R. § 1903.15.
- Additionally, Section 11(b) of the OSH Act allows the Secretary to seek summary enforcement of a final order of the Commission in the U.S. Courts of Appeals. 29 U.S.C. § 660(b). If a Court of Appeals issues a decree enforcing the final order, failure to obey it can lead the violator to be held in contempt of court, and thereby be potentially subject to multiple sanctions including: daily penalties; payment of the Secretary's costs for bringing the action; incarceration; and any other sanction the court deems necessary. Id.; 28 U.S.C. § 2412; 29 U.S.C. § 666; Fed. R. App. P. 39 (a) – (b).

Annex I. Sources

The major sources of authority involving OSH laws and regulations are listed below (with hyperlinks). Additional materials (e.g. sample forms, templates, reports, and other publications) can be accessed through OSHA's website (https://www.osha.gov/). The website's "Regulations" and "Enforcement" tabs contain links to the statute, regulations, OSHA directives, and OSHA policies. The website also contains a "Workers" tab (https://www.osha.gov/workers/index.html) that includes, among other things, a link to a Workers' Rights Booklet (https://www.osha.gov/Publications/osha3021.pdf), and an "Employers" tab that lists various resources and information to assist employers with compliance (https://www.osha.gov/employers/index.html).

Source of Authority	Citation and Link
Williams-Steiger Occupational Safety and Health Act of 1970. **(Pub. L. 91-596, 84 Stat. 1590 et seq., 29 U.S.C. 651 et seq.)**	**General Duty Clause**
	Complete OSH Act Version ("All-in-One")
	Section 1 - Introduction
	Section 2 - Congressional Findings and Purpose
	Section 3 - Definitions
	Section 4 - Applicability of This Act
	Section 5 - Duties
	Section 6 - Occupational Safety and Health Standards
	Section 7 - Advisory Committees; Administration
	Section 8 - Inspections, Investigations, and Recordkeeping
	Section 9 - Citations
	Section 10 - Procedure for Enforcement
	Section 11 - Judicial Review
	Section 12 - The Occupational Safety and Health Review Commission
	Section 13 - Procedures to Counteract Imminent Dangers
	Section 14 - Representation in Civil Litigation
	Section 15 - Confidentiality of Trade Secrets
	Section 16 - Variations, Tolerances, and Exemptions
	Section 17 - Penalties
	Section 18 - State Jurisdiction and State Plans
	Section 19 - Federal Agency Safety Programs and Responsibilities
	Section 20 - Research and Related Activities
	Section 21 - Training and Employee Education
	Section 22 - National Institute for Occupational Safety and Health
	Section 23 - Grants to the States
	Section 24 - Statistics
	Section 25 - Audits
	Section 26 - Annual Report
	Section 27 - National Commission on State Workmen's Compensation Laws
	Section 28 - Economic Assistance to Small Businesses
	Section 29 - Additional Assistant Secretary of Labor
	Section 30 - Additional Positions
	Section 31 - Emergency Locator Beacons
	Section 32 - Separability
	Section 33 - Appropriations
	Section 34 - Effective Date
	Section - Historical Notes

Source of Authority	Citation and Link
OSHA Regulations (Standards – Title 29 of the Code of Federal Regulations)	PART 1901 Procedures for State Agreements
	PART 1902 State Plans for the Development and Enforcement of State Standards
	PART 1903 Inspections, Citations, and Proposed Penalties
	PART 1904 Recording and Reporting Occupational Injuries and Illness
	PART 1905 Rules of Practice
	PART 1906 Administration Witness and Documentations in Private Litigation
	PART 1908 Consultation Agreements
	PART 1910 Occupational Safety and Health Standards
	PART 1911 Rules of Procedure for Promulgating, Modifying or Revoking OSHA Standards
	PART 1912 Advisory Committees on Standards
	PART 1912A National Advisory Committee on OSHA
	PART 1913 Rules Concerning OSHA Access to Employee Medical Records
	PART 1915 Occup. Safety and Health Standards for Shipyard Employment
	PART 1917 Marine Terminals
	PART 1918 Safety and Health Regulations for Longshoring
	PART 1919 Gear Certification
	PART 1920 Procedure for Variations under Longshoremen's Act
	PART 1921 Rules of Practice in Enforcement under Section 41 of Longshoremen's Act
	PART 1922 Investigational Hearings under Section 41 of the Longshoremen's and Harbor Workers' Compensation Act
	PART 1924 Safety Standards Applicable to Workshops and Rehab. Facilities
	PART 1925 Safety and Health Standards for Federal Service Contracts
	PART 1926 Safety and Health Regulations for Construction
	PART 1927 Reserved
	PART 1928 Occup. Safety and Health Standards for Agriculture
	PART 1949 Office of Training and Education, OSHA
	PART 1952 Approved State Plans for Enforcement of State Standards
	PART 1953 Changes to State Plans
	PART 1954 Procedures for the Eval. and Monitoring of Approved State Plans

