



“Walk This Way”: What Are Employers’ Walk-Around Rights During OSHA Inspections?

Insights

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Under the Occupational Safety and Health Act of 1970 (OSH Act), employers have a right to be given the opportunity to accompany an OSHA compliance safety and health officer (CSHO) during an inspection of the workplace. In most cases, there is no issue with compliance: when a CSHO shows up to conduct an inspection and presents their credentials to the employer, the employer knows that OSHA intends to conduct an inspection and has an opportunity to guide the walk-around.

But where there are multiple employers at a worksite—such as a construction site—a CSHO may present credentials to the general contractor and conduct an inspection of the site, even though there may be multiple subcontractors working at the site. Does each employer at a worksite have the right to accompany the inspector during a walk-around inspection?

Employers Have A Right To Be Present For OSHA Inspections

Employers have a clear right to be present for OSHA inspections at their worksites and to accompany OSHA inspectors during the walk-around part of the inspection. Section 8(e) of the OSH Act provides that “a representative of the employer . . . shall be given an opportunity to accompany the Secretary[’s] . . . representative during the physical inspection.” Similarly, the Secretary of Labor has promulgated a regulation that further enshrines this right:

A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection.

What Happens If This Right Is Violated?

Let’s say OSHA conducts an inspection of a worksite after it received a complaint of an alleged safety hazard. The general contractor of the site consents to the OSHA inspection, and during the inspection the CSHO sees a possible trenching violation related to your company, a subcontractor at the worksite. Your company was not provided any notice that OSHA was conducting an inspection. Can you challenge the inspection and resulting citation on the basis that you were not provided the opportunity to participate in the walk-around inspection?

Maybe. No violation will be found if there is “substantial compliance” by OSHA with Section 8(e) of the OSH Act, and the court will not exclude subsequent citations that may be issued unless the employer can show actual prejudice.

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The controlling Occupational Safety and Health Review Commission (OSHRC) case is *A. J. McNulty & Co., Inc.*, 19 O.S.H. Cas. (BNA) ¶ 1121 (O.S.H.R.C. Oct. 5, 2000). In that case, the CSHO held an opening conference with each contractor and subcontractor on the first day of the inspection. McNulty, a subcontractor on the site, was too busy to attend the opening conference. Within two hours, however, the CSHO encountered both McNulty's foreman and project manager and informed them that they or other company representatives could accompany him during the inspection. Subsequently, on each day the CSHO was onsite, he would locate a McNulty representative after he observed a hazard in an area where the company was working. On the second day of the inspection in particular, the CSHO "came upon a number of cited hazards while McNulty representatives were not present, but he located a McNulty representative within approximately one to fifteen minutes in each instance and reported each hazard to" a McNulty representative.

In rejecting McNulty's argument that the CSHO was required to alert each contractor prior to the inspection occurring on each subsequent day, the Commission held that a CSHO "need not alert an employer prior to inspecting its work area if he informs the employer of the accompaniment right at the outset of the inspection and makes an effort within a reasonable time to report any violations to the employer." The Commission held that the CSHO's conduct "substantially complied" with § 8(e) because the immediate notification to McNulty of the hazard after it was discovered by the CSHO "gave the McNulty representatives an opportunity to ask the CSHO what he had observed, including which employees were exposed to the hazard when it was detected." The Commission further held:

Moreover, a compliance officer's failure to do one or both of these things to achieve substantial compliance with § 8(e) does not warrant vacating a citation item unless the employer makes a specific showing that the misbehavior prejudiced it in preparing or presenting its defense.

The Commission held that McNulty was not prejudiced because "its representatives learned of possible violations almost immediately after the CSHO observed them."

Additionally, federal courts have found substantial compliance with § 8(e) in the following circumstances:

- The CSHO failed to take a representative of the prime contractor on the walk-around but had informed the company that an inspection was about to begin and had provided it with the OSH Act and an informational pamphlet explaining the Act, and the contractor did not assert its right to be present. *Chicago Bridge & Iron Co. v. OSHRC*, 535 F.2d 371 (7th Cir. 1976).
- The employer's superintendent was not notified of the inspection until part of it had been completed, although the CSHO had made an unsuccessful attempt to locate the superintendent prior to the walk-around. *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071 (9th Cir. 1976).
- Where the CSHO did not "seek out" an employer's representative to accompany him during the walk-around, but the employer was aware of the CSHO's presence and "made no effort to participate in" the walk-around. *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840 (D.C. Cir. 2004).

Additionally, employers must specifically identify how they were prejudiced by the failure of OSHA to provide the right to attend the walk-around. Actual prejudice can be shown where “further material or mitigating facts might have emerged” if the employer representative had accompanied the CSHO on the walk-around. *Accu-Namics, Inc. v. Occupational Safety & Health Review Comm’n*, 515 F.2d 828 (5th Cir. 1975). Case law suggests that a generalized claim of prejudice, without specifically identifying what the prejudice is and how it arose, is an insufficient basis to have a citation vacated based upon the failure to provide the walk-around right.

Summary And Best Practices

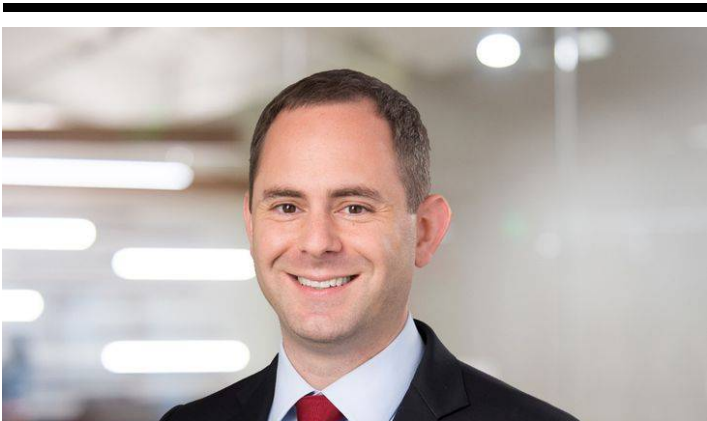
Employers have a clear right to be present for any walk-around that is conducted during an OSHA inspection. That said, for OSHA to comply with providing this right to employers, case law suggests that it does not need to specifically say as much to employers: there is no *Miranda* requirement that unless certain words be read, anything that happens afterwards is excluded. Rather, as long as OSHA substantially complies with § 8(e) of the OSH Act, employers cannot have citations that are subsequently issued be vacated under any exclusionary rule unless they can show specific prejudice related to the failure to provide them with their walk-around rights.

Therefore, best practices for protecting your walk-around rights include:

- If you become aware that OSHA is conducting an inspection at a place where your employees work, be proactive and assert your rights to be present for the walk-around even if the CSHO has not specifically told you that you have a right to be present for the inspection.
- Communicate with other employers at your job sites to ensure that there is a process in place for alerting the other employers who could be affected by the inspection if OSHA shows up.
- If you have reason to believe that OSHA violated your walk-around rights, think about what specific prejudice you were caused—such as providing additional information to the CSHO—because the Commission will require a showing of actual prejudice to have any citation vacated.

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