

# Effectively Handling an OSHA Inspection: Knowing Your Legal Rights

## **FLORIDA CHAMBER SAFETY COUNCIL**

*Making Florida Safer, Healthier and More Sustainable*

Jason Mozo, J. D.  
Executive Director

[JMozo@FlChamber.com](mailto:JMozo@FlChamber.com)

(850) 521-1237



**Thank you for joining us,  
we will begin soon...**

# FLORIDA CHAMBER SAFETY COUNCIL

*Making Florida Safer, Healthier and More Sustainable*

## 18 Advisory Board Members



**Mark Morgan, Chair**  
NextEra Energy, Inc.



**Tom Baldwin**  
Global Medical Response



**Erin Black**  
Coca-Cola Florida



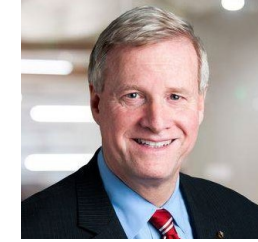
**Dr. Josh Chard**  
Altec Industries



**Steven Danon**  
Restaurant Brands  
International



**Matt Fisher**  
Pike Electric



**Edwin G. Foulke, Jr.**  
Fisher Phillips



**Scott Frazer**  
Boldt



**Greg Hale**  
Walt Disney Parks &  
Resorts



**Sandy Hodes**  
Ryder Systems, Inc.



**Mark Ligon**  
Vecellio Group, Inc.



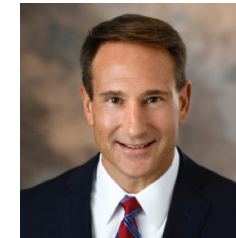
**Jody McClure**  
ABC Fine Wine & Spirits



**Greg Meloon**  
Nautique Boat  
Company



**Chief Carl Metzger**  
University of Central  
Florida



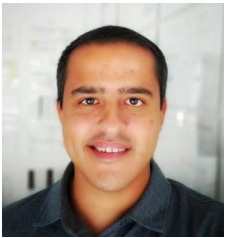
**Robert Roncska**  
"Navy Bob"  
AdventHealth



**John Trevathan**  
GuideWell



**Mark Wilson**  
Florida Chamber



**George Zamora**  
City Furniture



## Safety Training Courses Include, but are not limited to:

- OSHA 10 Hour - Construction Industry
- OSHA 30 Hour – Construction Industry
- OSHA 10 Hour – General Industry
- OSHA 30 Hour – General Industry
- HAZWOPER 8 Hour
- HAZWOPER 24 Hour
- HAZWOPER 40 Hour
- Advanced Safety Certification
- Active Shooter
- Bloodborne Pathogens
- CPR/First AID/AED
- Confined Space Entry
- Crane & Hoist Safety
- Creating a World Class Safety Culture
- Defensive Driver 4HR / 6HR / 8HR
- Electrical Safety
- Fall Protection
- Fire Protection & Prevention
- Flagger
- Hazard Communications
- Hazardous Materials and Waste
- Heat Stress Prevention
- Heavy Equipment Operator Training
- Hearing Protection
- Hand Protection
- Incident Investigation: Root Cause Analysis
- Job Safety Analysis
- Ladder Safety
- Lock Out/Tag Out
- Mobile Elevating Work Platforms - MEWP's (Boom Lift & Scissor Lift)
- OSHA Recordkeeping
- Personal Protective Equipment - PPE
- Powered Industrial Trucks – Forklift Operator
- Principles of Occupational Safety & Health
- Respirable Crystalline Silica
- Respiratory Protection
- Safety Inspections
- Safety Audits
- Safety for Supervisors
- Safety Management Techniques
- Safety Training Methods
- Scaffold Safety
- Silica Respirable Crystalline
- Slips, Trips & Falls Prevention
- Team Safety
- Trenching & Excavation for Competent Person



## Protective Eyewear Selection Available Now!



Scan QR Code to  
Shop Eyewear



# Browse our Growing Collection of Safety Supplies!

## Safety Supplies Coming Soon:



Fall Protection Equipment



Worksite Apparel



Lockout/Tagout Supplies

# Last Chance to Register for our Active Shooter Virtual Training

Instructed by:



Sean Collins  
*President/Lead Firearms*  
*Calusa Security*

**June 10, 2022**

8:30am – 12:30pm EDT

**\$79.95**

**Via Zoom**

Scan QR Code to Register



**\*Participants will earn a Course Completion  
Certificate and .4 CEUs upon completion**

Browse all 7 upcoming trainings here: [FlChamberSafety.com/Learn](https://flchambersafety.com/learn)

