

8 Tips For Employers When OSHA Comes Calling

By **Abigail Rubenstein**

Law360, New York (February 27, 2014, 8:57 PM ET) -- The Occupational Safety and Health Administration does not have to warn employers before it comes to conduct on-site inspections, and with the agency cracking down, attorneys say businesses need to make sure they are ready when an inspector arrives.

“It's important to understand all this through OSHA's current enforcement lens because not a day goes by that OSHA doesn't issue a press release announcing citations against a company,” said Melissa Bailey of Ogletree Deakins Nash Smoak & Stewart PC.

“Penalties have gone way up, the number of citations has gone up, and bad PR is happening for companies every day, so the stakes are higher than they have ever been, so it is important that employers invest the time in getting ready for an inspection so they are not caught flat-footed,” she said.

With so much at stake, lawyers told Law360 that it pays for an employer to know what to expect and to make sure preparations have been made.

Here, employment lawyers share their best tips for when OSHA is at the door.

Have a Plan

While a particular OSHA inspection may come as a surprise to the employer, the very idea of an inspection shouldn't, especially for businesses in industries where risks may be present and where the agency has shown an interest, lawyers say.

In order to be ready if an inspection does happen, an employer should have at least one designated person whose responsibility it is to be present for the inspection and to interact with the compliance officer, and that person should understand both OSHA's regulations and how the inspection process works, attorneys told Law360.

Employees should be trained to reach out to the appropriate person if an OSHA inspector shows up.

It may even make sense to give employees a simple script to use for explaining to the compliance officer that the company's policy is to have that person present for inspections, that they will go contact that person and will let the officer know when the person arrives, according to Steven R. McCown, the chair of Littler Mendelson PC's workplace safety and health practice.

Another important piece of preparation is simply to take steps to remain in compliance with the law, so that there won't be anything amiss for an inspector to find.

“The best way to be prepared is compliance with all laws and rules,” McCown said.

That means companies whose workers could be exposed to potential hazards should have an ongoing safety program and make sure their workers have proper training on safety protocols, not only to protect their employees but also to ensure their compliance with safety laws and regulations.

Maintaining up-to-date records — especially OSHA 300 logs that track workplace injuries — will also help keep the path smooth for employers because everything will be in order when OSHA asks to see these documents.

Find out Why OSHA Is There

When an OSHA inspector arrives, attorneys say the first thing an employer should do is ask to see the inspector's credentials, but the next thing is to find out what brought the inspector to the business.

The agency has broad investigatory authority, but it must have probable cause to believe that a violative condition exists to enter a facility.

There are numerous things that can provide OSHA with probable cause, including an employee complaint, a report from a first responder at the site of an accident or fatality, a media report of an incident at the facility, or a national or local inspection program targeting specific industries or hazards that uses neutral criteria to determine where inspections should take place.

The employer should ask what has prompted OSHA's investigation at the start of the interaction, to suss out what the agency is looking for, lawyers say.

“This is important because it gets into the scope of the investigation, so it is important for the employer to be aware of what the basis is by which OSHA is coming into the facility,” said Morgan Lewis & Bockius LLP partner Jonathan Snare, a former acting assistant secretary for OSHA.

If, for example, the inspector is there because of a complaint about one machine in one of 10 rooms of a facility, the inspector does not have the right to inspect the other nine rooms, and if the inspector is there because of a national emphasis program, the inspection should be limited to what's in the program, Snare explained.

Assert Your Rights When Necessary

During an OSHA inspection, the rights of the agency, the employer and the employees all need to be balanced, and lawyers say it's important for employers to understand theirs so they can stick up for themselves when they need to.

The first right that employers should know they have is that, even though it's generally beneficial to cooperate with OSHA, they do not necessarily have to let an inspector in right away.

“The Fourth Amendment applies in workplaces, just as it does in homes or vehicles, so the employer is protected from unreasonable searches and seizures, which includes inspections by OSHA,” Eric J. Conn, the head of Epstein Becker & Green PC’s OSHA practice group said. “This means that OSHA needs your consent or a warrant to conduct a workplace health and safety inspection. The burden for obtaining a warrant is much lower than in criminal cases, but there is a burden.”

In most cases, it makes sense for employers to waive their right to demand a warrant, but not before negotiating a reasonable scope for the inspection, lawyers say.

During the inspection, employers also have the right to have a representative present, including during interviews with management-level employees and to object to inspections that are not reasonable, including those that would be overly disruptive to business operations, lawyers say.

Employers can also ask an inspector to wait a reasonable amount of time for the employer’s representative to arrive before beginning the inspection, lawyers say.

