

Your Rights in An OSHA Inspection

A workplace inspection by the Occupational Safety and Health Administration (“OSHA”) can result in substantial penalties where violations are found. Employers need to know their rights during an inspection, including the right to say “no” to an OSHA compliance officer (“inspector”) when he or she seeks to inspect a work place. The protocols to be followed by your company need to be established and understood by supervisory as well as non-supervisory employees ahead of time, and reinforced from time to time. All supervisory employees should be well versed in the company’s OSHA access policy and must have familiarity with OSHA regulations and the company’s programs for compliance. Non-supervisory employees should understand that they have no right to grant OSHA access and should refer any such attempt to management. They also should be briefed on their rights if interviewed by OSHA in the course of an inspection.

When to Expect OSHA

OSHA is likely to show up in one of four situations. In the order of priority that OSHA gives to them, they are:

1. Imminent danger inspection, which arises out of a complaint about workplace conditions, often by a current or former employee.
2. Fatality/catastrophe inspection, which as the name implies, immediately follows a fatality or catastrophe (the latter defined as an accident causing five or more employees to be hospitalized) at the workplace.
3. Follow-up inspection, which occurs in connection with violations found during prior inspections.
4. Targeted or programmed inspection, which are planned inspections generally in high hazard industries.

Of the four types of inspections, the second type is predictable and the third somewhat less so. The other two types are essentially random events and thus difficult to prepare for, thus reinforcing the need to have a policy in place in the event of such an inspection.

What to Expect From OSHA

An OSHA inspection should start with an opening conference, which OSHA is required to conduct by law. OSHA personnel are expected to present their credentials, state the nature of their visit and produce a search warrant if one has been obtained by OSHA. A company representative should verify the inspector's credentials, determine why the inspection is sought and, determine whether the inspector has a warrant and if so, review it and obtain a copy of it and any other documents presented. The inspector can be asked to wait until a company safety officer or other official is present or consulted. (OSHA will usually wait a reasonable amount of time). If the inspector does not have a warrant, and your company policy requires one, you must instruct the inspector to leave the work place immediately, i.e., do not allow any inspection to start in the first place in order to avoid an argument that you waived the right to require a warrant. At the opening conference the company should establish the protocols covering the scope of the inspection and any employee interviews. The opening conference and all subsequent contact with OSHA during the inspection should be handled by company personnel familiar with the company's inspection policy and able to make decisions on access, etc., or know who to call for such authority. An agreement should be struck that any crucial work in process will not be interrupted by the inspection.

The actual inspection, if permitted by the company, follows the opening conference. OSHA inspections can vary in scope from comprehensive "wall-to-wall walk-a-rounds" to partial inspections focused on a particular operation or location. What type is sought and will be allowed should be established in the opening conference. Do not allow OSHA to turn a limited inspection into a comprehensive one "on the fly". Do not allow OSHA to have access to any part of your facility unaccompanied.

What Restrictions Are Placed on OSHA

The company has the Constitutional right to demand that OSHA obtain a search warrant before conducting an inspection. As noted, care must be taken not to waive this right by allowing OSHA to start an inspection before the right is invoked. The decision to invoke the right should be made in the opening conference once the purpose of OSHA's visit is determined. Only those personnel with authority can grant access to OSHA and those lacking such authority need to understand this, e.g. a "line" employee must understand that he or she has no authority to allow an inspection by OSHA if asked.

Whether the company should invoke its Constitutional right to require a warrant can be a tough call. Denying access may make sense where the company knows that a serious violation is likely to be found if the inspection proceeds at that time. Conversely, denying access may cause OSHA to have a heightened interest in the facility in the future. In addition, employees may wonder “what the company has to hide” if access is denied. Knowing why OSHA is there in the first place, and what it is likely to find if granted access, will likely inform the decision whether or not to require a warrant. Alternatively, the company may also be able to “buy time” without invoking the warrant requirement. OSHA is likely to accept for a limited time a reasonable explanation that an inspection is inconvenient because of work load at the location or because of the absence of key personnel, or simply because the company would like to confer with its lawyer first. Offering to provide access “in a few days” may make sense and probably reduces OSHA’s fear, compared to a blank refusal, that the company is buying time in order to rectify a known safety violation. This also allows the company some time to prepare for an inspection by making sure that housekeeping is in order, that required documents such as injury logs and safety data sheets are in hand and that employees are aware of what is about to happen.

What to do During the Inspection

The company should designate a safety officer or other tasked employee to accompany OSHA at all times during the inspection. Notes chronicling the inspection should be taken. (avoiding any editorial comments or admissions that could later be subject to discovery in litigation). It is important that OSHA’s record of the inspection is not the only “evidence” available should the matter proceed to litigation. Photos, measurements, and the like taken by OSHA should be duplicated by the company. Inaccuracies in measurements or depictions of the worksite, equipment, etc., should be noted and pointed out to OSHA at the time. The company should make no concessions of violations or operational deficiencies because it is unlikely to buy the company goodwill and can be used against the company later.

OSHA’s Right to Interview Employees

Unless it is beyond the scope of any warrant presented, OSHA has the right to interview employees including privately. For employees serving as managers, the company can insist on the presence of company legal counsel. The company can insist that employees be interviewed after work hours and off of the premises. Where possible, the company safety officer (or legal counsel) should seek to interview the employees OSHA is interested in, in order to determine

what relevant information they may have and what they might have to say. Employees are entitled to a copy of any statement they make to OSHA. All employees should be advised that they only need to answer the questions asked and need not feel compelled to volunteer information of any type.

After OSHA Leaves

Once the inspection is over, a closing conference should be held in which the OSHA inspector should describe any violations found. Once the closing conference concludes, and if violations have been alleged, a record in the form of a memorandum to legal counsel from management should be made. This provides a basis for insulating the record from discovery by OSHA in any ensuing litigation. The memorandum should detail the topics discussed with OSHA, who was present, who OSHA spoke with and what was said and other pertinent details including a chronology of the visit.

With proper planning, the company can exert reasonable control over an OSHA inspection and where violations are found can preserve necessary evidence for later use in litigation or in negotiation of a settlement.

This bulletin was drafted by Ed Walsh of Reed Smith LLP, who may be reached at ewalsh@reedsmith.com or 312-207-3898.