Source of Authority	Citation and Link
OSHA Regulations (Standards – Title 29 of the Code of Federal Regulations)	PART 1955 Procedures for Withdrawal of Approval of State Plans
	PART 1956 Plans for State and Local Government Employees without Approved Plans
	PART 1960 Basic Program Elements for Federal Employees OSHA
	PART 1975 Coverage of Employees under the Williams-Steiger OSHA 1970
	PART 1977 Discrimination against Employees under OSHA Act of 1970
	PART 1978 Procedures For The Handling Of Retaliation Complaints Under The Employee Protection Provision Of The Surface Transportation Assistance Act Of 1982 (STAA), As Amended
	PART 1979 Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21ST Century
	PART 1980 Procedures for the Handling of Discrimination Complaints Under Section 806 Of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002
	PART 1981 Procedures for the Handling of Discrimination Complaints Under Section 6 of The Pipeline Safety Improvement Act of 2002
	PART 1982 Procedures For The Handling Of Retaliation Complaints Under The National Transit Systems Security Act And The Federal Railroad Safety Act
	PART 1983 Procedures for the Handling of Retaliation Complaints Under Section 219 of The Consumer Product Safety Improvement Act of 2008
	PART 1984 Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act
	PART 1985 Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010
	PART 1986 Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Seaman's Protection Act (SPA), as Amended
	PART 1987 Procedures for Handling Retaliation Complaints Under Section 402 of the FDA Food Safety Modernization Act
	PART 1988 Procedures for Handling Retaliation Complaints Under Section 31307 of the Moving Ahead for Progress in the 21ST Century Act (MAP-21)
	PART 1990 Identification, Classification, and Regulation of Carcinogens

Source of Authority	Citation and Link
Rules of Procedure of the Occupational Safety and Health Review Commission **(Title 29 of the Code of Federal Regulations at Parts 2200 and 2204)**	**Rules of Procedure Part 2200** Occupational Safety and Health Review Commission (Updated as of 01/15/10) **Subpart A -- General Provisions** 2200.1 Definitions. 2200.2 Scope of rules; applicability of Federal Rules of Civil Procedure; construction. 2200.3 Use of gender and number. 2200.4 Computation of time. 2200.5 Extensions of time. 2200.6 Record address. 2200.7 Service and notice. 2200.8 Filing. 2200.9 Consolidation. 2200.10 Severance. 2200.11 [Reserved] 2200.12 References to cases. **Subpart B -- Parties and Representatives** 2200.20 Party status. 2200.21 Intervention; Appearance by non-parties. 2200.22 Representation of parties and intervenors. 2200.23 Appearances and withdrawals. 2200.24 Brief of an amicus curiae. **Subpart C -- Pleadings and Motions** 2200.30 General rules. 2200.31 Caption; Titles of cases. 2200.32 Signing of pleadings and motions. 2200.33 Notices of contest. 2200.34 Employer contests. 2200.35 Disclosure of corporate parents, subsidiaries, and affiliates. 2200.36 [Reserved] 2200.37 Petitions for modification of the abatement period. 2200.38 Employee contests. 2200.39 Statement of position. 2200.40 Motions and requests. 2200.41 [Reserved] **Subpart D -- Prehearing Procedures and Discovery** 2200.50 [Reserved] 2200.51 Prehearing conferences and orders. 2200.52 General provisions governing discovery. 2200.53 Production of documents and things. 2200.54 Requests for admissions. 2200.55 Interrogatories. 2200.56 Depositions. 2200.57 Issuance of subpoenas; Petitions to revoke or modify subpoenas; Right to inspect or copy data.

Source of Authority	Citation and Link
Rules of Procedure of the Occupational Safety and Health Review Commission **(Title 29 of the Code of Federal Regulations at Parts 2200 and 2204)**	**Subpart I-L -- [Reserved]**
	Subpart M – Simplified Proceedings
	2200.200 Purpose.
	2200.201 Application.
	2200.202 Eligibility for Simplified Proceedings.
	2200.203 Commencing Simplified Proceedings.
	2200.204 Discontinuance of Simplified Proceedings.
	2200.205 Filing of pleadings.
	2200.206 Disclosure of Information.
	2200.207 Pre-hearing conference.
	2200.208 Discovery.
	2200.209 Hearing.
	2200.210 Review of Judge's decision.
	2200.211 Applicability of Subparts A through G.
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Source of Authority	Citation and Link
Rules of Procedure of the Occupational Safety and Health Review Commission (Title 29 of the Code of Federal Regulations at Parts 2200 and 2204)	**Subpart E -- Hearings** 2200.60 Notice of hearing; Location. 2200.61 Submission without hearing. 2200.62 Postponement of hearing. 2200.63 Stay of proceedings. 2200.64 Failure to appear. 2200.65 Payment of witness fees and mileage; Fees of persons taking depositions. 2200.66 Transcript of testimony. 2200.67 Duties and powers of Judges. 2200.68 Disqualification of the Judge. 2200.69 Examination of witnesses. 2200.70 Exhibits. 2200.71 Rules of evidence. 2200.72 Objections. 2200.73 Interlocutory review. 2200.74 Filing of briefs and proposed findings with the Judge; Oral argument at the hearing. **Subpart F -- Posthearing Procedures** 2200.90 Decisions of Judges. 2200.91 Discretionary review; Petitions for discretionary review; Statements in opposition to petitions. 2200.92 Review by the Commission. 2200.93 Briefs before the Commission. 2200.94 Stay of final order. 2200.95 Oral argument before the Commission. 2200.96 Commission receipt pursuant to 28 U.S.C. 2112(a)(1) of copies of petitions for judicial review of Commission orders when petitions for review are filed in two or more courts of appeals with respect to the same order. **Subpart G -- Miscellaneous Provisions** 2200.100 Settlement. 2200.101 Failure to obey rules. 2200.102 Withdrawal. 2200.103 Expedited proceeding. 2200.104 Standards of conduct. 2200.105 Ex parte communication. 2200.106 Amendment to rules. 2200.107 Special circumstances; waiver of rules. 2200.108 Official Seal of the Occupational Safety and Health Review Commission. **Subpart H -- Settlement Part** 2200.120 Settlement procedure.

Source of Authority	Citation and Link
Decisions of the Occupational Safety and Health Review Commission	Final Commission Decisions, 1972 to Present.

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