# Is OSHA Improperly Expanding the Scope of its Inspections?

Insights
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2015 brought more changes to the OSHA enforcement landscape than we've seen in the last 30 years.

A judge's ruling in December that Fed-OSHA could seek abatement of alleged hazards at every location operated by an employer, even if OSHA had never inspected those sites, surprised us all. See our previous article on Sec. of Labor v. Central Transport, LLC. The *Central Transport, LLC* ruling is part of what appears to be Fed-OSHA's attempt to expand its enforcement reach even though its resources are limited. Given a tighter budget, the agency wants to remain effective while completing fewer inspections.

A less heralded memorandum issued by Fed-OSHA last fall should give employers just as much concern as *Central Transport*.

On October 28, 2015, Fed-OSHA instructed its inspectors to substantially expand every inspection of a poultry processing facility, regardless of what triggered the visit. For example, OSHA's memo requires inspectors to address not only the issues set forth in a complaint, but numerous additional potential hazards as well.

The following scenario shows the impact of Fed-OSHA's memo:

> *An OSHA compliance officer is at the door of your poultry processing facility.*
> *She claims the local area office received a complaint concerning the lack of guarding on one of your deboning machines. During the opening conference, you ask the inspector to confirm that the inspection will be limited to the issues relating to the deboning machine, including guarding and your lock-out tag-out program.*
> *The compliance officer says no. Her area director wants to expand the inspection to include, among other items, ergonomics, occupational noise, and a review of your process safety management program. Your natural reaction is to resist the scope of this inspection.*
> *You ask for clarification on the authority for this aggressive expansion of the inspection. The compliance officer hands you the following memorandum from Federal OSHA:*
> *October 28, 2015*
> *This memorandum establishes guidance for inspections conducted in poultry slaughtering and processing establishments, North American Industry Classification System (NAICS)*

*311615, Poultry Processing.* ***All such inspections, programmed and unprogrammed****, shall cover the hazards listed below:*

- *Ergonomics/Musculoskeletal Disorders*
- *Personal Protection Equipment (PPE)/Payment for PPE*
- *Lockout/Tagout – Electrical*
- *Machine Guarding*
- *Slips, Trips, and Falls*
- *Process Safety Management – Ammonia*
- *Chemical hazards – Ammonia, Chlorine, Hydrogen Peroxide, Peracetic Acid, Carbon Dioxide*
- *Occupational Noise*
- *Egress and blocked exits*
- *Sanitation and cleanup operations*

***These focus hazards shall be addressed in addition to other hazards that may be the subject of the inspection or brought to the attention of the compliance officer during the inspection.*** *The goal of this policy is to significantly reduce injuries and illnesses resulting from these hazards through a combination of enforcement, compliance assistance, and outreach.*

In other words, Fed-OSHA wants all complaint-based inspections of poultry facilities expanded into a comprehensive review, or a "wall-to-wall" inspection.

Is OSHA's directive to unilaterally expand complaint-based inspections legal?

There's a compelling argument it is not. At least not according to pertinent Federal case law on this issue. Many courts have held that OSHA cannot expand a complaint-based inspection to an expansive "wall-to-wall" review.

This issue was first addressed in the U.S. Supreme Court's 1978 ruling in ***Marshall v. Barlow's, Inc.*** There, the Court found that government inspections of a business were subject to the Fourth Amendment's prohibition on unreasonable searches and seizures.

> The ***Marshall*** court held:
> "The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. **That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search."**

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The Court also found that a warrant for a business inspection should describe the scope of the inspection. It stated: *"a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed."*

Circuit courts have subsequently held that a complaint-based inspection must be reasonably proportionate in scope to the hazards alleged in the complaint. The 11th Circuit's 1982 decision in ***Donovan v. Sarasota Concrete Co***. identified the differing risks of complaint-based inspections and programmed visits, the latter of which the Court found more reasonable because they are calculated by administrative and legislative guidance:

> "In evaluating probable cause, when an inspection is pursuant to an administrative plan, the principal concern is that the plan be neutral. When, however, an inspection is pursuant to an employee complaint, as in the present case, a more individualized inquiry is required. This distinction is drawn because employee complaints lack the administrative and legislative guidelines that ensure that the target of the search was not chosen for harassment."

The Court in *Sarasota Concrete* found that complaint-based inspections must be limited in scope to the hazard alleged in order to avoid abuse of the OSHA investigation process: "Because of this increased danger of abuse of discretion and intrusiveness, we join those courts that have recognized that a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint."

Twelve years later, the 6th Circuit made a similar ruling in ***Trinity Constr. v. Sec. of Labor.*** There, the Court echoed the 11th Circuit's ruling in Sarasota Concrete:

> "Because administrative and legislative guidelines ensure that employers selected for inspection pursuant to neutral administrative plans have not been chosen simply for the purpose of harassment, **courts have held that administrative plan searches may properly extend to the entire workplace.** In the case of searches based on employee complaints, however, such safeguards are absent. ***Given the increased danger of abuse of discretion and intrusiveness presented by such searches, we agree with those circuits that have explicitly recognized that a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint."***

Given this precedent, a strong case can be made that Fed-OSHA's October 28 directive is improper. The analysis of this issue for employers facing an OSHA inspection, however, doesn't stop there. Keep in mind the following:

1. **Do Not Consent to the Improper Expansion of an Inspection.** Regardless of the reason OSHA appears at your door, if you consent to the inspection without limiting the review to the stated-reason OSHA is there (e.g., hazard alleged in a complaint), most arguments relating to the scope of the inspection are lost. You may have consented to an expanded search of your business

of the inspection are lost. You may have consented to an expanded search of your business.

Consent to expansion can also occur later in the inspection, if you voluntarily offer information outside the agreed-upon scope.

2. **Contact your Corporate or Outside Counsel.** Knowing your rights regarding OSHA inspections and their proper scope is important. Call your in-house or corporate counsel. Make sure all available defenses are known and, if appropriate, raised prior to allowing the inspection. This should occur prior to the end of the opening conference.
3. **Keep Your Other Facilities Informed.** If OSHA initiates an inspection at one of your facilities, make sure you notify all other locations. Any hazards found at one facility may form the basis of a repeat, or even worse, a willful violation if the same hazard is found at a different location.
4. **Stay Cordial and Professional.** Remember that employers and OSHA are on the same page from a mission standpoint. They want to keep employees safe. Being abrasive or unprofessional is not the demeanor that will help accomplish this goal. When asking OSHA for clarification on issues relating to its inspection, including the scope, remain cordial throughout this process.

Fed-OSHA's memo is currently limited to the poultry industry. However, given the landscape shifting changes we saw in 2015, we would not be surprised to see similar directives issued for other industries.

## *Related People*

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