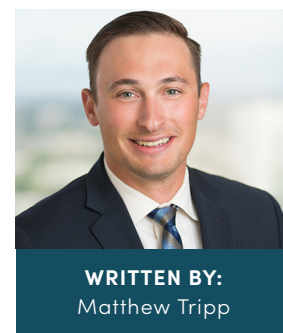


KEEP THE TRAINS RUNNING ON TIME: RESPONDING TO AN OSHA INSPECTION

OSHA inspections can present a challenge for employers, but a basic knowledge of inspection protocols and best practices help employers respond appropriately.

OSHA Inspections generally follow a specific process: (1) an opening conference, (2) review of records, (3) inspection of the worksite, (4) employee interviews, and (5) a closing conference. Inspections may lead to citations. Employers cited for violations may accept, settle, or dispute the citation. Employers that dispute citations have the opportunity to adjudicate their claims before the Occupational Safety and Health Review Commission.



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What Prompts an OSHA Inspection?

The circumstances that prompt an OSHA inspection fall into one of two categories:

1. Programmed inspections arising out of a structured OSHA plan designed to eliminate recognized workplace hazards.
2. Unprogrammed inspections arising out of a source other than a structured plan, as described below.

Programmed Inspections

Programmed inspections are pre-planned by OSHA, and are usually the result of selection under OSHA's annual site-specific targeting plan. OSHA develops a site-specific targeting plan each year to target industry sectors with historically high injury and/or illness rates. In developing the plan and the list of targeted employers, OSHA looks at the injury rates reported by the employer on its injury and illness logs. In particular, OSHA focuses on the rates of Days Away, Restricted or Transferred, and Days Away from Work, Injury and Illness.

Programmed inspections may also occur as a result of a National, Regional, or Local Emphasis Program. OSHA periodically develops Emphasis Programs to investigate and improve what it deems particularly dangerous work practices, equipment, chemicals, or materials.

Unprogrammed Inspections

An unprogrammed inspection is one that is prompted by some event or report, such as: (1) employee complaints, (2) injuries or accidents, (3) violations in plain view, (4) previous citations, or (5) questionable employers responses to OSHA inquires.

Conduct and Management of an OSHA Inspection

Step 1: Opening Conference

An OSHA opening conference is a short meeting between the compliance officer and company representatives to discuss what the compliance officer intends to do during the inspection. During the opening conference, the employer should:

- *Inspect credentials.* Ask to see the compliance officer's credentials before the inspection begins.
- *Determine the reason for the inspection.* Find out what prompted the inspection (for example, an employee complaint? Selection under an emphasis program?).
- *Determine the scope of the inspection.* Use the opening conference to obtain information about the inspection itself. This may include, for example: (1) which areas and operations the compliance officer plans to inspect, (2) which records the compliance officer seeks to review, and (3) whether the compliance officer will take photographs, videos, or air samples.
- *Prepare the worksite.* The opening conference gives the employer a brief opportunity to prepare the worksite or facility for inspection. During the opening conference, the employer should instruct supervisory personnel to conduct a quick walk-through of the facility to: (1) clean up dirty or disorganized areas, (2) ensure that employees are all wearing appropriate PPE, and (3) confirm that employees are performing work safely and in accordance with all applicable work rules.
- *Ask the compliance officer to wait if designated employees are not on the premises.* Generally, if designated company representatives responsible for health and safety compliance are not at the worksite or facility when a compliance officer arrives, employers should ask the compliance officer to wait a reasonable amount of time for the representative's arrival.

Step 2: Review of Records

The compliance officer likely will ask to review safety records as a part of the inspection. The compliance officer is generally entitled to review any records or reports required to be created and kept by the OSH Act or OSHA standards. The compliance officer almost always asks to review the employer's: (1) OSHA Form 300 Injury & Illness Log, (2) Form 301 Incident Reports, and (3) Form 300A Summary of Work-Related Injuries and Illnesses.

The compliance officer also has the right to request other business records that may be related to employee health and safety, such as: (1) workers' compensation documents, (2) internal safety audits, and (3) work policies or rules related to health or safety.

The employer should keep a list of all information provided to the compliance officer during the inspection, along with a duplicate copy of any documents given to OSHA.

