



MN NEWS

SPECIAL REPORT

Surprise Government Inspections & Audits

This is a fictional scenario that is entirely imagined and intended only to provide a context for discussions of current legal issues and potential workplace interactions. Any resemblance to actual persons, names, events or circumstances is entirely coincidental and not intentional. In addition, the information and related discussion is not intended as legal advice, and is for general informational and educational purposes only. While we hope it is informative, it also does not fully address the complexity of the issues or steps employers must take under applicable laws—which are also subject to change, even frequently, with or without prior notice. You should not act upon any information provided without seeking professional legal counsel tailored to your specific situation. For legal advice on these or related issues, please consult qualified legal counsel directly.

- The Occupational Safety and Health Administration (OSHA) conducts workplace inspections to evaluate the health and safety conditions of employers' workplaces.
- Employers typically do not have advanced notice for these inspections, but they can ensure they are prepared in case of an inspection.
- Employees can designate a person to be an "employee representative" at OSHA inspections, and this can include a union steward or even a non-employee (OSH Act, Section 8(e)) and can talk privately with the OSHA inspector.
- Employers are also entitled to have a representative during OSHA inspection.
- Employer and employee representatives cannot interfere with inspection; OSHA inspector can deny participation if interfering.

Why do OSHA Inspections Happen?

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- **Imminent Danger**—high priority inspections, triggered when an employee detects or suspects an imminently dangerous situation in the workplace.
- **Fatality/Catastrophe**—a work incident results in an employee death or the hospitalization of at least three employees.
- **Unprogrammed Inspections**—employee complains about a suspected OSHA violation (often done as retaliation by employee for discipline/termination).
- **Referral or Tip Inspections**—initiated by a referral or tip from another agency.
- **Programmed Inspections**—a scheduled inspection implemented under OSHA's standardized plan, typically targets high-hazard industries.
- **Voluntary Audits**—Employers can ask for OSHA on-site consultations.

Preparing for an OSHA Inspection

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1. **Have Written Health and Safety Policies**—include an employee safety concern reporting mechanism, set up a safety committee/meetings, maintain records and meeting minutes. Comply with state requirements on safety committees.
2. **Conduct Internal Audits**—by safety committee or an external auditor.
3. **Staff Training on OSHA Inspections**—train on OSHA standards and employer policies including: special safety procedures, identifying and reporting hazards, PPE, tools and PPE storage, lock out/tag out, MSDS sheets location, protocol in an incident.
4. **Create Written OSHA Response Plan and Team**—make a team!
Designate who will handle an inspection, possible walkaround rates, minimize “plain view” areas if possible.

When OSHA Shows Up

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1. **Review the Certified Safety and Health Official's (CSHO) Credentials**—Name and address. Exclude third-parties from the inspection unless they are clearly designated as an employee representative.
2. **Determine the Inspection's Purpose/Scope**—Get what the CSHO is inspecting and if there is a complaint (request a copy) or a warrant. If there is no warrant the employer may:
 - a. Refuse access for the inspection until a warrant is obtained, or
 - b. Negotiate to lower the scope/access/length of the inspection. (Remember good faith goes a long way with OSHA).
3. **Mobilize the Inspection Team**—Follow your policies and procedures.
4. **Opening Conference**—CSHO will request records, the employer and CSHO will agree to inspection ground rules (i.e. if photos/videos are permitted), determine if employer/employee representatives should be involved.

When OSHA Shows Up Cont.

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5. **Conduct the Walkaround**—Tailor the pre-planned route to the inspection's scope. Always accompany the CSHO. The employer should:
 - a. Note trade secrets to ensure limited access to the inspection records.
 - b. Document the inspection and replicate photos, videos, samples, measurements.
 - c. Answer questions carefully! Answers may be treated as admissions!
6. **Closing Conference**—CSHO will point out violations identified on the walkaround and gather additional information. The employer may request to have the closing conference in a private area.
7. **Contest Citations and Proposed Penalties**—Contest within 15 business days from receipt of the citation by filing a Notice of Contest with OSHA.

DO NOT obstruct the investigation. It could lead to criminal penalties.

- The U.S. Department of Labor (DOL) permits surprise workplace inspections to evaluate employer compliance with the Fair Labor Standards Act (FLSA).
- Inspections are conducted by the Wage and Hour Division (WHD).
- Inspections can be triggered by:
 - An employee complaint of FLSA violations *OR* a WHD targeted investigation initiative.
- WHD targets:
 - Low wage industries AND
 - Industries and localities undergoing rapid growth or decline.
 - Industries with high percentages of immigrant employees may be targets now as well.

