

BULLETIN

OSHA INSPECTIONS: WHAT TO EXPECT AND HOW TO PREPARE

In 2014, 4,679 individuals were killed while working in the United States – an equivalent of 3.3 fatalities per 100,000 full-time workers and more than 13 deaths per day.¹ Obviously, workplace safety is a major concern. To ensure safe and healthful working conditions, in 2014, there were 36,163 federal the Occupational Safety and Health Administration (“OSHA”) inspections and 47,217 State Plan OSHA inspections.²

In order to assure that the OSHA standards are complied with, on-site employer inspections are conducted by Compliance Safety and Health Officers (“CSHO”) and, except in limited circumstances, the employer has no advance notice of the inspection.³ Inspections target imminent danger, catastrophes and fatalities, worker complaints and referrals, severe violators, and high injury or illness rates.⁴

This bulletin will provide an overview of the inspection process and highlight some employer strategies and procedures to implement before, during, and after the inspection.

I. When does OSHA conduct inspections

As a preliminary matter, is important to understand when OSHA conducts an inspection. Inspections can be random, because of an employee complaint, or sparked by special emphasis programs. In fiscal year 2014, OSHA conducted 36,163 federal inspections, of which 9,570 related to employee complaints.⁵ It is therefore critical that employers have an internal mechanism for managing employee complaints, as this would encourage employees to handle the matter internally, rather than by filing an OSHA complaint. Furthermore, employers should stay abreast of national and local special emphasis programs that may apply to them as this increases the likelihood of inspection. For example, nationally, OSHA has several special emphasis programs focusing on, federal agencies and hazardous machinery.⁶ In California, featured safety programs including those focusing on longshoring activity and retail facilities.⁷

II. Pre-inspection precautions and strategies

a. Establish employee responsibilities

In order to facilitate an efficient and minimally invasive inspection, employers must ensure that employees are aware of their roles and responsibilities should a CSHO arrive for an inspection.

Best practices provide that the employer establish an “inspection team” comprised of individuals with distinct responsibilities during the inspection. At a minimum, management should identify who is responsible for meeting with the CSHO, who will be the primary contact person for the CSHO, and who will be present during the inspection. Because the employer has the right to mimic any tests performed by the CSHO, the employer should designate an individual responsible for doing so. Further, it is helpful if the employer also designate a member of maintenance or the facilities department for OSHA inspections. Should the individual identify any easily remedied violation during the walkthrough, he/she would be able to abate the violation during the course of the inspection, thereby lessening the chance of a citation.

b. Identify an individual responsible for maintaining potentially relevant records

The employer should also ensure that someone is designated with the task of maintaining certain records that are of critical importance during an OSHA inspection, including: training records, OSHA logs, internal audit documents, and third party audit documents.

On a related note, it is important that the employer stay current on the OSHA recordkeeping and reporting requirements. As of January 1, 2015, all employers are subject to certain reporting requirements, even those exempt from OSHA recordkeeping requirements.⁸ As of January 1, 2015, OSHA has revised its recordkeeping regulations to partially exempt new industries.⁹

Furthermore, training records can be essential evidence when the employer seeks to establish an affirmative defense based on unpreventable employee misconduct, discussed later. If the employer has performed internal safety audits or has had a third-party safety audit performed, it is imperative that the employer address and abate any safety issues identified. In practice, it is nearly guaranteed that the CSHO will request these documents during the course of the inspection and track abatements. Where applicable, any invoices or documentations related to the abatements should be retained by the employer. If the inspection reveals that an internal or third-party audit identified a safety violation that was not abated, the employer can be subject to penalties for a willful violation.