# Effectively Handling an OSHA Inspection: Knowing Your Legal Rights



**Edwin G. Foulke**

*Former Head of OSHA &  
Current Partner Fisher Phillips,  
Florida Chamber Safety Council Advisory  
Board member*



# Effectively Handling an OSHA Inspection: Knowing Your Legal Rights



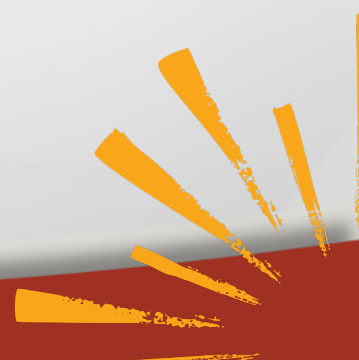
Presented by:  
**Edwin G. Foulke**  
Phone: (404) 240-4273  
Email: [efoulke@fisherphillips.com](mailto:efoulke@fisherphillips.com)

# Thank You For Your Commitment To Safety



*“Winning is not a sometime thing, it is an all-time thing.”  
~ Vince Lombardi*

So Is Safety!





# Safety Tip Of The Day #1

*Never take a sleeping pill and  
a laxative at the same time.*

## Safety Tip Of The Day #2

*If you don't know where you are going, you might wind up  
someplace else.*

*~ Yogi Berra*

# Why Be Concerned?

- During the pandemic, OSHA has limited inspections to fatalities, catastrophic accidents and certain Coronavirus issues.
- OSHA will be looking to make up for lost inspection numbers, as well as citations and penalties.
- Heavy union background on new DOL political leadership and pressure from Congress and unions on doing more aggressive enforcement and on using more unfriendly press releases
- Proposed rule to amend federal injury and illness recordkeeping regulation
- OSHA initiates enforcement program to identify employers failing to submit injury and illness data
- OSHA announces National Emphasis Program on indoor and outdoor heat-related inspections as well as prepare a new standard



# Why Be Concerned?

- OSHA published its proposed standard on COVID-19
- Significant increase to OSHA in proposed 2023 budget
- OSHA penalties increased 2016 through 2022.
- Currently willful and repeat (\$145,027); serious and other (\$14,502)
- Recordkeeping changes in 2015, 2016 and 2017
- Likely emphasis on employers being placed in the Severe Violators Enforcement Program
- Increased whistleblower complaints with push to find more “cause” determinations especially on employee exposure to Coronavirus and not following CDC and OSHA guidance – Note: 2 new whistleblower statutes covered by OSHA – Criminal Anti-Trust Anti-Retaliation Act and Anti-Money Laundering Act

# Why Be Concerned?

- Increased state court negligence lawsuits being filed especially for “wrongful death”
- Potential Congressional legislation to allow employees to sue their employers for OSHA violations
- Local, state and national governments look at safety records – bar on submitting bids
- Private sector companies also looking at contractors, vendors, system safety record and OSHA history – may lose clients
- Increased injury and illness reporting requirements – Electronic filing of OSHA 300 A summaries by March 2nd
- Local and state executive orders or ordinances being issued with different requirements

# OSHA's Top 10 Most Cited Violations – Fiscal Year 2021

1. Fall Protection, General Requirements (1926.501)
2. Respiratory Protection (1910.134)
3. Ladders (1926.1053)
4. Scaffolding (1926.451)
5. Hazard Communication (1910.1200)
6. Lockout/Tagout (1910.147)
7. Fall Protection (1926.503)
8. PPE – Eye and Face Protection (1926.102)
9. Powered Industrial Trucks (1910.178)
10. Machine Guarding (1910.212)



# Top 10 Most Frequent General Duty Clause Citations

- |                                 |                                      |
|---------------------------------|--------------------------------------|
| 1. Forklift Hazards – 26.9%     | 6. PVC Piping Rupture -5.4%          |
| - Lack of seatbelts             | 7. Fire and Explosions -5.4%         |
| - Improper lifting of personnel | 8. Fall Hazards – 5%                 |
| 2. Crane Hazards – 21.7%        | 9. Automobile Lifts and Jacks – 4.6% |
| 3. Dust Explosions -12.0%       | 10. Storage Rack Hazards – 3.6%      |
| 4. Struck-by Vehicle -10%       |                                      |
| 5. Ladder Fall – 5.8%           |                                      |

Source: Tracy Cekada and Christopher Janicak – Indiana University of Pennsylvania 2016

# OSHA's Burden Of Proof To Issue Citation Of “Vertical” Standard

- Vertical standard – specific only to particular industries
- OSHA has the burden to prove:
  - The cited standard applies to the condition;
  - Non-compliance with the standard;
  - Employees were exposed to or had access to the cited condition;
  - The employer knew of the hazard or should have known of it with the exercise of due diligence; and
  - The selected characterization (e.g., serious, willful, repeat) is appropriate
  - Standard of proof required is by a preponderance of the evidence.