Preparing for DOL Investigation

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1. **Conduct Self-Audits**—Semi-regularly self-audit to find wage and hour issues in the company. Include classifications (employee, contractor, intern), wage payments, hours records, safe-harbor policies, etc.
2. **Develop An Investigation Protocol**—Assemble a team to facilitate WHD investigations, update policies, and conduct audits. Create inspection protocols. Train employees on their rights, wage and hour compliance, and what to do during an inspection.
3. **Know Your Rights**—Employers need to cooperate, but they can:
 - a. Refuse access to the site without a warrant,
 - b. **Request a 72-hour period** to comply with the investigation demand,
 - c. Request a reasonable time for the on-site inspection and interviews,
 - d. Escort the investigator, participate in opening/closing conferences and management interviews,
 - e. Protect trade secrets and confidential business information,
 - f. Contest violations.

The Steps of a DOL Investigation

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1. **Examination of Records**—the WHD investigator will examine employer records to determine what laws or exemptions apply. These can be paper or electronic records.
2. **Examination of Payroll and Time Records**—the WHD investigator will take notes or make transcriptions for the investigation.
3. **Employee Interviews in Private**—the WHD investigator may interview employees to verify payroll records, identify employee duties, confirm that minors are lawfully employed. Typically conducted at the employer's premises but can be held at the employee's residence or by mail or phone.
4. **DOL Meets With the Employer**—After the above fact-finding steps, the WHD investigator meets with the employer to discuss discovered violations and necessary corrective actions. WHD may ask the employer to compute and pay back wages.

What To Do in a DOL Investigation

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REMEMBER—You may request a different time within a 72-hour window.

- 1. Verify Credentials**—Ask the name, address, and purpose/scope of the investigation. Also ask for a warrant or subpoena.
 - a. Consider consenting to the search if there is a reasonable scope, a willingness to return later, or a desire to avoid a more rigorous inspection later.
 - b. Consider demanding a subpoena if there is no extension, is significant interference with business operations, are interviews at unreasonable times, are no conferences, or no protection of trade secrets.
- 2. Notify the Investigation Team**—A representative should be present.
- 3. Escort the Investigator**—Document the inspection, flag trade secrets, mimic pictures, videos, and samples.

What To Do in a DOL Investigation

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4. Prepare Documents and Employees—With an extension, employers should:

- a. Documents: label with identifying numbers and “Confidential and Proprietary”
- b. Employee Interviews:
 - a. **Prepare** employees for possible questions and applicable policies/procedures.
 - b. **Remind** employees of the right to request a representative/refuse recording and that they may examine documents mentioned in questions.

5. Respond to Adverse Findings—If an adverse finding with back wages is issued, the employer may:

- a. Accept and pay,
- b. Negotiate reduced amounts in an informal settlement with the investigator,
- c. Contest and negotiate in a formal settlement with DOL,
- d. Contest and defend.

ICE Surprise Inspections

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- Immigration enforcement is a high priority for the current administration and has led to an increase in federal immigration surprise inspections in a wider variety of industries.
- Surprise immigration inspections are typically carried out by the Immigration and Customs Enforcement (ICE) with help from other federal and *sometimes* state agencies.
- Sensitive locations – DHS rescinded a policy preventing ICE access to schools, hospitals, and places of worship (with listed exceptions) giving ICE officers discretion on making arrests in or around these spaces.

ICE Policy:

Seeks “all aliens who violate U.S. Immigration law” in their raids “regardless of their criminal histories.”

ICE Surprise Inspections

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- ICE interacts with employers through:
 - I-9 audits:
 - Require a Notice of Inspection with at least 3 business days of notice.
 - To verify identity and employment eligibility.
 - Workplace surprise inspections:
 - No advanced notice is given to employers.
 - Requires either employer permission or a **judicial search warrant signed by a judge or magistrate.**
 - The warrant must include the areas to be searched and the items to be seen.

Prepare for an ICE Surprise Inspection

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- 1. Create a written response plan**—Designate who will respond to ICE and what other employees do. The plan should include:
 - a. Who calls the employer's lawyer and informs ICE,
 - b. Who gets the name and credentials of the agents,
 - c. Who reviews the warrant for validity and scope—it must be signed by a judge or magistrate,
 - d. Determine policy on recording the inspection/taking notes,
 - e. Who contacts the families of detained employees,
 - f. If union members are detained, who contacts a union liaison.
- 2. Instruct employees how to interact with ICE**—Employees:
 - a. Should NOT run away, this gives grounds for arrest. They should remain calm throughout.
 - b. Have the right to remain silent and to speak to an attorney.
 - c. Do not have to answer questions on their immigration status, show identification, or be grouped.