Step 3: Inspection of the Worksite

If it is in Plain View, it is Fair Game

While the compliance officer is usually focused on specific areas for an inspection, employers should consider other areas of the workplace that the compliance officer may see during the inspection. Even if not the focus of the compliance officer's inspection or the reason the officer is there, if the officer observes an OSHA violation in plain view, that violation can still be the basis for a citation.

Protecting Confidential Processes and Trade Secrets

OSHA inspection records are subject to public disclosure laws such as the Freedom of Information Act (FOIA). To protect the company's confidential production processes or other trade secrets, the employer should identify those items before the compliance officer takes a picture or begins video recording it. The employer should also notify the compliance officer in writing that the process or information in question must be treated as a trade secret. By identifying confidential or trade secret information in writing, the employer can protect against disclosure in response to a FOIA request.

Equipment

Employers are under no obligation to demonstrate the operation of equipment that is not otherwise being used. The compliance officer cannot force the employer to start machinery outside of the employer's normal procedures or production. However, the compliance officer does have the right to ask when the machinery will be operated and may come back to view the operation at a later date.

Can the Compliance Officer Ask to Inspect Other Information?

Compliance officers do not have an automatic right to everything they request. If the employer senses that the compliance officer is fishing or overreaching, the employer should not hesitate to ask why the requested information is relevant to the inspection. Employer representatives can also politely defer a response to the request until they have time to consult with others at the organization or with counsel.

Not Your Enemy, Not Your Friend

Employers walk a fine line when dealing with a compliance officer during an inspection. On the one hand, the employer wants to be perceived as being friendly, open, and cooperative so that the compliance officer does not think that the employer has something to hide. On the other hand, the employer wants to protect its rights and limit the scope of the inspection to the greatest extent possible. Being reasonable and sensibly cooperative is important, but employers should also be ready to politely rely on their rights.

It's a Group Venture

Employers should not leave the compliance officer to wander around on their own. An employer representative should accompany the officer, and a union representative may also be permitted to accompany the officer during the inspection. The employer representative should also: (1) take notes about everything the compliance officer asks and does, (2) take photographs, video, or measurements similar to those of the compliance officer, and (3) pay close attention to how sampling or air monitoring is conducted and what activities any monitored employee is engaging in if the compliance officer conducts sampling or air monitoring.

Step 4: Employee Interviews

Interviews of Hourly, Non-Supervisory Employees

Compliance officers may wish to conduct interviews with hourly, non-supervisory employees. Those employees have a right to have a representative sit in on the interview with them (for example, a union representative or fellow non-supervisory employee).

OSHA does not permit supervisory or management personnel to sit in on interviews of non-supervisory personnel.

Employees are often nervous or scared to be involved in the inspection, and therefore may forget safety training and rules that they know. In addition, the manner in which the compliance officer poses questions may be confusing or misleading. Employers can reduce the risk inherent in these interviews by (1) allowing interviews at the facility or worksite, where the employee will likely be more comfortable and where the employer can note who was interviewed and (2) preparing employees for their interview with the compliance officer, including confirming with the employee that all the employer asks is that they truthfully respond to the compliance officer.

Interviews of Supervisory or Management Employees

The compliance officer may also want to interview supervisory or management personnel. The employer should have a company representative or attorney present during interviews of supervisory and management employees. Statements by supervisors or managers will be considered statements by the employer, so these individuals should be prepared prior to the interview. If an attorney conducts the preparation of a supervisor or manager, the preparation session would be protected by the attorney-client privilege.

Step 5: Closing Conference

At the conclusion of the inspection, the compliance officer conducts a closing conference with the employer. The purpose of this conference is to inform the employer of: (1) what was found during the inspection, (2) what citations may be issued as a result of the inspection, and (3) how the compliance officer believes the employer might correct any alleged violation.

During the closing conference, the employer's primary focus should be on asking questions and listening, rather than attempting to argue with the compliance officer about facts or appropriate citations. The employer should also ask when it can expect to receive the citations and be certain to clarify the address to which they should be sent.

OSHA Citations and Employer Options for Response

If OSHA issues a citation, the employer has several options. The employer may choose to: (1) accept the citation without disputing it and pay any fine, (2) file a notice of contest disputing the citation and fine, or (3) attempt to settle the citation or fine.

