

# THE “FOCUS 4” THRESHOLD TIPS FOR SURVIVING AN OSHA INSPECTION, PART ONE: DON’T ALLOW SUPERVISOR INTERVIEWS ON INSPECTION DAY

Insights  
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With maximum limits for Occupational Safety and Health Administration penalties increasing every year – currently over \$15,000 for serious/other than serious citations and more than \$150,000 for a repeat and willful – knowing what to do when OSHA arrives at your door is more important than ever. That’s why we’re releasing this four-part series to cover the most important things employers can do when OSHA arrives. These threshold steps will likely prevent citations, minimize the penalties issued, and narrow the scope of OSHA’s inspection. The first threshold tip: don’t permit any manager or supervisor interviews by OSHA on the day the agency arrives. Without a warrant or subpoena, the agency cannot compel you to do anything. By preventing same-day interviews, the inspection can proceed based solely on your narrowly tailored consent, and OSHA has to conduct its inspection within the parameters of that consent. Read on to learn more.

## Why No Supervisor Interviews on the Day OSHA Arrives?

The actions – or words – of your supervisors can bind your company. If the supervisor speaks, they speak on behalf of the company. OSHA can use this information to form a citation against you.

Speaking to OSHA on the day of first day of an inspection can lead to careless errors, prevent time for adequate preparation and, much worse, could lead to a criminal referral. Restricting same-day interviews is especially important in the event of an OSHA inspection following a fatality. Your supervisor likely will be upset following the loss

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of a valued co-worker. They are in no shape to speak to a government agency under such conditions.

## **Why Are Supervisor Interviews So Important?**

For nearly every citation, OSHA must generally prove four things:

- that there was a standard that addressed the cited circumstances;
- that the standard was violated;
- that employees were exposed to the cited condition; and
- that the company, through either actual or constructive knowledge, had knowledge of the exposure.

The most difficult of these elements to prove by OSHA is often employer knowledge. OSHA satisfies this requirement by imputing the knowledge of a supervisor to the company. Generally, supervisors don't witness accidents as they occur, but if they knew of a violative condition before the accident, or should have known of the violative condition, then that element of an OSHA citation can be met.

## **Who is a Supervisor in an OSHA Inspection?**

OSHA has a broad definition of what constitutes a supervisor. In addition to those employees who can hire, fire, or discipline others, OSHA also includes as supervisors those who can direct work. This is significant because many hourly leads, foremen, or other non-manager employees who direct the work – even an hourly crane operator who directs the work of riggers, for example – could be viewed by OSHA as a supervisor and thus whose knowledge would be imputed to the company.

## **Who Can Attend Supervisor Interviews?**

Unlike non-supervisor interviews, you have the right to attend supervisor interviews with OSHA. The attendees can include other supervisors, counsel, or anyone else designated by the company. This is crucial because counsel or other company representatives can provide support for the witness, including ensuring OSHA's inquiries stay within the agreed scope of the inspection.

## **When Will Supervisor Interviews Occur?**

OSHA generally has six months to conduct an inspection from the time it opens the investigation. Although it certainly is not a good practice to make OSHA wait months for supervisor interviews, you should ensure you have taken all the steps outlined in this article before permitting supervisor interviews. This includes fully preparing the witness and determining whether a supervisor needs their own counsel. This practice will significantly diminish the likelihood of receiving a citation, or decrease the number of citations issued.

### **Are Criminal Referrals a Possibility?**

The OSH Act allows OSHA to issue criminal penalties and imprison employers for certain violations, including willfully violating an agency regulation under certain circumstances, giving advance notice of an inspection, or knowingly giving a false statement. Yet, the real "teeth" for OSHA is referring you to the local district attorney's office or Department of Justice for prosecution under a litany of available state or federal statutes, including manslaughter and criminal negligence.

If you give a statement to OSHA, understand that it can be used not only by the safety agency, but also sent to another agency for criminal prosecution. This happens more often than you'd like to believe. Therefore, you must be prepared for that possibility, including hiring counsel for an individual supervisor, for example, to ensure their rights are protected. If you plan to subject yourself to this type of prosecution, don't do it with a statement on the first day of an OSHA inspection.

### **Conclusion**

You should understand your rights during an OSHA inspection before handling it alone. Before handling an inspection by OSHA or a state agency, contact the author of this insight, any member of the [Workplace Safety Practice Group](#), or your Fisher Phillips attorney for guidance. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information on OSHA issues – including the next three editions of our "Focus 4" series.