Prepare for an ICE Surprise Inspection

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3. Maintain accurate I-9 documents for all employees with supporting documents.
4. Establish private/non-public areas in the worksite—ICE cannot enter non-public areas unless the warrant permits it.
 - a. Post “Private” or “Employees Only” signs on all non-public spaces. Keep the doors to these spaces closed and locked when possible.
 - b. Determine a policy designating certain areas as non-public and train employees on the policy.
5. Perform a self-audit of I-9 documents for all employees.

Sanctuary Cities—Can the State Help ICE?

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- Sanctuary Laws—restrict law enforcement and other agencies from assisting or granting resources to ICE surprise inspections.
- The Trump Administration passed E.O. 14287 stating consequences of being labeled a “Sanctuary City” which includes cities that take non-cooperative actions against ICE without refusing cooperation.
 - There has been an increase in workplace investigations in these cities with Los Angeles, Portland, and Seattle as priorities.
- Employers in sanctuary jurisdictions should be aware of the balance between complying with federal and state/local laws. Public employers need to be especially careful that they comply with both sets of laws.

Sanctuary Cities —Oregon

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- Longstanding sanctuary state, initial law in 1987
- 2021 revisions (Sanctuary Promise Act)—
 - Oregon public bodies and law enforcement agencies cannot be involved in federal immigration enforcement efforts.
 - All state and local officials must require a warrant before giving information to ICE or allowing ICE into a non-public space.
- Public schools, public hospitals/healthcare facilities, and law enforcement all fall under the sanctuary rules and may have additional requirements in their interactions with ICE:
 - Public Schools—May not assist ICE unless: required by subpoena or court proceedings OR if the information is available to the public.
- Portland has additional sanctuary restrictions—Portland police cannot note immigration status unless it is necessary for an investigation.

Sanctuary Cities—Washington

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- Washington is a sanctuary state.
- 2019 Keep Washington Working Act—Broad law, applies to all state agencies and resources.
 - Prohibits any use of state personnel or resources for cooperating in any way with ICE investigations or other laws that target people based on immigration status.
 - Requires local law enforcement agencies and public schools, courthouses, and public health facilities to adopt policies limiting cooperation/access to ICE.
 - Agencies cannot deny services or benefits based on immigration status.
- The Washington State Attorney General—Writes model policies that state and local agencies must adopt and comply with.
- Seattle has additional sanctuary restrictions—City employees are prohibited from asking about immigration status with limited exceptions.
- Spokane recently supported KWWA, but Spokane Valley opposes the law.

Sanctuary Cities—California

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- California is a sanctuary state.
- 2017 California Values Act—limits the use of state and local government resources for immigration enforcement.
 - Prohibits law enforcement from investigating, interrogating, detaining, or arresting persons for immigration enforcement.
 - Prohibits law enforcement and prison staff from following ICE transfer/notification requests.
- Los Angeles prohibits any City resources being used to support ICE, including property or personnel.
- San Francisco prohibits City funds/resources assisting ICE, prohibits cooperation with detainer requests, limits when city police can give ICE notice of a persons release from jail, has a platform for violation complaints.
- San Diego prohibits cooperation with ICE even for people convicted of serious felonies.
- Sacramento, Berkley, Oakland and other cities all have policies limiting funding, resources going to ICE investigations.

Sanctuary Cities—Idaho, Alaska, Montana

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- **Idaho**—Not a sanctuary state:
 - Border Security and Immigration Enforcement Act—executive order by Governor Brad Little supporting federal immigration enforcement.
 - Requires state agency review of rules/practices for compliance with federal immigration laws.
 - Requires Idaho State Police and Dept. of Corrections to cooperate with Immigration enforcement.
- **Alaska**—Not a sanctuary state:
 - Moderate stance towards immigration law enforcement
 - Anchorage is a “Welcoming City,” but it does not have a sanctuary law.
- **Montana**—Not a sanctuary state:
 - Anti-Sanctuary City Law—2021 law banning sanctuary cities, requiring state and local law enforcement to comply with federal immigration enforcement, and empowering the attorney general to sue jurisdictions that don’t comply.

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