Accepting the Citation

If the employer intends to accept the citation, it must post the citation (or a copy of it) in the location where the workplace hazards identified by the citation exist for the longer of three working days (not to include weekends or federal holidays) or the time that it takes to eliminate the hazard.

The employer must also write a letter notifying the Area Director that it has responded to the problem within the time specified by the citation. The letter, known as a letter of corrective action, must:

- Explain the employer's response to the citation.
- Identify the date on which the employer took each responsive action.

For citations authorizing a longer period to remedy the problem, employers must provide OSHA with regular updates on progress toward resolving the problem.

Disputing the Citation

The employer has 15 working days to dispute or contest the citation. If the employer fails to file a letter, called a notice of contest, within 15 days, the citation becomes a final order of the Review Commission and is difficult to overturn.

To dispute the citation, the employer must send a written notice of contest to the Area Director of the OSHA office. There is no specific requirement for the format of the notice of contest, but it must contain:

- A description of the elements in the citation the employer seeks to contest (for example, the allegations of a violation, the proposed penalty, or the abatement date). In most cases, the employer contests all citation elements.
- The inspection number, which is prominently displayed on the first page of the citation and notification of penalty.

The employer must also provide a copy of the notice of contest to the employees' authorized representative or, if there is no authorized representative, either post or distribute the notice of contest personally to each employee. Once the employer files a notice of contest, the OSHA Area Director forwards the inspection file to the Regional Solicitor's Office to begin the administrative hearing process.

Settling the Citation with the Area Director

During the 15-day period between the employer's receipt of the citation and the deadline for filing a notice of contest, employers have the opportunity to meet with the OSHA Area Director and attempt to settle the citation. This is commonly referred to as an informal conference.

An informal conference is like any other settlement negotiation. The employer can attempt to negotiate a settlement that: (1) vacates the citation, (2) reduces the monetary penalty, (3) reduces the penalty classification, (4) changes the date by which changes must be made (otherwise known as the abatement date), (5) changes the standard under which the employer is cited to an alternative standard, or (6) modifies other terms and conditions.

When contemplating settlement, employers should recognize that OSHA does not typically allow piecemeal settlement of citations at an informal conference. In other words, in most cases, an employer cannot settle one citation at an informal conference and contest the other in administrative proceedings. If settlement occurs at this stage, generally all citations must be resolved at the informal conference.

It is highly recommended that employers who have received OSHA citations schedule and participate in an informal conference. Even if settlement is unlikely, the informal conference gives the employer the opportunity to: (1) meet the OSHA Area Director, (2) create a rapport with the Area Director, (3) ensure that OSHA knows that the employer takes safety seriously, (4) gather information about the basis for OSHA's claim that violations have occurred, which can help the employer defend itself in a subsequent hearing, and (5) discuss employer options and an appropriate timeline for correcting the underlying problem.

Disputing Then Settling with the Regional Solicitor

If an employer files a notice of contest, the Area Director forwards the inspection file to the Regional Solicitor's Office. The Regional Solicitor is the lawyer responsible for representing OSHA in the administrative proceedings and at a hearing on the citations. The Regional Solicitor files a complaint to enforce the citations with the Review Commission and the case is assigned to an administrative law judge (ALJ) for discovery proceedings and a hearing. The Regional Solicitor must file the complaint on behalf of the Secretary of Labor within 20 calendar days of receipt of the employer's notice of contest.

The opportunity for settlement does not disappear because of the initiation of an administrative action. It is always possible to settle the case with the Regional Solicitor at any point in the administrative proceedings.

Administrative Hearings and Appeals

Once the case is assigned to an ALJ, the employer (usually through the employer's attorney) has the opportunity to file an answer and assert affirmative defenses. Shortly after the submission of the initial pleadings, the ALJ sets up a pre-hearing conference, at which a hearing date is set, and discovery and dispositive motion deadlines are created. Although proceedings before the ALJ are very similar to traditional civil trials, the timeframe is more condensed. In most cases, the hearing date is set only two to three months after the pre-hearing conference between the parties and the ALJ.

At the hearing, the Regional Solicitor and OSHA bear the burden of establishing by a preponderance of the evidence each of the elements alleged in the citation. After the hearing, the ALJ issues a decision on the contested citations. If the employer or OSHA disagree with the ALJ's decision, they have the right to request review by the Review Commission by filing a Petition for Discretionary Review (PDR). The petitioning party may file a PDR any time following the service of the ALJ's decision on the parties but no later than 20 days after the docketing date of the ALJ's report.

The Review Commission is not required to grant review, and if it declines to do so, the ALJ's decision becomes a final order of the Review Commission. Final orders of the Review Commission can then be appealed to the Federal Circuit Court of Appeals in the circuit where the violation occurred, the circuit in which the employer has its principal place of business, or the US Court of Appeals for the District of Columbia Circuit.

Best Practices

Be Prepared and Have a Plan

The most effective way to avoid OSHA citations is to first, actively take steps to comply with all safety requirements. Even when very active on safety issues, however, accidents can happen and employers should have a thorough, pre-designed plan for how the company responds in the event of an OSHA inspection. There should be a notification plan, starting with the receptionist, specifying how employees in the company become aware of a compliance officer's arrival at the worksite. The individuals to be notified as part of the notification plan should be individuals within the organization who:

- Are most knowledgeable concerning safety and health (the employer should divide the related responsibilities accordingly).
- Can serve as the point persons for dealing with a compliance officer because they are

sufficiently knowledgeable and diplomatic.

- Are responsible for identifying and gathering safety-related documents.
- Will conduct a preemptive walkthrough of the worksite while the opening conference is taking place.
- Will assist in preparing employees for interviews.

These individuals should be trained and well-versed in the employer's rights in responding to an OSHA inspection. These well-trained and well-prepared individuals are an employer's best defense to an OSHA citation.

Inspect Yourself – And Correct Any Problems Found

Internal safety audits can be a good way to catch safety hazards and issues before a potential OSHA inspection. To the extent possible, those safety audits and reports should be conducted at the direction of the company's inside or outside legal counsel, which can keep the results confidential under the attorney-client privilege.

Internal safety audits are a positive step but only if the employer follows through and corrects issues identified in the audit. The worst thing an employer can do is conduct an audit and identify areas where there are safety concerns but fail to take any action to remedy those issues. If an employer identifies safety issues as a part of a safety audit but fails to correct those issues, the employer may face adverse consequences. If problems later result in an accident or injury, that safety audit is likely to be used as evidence that the employer was aware of the hazards and willfully disregarded the danger to its employees.

Employees Can Be Allies

A large percentage of OSHA inspections are triggered by employee complaints. Even when the inspection is not initiated by an employee complaint, damaging information provided in the compliance officer's private interviews of employees generally leads to an OSHA citation of some kind.

With this in mind, employers should evaluate their safety programs and seek to increase employee participation. This can be done in several ways, including:

- Creating formal procedures for reporting and resolving employee safety concerns.
- Creating a safety committee that involves employee representatives.
- Rewarding employees as part of the safety program. However, employers must be careful when structuring any safety reward or incentive program because OSHA scrutinizes these programs as having the potential to encourage and incentivize employees and employers not to record injuries and illnesses that should be recorded.

By involving employees in maintaining safety at the workplace, the employer sends the message that the employer takes employee safety seriously and appreciates employee input. Giving employees a stake in the safety program and aligning them with the employer's safety efforts goes a long way toward fending off OSHA inspections and citations.

Cleanliness Is Key

Compliance officers encountering a dirty, disorganized facility may assume that if the employer does not care enough to keep its workplace neat and orderly, it probably does not care a great deal about employee health and safety. By contrast, a clean and well-maintained workplace sends the message that the company cares about the details, including employee safety. Not every factory or construction site can be spotless. However, implementing work rules that require employees to clean up their workstations and increasing the frequency and breadth of cleaning and housekeeping make a significant difference in how a company is perceived when the OSHA compliance officer first arrives.

KEY TAKEAWAYS

1. Have a plan in place to execute when OSHA unexpectedly arrives for an inspection.
2. Implement procedures and work with counsel to timely contest OSHA citations within the short 15-day deadline for doing so.
3. Try to work collaboratively with OSHA, both during the inspection and regarding any citation. But remember your rights and be prepared to politely assert them when appropriate.