# Requirements To Issue 5(A)(1) General Duty Citation

OSHA must prove:

- Condition or activity in the workplace presented a hazard
- Employer or its industry recognized the hazard
- Hazard was likely to cause death or serious physical harm
- And a feasible means existed to eliminate or materially reduce the hazard

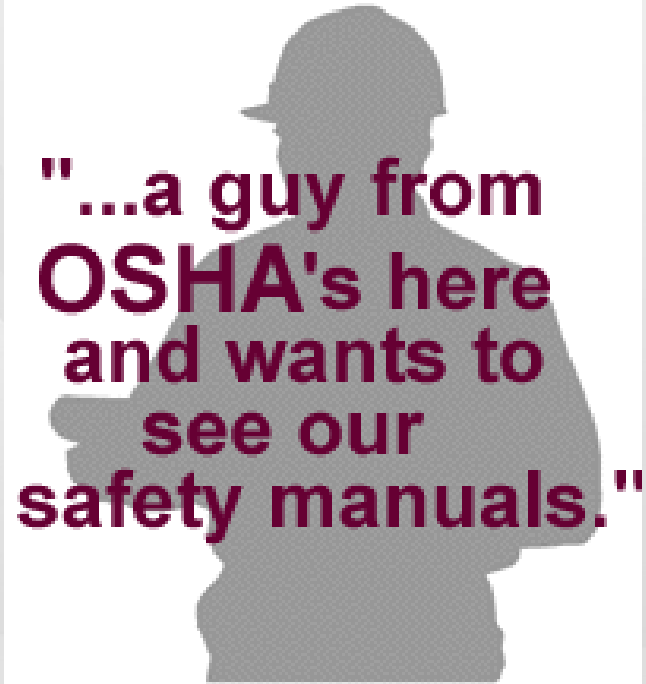




# Handling OSHA Informal Complaints (Rapid Response)

- Need to do it right or you may have an onsite inspection
- Recommend against using OSHA's rapid response form
- Do your own investigation and report findings (KISS)
- Avoid making admissions
- Emphasis on corrective actions and going forward
- Have supporting documentation with response letter
- Posting and certification

# Effectively Handling An OSHA Inspection: How To Legally Protect Your Rights



**"...a guy from  
OSHA's here  
and wants to  
see our  
safety manuals."**

# Strategic Balancing Act

Fulfilling Employer  
Responsibilities

Asserting Employer  
Rights

Professionalism  
And  
Wisdom



# Supervisor Role In OSHA Citations: Learning Of OSHA Violations

“Because employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by providing that a supervisory employee knew of or was responsible for the violation.”

# Safety Responsibility: Unpreventable Employee Misconduct Defense Elements

- Establish work rules designed to ensure safe work and to avoid OSHA violations
- Communicate the work rules to employees and train employees as needed
- Take appropriate steps to discover violations
- Effectively enforce the rules and practices when violations are discovered; and
- **Document the above actions**

# Pre-inspection Action Plan

- OSHA Poster
- Notification responsibilities
  - Contact persons
  - When you have a reportable incident
  - When OSHA inspectors are onsite
  - Any other unusual safety & health issue
- Assignment of responsibilities
- Training/recordkeeping
- Know what OSHA standards are applicable to your operation and that you are fully compliant
- Know your COVID-19 control plan and ensure you have implemented all protective actions and precautions

Equipment needed during inspection

Review of previous citations

Review of insurance and third-party audits

Periodic audits and reviews

# Why Me?

## INSPECTION PRIORITIES

- Imminent danger
- Fatalities/catastrophic accidents
- Employee complaints/referrals
- High-hazard industries (site specific targeting)
- Special emphasis programs

NOTE: With recent changes to OSHA recordkeeping reporting requirements, many new self-referral inspections





# How to Confidently Manage an OSHA Inspection

What do employers need to know?

