

Employer Guide to OSHA Inspections

Know Your Rights and What to Expect Before,
During and After OSHA Visits

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Introduction

Every employer should strive to maintain a good OSHA record. Not only are customers, insurers, and others increasingly scrutinizing employers' OSHA records as a condition of doing business, but OSHA penalties and citations can be substantial – as much as \$70,000 for a single willful or repeat violation. Citations and penalties not only impact a company's bottom line, but also its ability to do business.

An OSHA inspection is not a friendly visit – OSHA's purpose is to gather evidence so that citations and penalties can be issued and later affirmed. Sherman & Howard's **Employer Guide to OSHA Inspections** is designed to help employers be prepared and to understand and exercise their rights – prior to, during, and after OSHA inspections – with the goal of minimizing OSHA liability.

Sherman & Howard has prepared this guide to provide general information that may be of interest. This guide does not provide legal advice for any specific situation and this does not create an attorney-client relationship between any reader and the Firm.

Before OSHA Arrives

✓ **Select a Company Representative.**

Most on-site inspections begin with an unannounced visit by an OSHA compliance officer. When OSHA arrives at your door, it may be too late to decide who handles the inspection and what to do. Before OSHA arrives, your company should develop an inspection policy or procedure that includes designating a representative to supervise and handle all aspects of an OSHA inspection. By establishing policies and procedures in advance, and selecting a representative (and potential back-up representatives) in advance, you can ease the disruption of an OSHA inspection and minimize your company's legal liability.

Who should your representative be? Ideally, your representative should be your company's Safety Director or someone in upper management who is well-versed in a) OSHA standards applicable to the facility, b) the health and safety conditions of the workplace under inspection, c) your company's health and safety program, and d) the location of records that OSHA requires employers to keep (such as OSHA 300 logs). Additionally, a well-versed representative may want to be familiar with OSHA's own internal procedures for handling an OSHA inspection, as described in OSHA's Field Operations Manual (or FOM) and available at http://osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

What if your representative is not available? Because OSHA visits are typically unannounced, your company should identify potential back-up representatives as well. When OSHA arrives, you may ask the OSHA inspector to wait for the arrival of your designated representative before starting the inspection. In most cases, OSHA inspectors are willing to wait a reasonable time, up to one hour, before proceeding.

What if OSHA refuses to wait? Where the inspector refuses to wait, or where it is impossible for the representative to personally appear, designate a back-up representative to fill in. Your designated representative can then supervise and monitor the inspection by telephone, giving instructions to the back-up until he or she arrives on site.

Before OSHA Arrives

✓ **Establish Your Company Representative's Responsibilities.**

Your designated representative should accompany and supervise all aspects of OSHA's inspection. The representative's responsibilities should include:

- Attending the opening and closing conferences.
- Accompanying the OSHA inspector and recording all aspects of the walk-around inspection, including: areas of the workplace inspected, names of all employees and supervisors interviewed and identification of any photographs, measurements and samples taken. The representative's notes of the inspection should remain confidential. (For an example of the notes that should be taken during an OSHA inspection, see the "Sample OSHA Inspection Notes" at the end of this Guide.)
- Photographing all areas of the facility inspected, making certain to take "side-by-side" photographs of all areas photographed or videotaped by OSHA.
- Responding to all document and other information requests by the OSHA inspector.
- Making sure that employees are aware of their rights during an OSHA interview.
- Attending and assisting in all interviews of management employees.
- Keeping the inspection under control. The Occupational Safety & Health Act provides that the inspection shall take place at "reasonable times and within reasonable limits." Within the exercise of good judgment, your representative should not allow the inspection to unreasonably interfere with work in progress or run beyond normal working hours. "Partial" inspections should not be allowed to expand, unnecessarily, into "wall-to-wall" inspections covering an entire facility or worksite.
- Never admitting violations or unsafe practices, but correcting observed violations as soon as possible.
- Consulting with your company's legal counsel about difficult or special problems, such as search warrants or subpoenas. As necessary, allow counsel to deal directly with the OSHA inspector.
- Being courteous and polite, but firmly exercising your company's legal rights.

