

By Randi Klein Hyatt, Esq.

What to do When OSHA Comes Knocking

Editor's Note: This information is not intended to be legal advice. You should have a licensed attorney review the facts of your specific situation.

The Occupational Safety and Health Act ("the Act") was enacted in 1970 to ensure that employers provided their employees with safe and healthy working conditions. Twenty-five years later, employers are wiser about how OSHA goes about its business. Although OSHA has alternated between "lax" and "strict" enforcement motives (depending quite often upon the politics at play), over the last 15 years, OSHA has maintained a vigorous administration and enforcement campaign. The construction industry, of course, always ranks at the top of OSHA's list for inspections; however, there are steps employers can take when the OSHA compliance officer (CO) comes knocking on your door.

There are four types of OSHA inspections:

- **targeted or programmed** inspections which are deliberately planned inspections in high hazard industries, such as construction
- **imminent danger** inspections arising out of an employee (or other informant's) complaint about workplace conditions
- **fatcat** inspections which immediately follow a fatality or catastro-

phe (accident causing five or more employees to be hospitalized) at the workplace

- **follow-up** inspections to violations found during prior inspections

OSHA gives imminent danger inspections highest priority, followed by fatcat inspections, follow-up investigations and programmed inspections. OSHA inspections also vary in degree. Comprehensive or "wall-to-wall" inspections include the entire work site, while partial inspections are limited to a particular activity or location.

The OSHA inspection typically has three phases: opening conference, the actual inspection (or "walkaround") and the closing conference. The key to a successful OSHA inspection (i.e., minimal OSHA exposure) lies in the company's OSHA inspection strategy which is in place *before* an actual inspection occurs.

The Fourth Amendment to the Constitution gives an employer the right to demand that OSHA only conduct its inspection on the premises after obtaining a search warrant. That right is waived, however, if the employer consents to a warrantless inspection (which will normally be deemed to occur once the employer lets the CO onto the worksite to begin an inspection). Moreover, OSHA is not legally obligated to advise the employer of its right to insist upon a warrant. Non-supervisory employees should be informed about "what to

do" if and when OSHA personnel should arrive at the job site.

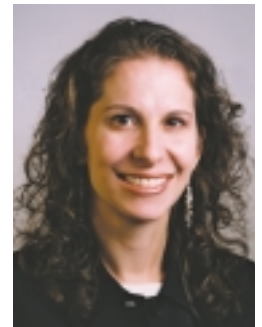
Non-supervisory employees must understand that they do not have the authority to grant OSHA access to a job site to permit an inspection, and they must also understand that they need to inform OSHA investigators that they lack such authority. All supervisory employees should know and understand the company's OSHA inspection policy, the company's safety program, and the applicable OSHA regulations. The company should designate a safety officer to accompany the OSHA COs during the inspection process.

It is not always the right choice to require that OSHA return with a warrant. The decision will depend upon a variety of factors, including:

- Whether OSHA is likely find a violation if an inspection is conducted right then
- The type of inspection being sought (partial or wall-to-wall)
- The reasons for which OSHA came knocking in the first place (what type of inspection is being conducted)

The advantages to requiring a warrant include:

- OSHA may change its mind and go away



- OSHA may not be successful in obtaining a warrant
- The court may limit the scope of the inspection that OSHA can conduct
- The employer is able to buy some time to “clean up shop”
- There may ultimately be procedural grounds upon which a challenge to the citation could be based

Some disadvantages to requiring a warrant include:

- OSHA may get “irritated”
- OSHA may then decide to increase the scope of the inspection
- Employee relations may be negatively impacted

Practically speaking, employers can often buy additional time by explaining to OSHA that it is willing to cooperate with the process, but that it needs time to consult with counsel (or that the present moment is not convenient for an inspection), and if OSHA would return at a mutually convenient time (usually 48 or 72 hours out), the employer would cooperate with the process without requiring a warrant. This will provide the employer with sufficient time to:

- Do its own inspection and clean up possible hazards on the job site
- Obtain all necessary materials for the inspection¹
- Prepare supervisory and non-supervisory employees for the inspection and possible interview process
- Make sure that all OSHA required recordkeeping forms are up-to-date
- Consult with labor counsel to ensure that the employer is as ready

and knowledgeable as possible for the process

Upon OSHA’s arrival, a company representative should meet with the CO immediately to verify the CO’s credentials, determine why the CO seeks to inspect the job site, determine whether the CO has a warrant (and if so, obtain a copy), instruct the CO to wait until a company safety officer or other official is present or consulted (OSHA will usually wait one hour for this process). If the CO does not have a warrant, and your company requires one, you must instruct the CO to cease the inspection and leave the job site immediately. You will also want to provide the CO with a copy of your company’s OSHA warrant policy.

Once the inspection begins, the first step will be the opening conference, which OSHA is required to do by law. If the CO does not initiate one, be sure to request that it occurs. During the opening conference, review the warrant, if there is one. Also, lay down the ground rules covering the scope of the inspection, employee interviews, and that ongoing, critical work will not be disrupted. Be sure to take notes and keep copies of any documentation OSHA provides.

The inspection (or walkaround) should be your highest concern. The best strategy with the inspection is to make a comprehensive record of what occurs during the inspection and to control the inspection. An employer does not want the only “evidence” about what occurred during the inspection to be that which is offered by OSHA. Never permit a CO unfettered and unsupervised access to the job site.

A management and employee representative is permitted to accompany the CO during the inspection. A manage-

ment official should be present at all times, taking detailed notes of the CO’s actions during the inspection. If the CO takes photographs or video, be sure to do the same. Photographs can be deceptive, so it is advisable to take additional pictures or video footage from different angles. If the CO takes measurements, be sure to take measurements to verify what the CO found. If you disagree with the CO’s measurements, notify the CO immediately. Furthermore, do not feel compelled to perform unnecessary operations for the CO, such as operating equipment that is in an idle or dormant state. If apparent violations are found, do not correct them on the spot. This only draws attention to an issue that the CO may not have noticed. Also, instant voluntary abatement does not preclude a citation. Wait until after the inspection is over to make any corrections.

During the inspection, OSHA will likely seek to interview employees. OSHA is permitted to interview employees privately, although the company can refuse the interviews if they are not identified in the warrant. Additionally, the company can insist that interviews occur after working hours. If possible, the company safety officer (or legal counsel) should meet with the employees who will be interviewed ahead of time to ascertain the relevant information the employees may have and to try and determine what issues the CO may uncover.

Employees should also be advised that they have the right to request a copy of any statement made or taken during the interview. For managerial employees, the company should insist on company or legal presence during the interview process. Although OSHA may try to decline such presence, the company should insist on this because of the bind-

ing effect that managerial statements have on employers in an OSHA proceeding. All employees should be advised to answer only the questions asked, keep answers brief and not volunteer any other information.

The last part of the inspection process will be the closing conference during which time the CO will describe any hazards and/or violations found. Continue making a record of the items discussed and be sure to ask questions so you fully understand the basis for alleged violations. Never admit to wrongdoing at any point during the inspection process. It does not earn you points with OSHA and certainly does not work in your favor down the road if you decide to contest the citations.

Once the inspection is over, prepare a detailed memorandum of the inspection, recording everything that can be recalled, including the CO's name, the time of entry, the length of the inspection, the time of departure, persons with whom the CO spoke, documents that were exchanged and issues that were discussed. Sign and date the memorandum and maintain it safely. This document will be important if the company contests any citations that OSHA may issue.

The door knock need not be the sound of doom. With the right strategy and preparedness in place, an OSHA inspection can be a controlled process during which the employer remains in charge and in command. ■

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References

¹Consider having the following materials handy: a digital or video camera; backup video tapes, disks, and batteries; note pad and pen; tape measure and other relevant measuring/monitoring devices.