



# Preparing for an OSHA Interview Under the Current Administration

Insights

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As many employers know, OSHA has attempted to gain unprecedented power in the inspection process. Indeed, as this article is written, battles are being fought in federal court relative to OSHA's authority and power in the inspection and rulemaking process.

One of the tools OSHA employs in the inspection process is the aggressive pursuit of employee interviews. Aggressive interviews, coupled with OSHA's insistence that the interviews are OSHA's "right," have led employees and employers to feel an extreme sense of helplessness during the interview process. These attempts to broaden OSHA's power underscore the need for employers to obtain guidance – in advance of an inspection – on how to prepare and handle company witness interviews.

The following should be considered in advance of OSHA arriving and requesting interviews:

1. Consider a warrant. While generally *not* recommended in the past, employers may want to consider demanding a warrant before permitting OSHA to begin the inspection process. This may be necessary to limit and define the scope of the inspection.
2. If a warrant is not requested, employers should get a clear agreement on the scope of the inspection and require strict adherence to that agreed scope. This is crucial and the subject of many current legal fights. To the extent possible, OSHA should not be allowed to deviate from the agreed scope of the inspection.
3. All employees can elect to not give an interview. Even if OSHA threatens an administrative subpoena, a witness can refuse to speak and invoke the protections of the 5<sup>th</sup> Amendment.
4. If consent is given to the interview, the witness should tell the truth. Intentionally misleading or lying carries the potential of harsh penalties and needlessly complicates the investigation.
5. If the witness feels the investigation is headed in a direction that has criminal implications, the interview should be immediately terminated. OSHA interviews are non-custodial and the protections of *Miranda* generally do not apply.
6. The witness should demand candor from OSHA and fair questions to answer.
7. If the witness feels intimidated or harassed, the interview should be stopped and the area director immediately notified.

8. The witness does not have to sign a statement and should not feel compelled to do so.
9. If the witness elects to sign a statement, they should review the entire document and ensure it is complete and accurate. The employee is not required to give a written witness statement. If the employee decides to do so, he or she should take it home and review it prior to returning it to OSHA. There is no obligation to give OSHA a witness statement "on-the-spot."
10. The witness can refuse to be recorded by audio and/or video.
11. The witness should make certain they understand what is being asked before answering.
12. The witness should feel free to ask the investigator questions for clarification.
13. The witness should give direct and short answers to the questions.
14. The witnesses should not guess or speculate.
15. The witness does not have to answer a question that was not asked.
16. You do not have to know everything. There is nothing wrong with saying "I do not know" or "I do not remember" if it is the truth.
17. The witness should not feel compelled to make small talk with the investigator or provide irrelevant personal information to the investigator.
18. The witness should not be pressured by repeat questions. If the same questions is asked repeatedly, the witness should not feel compelled to change his/her answer.
19. Do not let the pregnant pause give birth to a bad answer. There is nothing wrong with silence. If there are long pauses or staring contests the witness should not give in to breaking the silence.
20. The witness should be aware of inaccuracies (even minor inaccuracies) imbedded in questions. Do not agree to anything that is not completely accurate.
21. There is a reason for every question. OSHA is likely asking questions to support citations. Keep in mind OSHA rarely conducts an investigation without citing an employer.
22. OSHA loves admissions, especially from management level employees. In fact, OSHA depends upon such admissions to show employer knowledge of a hazard. In situations involving a traumatic situation, or where employees wrongfully feel responsible, interviews should be postponed until employees are able to give a fair interview.
23. While care should be taken with non-management employees, they should be offered the opportunity to be prepared for the interview.
24. All employees should be advised that they cannot and will not suffer adverse employment actions for simply giving an interview to OSHA.
25. Consider having counsel present for all interviews and prep sessions. It should be anticipated that OSHA will resist the presence of counsel, especially if the employer and the employees are sharing the same counsel or the employer is paying for counsel. Regardless, if a non-management employee desires the presence of counsel, it should be clearly made known by the

employee. If OSHA attempts to assert the potential for a “conflict of interest,” it should be pointed out that potential conflicts of interest are for the employee/employer to raise.

26. You do not have to go alone. If the employee is a manager or has any supervisory authority, the employer has the right to have a representative, including counsel, present during the interview. Similarly, employees who are not members of management do not have to go alone as they can insist on the presence of counsel or a colleague. If OSHA resists, the person being interviewed needs to be prepared to insist on their request.
27. Be professional and courteous regardless of the circumstances. There is nothing wrong with being polite, but insisting that OSHA honor your rights and follow the proper procedures.

### ***Related People***

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**Travis W. Vance**  
Regional Managing Partner  
704.778.4164  
[Email](#)