Before OSHA Arrives

✓ **Catastrophic Accidents, Fatalities, and Other Significant Investigations**

Special care must be taken in the case of catastrophic accidents, fatalities or other significant inspections, such as those involving lengthy “wall-to-wall” inspections or those conducted as part of OSHA’s National Emphasis Programs. Because of the potential liability and the added complexity of the legal issues involved these cases, you should contact legal counsel immediately and, if at all possible, before OSHA is allowed to start its inspection or any information is provided. Your company’s legal counsel, or your designated representative acting with the advice of counsel, should then closely supervise and monitor all aspects of the inspection.

OSHA inspections under these circumstances may last several weeks or months, require several inspectors, involve the issuance of search warrants and/or subpoenas for the production of records and testimony, and present a number of issues usually not present in a routine inspection. In many instances, OSHA citations resulting from fatality or catastrophe inspections can carry very significant penalties – some in excess of \$1 million. A willful violation of an OSHA standard resulting in death can also carry criminal penalties.

After OSHA Arrives

✓ The Opening Conference

Most OSHA inspections begin with an opening conference. The purpose of an opening conference is to discuss what will happen during the inspection. This is your opportunity to start managing the inspection. Here are some recommendations:

- Ask to see the inspector's official credentials if he or she does not offer them.
- Identify the company representative that you have designated to supervise the inspection, and inform the inspector that all inspection activities should be coordinated through your designated representative, no one else.
- Don't be afraid to ask questions, including why your facility or worksite was chosen for inspection (employee complaint, referral by another agency, etc.).
- Ask to see a copy of the written complaint if there is one.
- Confirm with the inspector what he or she wants to see and do, and how long he or she expects to be at your workplace. Be courteous, but keep the inspection moving toward completion.
- Reach an understanding with the OSHA inspector that the inspection will be limited to the areas or conditions listed in the complaint or referral. For example, if an employee files a complaint about defective forklifts in the warehouse, then the inspection should be limited to forklifts in the warehouse, not other areas. The OSHA inspector will usually investigate other observed violations in "plain view" during the investigation, but your company representative should not be afraid to object if the inspector wants to expand a limited investigation into a lengthy "wall-to-wall" inspection, without justification.
- Discuss any safety issues that may be encountered during the inspection, including personal protective equipment required by your company. Require the inspector to abide by all company safety rules.
- Identify areas in the workplace or documents that might reveal confidential trade secrets and get the inspector's confirmation that photographs of confidential areas or documents will be noted as "trade secret" in OSHA's file. Send a confirming letter or email if necessary.
- Take good notes of all matters discussed at the Opening Conference.

After OSHA Arrives

✓ Handling Record Requests: Required vs. Non-Required Documents

During the Opening Conference, or some time during the inspection, the inspector will ask to see certain records and documents. As a general rule, you should not volunteer documents not specifically requested. If your company is served with a subpoena for the production of records or witness testimony, you should consult your company's legal counsel.

In responding to document requests, you should distinguish between those records that are required to be maintained and produced under OSHA's standards and those that are not. Examples of required documents include official injury and illness logs (OSHA 300, 301 and 300A) or your company's Hazard Communication Program. Your company representative should be familiar with required records and be ready to produce them as requested. Failure to produce the required records in a timely manner may result in citations and penalties.

Production of records **not required** to be kept by OSHA's standards is another matter. By complying with such requests, you run the risk of providing damaging evidence against your company or helping the inspector find and document violations or expand the investigation. As to these documents, the better practice is to defer all requests until the documents have been reviewed with upper management and/or your company's legal counsel. Your company may find that it can object to producing these documents on the grounds that OSHA's request is overly burdensome (*i.e.*, it takes too much time and effort to comply), irrelevant to the investigation, or legally protected from disclosure.

Generally speaking, you should take the following steps when responding to document requests:

- To avoid later misunderstandings, have the inspector put all document requests in writing or an email.
- Obtain a clear understanding of when and where the inspector wants the documents to be produced.
- Before producing any records, make sure that they are complete and accurate. For example, are the company's OSHA 300 forms completely filled out? Are they accurate?
- Keep a copy or a list of all documents provided.