Know Who Else May Be There

While longstanding policy permits workers in unionized workplaces to have a union representative present during an inspection, an OSHA interpretation letter made public in February 2013 stated that the agency’s regulations allow workers at businesses without collective bargaining agreements to select outside representatives, including union agents, to represent them during OSHA inspections.

This new interpretation means that employers at nonunion facilities need to pay extra attention to who will be involved in any proposed inspection.

While the new interpretation means that an OSHA inspector might show up with a union representative, many on the management side believe the interpretation is incorrect and the employer does not need to give that representative access to their facility — and by extension to their workers.

“Most of the people in the business community don’t believe that the interpretation allowing third parties to join them are reasonable or legal,” McCown said. “Our advice to our clients is that unless there is some reason you should allow them in, don’t allow them in.”

If an OSHA inspector insists on bringing a union or community organization representative along, it may be a situation where an employer should demand a warrant, lawyers say.

Shadow the Compliance Officer

Once the inspection does begin, the compliance officer will go on a walk-around to perform the inspection, and attorneys say it’s important for the employer’s representative to remain by the officer’s side for that entire time.

“You should be attached at the hip whenever the compliance officer is at the facility, and to the extent that you can, you should be steering the paths to locations rather than being steered by the compliance officer,” Conn said.

Beyond just being present, the employer’s representative should be taking side-by-side photographs whenever the compliance officer takes a photograph and should be collecting his or her own version of any physical evidence OSHA takes during the inspection, lawyer say.

Keeping your own version of the evidence that the OSHA inspector collects will allow you to have an understanding of what the government may end up basing citations on and lets you evaluate the situation yourself, attorneys told Law360.

Prep Your Workers for Interviews

The compliance officer will want to talk to your employees, but whether the interviews are with management or nonmanagement employees makes a big difference.

As a general rule, OSHA will speak with nonmanagement employees without an employer representative present, but when it comes to management-level staffers, the company can and should insist on having a representative, which can include outside counsel, present for the interview because anything a management employee says can be deemed an admission by the company, lawyers say.

In both cases, it is best to try to get your employees ready, lawyers say.

“For [nonmanagement] employee interviews, OSHA will usually insist on doing it privately, but there is no reason you can't — and, in fact, you should — sit down with your employees and say, 'OSHA is here, and it's important for you to tell the truth and to understand that whatever you say is not going to affect your job,' and then go over training records and get your employees comfortable with the process,” Bailey said.

Meanwhile, management employees should be even more vigorously prepared since the stakes of their interviews are higher. OSHA often gets a significant amount of evidence from its discussions with management employees — from frontline supervisors to CEOs — so it's important that those employees understand their position and know, for example, not to guess when they don't know the answer to a question.

“With management employees, you should prepare them much like you would for a deposition, because OSHA's purpose in conducting that interview is to get proof that you violated a standard,” Bailey said.

Protect Your Confidential Information

OSHA will often ask for documents, and lawyers say it's helpful to ask that all such requests be made in writing both so that the employer can be sure to not miss any requests and to have a record if OSHA claims there are discrepancies between what was requested and what was produced.

And in turning over documents, it is important for employers to take steps to protect their trade secrets and other confidential information from public disclosure, attorneys say.

Employers can try to protect their sensitive documents from such disclosure by labeling them as confidential before producing them for OSHA.

“You have to share the information with OSHA, but if you designate it as confidential business information, you limit OSHA's ability to share it with the public in response to a Freedom of Information Act request or in any public statement [OSHA] makes about the enforcement action,” Conn said.

When information is labeled confidential, OSHA will either refuse to produce the information in response to a FOIA request, or will at least notify the employer that such a request has been made, and possibly even let the employer know who made the request and let the employer justify its claim that the information should be kept under wraps.

Remember It Isn't the Final Word

At the closing conference that ends an investigation, OSHA may decide to issue citations for alleged violations, but lawyers say employers should keep in mind that this does not necessarily have to be the end of the road.

“Employers have a right to challenge citations,” Conn said. “It is important to understand that OSHA is not the final word and that there is an independent body of judges who hear challenges to OSHA citations. If you think OSHA is wrong, there is a reason employers have a right to contest.”

It is therefore important for employers to keep their own record of what occurred during the inspection, to make an informed decision about whether to push back, lawyers say.

“Make sure you have a record of what OSHA does for the future so that you can evaluate and decide whether to defend yourself against an OSHA citation, which is just an allegation,” Snare said. “The employer can contest and needs to have all of the information necessary to make that decision.”

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