

OSHA Is Knocking At My Door...What Do I Do?

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Practice Area: Labor and Employment & OSHA Law and Litigation

It's a Monday morning at your factory. Just like any other Monday. Traffic was annoying, but tolerable. You only had one no call/no show. Just an average day...until someone in a grey OSHA Polo shirt with a clipboard shows up in the lobby. This is why people hate Mondays.

What Should I do?

1. **Wait for your Attorney.** Unless the OSHA inspector has produced a court-issued warrant, you are not required to grant them access. However, it is fairly easy for an inspector to obtain an *ex parte* warrant. Instead of demanding a warrant, have the inspector quietly wait in the lobby while you contact your attorney. Then inform the inspector that you will allow him or her on the premises once your attorney arrives. If the inspector does not wish to wait, inform them that they may seek a warrant, but that you will not permit them on the premises without one. If the inspector later obtains a warrant, have your attorney on standby to participate in the inspection.
2. **Require Credentials.** Before proceeding with any part of the inspection, require that the inspector present his or her credentials. Record the information on the credentials for your records.
3. **The Opening Conference.** The inspector will hold an opening conference with a company representative, the company's attorney, the company safety officer, and any employee representative, such as a union steward. During this time, request that the inspector present a clear scope of the areas and issues to be addressed during the inspection. If the inspection is due to a complaint, the inspector must provide you with a copy of the complaint. Once you understand the scope of the inspection, quietly excuse your safety officer so he or she can discreetly "prepare" the inspection route. During the opening conference, you should identify any areas in which confidential information or trade secrets may be of concern. OSHA inspectors have an obligation to maintain the confidentiality of any proprietary information and can be fined up to \$1,000 and imprisoned for one year if they reveal any such information.
4. **The Walk-Around.** The inspector will perform a physical review of the relevant areas. The company representative, the company's attorney, and any relevant employee representatives are entitled to accompany the inspector on the walk-around. Although inspectors have broad inspection authority, keeping the inspector to the areas outlined in the opening conference is desirable. You should plan the inspection route so that it is focused solely on the area of interest, bearing in mind that the inspector has "line of sight" authority to vary outside of the areas identified in the opening conference. You are not required to take the most direct route. During the walk-around, you should mimic all documentation made by the inspector, taking the same photographs and videos from the same angles and, if possible, taking the same environmental samples. Designate a management employee to accompany you on the walk-around solely for the purpose of taking notes—they should write down every comment and question, in addition to making a note of everything inspected. Inspectors frequently will engage in ad hoc interviews of the employees on the production floor. If at all possible, try to coordinate break times to eliminate or reduce this opportunity. If the inspector approaches an employee and tries to engage them, remind the inspector that he or she does not have a right to interrupt production lines, but that interviews can be scheduled during a break.
5. **The Interview.** The inspector will have a preliminary list of interviews when he or she arrives at the facility. It is likely that after the opening conference and walk-around, and during the initial interviews, this list of employees to interview will grow. You are entitled to have your attorney present for all management interviews. Often, the OSHA inspector will say that you are not entitled to have an attorney present at supervisor interviews. Prior to the interview process, you should establish the reasons for classification of supervisory employees as managers entitled to attorney representation. You will not be entitled to have your attorney present for any non-managerial employee interviews. Review the personnel files for all interviewees and locate all documentation of safety training received.
6. **Record Review.** Employers are required to produce certain records for review during an OSHA inspection. First, all records required to be kept by law must be produced (e.g., 300A Logs for injuries and 301 Forms for incident reports). Second, employers will be required to produce any documents related to the inspection (e.g., maintenance and training records related to relevant pieces of equipment). Make copies of all documents provided to OSHA for your own inspection file.
7. **Closing Conference.** OSHA inspectors frequently, but not always, will conduct a closing conference with the company representative and the company's attorney. During the conference, the inspector will discuss a timeline for the report, including

During the conference, the inspector will discuss a timeline for the report, including when any possible citation will be issued. The inspector also will discuss any possible follow-up visits. If a closing conference is not offered, you should request one so that you can ask what concerns the inspector might have.