III. During the inspection

Throughout the course of the inspection, remember: it is your facility and you have rights concerning the inspection process. The CSHO must conduct the inspection in a manner that is not unreasonably disruptive.¹⁰ In general, the inspection will begin with an Opening Conference, which is followed by a walkthrough, interviews, and a Closing Conference.

a. Opening Conference¹¹

At this point, the CSHO will explain the scope and purpose of the inspection. The CSHO will likely request documentation from the employer. Note that the OSHA standards set forth the records the employer is required to provide.¹² Therefore, it is sometimes important that management consult with the company's OSHA counsel before providing documents to the CSHO, in order to avoid inadvertently disclosing more information than necessary. The Opening Conference is an opportunity for the employer to notify the CSHO of any trade secret issues and for the officer to gain an understanding of the employer's operation and safety standards. While this should be an open dialogue, it is important that the employer does not reveal more information than necessary thereby avoiding the possibility that the CSHO is provided with information that can be used against the employer.

b. Walkthrough

The facilities walkthrough can take anywhere from a couple of hours to a couple of months depending on the size and complexities of the facility and safety standards. As previously noted, the employer has the right to accompany the inspector.¹³ In this, if the inspectors intend to take photographs or hire experts for testing, the employer has the right to do the same. If there are any discrepancies noted between the results of the CSHO expert or employer expert, the discrepancies should be immediately documented and addressed. If the employer requires that employees complete certain training programs prior to being allowed access to the facilities, then the employer has the right to require that the CSHO complete the training as well. Furthermore, if the facility safety standards restrict the use of photography or the introduction of chemicals necessary for expert testing, then the CSHO is precluded from violating these standards.¹⁴ For example, the facility may restrict flash photography as there would be an adverse chemical reaction in the plant; if this is the case, the CSHO may not violate this safety standard and is precluded from photographing the area.

Even more, the employer has the right to protect their trade secrets.¹⁵ Since the OSHA reports are discoverable to the general public, the employer has certain rights concerning their trade secrets that they should be aware of so that they can protect their trade secrets during the inspection.

c. Interviews¹⁶

The inspection process will oftentimes include employee interviews. In order to ensure minimal business and productivity interruption, the employer should schedule these interviews away from the production floor. These inspections are conducted in private, however, the employee may request a union representative be in attendance. Further, the CSHO will typically seek to document the discussion through an Interview Statement that is signed by the interviewee. The employee/interviewee should carefully review the statement before signing.

d. Closing Conference¹⁷

At this conference, the CSHO will explain violations noted during the walkthrough inspection. Although it might be tempting for employers to explain or discuss the violations with CSHO, employers should be careful not to inadvertently provide the CSHO with information that can be used against them by either proposing an unreasonable abatement date or admitting to a violation. This conference can be an important opportunity for the employer to gain free discovery and insight into the CSHO's findings.

e. Citations and Options

No later than six months after the inspection, a citation may be issued against the employer.¹⁸ This citation must describe the violation "with particularity."¹⁹ Upon receipt of the citation, the employer must post the citation at or near the place of violation for three days or until it is abated, whichever is later.²⁰ The citation will prescribe an abatement deadline; however, if the employer is unable to comply with the deadline, OSHA readily grants extensions.

The citation will indicate a proposed penalty that the employer may accept and pay in full, attempt to informally settle, or file a notice of contest. Of note, the timeframe for filing a notice of contest can vary by state.

f. Common defenses to OSHA citations

i. Lack of Employer Knowledge

In order to establish a violation, OSHA must prove by a preponderance of the evidence that:

1. The cited standard applies;
2. The employer failed to comply with the standard;
3. The employees had access or exposure to the violative condition; and
4. Employer had knowledge of the violative condition.²¹

The final factor is often decisive. OSHA must prove by a preponderance of the evidence that either: 1) the employer had actual, direct knowledge of the condition; or 2) the employer *should have known* about the condition through the exercise of reasonable diligence.²² Note that where a supervisor has knowledge of a violation, the knowledge is imputed on the employers to prove a prima facie case.²³ Hence, it is imperative that employers train supervisors to conduct review of safety conditions and to report unsafe conditions.

ii. Unpreventable Employee Misconduct

The employer may also raise the “unpreventable employee misconduct” defense.²⁴ Generally, to establish this defense, the employer must prove:

1. The employer has safety rules designed to prevent the violation;
2. The employer has adequately communicated the safety rules and standards to employees;
3. The employer has provided any necessary safety training;
4. The employer has taken steps to discover violations of the safety rules and standards; and
5. The employer has enforced the rules and standards when violations have been discovered.²⁵

From a practical standpoint, it is incredibly important that the employer maintains documentation of the above. As described previously, the retention of certain records can be critical in an OSHA inspection. Safety training records, documentation of any abatements of violations identified in internal or third-party audits, and other documents may be helpful in instances where an employer seeks to establish this defense.

