

Handling an OSHA Inspection and Defense of Citations

ACC Houston

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Introductions and Overview of Topics

- Background
- Inspection Tips
- Citations
- Defense of Citations
- Recommended Actions

A photograph of two warehouse workers, a man and a woman, both wearing yellow hard hats and high-visibility green safety vests. They are also wearing light blue surgical masks. The man is holding a tablet computer, and the woman is pointing at the screen. They are standing in a warehouse aisle with tall stacks of cardboard boxes on the left and a forklift on the right. The background is slightly blurred, emphasizing the workers.

Background

OSH Act, Section 8(a)



OSHA may enter “without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer;”

and inspect and investigate

“structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.”

OSHA's Inspection and Investigation Process

- OSHA inspection priorities:
 - Imminent danger situations
 - Severe injuries and illnesses
 - Worker complaints
 - Referrals
 - From other federal, state or local agencies, individuals, organizations, or the media
 - Targeted inspections
 - Aimed at specific high-hazard industries or individual workplaces that have experienced high rates of injuries and illnesses
 - Follow-up inspections

OSHA's Inspection Process

OSHA preparation

Arrival on site

Opening conference

Walk-around

Employee interviews

Document requests

Closing conference

A person wearing a white hard hat and a grey jacket is shown from the side, holding a tablet computer. They are standing in a wind farm, with several wind turbines visible in the background under a cloudy sky. The person is looking at the tablet screen, which is currently black. A blue bar is visible on the left side of the image.

Inspection Tips

Before the OSHA Inspector Arrives




For a programmed inspection, the company will not know of an inspection in advance, but it should **plan for an inspection anyway**.

If there has been an incident involving an employee injury or a process safety incident, an OSHA inspection should be expected shortly.

In either case, it pays to be prepared.

Before the OSHA Inspector Arrives

Consult the company or facility guidance on how to handle an OSHA inspection (or equivalent).



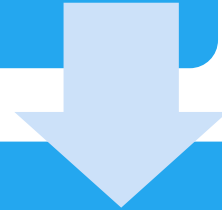
Obtain and keep handy a copy of OSHA's Field Operations Manual, which is available on the .



If there has been an incident that triggers OSHA notification requirements (fatality, employee hospitalization, amputation, or loss of an eye), notify OSHA within eight hours of the death, or within 24 hours of the incident leading to the hospitalization, amputation, or loss of an eye. See 29 C.F.R. § 1904.39. Secure the area.

Before the OSHA Inspector Arrives


Designate one person to be the host for OSHA inspection and a back-up for that person.




Identify a team of management employees who will manage the inspection.

Before the OSHA Inspector Arrives

Identify a room for use by the OSHA inspector. The room should not contain any confidential information. It should be available for several days.



Identify a different room for use by the company's team that will manage the inspection. This room should be available for several days.



Walk through the facility, focusing on housekeeping and any obvious OSHA compliance issues. Correct any non-compliances as quickly as possible.

Before the OSHA Inspector Arrives

If these actions cannot be completed before the OSHA inspector arrives, consider taking them shortly thereafter.

Before the OSHA Inspector Arrives



If an incident has occurred, **take photographs** of the incident scene.

If OSHA is likely to investigate an incident involving an employee, contact the company attorney who handles OSHA matters and have him/her direct that the company's investigation of the incident be conducted under the attorney-client privilege.

Before the OSHA Inspector Arrives

Find out the following information and record that information:

The work the employee was performing at the time of the incident.

Any personal protective equipment (PPE) that the employee should have been wearing at time of the incident and the PPE that he/she was wearing at the time of the incident.

Any regulatory compliance activities (e.g., LOTO) applicable to the task the employee was performing at the time of the incident.

The name of the employee's supervisor.

The identity and contact information for witnesses to the incident.

The names of any (other) contractors or subcontractors at the site and their contact information; (if applicable), the name of the host employer and its contact information.

Before the OSHA Inspector Arrives

If applicable:

- Record any recordable injuries or illnesses on the OSHA 300 log and prepare an OSHA 301 form.
- File a worker's compensation form and keep a copy in the inspection file.

When the OSHA Inspector First Arrives

Getting off to the right start on an OSHA inspection can pay dividends later on. Consider the following:

Notify the facility management and the inspection coordinator and/or the back-up that an OSHA inspector has arrived.

Check and copy the credentials presented by the OSHA inspector.

If the OSHA inspector has a warrant, get a copy and review its contents. Limit the inspection to the scope of the warrant. Notify the company attorney who handles OSHA matters.

Confirm that the room for use by the OSHA inspector is available and cleared of confidential information.

Contact the company attorney who handles OSHA matters and have the attorney request that the company's response to the inspection be conducted under the attorney-client privilege.

The Opening Conference

Discussion Points

The inspection coordinator and his/her role.

Any facility-required safety training that the OSHA inspector must receive.

Any facility-required PPE that the OSHA inspector must wear (e.g., hearing protection, escape respirator).

The basis for the inspection (programmed, complaint, incident, etc.).

How long is the inspection expected to last.



The Opening Conference

Discussion Points

The company should request that the OSHA inspector inform the inspection coordinator as the inspector identifies areas of concern or at the end of each day of the inspection.



The company should request a closing conference at the end of the inspection (or at the end of each major segment of the inspection).



The Walk-Around Inspection

If possible, **limit the scope of the inspection** to the basis for the inspection

- For example, if the employee complaint that serves as the basis for the inspection concerns only one part of the facility, the inspection should not extend to the rest of the facility

The inspection coordinator should accompany the OSHA inspector whenever he/she is walking around the facility.



The Walk-Around Inspection

Take photographs of everything that the OSHA inspector photographs, and also include broader views to provide context.

If the OSHA inspector takes industrial hygiene samples, **take comparable samples** at the same time. Alternatively, reach agreement with the inspector that samples will be split.

If the OSHA inspector sees a violation, **correct the violation immediately if possible**, and otherwise as soon as possible, and let the inspector know that the violation has been corrected. (Sometimes OSHA does not cite violations that are corrected immediately.)



Employee Interviews

Obtain from the OSHA inspector a **list of employees** whom the inspector wants to interview.



If possible, **interview those employees before the OSHA inspector** does about what they know about the subject matter of the inspection.



Employee Interviews

Inform employees who are to be interviewed by the OSHA inspector of the following:

They should tell the truth
during their interview.

The company **supports**
cooperation with OSHA
during the inspection.



Employee Interviews

Inform employees who are to be interviewed by the OSHA inspector of the following:

Hourly employees may be accompanied by an employee representative, such as a union steward, during their interview, if they so choose.

Management employees may be accompanied by a management representative, if they so choose.



Employee Interviews

Inform employees who are to be interviewed by the OSHA inspector of the following:

If the OSHA inspector asks **if there is an objection to the inspector recording the interview**, the company has no objection (unless it does).

The company requests that every employee who is interviewed contact his or her supervisor and **participate in a debriefing afterward** of what happened during the interview.



Employee Interviews

Inform employees who are to be interviewed by the OSHA inspector of the following:

If they do not understand the inspector's question, they should **ask for clarification**.

Employees should **limit their responses to what they know**.

Let the OSHA inspector conduct the interview. There **is no need to volunteer information unless it is clear that the inspector misunderstands the situation**, in which case the employee may want to volunteer clarifying information.



Employee Interviews

Inform employees who are to be interviewed by the OSHA inspector of the following:

Employees are not required to sign any statement indicating that the statement accurately recounts what they said.

Employees may request a copy of any such statement.



Employee Interviews

The inspection coordinator **should ask the OSHA inspector to have a management representative attend the interviews of management employees.**

If possible, **debrief each employee promptly after the interview**, taking detailed notes on what was said by the inspector and the employee.

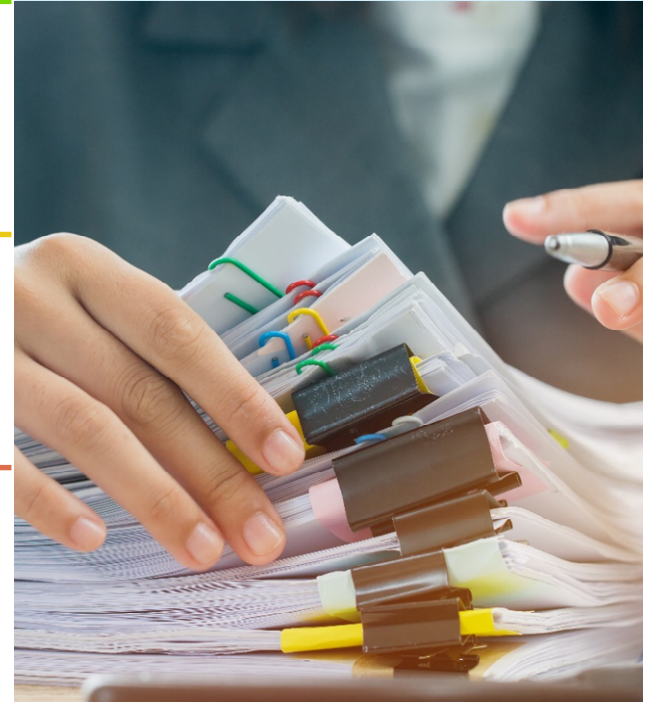


Documents

Set up a **secure electronic file that is password-protected** for use in storing relevant documents. Preferably, this should be on a Law Department server. Identify an owner for that file (e.g., a paralegal).

Set up a **central file for hard copy documents** that is marked CONFIDENTIAL - ATTORNEY-CLIENT PRIVILEGED.

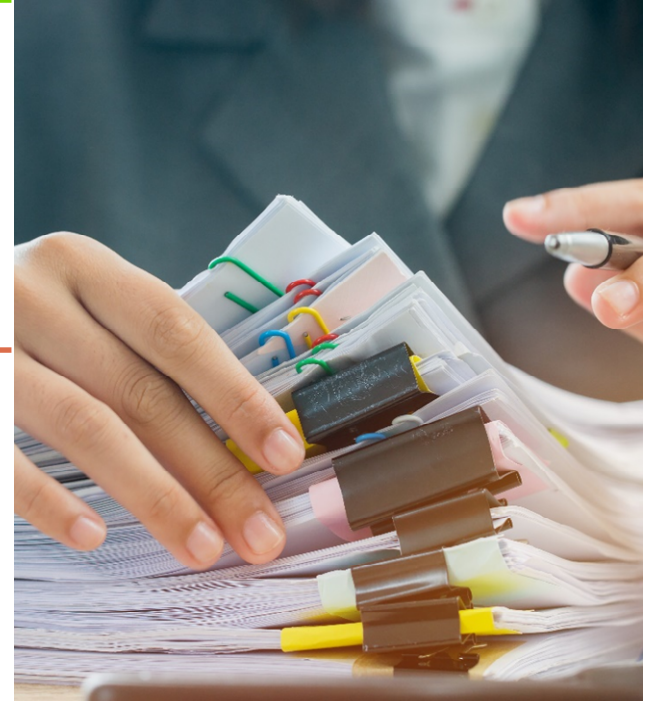
If the OSHA inspector orally asks for documents, **ask for a written document request.**



Documents

Prepare a **form identifying all document requests**, the date the request was received, the date each requested document was provided, and whether the OSHA inspector kept a copy of the document.

If any documents are provided to the OSHA inspector, **ask for them back after review**. If the inspector asks for a copy to keep, mark the copy CONFIDENTIAL (if it is) and keep a copy in the inspection file.



Documents

Identify relevant documents, and then store them in the electronic file or hard copy file. Documents may include the following, among others:

**OSHA 300 logs and
OSHA 301 forms**

**Copies of
documents
provided to the
OSHA inspector for
review or to keep**

Photographs

**Test or monitoring
results**

**Training records
for any employees
present at the
time of an incident**

Documents

Identify relevant documents, and then store them in the electronic file or hard copy file. Documents may include the following, among others:

The personnel file for any employee involved in the incident

Any permits issued for the work involved in the incident (e.g., hot work permit, confined space entry permit, hazardous work permit)

Information (contact information, any documents) supplied by the OSHA inspector

Company health and safety procedures, guidance, performance aids, and training materials applicable to the work being done at the time of the incident or being inspected

Notes on employee interviews

The Closing Conference

Clarify issues such as the following:

Whether the OSHA inspector has identified any violations, and if so, what they are.