Why me?

Employers typically want to know why they have been singled out for an OSHA inspection. Inspections can be motivated by on-site circumstances, or they can be scheduled pursuant to one of OSHA's special emphasis programs.

1. **Catastrophic Accident or Death.** If an employee dies at your workplace or is injured and sent to the hospital, you will receive an OSHA inspection in short time. Please recall that employers have a self-reporting requirement in **some** situations. You can expect that such an inspection will focus on the work areas frequented by the injured employee and any equipment that could have been used by the employee in the preceding several years. Additionally, OSHA will focus on your safety training and documentation.
2. **Follow-Up Inspections.** It is not uncommon for OSHA to conduct follow-up inspections for previously cited violations. If abatement was required, and if you have not filed proper abatement documentation with OSHA in a timely manner, OSHA likely will conduct another inspection. This inspection will not necessarily be limited to the areas of abatement. After completing any OSHA inspection, employers should put a method in place for tracking their abatement deadlines to avoid any follow-up inspections.
3. **Referrals.** OSHA frequently schedules inspections based on external referrals, such as media stories, or direct notification by law enforcement or emergency medical services. Employers should monitor news sources and blogs, including setting up an online alert, so that they are aware of any potential for a referral inspection. If an online alert indicates that a referral inspection may be imminent, employers should take steps to ensure that their inspection will go smoothly.
4. **Complaints.** Inspections frequently occur due to employee complaints. Employers should be aware of any disgruntled employee or former employee that may take out their anger on the company through an OSHA complaint. However, employers that suspect current employees of making a complaint, or cooperating with a complaining employee, must take care not to retaliate against the employee. That employee could bring a whistleblower complaint against the company.
5. **Programmed Inspection Plans.** OSHA has several inspection plans subject to "special emphasis programs" and "local emphasis programs". These programs target certain industries or areas that are of concern to OSHA. Programmed inspections usually are related to industries with high injury rates, exposure to toxic substances, or individual employers or industries with high citation histories.

What should I do if I'm alerted to the pending inspection?

It is extremely rare that an employer will receive advanced notice from OSHA of an inspection. If an OSHA employee provides advanced notice, he or she can be subject to penalties, including a \$1,000 fine and up to six months in prison. However, certain events should alert a vigilant employer of a pending inspection.

If you suspect an OSHA inspection may be imminent, you should take several immediate steps to review your facility, including but not limited to:

- Walk through the production floor and conduct your own inspection.
- Take careful note of all guarding methods and make sure that they have not been disregarded for the sake of ease or efficiency.
- Note all power sources and sources of motion to make sure the proper emergency shut-offs are in place.
- Make sure that all lock-out/tag-out procedures are being followed.
- Examine all logs for currency and completeness.
- Ensure that all switches are effective and compliant.
- Document all safety meetings.
- Update safety manuals.
- Locate the urgent response and blood-borne pathogen policies and procedures.
- Conduct periodic training on all safety procedures, including lock-out/tag-out procedures.
- Conduct lock-out/tag-out audits of all safety trainers.
- Make sure your forklifts are compliant and all users are certified as trained.

What Next?

After the OSHA inspection has been concluded, the employer likely will have to wait several weeks or months before receiving a notice of citation. Once the OSHA inspector inevitably issues a citation, regardless of whether or not the employer intends to contest the citation, the employer should create an abatement plan in order to establish a timeline and cost estimates. Within 15 days of receipt of the citation, the employer must decide whether it will engage in an informal conference to negotiate a lower citation, appeal the citation, or pay the citation. It is highly recommended that employers work with counsel to develop a clear strategy for disputing the citation, either if they contest the citation or if they attempt to bargain for a lesser fine at an informal conference.

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