



# How To Manage An OSHA Inspection

Insights

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## (Labor Letter, November 2013)

Many articles on handling OSHA inspections provide the same basic guidelines and little explanation of *why* an employer should take certain steps. Readers already know to take photos whenever the Compliance Officer takes shots and to take notes, but do you know "why" to take those photos and "what" to look for? What do you need to note in order to challenge citations when they are issued six months later?

### Plan In Advance

Every company worksite should have a number of managers who know the basic steps to take whenever any government investigator shows up. The most important step is for site managers to know whom to call to obtain guidance. No executive or in-house counsel will be pleased to learn of an investigation upon receipt of a citation. No matter how tough your site manager may be, he or she may shut down when a coworker or subordinate is killed.

Most site management can handle evacuating and protecting employees, and dealing with first responders. The company needs a system in place so that with one call, the site manager activates corporate support, including legal and risk management guidance, assistance to employees and families, and press and media management. Set up this system and practice response. Do not assume that you will never face a fatality or catastrophe. Tornadoes, vehicular accidents, and workplace violence can strike any employer.

Make sure that management takes an OSHA inspection seriously. Many employers are unprepared for the aggressive approach now dictated by D.C. In some industries, even a single serious citation can harm bidding opportunities. Most of the six-figure citations have involved repeat violations of routine items such as a missing electric-cabinet switch label, a damaged extension cord, partially blocked electric cabinet, or one employee who missed his annual training. Each violation can serve as the basis for a repeat violation of up to \$70,000 per item at *any* company location in any Fed-OSHA state for five years. No inspection is minor. And by the way ... OSHA's new IT system will allow them to better track your corporation's performance, even when the company operates under many names.

### "Manage" The Inspection

Step one is to ask "why" OSHA is present. Many inspections are triggered by a complaint and OSHA must tell you the items. Admit OSHA for the purpose of the complaint and limit the inspection to the "scope" of the complaint. Inspectors will broaden the inspection if they observe hazards or if employees mention other hazards. But require them to justify expanding the scope. Be courteous and professional with the Compliance Officer (CO) but know and exercise your rights. Always focus first on safety, but that attitude does not preclude making OSHA live by its own procedures.

Recognize that the CO must establish 1) an applicable standard; 2) a hazard; 3) employee exposure; and 4) that the employer knew of the violation or hazard, or should have known of it with the exercise of "reasonable diligence." Make sure that a hazard exists. Measure fall distances, check guards, etc. The burden is on OSHA to prove these four elements, so check to see if the CO can prove that any employees were exposed in the last six months or would reasonably be expected to be exposed in the normal course of business. Is the area isolated? Do employees work near the alleged hazard? How often do employees travel in that area? How long was the hazard present?

Of these four elements, OSHA often does not build an adequate file on the employer's "knowledge" of the violation. Any supervisor's knowledge of a violation is "imputed" to the company. Even where OSHA cannot prove that a supervisor knew of the issue, it can make out this element by developing evidence that the employer should have known of the violation with the "exercise of reasonable diligence." So OSHA must prove that the employer didn't enforce safety rules, training was inadequate, or that the employer made little effort to provide oversight. Show that the company *did* exercise this due diligence. Also, ask how long a violation was present and when were supervisory employees last in the area.

Don't be rushed and bullied about documents. Some documents such as OSHA 300's and MSDS's must be promptly provided, but you have the right to a reasonable amount of time to provide other materials. Review them. Consider if explanation is required or if materials may be privileged or work product protected. Don't volunteer self-audits, insurance and consultant reports or other similar materials without talking to counsel.

If documentation is weak, try to determine where on-the-job instruction occurred or where oral lockout instructions were provided. You may still have a violation but counsel may be able to use such information as defenses, to reduce the citation classification, or to build good will. Obtain legal guidance and be mindful that if you show that you knew of a standard's requirement and did not follow it, there is a possibility that OSHA might assert a "willful" classification.

In developing defenses, dig-dig-dig. There are always more facts. Don't delegate. Ask the questions yourself.

Exercise your right to sit in on or have counsel attend interviews on all employees who supervise others; they can bind the company. You have an absolute right to sit in with managers but do so while showing courtesy to the CO. You may also want to contact counsel about whether OSHA will

define an employee as a supervisor. OSHA uses a broader definition than the NLRB or the wage-hour division.

OSHA has the right to interview hourly employees in private, but you can briefly explain to the employees the reason that they are being interviewed, and that you appreciate their cooperation and to tell the truth. Sometimes it is ok to tell them the topics OSHA may discuss and that may involve a bit of briefing, but mainly encourage them to tell the truth. Ensure that employees know that you appreciate their cooperation with OSHA. OSHA is very sensitive to even a whiff of intimidation or threat of retaliation.

Multiemployer worksites present special challenges. When more than one employer is on site, OSHA can cite both the employee's direct employer (the "exposing employer") and the "supervising" employer who was directing the work (such as at construction sites or for contingent workers) or the "creating" employer who generated the hazard, or the "correcting" employer who was responsible to address the hazard, ... or all of the above! Unfortunately, it often seems that one employer onsite will try to persuade OSHA of questionable facts and throw other employers under the proverbial bus. Be alert.

### **Don't Just Accept Citations Or A Penalty Reduction**

Do go to the OSHA Informal Conference after citations are issued, and do contest all citations if you have reasonable arguments. Remember that OSHA focuses on safety and does not consider whether the Secretary can carry its burdens before a judge. But OSHA attorneys do recognize this reality. Negotiations may be fruitful.

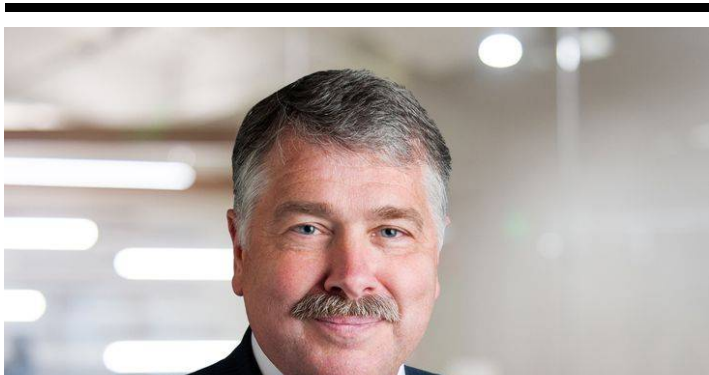
So long as you ensure OSHA knows that you will and are addressing hazards, it will understand that your decision is dictated by business necessity and does not show a disregard for safety.

Finally: do not miss the contest period! And be aware that many of the "State-OSHA plans" have different appeal processes.

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### ***Related People***





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