IV. Conclusion

Although an OSHA inspection can be a stressful and nerve-wracking experience for any employer, proper preparation can help alleviate the stress and uncertainty of the experience. Employers should ensure that all employees are familiar with the employer’s procedures for OSHA inspections in order to make certain that the inspection process, from beginning to end, is as streamlined and minimally invasive as possible. With proper procedures in place, the employer can ensure that the employer is prepared to comply with the OSHA inspection requirements, while still exercising its rights (through things such as side-by-side testing and protection of trade secrets).

¹ <https://www.osha.gov/oshstats/commonstats.html>

² <https://www.osha.gov/oshstats/commonstats.html>

³ 29 C.F.R. § 1903.6

⁴ <https://www.osha.gov/dep/index.html>

⁵ https://www.osha.gov/dep/2014_enforcement_summary.html

⁶ <https://www.osha.gov/dep/neps/nep-programs.html>

⁷ <https://www.osha.gov/dep/leps/leps.html>

⁸ <https://www.osha.gov/recordkeeping2014/index.html>; https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=26673

⁹ <https://www.osha.gov/recordkeeping2014/records.html>

¹⁰ 29 C.F.R. § 1903.7(d)

¹¹ OSHA Instruction, Field Operations Manual, 3(V) Opening Conference (available: https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf)

¹² 29 U.S.C. § 657(c)

¹³ 29 U.S.C. § 657(e)

¹⁴ 29 C.F.R. § 1903.7(c)

¹⁵ 29 U.S.C. § 664; 29 C.F.R. § 1903.9

¹⁶ OSHA Instruction, Field Operations Manual, 3(VII) Walkaround Inspections (available: https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf)

¹⁷ OSHA Instruction, Field Operations Manual, 3(VIII) Closing Conference (available: https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf)

¹⁸ 29 U.S.C. § 658(c); 29 C.F.R. § 1903.14(a)

¹⁹ 29 U.S.C. § 658(a); 29 C.F.R. § 1903.14(b)

²⁰ 29 U.S.C. § 658(b); 29 C.F.R. § 1903.16(b)

²¹ <http://www.oshalawupdate.com/2012/10/24/osha-faq-series-faq-2-unpreventable-employee-misconduct-defense/>; *New York State Elec. & Gas Corp. v. Secretary of Labor* (2d Cir. 1996) 88 F.3d 98, 105

²² *Id.*; *Tampa Shipyards Inc.* (O.S.H.R.C. Mar. 10, 1992) 15 O.S.H. Cas. (BNA) ¶ 1533

²³ *Tampa Shipyards Inc.* (O.S.H.R.C. Mar. 10, 1992) 15 O.S.H. Cas. (BNA) ¶ 1533

²⁴ 29 C.F.R. § 2200.34

²⁵ *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Com'n* (1st Cir. 1997) 115 F.3d 100, 109; *Cbi Services, Inc.* (O.S.H.R.C. Oct. 29, 2001) 19 O.S.H. Cas. (BNA) ¶ 1591; *Burford's Tree, Inc.* (O.S.H.R.C. Jan. 8, 2010) 22 O.S.H. Cas. (BNA) ¶ 1948; *Psp Monotech Indus.* (O.S.H.R.C. Aug. 14, 2008) 22 O.S.H. Cas. (BNA) ¶ 1303; see also OSHA Instruction, Field Operations Manual, 5(VI) Affirmative Defenses (available: https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf)