

# Managing an OSHA Inspection...Are You Prepared?

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If there's one thing I can promise...as every workplace is unique, every OSHA inspection is unique – as is every inspector. So, let's take a moment to outline the structure of the inspection, the employer's rights, and what you can do to prepare.

## Employer Preparation

Plan in advance! The best time to think about and plan for an inspection is before one happens. Just like other 'emergencies,' have a set protocol, including, but not limited to:

- Designate a safety director or other manager to act as the company's representative during an OSHA inspection.
- Contact your advocates such as your Safety Consultant or your Insurance Broker.
- Consider having a backup for the company representative(s) to fill in for the primary representative during a vacation or other absence.
- Develop a call list and inform front desk personnel/receptionist and key personnel.
- Politely ask OSHA to wait until your company representatives and/or outside advocates can be present (OSHA will typically wait 30-60 minutes).

The best preparation for an OSHA inspection is having a robust safety and health management program in place. A mock OSHA inspection and regular safety audits can uncover unrecognized hazards.

## Why is OSHA Here?

OSHA is on-site for a specific reason. There is a hierarchy of priorities OSHA uses to allocate its inspection and enforcement resources:

1. Imminent danger (e.g. fall protection, excavation, etc. often occurs as a result of a 'drive-by');
2. Severe injuries and illnesses – as a result of reporting a severe injury (fatality, enucleation, hospitalization, and amputation);
3. Worker complaints (i.e. whistleblower) – we're seeing a high number of investigations as a result of complaints;
4. Referrals from other federal, state or local agencies, individuals, organizations or the media;
5. Targeted inspections (e.g., national, regional, and local emphasis programs); and
6. Follow-up inspections to verify abatement of hazards.

Programmed inspections include those for local, national, regional, and special emphasis programs to address compliance in hazardous industries or specific workplace hazards.

## Your Rights as an Employer

Before an inspection even begins, employers have a right under

the Fourth Amendment to the U.S. Constitution to be free in their workplaces, just as they are in their homes, from unreasonable searches and seizures, which includes inspections by OSHA. What that means is, OSHA may not inspect a workplace unless the Agency has administrative probable cause (a lower burden than criminal probable cause) to believe that a violative condition exists within.

Accordingly, employers have a right to demand an inspection warrant that establishes OSHA's probable cause to inspect. We rarely (if ever) advise clients to demand an inspection warrant; rather we try to negotiate with the Agency over a reasonable scope of the inspection, and with such an agreement, waive the warrant right and consent to the inspection. Aside from your right to request a warrant, other employer rights include:

- "Reasonable inspection" at "reasonable times"
- Participate in management interviews
- An opening conference
- Protect trade secret and confidential business information
- A copy of formal employee complaints
- A closing conference
- Accompany the Compliance Officer during the walkaround
- Contest alleged violation

## Opening Conference

An on-site investigation begins with an opening conference. In my opinion, this is the most important stage of the inspection because it is the time when employers can:

- Meet the Compliance Officer (CO) – presented with the proper credentials: an agency photo identification if there is no badge.
- Negotiate to narrow the scope of the inspection and set the tone of the inspection;
- Understand (ask questions about) the purpose of and probable cause justifying the inspection; and
- Try to establish ground rules with OSHA about how the inspection may proceed, from the collection of documents (through written requests only), to interviews (scheduled in advance), and physical access to the facility (only with a management escort).

## Inspection/Walk-around

The company representative(s) should accompany the CO during the workplace walk-around. A union representative may also participate in the walk-around if the employees are part of a collective bargaining agreement.

Some notes regarding the Inspection/Walk-around:

- DO take the same photographs or video that the CO does.
- DO NOT admit that something is a violation.
- DO take detailed notes.
- DO NOT give CO documents that were not requested.
- DO only state known facts.
- DO NOT become angry or argue with the compliance officer.