After OSHA Arrives

✓ **Overseeing the Walk-Around Inspection**

OSHA's actual inspection of your workplace – known as the “walk-around” – is one of the most critical phases of its investigation. The efforts of the OSHA inspector during the walk-around inspection will produce much of OSHA's evidence as to whether a violation exists. Here are points to remember:

- **Accompany the Inspector:** The law provides that your representative shall be given an opportunity to accompany the inspector. You should always exercise this right. If your designated representative is not immediately available when the OSHA inspector arrives, request that the inspector wait until your representative can arrive to begin the inspection.
- **Employee Representative May Accompany Inspection:** The law also provides that a representative authorized by the employees, usually a union steward, shall have the right to accompany the inspection. Generally, you have no say in the selection of the employee representative.
- **Photographs, Videotapes, Measurements and Environmental Samplings:** Typically the inspector will photograph or videotape the workplace, take critical measurements and conduct environmental samplings, such as air samples or noise measurements, depending on the type of inspection involved. Unless trade secrets are involved, you generally have no right to object.
- **Video or Audio Taping Employees:** Caution should be exercised when the inspector attempts to videotape or audio tape statements by your employer representatives. They have the option of telling the inspector that they do not wish to have their comments recorded.
- **Take Your Own Photographs and Measurements:** Your employer representative should take his or her own photographs and measurements either during or immediately after the OSHA inspection. Your representative should also take good notes of what the inspector does during the inspection.
- **Consider Using Your Own Experts:** Complex health inspections involving, for example, air contaminants or noise, pose special issues. Your employer representative may not have the expertise to effectively monitor or replicate OSHA's scientific monitoring. In such cases, you should consider designating your own expert, such as an industrial hygienist, to accompany and monitor those portions of the inspection and, if appropriate, do side-by-side testing and observation.
- **Correct Unsafe Conditions As Soon As Possible:** In many cases, unsafe conditions are observed during the walk-around inspection. If possible, you should always correct unsafe conditions observed during the inspection as soon as possible or after the inspector departs. In the event a citation is issued, this corrective action will demonstrate your good faith and may result in a lower penalty. On the other hand, failure to correct an unsafe condition pointed out by the inspector could result in higher penalties or a willful violation.

After OSHA Arrives

✓ **Preparing for Employee Interviews**

OSHA interviews are also one of the most critical aspects of the inspection. An alarming number of citations are based on statements of employees or supervisors. Advance preparation for these interviews can lessen your company's liability. Be aware, however, that the guidelines for non-supervisor and supervisor interviews are different.

✓ **Guidelines for Non-Supervisor Interviews**

The OSHA Act gives employees the right to speak privately with OSHA. For that reason, employer representatives are generally not entitled to be present for non-supervisory interviews. "Non-supervisory" employees are typically defined as those without the authority to hire, fire, discipline or direct the work. You should be guided by your company's own determination of which employees are considered supervisory. In some cases, lead employees or foremen are considered supervisory employees, as are safety directors, salaried managers and professionals. You should seek advice from your company's legal counsel if you are in doubt.

Even though your employer representatives may not be permitted to be present during non-supervisory interviews, you can take the following steps to prepare employees:

- Inform employees that they have the right to speak or not speak to OSHA.
- Inform employees that they may request a representative, including a supervisor, a union representative, or an interpreter, to sit in on the interview. Understand, however, that OSHA may resist the presence of any management representative during the interview.
- Put employees at ease and give them a "heads-up" as to what the OSHA inspector is likely to ask. For example, employees are almost always quizzed on their safety training and the facts surrounding any alleged violations or an accident.
- Always advise employees to tell the truth.
- Intercede on behalf of employees who may be distraught or physically unable to speak with OSHA, particularly after a fatality or catastrophic accident. Employees and supervisors should not be interviewed until they feel they are physically and emotionally able to do so.
- Inform employees of their right to request that they not be tape-recorded and that they have the right to bring their own tape recorder.
- Conduct a voluntary debriefing of all employees interviewed by OSHA.

After OSHA Arrives

✓ **Guidelines for Non-Supervisor Interviews** (*continued*)

When informing employees of their rights or debriefing them, you must avoid any pressure, coercion or retaliation. The OSH Act prohibits retaliation or discrimination against an employee participating in an OSHA inspection, including OSHA interviews. You should always tell employees that it is their free choice as to how they wish to conduct their OSHA interview – you are simply advising them of their rights.

✓ **Guidelines for Supervisor Interviews**

Unlike non-supervisory employees, the statements and admissions of a supervisor may legally bind the company. In responding to management interviews, the following guidelines should be observed:

- Your company representative has the right to be present for supervisor or management interviews and should always exercise that right. In a fatality, catastrophe, or other inspection involving significant potential liability, it is often advisable to have legal counsel prepare supervisors or managers for interviews and have legal counsel attend all supervisor or management interviews. Besides providing moral support, your representative or your legal counsel can assist the supervisor in making sure that questions are clearly asked and correctly answered.
- Management witnesses should be prepared in advance as to possible subject areas during their interview, and the “dos and don’ts” for giving testimony, including just answering the questions, avoiding speculation, and the importance of telling the truth.
- During the interview, or anytime during the inspection, avoid admitting violations or hazardous conditions.
- Supervisors also have the right not to be tape-recorded, or to bring their own tape recorder.