- **Where** is OSHA authorized to inspect?
- **When** is OSHA authorized to inspect?
- What is the **purpose** of an inspection?
- What are the employers' **rights**?



# How to Confidently Manage an OSHA Inspection

Things to remember throughout the inspection

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





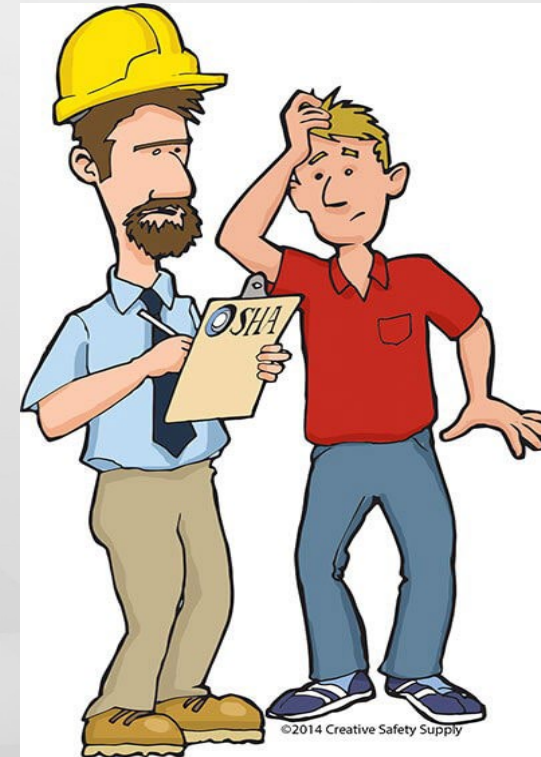
# How to Confidently Manage an OSHA Inspection

## Maintaining Control

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

# Elements of an OSHA Inspection

- The Knock at the Door
- The Opening Conference
- The Walk-Around
- The Closing Conference





# Elements of an OSHA Inspection

## Step 1: Knock at the Door

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

# Elements of an OSHA Inspection

## Step 2: Opening Conference

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





# Elements of an OSHA Inspection

## Step 2: Opening Conference

- Determine the type of inspection and scope:
  - Imminent Danger
  - Fatality
  - Catastrophe
  - Complaint
  - Referral
  - Programmed
  - Follow-Up

# Elements of an OSHA Inspection

## Step 2: Opening Conference

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

# Elements of an OSHA Inspection

## Step 2: Opening Conference

Request documents (keep all information requests within the scope of the investigation); **NOTE:** If inspectors request **trade secret/confidential information**, ask that they treat it as confidential)

- Information typically requested:
  - OSHA 300 Log, 300A, and 301s – within 4 hours
  - Names of first-aid trained and designated responders
  - Copy of Emergency Action Plan
  - First aid and blood borne pathogen training records
  - Location and content of first aid supplies
  - Required personal protective equipment
  - Other relevant safety programs/documents

# Elements of an OSHA Inspection

## Step 3: Walk-Around

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

# Elements of an OSHA Inspection

## Step 3: Walk-Around

- **What to expect?**

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



# Elements of an OSHA Inspection

## Step 3: Walk-Around

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



# The Inspection

- Hourly employee interviews
  - OSHA takes position no management present
  - Up to employee – can have Employee Representative
  - **Advise employee of his/her rights, appreciation of cooperation, and to tell the truth**
- Warning: Employees have whistleblower rights.



# The Inspection

- Management and supervisor interviews
  - **Always another management/counsel present – agent of Company**
  - Definition of manager?
  - Fatality investigation – attorney always present
  - Responses limited to scope of inspection – no fishing expedition
  - **No tape-recording**
  - **Signed statement**

# The Inspection

## Documentation

- Recordkeeping
- Training
- Safety and health policies
- Monitoring results
- Medical surveillance
- Medical access orders
- **Previous safety audits**
- **Standard required documents**

# Scenario 1:Facts

- Automotive Parts Manufacturer
- Union Employer
- OSHA Complaint Inspection
- Complaint Involves One Particular Overhead Hoist
- Complaint is Precipitated by a Worker Injury on Hoist





# Scenario 1: OSHA's Requests

- Walkaround Inspection of the Entire Facility
- Interview Line Employees in Privacy
- Interview Supervisors in Private
- Documents