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If any documents are requested, don't feel rush or bullied. Ask for a formal "Document Request" to ensure everyone is on the same page. Then, you'll have a reasonable amount of time to provide the requested materials. Consider if materials may be privileged or protected work product. Don't volunteer self-audits, insurance and consultant reports, or other similar materials without talking to legal counsel. Also note that any safety and health violations in "plain view" of the CO during the walk-around may lead the inspector to insist on expanding the scope of the inspection. So, it's best to plan your "route of travel" during the Opening Conference stage.

**Closing Conference**

At the conclusion of an inspection, the CO will conduct a Closing Conference – either in-person or via telephone. During the Closing Conference, the inspector will:

- Discuss any apparent violations and any pertinent information discovered during the inspection;
- Cover the strengths and weaknesses of the employer's safety and health program; and
- Advise all representatives of their rights to participate in subsequent conferences, meetings, or contest proceedings.

This is your 'last stand' before a potential citation is issued, so you'll want to:

1. Listen carefully to OSHA's findings. OSHA citations are sometimes based on misunderstandings as to what was or was not provided to OSHA. The closing conference provides the opportunity to avoid citations based upon such misunderstandings.
2. Depending upon the circumstances, it may be worthwhile to inquire as to specific information supporting an alleged violation. The employer can then use this information to formulate a strategy for responding to the anticipated citation.
3. Ask about hazards that need to be abated. Prompt abatement of hazards has advantages such as 'good faith' and possibly a lower penalty.

**Citations**

When an inspector finds violations of OSHA standards or serious hazards, OSHA may issue citations and fines. OSHA must issue a citation and proposed penalty within 6 months of the violation's occurrence. Citations describe:

- OSHA requirements allegedly violated,
- list any proposed penalties, and
- give a deadline for correcting the alleged hazards.

As violations are categorized (by type), varying penalties can be attached. Below are the maximum penalty amounts adjusted for inflation as of Jan. 23, 2019.

| Type of Violation                                   | Penalty                                    |
|---|--|
| Serious and Other-Than-Serious Posting Requirements | \$13,260 per violation                     |
| Failure to Abate                                    | \$13,260 per day beyond the abatement date |
| Willful or Repeated                                 | \$132,598 per violation                    |

**Post Citation (Informal Conference / Contest)**

The post citation process really consists of two options:

1. Contest the citation(s) – formally disagreeing with what was issued. An employer has 15 working days (from the receipt of the citation) to contest OSHA citations by filing a case with the review commission.
2. Request an Informal Conference – informally settling the case (typically what we recommend). The informal conference must be held during the 15-day contest period but does not stay the contest deadline. During an informal conference, OSHA personnel will review:
  - The purpose of the conference,
  - Rights of all participants,
  - Contest rights and time constraints,
  - The abatement/correction of the citations, and
  - The potential for settlement of any of the citations.

Once terms have been reached, the OSHA representative will draft a settlement agreement. Prior to that being done, it's recommended that the agreement include an "exculpatory statement" that provides that the employer hasn't admitted to a violation of any OSHA standard. Essentially, it's a "we agree to disagree", and in a courtroom, a settlement agreement without an exculpatory clause could be used as evidence to reinforce your negligence. Frequently, such settlement agreements contain the following information:

- By entering into this agreement, the employer does not admit that it violated the cited standards for any litigation or purpose other than a subsequent proceeding under the Occupational Safety and Health Act and that this agreement is not intended to be admissible or deemed an admission in any other proceeding other than a subsequent proceeding under the Act.

Bottom line, an OSHA Investigation may feel like you're being sent to the principal's office, but it does not have to be a bad experience...as the old adage goes, "By failing to prepare you are preparing to fail."

To schedule a mock OSHA inspection or questions about this brief, contact PCA Associate Member Roger Paveza, Vista Safety Consulting at 847-951-7544 or by email at [roger@vistasafetyconsulting.com](mailto:roger@vistasafetyconsulting.com).

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