After OSHA Arrives

✓ The Closing Conference

At the conclusion of the inspection, the inspector will hold a closing conference to discuss observed violations. The closing conference may occur immediately following the walk-around inspection, or several days or weeks later. Here is some final advice:

- Don't be afraid to ask questions: What specific standards are being cited? Why? What is the classification (serious, repeat, etc.)? How much is the penalty?
- Attempts to argue or settle the citations with the inspector at the closing conference are usually unsuccessful. Instead, the inspector will encourage you to attend an informal settlement conference after receipt of the citations.
- Even if you agree with the proposed citations, avoid admitting violations or recognizing hazards. There may be defenses to the citations that you have not considered.
- Tell the inspector where to send the citations.
- Take good notes.

After OSHA Leaves

✓ **Correct Violations or Other Safety Hazards.**

If not already corrected during the walk-around inspection, you should begin to address and correct violations or other safety hazards observed during the inspection. Failure to correct an unsafe condition pointed out by the inspector could result in a willful violation and significantly higher penalties.

✓ **Receiving the Citations**

Typically, citations are mailed to the employer within several days to several weeks after the closing conference. All citations must be issued within six months of the start of the inspection.

Upon receipt of the citations, you must post a copy at the workplace that was inspected. If the work has been completed at the site of the inspection, for example, at a construction site, then the citations should be posted at your company's main office. The citations must be posted until the violations are abated, or for three working days, whichever is longer. Failure to observe these posting requirements may result in additional citations.

✓ **Informal Settlement Procedures**

You have 15 working days from the receipt of a citation to contest the citations. Prior to that time, you may request an informal settlement conference with the OSHA Area Office to negotiate a settlement. In most cases, a reduction of the assessed penalty or a modification of the abatement date can be obtained. It is also possible to have the citation withdrawn or re-categorized to a lesser classification, *i.e.*, from "Serious" to "Other." Settlements can also be reached after the citations are contested.

✓ **Appeal Procedures**

Formal appeals are initiated by filing a "Notice of Contest" with the OSHA Area Director within 15 working days of receipt of the citations. You may contest the violation, the proposed penalties, the abatement deadline, or all three. The best practice is to contest all three. Citations not timely contested may not be appealed, and no extensions of time are available. To avoid default, you should watch for the citations in the mail following the closing conference and then make certain that the 15-working-day contest deadline is strictly observed.

After OSHA Leaves

✓ **Appeal Procedures** *(continued)*

The filing of a Notice of Contest stops the abatement requirements. The abatement period does not begin to run again until the case is settled or the Review Commission or the Court issues a final order affirming the violation.

Once a Notice of Contest has been filed with the Area Director, OSHA transfers the case to its attorneys in the Solicitor's Office of the U.S. Department of Labor. The case is also sent to the federal Occupational Safety & Health Review Commission, a separate federal agency charged with adjudicating contested citations. The Review Commission assigns the case to an administrative law judge. Such judges are located throughout the country.

Procedures before administrative law judges are similar to those in many courts. Pleadings, pre-hearing motions, discovery, hearing and post-hearing procedures are governed by the Review Commission's Rules of Procedures. Simplified proceedings are available for small cases. If the case does not settle, a hearing will be held before the administrative law judge, usually within 9-12 months after the citations are issued. The judge will issue a written decision affirming or denying the citations and, for affirmed citations, setting the penalty and the abatement date.

Review of administrative law judge decisions is conducted by the three-member Review Commission in Washington, D.C. Although any party may request review, or any member of the Commission may call the decision on his or her own motion, review is not a matter of right. Appeals of Review Commission decisions are taken directly to the U.S. Court of Appeals.

About the Authors

Rodney Smith, Pat Miller, Chuck Newcom and Matt Morrison practice occupational safety and health law, representing employers exclusively. They each routinely represent clients before the federal Occupational Safety and Health Review Commission, the federal Mine Safety and Health Review Commission, and state occupational safety and health boards.

About this Guide

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