How to Survive an OSHA Inspection

Presented by:

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OSHA’s Knocking… Are you ready?

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History

- December 29, 1970
- President Nixon signed the Occupational Safety and Health Act ("OSH Act") into law

**Purpose**
- 14,000 job-related deaths
- 2.5 million disabled from job-related accidents
- 300,000 new occupational diseases
- Lost productivity and wages
- Medical expenses & disability compensation

- Immense burden on national economy
Overview:

OSHA Inspections
Overview: OSHA Inspections

- OSHA typically arrives unexpectedly
- Major disruptive event
  - Fatality
  - Catastrophe
  - Serious employee injury
- Follow Up After Settlement
Overview: OSHA Inspections

- Employer unprepared to handle inspection
- Increased liability
  - OSHA citations
  - Civil liability
  - If fatality, possible criminal penalties
Overview: OSHA Inspections

- Tailor inspection preparation for specific workplace
- Prepare in advance
- Consider relationship with OSHA Area Office
- Anticipate issues that may arise
Advanced Preparation for OSHA Inspection
Advance Preparation for OSHA Inspection

• OSHA’S PURPOSE:
  – To gather evidence of violations
  – They are not there to “help”

• Inspection Results:
  – Citations
  – Civil Liability
  – Criminal Liability
Advance Preparation for OSHA Inspection

• Step 1: Goals and Basic Questions
• Recommended Inspection Goals
  – Minimize operational disruptions
  – Control flow of information to OSHA
  – Present facility or site in best possible light
  – Identify OSHA’s compliance “concerns” early
  – Minimize liability
Advance Preparation for OSHA Inspection

**Step 1: Goals and Basic Questions**

- **Issues to Consider in Advance**
  - Who will determine if OSHA can inspect or obtain a warrant?
  - Who is employer’s principal contact with OSHA and collective bargaining reps?
  - Who will accompany OSHA during walkaround?
  - Who will gather documents?
  - Who will arrange employee and management interviews?
  - Who will determine if counsel is needed?
Advance Preparation for OSHA Inspection

Step 2: Preparing for the Opening Conference

• OSHA Conducts 5 Types of Inspections
  – Imminent Danger
  – Fatality/Catastrophe
  – Complaint
  – Regional Programmed
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Step 2: Preparing for the Opening Conference (cont’d)

- **Opening Conference**
- Upon arrival - Compliance Officer conducts opening conference – ask for credentials
- First opportunity to begin managing inspection
- Ask C.O. to identify the type of inspection
- Reason for and scope of inspection
- Press for clear understanding of issues
- Identify areas of facility to be observed
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Step 2: Preparing for Opening Conference (cont’d)

- OSHA is obligated to conduct a “reasonable” inspection
- Ask C.O. to agree to the following protocols:
  - Submit document requests in writing to single management representative
  - C.O. accompanied at all times by management representatives
  - No lengthy/disruptive employee interviews during walkthrough (e.g. over 5 minutes)
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Step 2: Preparing for the Opening Conference (cont’d)

- **Opening Conference Protocols (cont’d)**
  - Management representative will arrange for a conference with any employee with whom OSHA desires to speak – allows replacement
  - Employer entitled to have a management representative present for all manager interviews – e.g. attorney or another manager
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Step 2: Preparing for the Opening Conference (cont’d)

- **Opening Conference Protocols (cont’d)**
  - Employer policy will not permit managers/supervisors to sign statements prepared by C.O.
  - Including “signing off” on C.O.’s notes of the interview
  - No tape-recorded or videotaped manager/supervisor interviews
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Step 2: Preparing for the Opening Conference (cont’d)

• Opening Conference Protocols (cont’d)
  – Require advance notice of industrial hygiene sampling to allow employer an opportunity to have competent personnel onsite to perform side-by-side samples
  – All photographs and videotapes taken by OSHA must be reviewed for trade secret/business confidential information
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Step 3: Preparing the Walkaround Team

- Employer has absolute right to accompany OSHA during walkthrough inspection
- Employer’s representative(s) who participate in walkthrough should understand facility’s safety procedures, as well as, the operations in the area of inspection
- Members of the “team” will depend on the type of inspection
  - E.g. programmed wall-to-wall inspection may require safety representative from several departments
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Step 3: Preparing the Walkaround Team (cont’d)

- Walkaround team members must:
  - Know employer’s rights during inspection
  - Know potential for OSHA liability
  - Know OSHA’s purpose for conducting inspection
  - Answer questions truthfully and accurately
  - Refrain from offering additional information
  - Refrain from admitting that a condition or practice is a violation
  - Pay close attention to OSHA’s concerns
Advance Preparation for OSHA Inspection

