

OSHA Inspections: Considerations for Employers to Help Inspections Run Smoothly

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PRACTICE AREAS

Employment and Labor

Can your business afford to pay thousands of dollars in penalties as a result of a workplace safety investigation? In December of 2018, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") cited one Nebraska business \$78,899 in penalties following an inspection that resulted when an employee suffered a leg laceration. Again, on January 18, 2019, OSHA cited another Nebraska business \$182,926 in penalties following an inspection that occurred after an employee suffered severe burns. These incidents serve as a reminder that OSHA often conducts inspections shortly after an employer reports an injury; however, it is also important for employers to remember that OSHA inspections often occur without any advance notice.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for all employees and OSHA is the administrative agency tasked with setting and enforcing workplace safety standards. When an OSHA inspector, known as a compliance safety and health officer, arrives at the worksite, the employer's preparedness and management of the inspection process can substantially impact the outcome of the inspection and mitigate the employer's risk of violations. Provided below is a general roadmap of the inspection process as well as some suggestions for how employers can prepare for, and manage, inspections.

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Before an Inspection Begins

When OSHA inspector arrives at your worksite, the compliance officer will begin the inspection with an "opening conference." The compliance officer will present his or her credentials, which include a serial number and photo identification. Employers have a right to require OSHA inspectors to obtain a warrant before entering a worksite. In most circumstances, OSHA does not obtain a warrant before an inspection and will only obtain a warrant if required by the employer. Thus, the employer should determine in advance of any workplace investigation whether or not it will require a warrant upon the arrival of a compliance officer.

A couple of key considerations should be made before an employer refuses an inspection and demands the compliance officer first obtain a warrant. The employer should consider whether and to what degree the delay will allow it to improve its compliance position. Any delay of the review of the employer's records and walkaround inspection will allow the employer at least some time to reduce or remove hazards. However, the employer should keep in mind that OSHA can issue citations where there is evidence of recent noncompliance. Further, if the employer decides to require the OSHA inspector to obtain a warrant, the employer should expect to receive an administrative subpoena for records prior to service of the warrant. Employers should keep in mind that while requesting a warrant should not, in theory, result in steeper penalties, such request sets a tone for the inevitable inspection.

Before the inspection begins, there are a number of things an employer can do to help this process run smoothly, as OSHA inspections can be stressful for even the most scrupulous employers. First, employers should establish procedures for receptionists, security guards, and other employees who may greet a compliance officer who arrives at the worksite. One such procedure is identifying a "designated person" and communicating with the frontline employees that only the designated person can manage the inspection. The "opening conference" and subsequent inspection should not begin until the employer's designated persons with authority are present.

During the opening conference, the employer should determine the reason for the inspection. OSHA inspections may occur as a result of a complaint, a recent injury or fatality, a targeted inspection (focus on specific industries), or the inspection could be random. If the inspection stems from a complaint, obtain a copy of the complaint. Keep in mind that if a complaint has been made, employees are protected from retaliation by their employer. Accordingly, the employer should not comment on the individual who made the complaint, or the reason the complaint may have been made.

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Next, the employer should require the compliance officer to define the scope of the inspection, clearly identifying the areas the compliance officer must see, and then limit the inspection to only those areas. Remember that a compliance officer may cite any hazard that is in plain view. For this reason, employers should take care where to route the inspector.

During a Walkaround

During a walkaround, the employer has a right to designate an employee representative. In fact, OSHA inspectors are required to ask for the participation of an employee representative. The compliance officer will then perform a walkaround of the areas of the worksite identified in the scope of the inspection. The inspector should be accompanied at all times. The employer should be cooperative, but under no circumstance should information be volunteered.

During the inspection, the inspector will examine hazards that have the potential to cause injury. OSHA inspectors are instructed to take photographs or create videos to document safety violations. If possible, employers should take photographs or videos of the same items as the compliance officer.

The inspector will review the employer's records of employee injuries and illness. Accordingly, employers should have all injury and illness documentation readily available for the inspector. In addition, the inspector will note whether an OSHA poster is properly displayed. The inspector will also privately interview employees. Company representatives may be present in any interviews with management employees. Employers should note which employees were interviewed and conference with employees after OSHA interviews to determine the scope of the investigation.

The Closing Conference

Lastly, the compliance officer will hold a closing conference with the employer following the inspection to discuss his or her findings, possible courses of actions and discuss how the employer may contest citations or proposed penalties. During this conference, the employer should take the opportunity to highlight the company's safety procedures and commitment to maintaining a safe workplace. The employer's willingness to listen, take notes, and cooperate with the compliance officer demonstrates good faith, which the compliance officer will take into account when assessing penalties.

Hopefully the inspection does not result in a citation, but if one is issued, it will describe the OSHA requirements violated; proposed penalties; and deadlines for the employer to take corrective action. Violations are classified as willful, serious, other-than-serious, *de minimis*, failure to abate, and repeated. OSHA's policy is to reduce penalties for small employers and employers it deems to have acted in good faith. Employers have 15 working days to contest a

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citation by sending written notice to an Area Director. Employers can be represented by their attorney during the contest proceedings, but are not required to have an attorney. In some circumstances, contest negotiations can result in a reduced classification for the violation and/or the penalty amount.

As the discussion above indicates, an employer who takes the time to consider and develop a plan to respond to an inspection can significantly increase the likelihood of a favorable outcome. For questions related to compliance with OSHA or other employment law matters, please contact a member of the Koley Jessen Employment, Labor and Benefits Practice Group.