

THE “FOCUS 4” THRESHOLD TIPS FOR SURVIVING AN OSHA INSPECTION, PART THREE: ESCORT YOUR INSPECTOR STRAIGHT TO AND FROM THE INSPECTION AREA

Insights
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With maximum limits for Occupational Safety and Health Administration (OSHA) 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. Our first edition focused on manager and supervisor interviews, while the second edition addressed the documents to provide OSHA when the agency arrives. **The third tip: take the OSHA inspector straight to and straight from the area of the referral, complaint, or even the pertinent area of an emphasis program inspection.**

Why is it Important to Limit Where Investigators Go?

OSHA inspections are subject to the plain view doctrine. This means that you can be cited for each violation an OSHA inspector observes while at your facility. Thus, you should limit the area seen by taking the inspector directly to the area at issue in the inspection.

You are not trying to hide anything, but rather limiting the number of safety violations they could ostensibly write up. This could include employee use of personal protective equipment (e.g., fall protection), locking or tagging out equipment during maintenance and service activities, or violations relating to welding or other high-hazard activities.

Related People



Travis W. Vance
Regional Managing Partner
704.778.4164

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These actions are difficult to control in real time during the walkaround portion of the inspection.

Where Can OSHA Go in Your Facility During an Inspection?

OSHA can enter your worksite in two ways: either with a **warrant**, where a judge or magistrate determines the scope of an inspection, or with your **consent**, when you determine the scope and direction of the investigation. We nearly always recommend permitting a consent-based inspection. This option gives your control of the inspection, including when and where the OSHA inspector visits at your facility.

During the opening conference (when OSHA first arrives to discuss the purpose of the inspection), you should be professional and courteous with the OSHA inspector. But also politely assert your rights, especially when discussing the scope of the inspection. In nearly every state (California generally excluded), an OSHA inspector can only visit the portions of your facility that are pertinent to the complaint, referral, and emphasis program on which the inspection is based. Keep OSHA to that scope.

Take them directly to the area of the facility relating to the basis of the inspection, and nowhere else. This includes, when reasonable and appropriate, driving them to the back of your facility and entering through a remote entryway to view only pertinent areas. Everything OSHA sees during an inspection is fair game. Whether it is your maintenance employee not wearing their safety glasses or a damaged or unilluminated exit sign, OSHA can and will cite you for it. There is absolutely no reason to take the OSHA inspector on a field trip during non-pertinent areas of the facility. In addition to the risk of additional citations, this decision will also lead to a loss of your time and resources, as the inspection likely will take much longer than if narrowed.

What Else Should You Do and Not Do During the Walkaround?

Keep in mind that everything you say to an OSHA inspector can bind the company – and will be used by OSHA to cite the company. This pertains to any manager or supervisor, including any employee who can hire, fire, discipline, or lead work, and also to anything said during the walkaround or any other time. Be professional with OSHA, but don't allow the inspector to interview you substantively during the walkaround. Cordially ask that substantive questions be

asked during a formal interview with OSHA, which can be scheduled after you have time to prepare for and understand the facts surrounding the basis of the inspection.

Take the same photos, videos, and sampling as OSHA during the walkaround. During the opening conference, politely ask that the inspector inform you prior to taking a photo or video, so you can capture the same shot during the inspection. If there are issues concerning confidentiality or proprietary information/equipment/processes, discuss those topics during the opening conference and take appropriate steps to limit or eliminate subsequent production by OSHA of those items, as well.

Finally, if OSHA wants to conduct sampling or testing during the inspection, such as noise monitoring or a chemical exposure analysis, cordially inform the inspector that that sampling will not occur until you have an industrial hygienist or other expert present to conduct side-by-side sampling. If not, you will never be able to duplicate the conditions captured by OSHA.

Please note that state OSHA programs, such as Washington and California, have different inspection procedures and requirements, and you should consult with counsel if you are facing an OSHA inspection in a state plan state. This article addresses only inspections in federal OSHA states, like Georgia, New Jersey, New York, Pennsylvania, Texas, and Florida.

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 final edition of our “Focus 4” series.