

OSHA INSPECTIONS: A SURVIVAL GUIDE

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“UH-OH, THE OSHA INSPECTOR IS HERE!”

Those words strike fear into the hearts of otherwise unflappable business owners and managers. No one, it seems, relishes the thought of having an OSHA compliance officer (“inspector”) comb through their jobsite, manufacturing facility, warehouse or office in search of potential violations.

Significantly, the possibility of an OSHA inspector appearing at your worksite and ultimately issuing citations is very real. In 2012, the U.S. Department of Labor’s Occupational Safety and Health Administration estimated it would conduct 41,000 inspections. Additionally, 25 states run their own safety programs approved by OSHA, accounting for an additional 50,000 inspections annually. Between OSHA and these “state plan” programs, over 200,000 violations are cited every year.

But you don’t have to be fearful when OSHA knocks. You can successfully manage an OSHA inspection, provided you follow two sets of rules. The first set is a safety checklist of those provisions you should put in place long before an OSHA inspector arrives. The second set consists of “dos and don’ts” you should follow once an OSHA inspector actually appears on your site for an inspection.

SAFETY CHECKLIST

To facilitate a safe workplace and prepare for the day OSHA decides to inspect, you should take time to do the following:

- Develop a written safety and health program. Distributing the program, which should be tailored to the activities at your worksite, to each employee and updating it at least annually, will go a long way toward showing an OSHA inspector that you take safety seriously.
- Establish a disciplinary program for those employees who violate safety rules. This means documenting every disciplinary measure you take. Putting this program in place demonstrates your



commitment to a safe workplace and may provide an important defense to OSHA citations.

- Designate an on-site safety officer who has the authority to discipline employees for safety rule infractions.
- Train your employees to wear the proper protective equipment, to safely operate tools and handle materials they work with, and to recognize and report safety hazards. This should be live training – not just a video – and should be reflected in detailed training records.
- Conduct regularly scheduled safety meetings at which you can address specific safety issues and at which employees can raise specific safety concerns. Then document those meetings.
- Make sure your OSHA 300 Logs, OSHA 300A Summaries, and OSHA 301 Incident Reports, which track employee injuries and illnesses, are accurate and kept up to date. These are the first records an OSHA inspector will ask to review.
- Designate an inspection representative (typically your safety officer) and back-up representatives. Waiting until OSHA arrives to make this decision is inadvisable. Your inspection representatives should be familiar with your safety and health program and OSHA’s inspection procedures.
- Conduct periodic self-audits to assess adherence to applicable safety and health regulations. Engage outside safety consultants and insurance company experts to conduct mock “inspections,” accompanied by your inspection representatives.

Preparation is key. Laying the essential safety groundwork before OSHA shows up on your worksite will calm your fears about an OSHA inspection and maximize your chances of that inspection going smoothly.

INSPECTION DOS AND DON'TS

As outlined below, you possess significant legal rights during the OSHA inspection process.



The Opening Conference

The inspection usually begins by the inspector ap-

pearing at your premises unannounced, without a search warrant, displaying his or her credentials. At this point your inspection representative should be contacted to deal with the OSHA inspector.

During the opening conference the inspector should explain the procedures for conducting the inspection.

Your inspection representative should:

- Ask the OSHA inspector during the opening conference to identify the reason for the inspection. If the inspection was triggered by an employee complaint, your representative should ask for a copy of the complaint (the employee's name will be redacted).
- Ask the OSHA inspector to identify the scope (i.e., aimed at a specific area or the entire site) and the anticipated duration of the inspection. If the inspector is requesting a "wall-to-wall" inspection but the inspection was triggered by an employee complaint or a referral regarding a particular aspect of your operation, you should object and ask the inspector to limit the inspection to the matter raised in the complaint or referral.
- An authorized employee representative is also given the opportunity to attend the opening conference and accompany the OSHA inspector during the inspection. If your employees are union members, then their union may designate the employee representative.

✓ The "Walk-Around"

The next phase of the inspection is the actual physical inspection, often referred to as the "walk-around." During the walk-around the OSHA inspector, your inspection representative, and the employee representative (if there is one – often there is not) proceed through the workplace together to inspect for safety and health hazards.

Your inspection representative should:

- Escort the OSHA inspector at all times during the walk-around. The OSHA inspector should never be allowed to wander through the worksite alone.
- The law requires the inspection take place at "reasonable times and within reasonable limits." Using good judgment, do not allow the inspection to unreasonably disrupt work or extend beyond normal working hours.
- Carefully consider the route on which you take the inspector to view his or her target area. Because any hazardous condition the inspector observes in "plain view" can be the subject of an OSHA citation, you want to minimize the inspector's

exposure to non-essential areas of your worksite.

- Take detailed notes of the entire inspection, including where the inspector goes, what he/she sees, and what he/she says. Write "Attorney-Client Privileged/Work Product" at the top of each page of your notes. If the inspector takes photos, videos, or measurements, so should you.
- Ask the inspector for duplicates of all physical samples and copies of all test results.
- Answer the OSHA inspector's questions but avoid volunteering information.

Once the inspection starts, you should remain mindful that what your inspection representative says during the inspection can and will be used against you by OSHA. This means that your representative should **not**:

- Agree with the inspector that an observed condition is an OSHA violation. Agreeing that a violation exists will almost always result in a citation and fines. Nevertheless, immediately correct (if possible) violations noted by the inspector.
- Argue with the inspector. Attempts to defend against possible violations may undermine your defenses.
- Be hostile to or lie to the OSHA inspector.
- Punish any employee who speaks to or cooperates with OSHA.

✓ Employee Interviews

How your employees (both supervisors and non-supervisors) respond during interviews with OSHA can significantly influence whether you are cited, as well as your ability to successfully defend any citations you receive.

The inspector has the right to privately question employees. You are not entitled to be present for interviews of non-supervisory employees. Nevertheless, you should conduct a voluntary debriefing of all non-supervisory employees interviewed by OSHA. You should also take the following steps to prepare your *non-supervisory* employees by:

- Informing them that they have the right to speak – or not speak – with the inspector.
- Advising them that they may request the presence of a representative during their interview – whether it be a supervisor, your safety officer, your OSHA attorney, their union representative, a personal attorney, or otherwise.
- Telling them what the inspector is likely to ask (e.g., questions about safety training or the facts involving an accident).
- Letting them know of their right to refuse to be video or audio tape-recorded during their interview.
- Informing them of their right to refuse to sign a written statement, and if they do sign such a statement, their right to re-

ceive a copy of it as a condition of giving the statement.

Interviews of *supervisors* present a different ball game. Because supervisors' statements may legally bind you, you have much more latitude. Unlike with non-supervisors, your representatives have an absolute right to be present during your supervisors' OSHA interviews, and you should always exercise that right. Moreover, in situations involving fatalities or serious injuries, you should have your OSHA attorney present during the interviews. Like non-supervisors, supervisors also have the right to refuse to be video or audio tape-recorded, and you should require that supervisors exercise that right.

✓ The Closing Conference

The last step in the inspection process is the closing conference. During the closing conference the OSHA inspector will identify the alleged violations uncovered during the inspection. Your representative should closely question the inspector about each violation and the evidence the inspector believes supports that violation.

Following these rules and vigilantly protecting your legal rights is the surest way to effectively manage an OSHA inspection and minimize your financial exposure.



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R.J. (Randy) Stevenson Chairs Baird Holm's 23-lawyer Labor, Employment and Employee Benefits Law Group. His practice is focused on representing private and public employers in all aspects of labor relations and employment law. He has successfully

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