# Scenario 1: OSHA's Document Requests

- 300 Logs
- Hazcom Program
- Incident Report of Injured Employee
- Witness Statements
- Accident Investigation Report
- Near Miss Reports
- Hoist/Crane Training Documentation
- Procedures for Hoist Operations
- Maintenance and Inspection Records for Hoist
- Hoist Modification Records
- Hoist Operators Manual
- Lockout Tagout Program
- CPR/First Aid Training Records
- BBP Training Records
- Disciplinary Records for for Safety Violations for ALL Employees for Prior Two Calendar Years
- Internal Audit Reports for Last Year
- Hepatitis B Declination Forms
- Building Evacuation Map

# Elements of an OSHA Inspection

## Step 4: Closing Conference

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

# Elements of an OSHA Inspection

## Step 4: Closing Conference

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

# Citations

## Essential Elements

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



# Penalties Effective January 15, 2022

- Other than serious  
Up to \$14,502 per violation
- Serious  
Up to \$14,502 per violation
- Posting Requirements  
Up to \$14,502 per violation
- Willful  
Up to \$145,027 per violation  
- Minimum of \$9,753
- Repeat  
Up to \$145,027 per violation
- Failure to abate  
Up to \$14,502 per day beyond abatement date

# Penalties – Criminal Violations

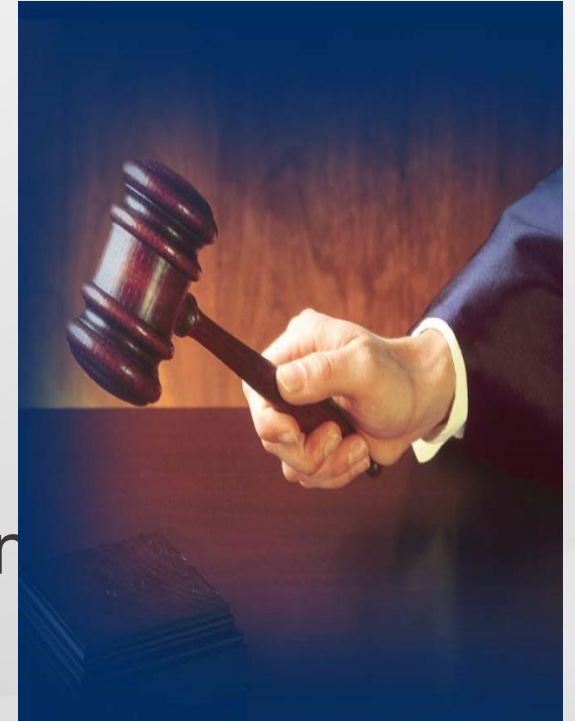
- Willful violation & employee death: \$10,000 or 6 months or both
  - Second conviction: \$20,000 or 12 months or both
- Advance notice of inspection: \$1,000 or 6 months or both
- Falsification of required records, etc.: \$10,000 or 6 months or both
- Murder or attempted murder of CO: Term of years to life

# Citation Options for Handling Citations

- Agree to citations, pay full penalty – (rarely recommended)
- Informal conference/informal settlement (careful of admission)
- **Notice of Contest – 15 working days (Federal); some state plan states different time period**
- Formal settlement
- Hearing

# Hearings

- Occupational Safety and Health Review Commission
- Formal complaint and answer
- Discovery similar to Federal Court
- Hearing before Administrative Law Judge
- ALJ issues written opinion
- Appeal to three-member Review Commission
- Other options – expedited proceedings



# Final Questions



Presented by:  
**Edwin G. Foulke, Jr.**  
Phone: (404) 240-4273  
Email: [efoulke@fisherphillips.com](mailto:efoulke@fisherphillips.com)





**BE SAFE!**

**REMEMBER:**

Bad decisions make good stories  
and usually the evening news.

Fisher & Phillips LLP  
is dedicated exclusively to  
representing employers in the practice of  
employment, labor, benefits, OSHA, and immigration law  
and related litigation.

**THESE MATERIALS AND THE INFORMATION PROVIDED DURING THE PROGRAM  
SHOULD NOT BE CONSTRUED AS LEGAL ADVICE OR AS CRITICAL OF THE  
CURRENT OR PAST ADMINISTRATIONS.**

# Thank You



Presented by:  
**Edwin G. Foulke, Jr.**  
Phone: (404) 240-4273  
Email: [efoulke@fisherphillips.com](mailto:efoulke@fisherphillips.com)

# Closing Remarks



**Jason Mozo, J. D.**  
**Executive Director**

Florida Chamber Safety Council

[JMozo@FlChamber.com](mailto:JMozo@FlChamber.com)

(850) 521-1237