

Tips for Handling an OSHA Inspection

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Overview - 10 Practical Tips

1. Appreciate the risk
2. Understand the process and your rights
3. Create an OSHA response plan
4. **Get your house in order before OSHA shows up**
5. **Address the OSHA low-hanging fruit**

10 Practical Tips

6. Assert your rights during an inspection
7. Proactively establish your defenses
8. Understand the difference between supervisory & non-supervisory employees
9. Use inspection records to help, not hurt
10. Assert your defenses & maximize your options

The Risk of OSHA Citations

Type of Violation	Penalty
“Serious” “Other-Than-Serious”	\$13,494 per violation
“Failure to Abate”	\$13,494 per day
“Willful” or “Repeated”	\$134,937 per violation

Additional Risk

- Negative publicity
- Loss of contracts
- Impact on related civil litigation
- Insurance premiums/loss of insurance
- “Repeat” violations
- Indirect costs of injuries
- Defense fees/expenses

Know Your Rights and the Process

- Stages of OSHA inspection
 - Opening conference
 - Walkaround
 - Interviews/document production
 - Closing conference
 - Citation
- Primary goals
 - Control the flow of information & make strategic decisions

OSHA's Inspection Rights

- OSH Act of 1970
 - “reasonable” inspection
 - “enter without delay” – but, 4th Amendment applies
- Inspection
 - 1. Documents
 - 2. Interviews
 - 3. Physical evidence, photographs, videos
- 6 months to issue citation

Employer's Inspection Rights

- Basis for the inspection
- Address 4th Amendment issues
- Delay inspection one hour
- Establish an inspection protocol
- Accompany inspector at all times
 - ensure inspector complies with agreed-upon protocol

Create an OSHA Response Plan

- Warrant philosophy
- Document and interview protocol
- Employee training
 - The OSHA process
 - Rights of OSHA, the employer, the employee
 - Company protocols – those involved, who to contact, general procedure, information to obtain

Prepare Before OSHA Shows Up

- Documentation
 - Health and Safety Plan
 - company & site-specific
 - updated, signed – following what it says, including forms, committees, communications
 - Training records – importance of “rules”
 - Inspection records
 - 1926.1412 (crane) - each shift, monthly, annual
 - 1926.451(f)(3) (scaffold & components) - by competent person
 - Disciplinary records
 - Prior accidents
 - Prior audits
 - OSHA 300 injury and illness logs

Address the OSHA Low-Hanging Fruit

- Training/retraining
 - fall protection, hazard communication, respiratory protection, etc.
- Written programs
 - hazard communication, respiratory protection, etc.
- Know your industry/scope of work and applicable standards
 - Competent/qualified persons

Assert Your Rights During Inspection

- Opening conference
 - Limit scope of inspection
 - Ask for purpose of inspection
 - Establish document production & interview protocols
- Document production
 - Insist on written requests
 - Do not create documents, leave documents in plain sight, or volunteer information
 - No document production on the spot (unless SDS and/or 300 logs)

Assert Your Rights During Inspection

- Walkaround
 - Accompany inspector at all times – take same photos, videos
 - Fix hazards identified by inspector
 - Ask questions and take notes

Assert Your Rights During Inspection

- Interviews
 - Supervisory versus non-supervisory (5 minute rule)
 - Pre-select office or conference room
 - Prepare all witnesses, including non-supervisory employees
 - Right not to be recorded; right not to sign statements
- Closing conference
 - Correct obvious errors/misimpressions
 - Identify alleged violations already corrected

Proactively Establish Your Defenses

- What can you do to protect yourself (legally) and, at the same time, protect the safety of your employees?
- What if your employee should have known better?
 - Case Example: Employee not wearing hard hat

Proactively Establish Your Defenses

- Unpreventable employee misconduct defense
- Employer must show that it:
 - Established work rules designed to prevent the violation;
 - Adequately communicated the rules to its employees;
 - **Has taken steps to discover violations of the rules;**
 - **and**
 - **Effectively enforced the rules when violations have been discovered**

Unpreventable Employee Misconduct

- Work Rules – Requirement #1
 - Rules must be rules: no ambiguity (“must”, “required”, “never”...)
 - Not general procedures, suggestions, or “best practices”
 - Same level of protection as OSHA standard
 - Balancing – too broad (“be safe”) versus too detailed (entirety of OSHA construction standards)
 - MUST be in writing
 - Engage in hazard identification

Unpreventable Employee Misconduct

- Communicate the Rules – Requirement #2
 - Critical Distinction
 - Not just made available
 - Instead: Steps taken to ensure rules are understood and able to be followed
 - Distribute rules to each employee
 - Any non-English speaking workers?
 - Training
 - Acknowledgment form: received, read, understands, agrees to abide, and will ask questions

Unpreventable Employee Misconduct

- Take steps to discover violations – Requirement #3
 - Daily walkthroughs/site visits/audits by supervisors
 - Document the walkthroughs, including:
 - Date, time, how long on site
 - What safety policies the walkthrough was designed to observe (e.g., compliance with strict PPE policy, etc.)
 - The results (e.g., all employees wearing hard hats/PPE – or not)

Unpreventable Employee Misconduct

- Enforce the Rules – Requirement #4
 - Written disciplinary program (shared with employees)
 - Employee counseling form
 - Description of workplace performance issue/incident
 - “VIOLATION OF COMPANY SAFETY RULES”
 - Corrective/disciplinary action taken – e.g., oral warning, written warning, suspension without pay, final warning, discharge
 - Employee acknowledgement/statement
 - Retain records

Supervisory vs. Non-Supervisory Employees

- OSHA must prove “the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. **Knowledge is imputed to the employer through its supervisory employee”**
- Supervisory employee – “employee who has been delegated authority over other employees, even if only temporarily”
- Formal title of the employee is not controlling

Inspection Records

- How inspection records can HURT
 - Show notice to employer of dangerous/recurring condition
 - Can lead to “willful” violation and/or criminal penalties
 - Identified conditions not corrected (or corrections made, but not documented)
 - Records not truthful (employees say something different)
- How inspection records can HELP
 - Requirement #3 (and possibly #4) of employee misconduct defense
 - Required under applicable standard
 - Prove the absence of a dangerous/recurring condition
 - Show company commitment to safety and continuous improvement

Disclosure of Inspection Records

- Insurance carrier audits (discoverable)
- Audits protected by attorney-client privilege (protected)

Assert and Establish Your Defenses

- OSHA must prove 4 elements to establish a violation
 - An applicable standard
 - Standard was not complied with and a hazard existed
 - An employee was exposed; and
 - The employer knew, or should have known, of the violation
- Consider your factual and legal defenses

Maximize Your Options

- Procedural options
 - Informal conference
 - Notice of Contest
 - Litigation – formal discovery and trial
- Potential outcomes
 - voluntary withdrawal of citation
 - Amend cited standard
 - Reduce or eliminate penalty
 - Reclassify violation
 - Perform enhanced abatement

Questions?

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