Whether the OSHA inspector has identified any other areas of concern, and if so, what they are.

The names of any employees whom the OSHA inspector still plans to interview, if any.

The documents that the OSHA inspector plans to request, if any.

The anticipated schedule for the rest of the inspection.

The timing for issuance of citations, if any.





Citations

Citations

**Classification
and maximum
penalties:**

Willful - \$145,027 per violation

Repeat - \$145,027 per violation

Serious - \$14,502 per violation

Other-than-serious - \$14,502 per violation

Failure to abate - \$14,502 per day beyond the abatement date

2022 Annual Adjustments to OSHA Civil Penalties, <https://www.osha.gov/memos/2022-01-13/2022-annual-adjustments-osa-civil-penalties> (Jan. 13, 2022).

Citations

WILLFUL: Employer either intentionally disregards legal requirements or acts with plain indifference to employee safety and health.

SERIOUS: When there is substantial probability that death or serious physical harm could result from a workplace hazard, unless the employer did not know or could not have known of the violation.

REPEATED: Employer has been cited previously for the same or a substantially similar condition or hazard, **and citation has become a final order of OSHRC.**

OTHER-THAN-SERIOUS: Accident/incident or illness that is most likely to result from a hazardous condition would probably not cause death or serious physical harm, but would have direct and immediate relationship to safety and health of employees.

Citations

Must contest within 15 working days from receipt or citation becomes a final order

Before then, may have informal conference with Area Office

- Come prepared
- Pre-contest settlement with Area Director

Litigation or post-contest settlement with Region

Deference



OSHRC and courts must defer to OSHA's interpretations of its requirements

- *Martin v. OSHRC*, 499 U.S. 1 (1991)



A photograph of several business professionals in a meeting. They are gathered around a table, looking at a document. One person is holding a pen, ready to sign. The scene is brightly lit, suggesting a professional office environment. A blue vertical bar is on the left side of the image.

Defense of Citations

Employer's Options

Correct and Pay

- Pay penalty within 15 days
- Complete abatement by date specified in Citation
- Provide abatement certification

Informal Conference

- Must occur within 15 working days
- Provides opportunity to enter into Informal Settlement Agreement

Contest the Citation

- Written Notice of Contest must be filed within 15 working days
- Initiates hearing process before OSHRC

Employer Considerations

Is the Citation timely?

- 6-month statute of limitations (OSH Act, Sec. 9(c))

Can OSHA establish each element of each alleged violation?

- Cited standard was applicable
- Employer failed to comply with standard's terms
- Employee access to violative conditions
- Actual or constructive knowledge of the violation

Are any affirmative defenses available?

- Unavoidable employee misconduct
- Impossibility/infeasibility of compliance
- Greater hazard

Employer Considerations

Is the classification appropriate?

Are the abatement requirements appropriate?

Is the penalty appropriate?

Is there a concern about future "repeat" citations?

Are there other legal or business concerns (e.g., likelihood of tort case)?

Informal Conference

Must be held within 15 working days of receiving Citation

Opportunity to discuss Citation and potential settlement options -- get Law Department involved!

Employer should be prepared to discuss relevant facts and abatement

If agreement is reached, OSHA will enter into Informal Settlement Agreement with employer



Contested Cases

Filing of notice of contest vests jurisdiction in Occupational Safety and Health Review Commission (OSHRC)

Assigned to an ALJ

Complaint, answer, discovery, motions, evidentiary hearing

Appeals go to three-member Commission, then to court of appeals

Settlement prior to hearing common

Opportunities for Appeal

Appeal to full Commission

- Commission discretion
- Conducts de novo review

Appeal to U.S. Court of Appeals

- Venue:
 - Circuit in which violation occurred
 - Circuit in which employer has its principal office
 - DC Circuit
- Standard of review:
 - Substantial evidence standard for factual findings
 - Arbitrary or capricious standard for legal findings

Thank You!



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