Step 3: Preparing the Walkaround Team (cont’d)

• Train potential walkaround team members in the following:
  – Control the flow of information:
    • Documents are only provided to OSHA through designated OSHA contact
    • Interviews are scheduled through designated OSHA contact
Advance Preparation for OSHA Inspection

Step 3: Preparing the Walkaround Team (cont’d)

• Train potential walkaround team members in the following:
  – OSHA’s purpose: *gather evidence of violations*
  – Every statement from management can potentially be evidence of a violation
  – Answer truthfully – do not volunteer
  – Do not guess – only provide known facts
  – Avoid admissions such as agreeing that a condition is a violation
Step 3: Preparing the Walkaround Team (cont’d)

- Train potential walkthrough team members in the following:
  - Understand concept of “plain view”
    - OSHA can site employer for any violation that is in “plain view”
    - Team members must know scope of inspection and limit inspectors to these areas to minimize a “plain view” citation
Advance Preparation for OSHA Inspection

Step 4: Designating OSHA’s Main Contact Person

• A single management representative should act as OSHA’s main contact
• Typically a safety department employee
• Require OSHA to submit all written document requests to this contact
• Schedule all interviews and gather and produce the requested documents
OSHA

Inspection
OSHA Inspection

CSHO Shall Review Hazard Assessments

- Written hazard assessments in accordance with 29 CFR §1910.132
- Used to be discretionary
- January 12, 2009 – “Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee
- Employer has a duty to provide PPE and training – now an instance-by-instance violation (i.e. per employee)
OSHA Inspection

**CSHO Shall Review Injury and Illness Records**

- Start of each inspection – CSHO shall review injury and illness logs (Form 300)
- Used to be discretionary
- Common practice to review records
- Now mandatory 3 years worth of records
- Employer must ensure that recordkeeping practices are accurate and up-to-date.
Should Legal Counsel Assist in Inspection?

- Inspection is beginning of litigation discovery process
- OSHA has right to obtain documents, evidence and interview witnesses
- OSHA has the right to physically inspect the facility, take photos and video
- Significant cases (fatality, serious injury, catastrophe) counsel should be involved
- Coordinate with insurers, address collateral issues such as personal injury and damage claims
- If production methods are implicated, could result in substantial capital outlays to achieve compliance
OSHA Inspection

- Photographs, Videotaping and Sampling
- OSHA has right to photograph and videotape
- Employer should “mirror” OSHA and take its own photos and video during inspection
- Do not accept OSHA’s offer to provide photos
- If equipment or process is trade secret or business confidential
  - OSHA should allow employer to take these photos and provide to OSHA
  - Label copies as “Confidential” when providing to OSHA
OSHA Inspection

• **Photographs, Videotaping and Sampling**

• **Industrial Hygiene Inspections**
  – OSHA collects samples, e.g. monitoring, airborne substances, wipe samples, etc.

• **Employers should conduct parallel monitoring**
  – Without own data, difficult to challenge OSHA’s results
Responding to Requests For Documents

Is the document one that OSHA is entitled to as a matter of law?

– Employer is required to make available certain documents upon request, e.g.:
  • Injury and illness logs
  • HAZCOM program w/MSDS
  • LOTO program

– Failure to produce may be a separate violation
OSHA Inspection

• Responding to Requests For Documents (cont’d)

• Is the document request reasonable?
  – OSHA must limit other document requests to relevant information generated during a reasonable time frame (e.g. not all accident reports for facility’s entire history)
  – Aware of employee privacy rights – unreasonable to request personnel files for employees
OSHA Inspection

- Responding to Requests For Documents (cont’d)
- Is information privileged or trade secret/business confidential?
  - Label appropriately
- Is the document responsive to OSHA’s request?
  - E.g. request for HAZCOM program should not result in the production of training records or audits of HAZCOM program
OSHA Inspection

• Responding to Requests For Documents (cont’d)

• Organizational Issues
  – Written cover sheet with each document
  – If no documents, “no documents responsive to the request have been located”
  – Designate trade secret/business confidential documents
Responding to Requests For Documents (cont’d)

Organizational Issues

– Consider numbering each page
– Parties will be able to communicate effectively during the inspection and subsequent litigation
– Use Bates numbering, e.g. 00015, etc.
Interviews of Non-Supervisory Employees

Most evidence of OSHA violations tends to come from employee interviews

Most difficult to control

Employer involvement may be a sensitive labor-management issue – especially in accident or complaint investigations

Use good judgment and careful evaluation
OSHA Inspection

• Interviews of Non-Supervisory Employees
• Preparation
  – Counsel or management should meet with the employee if the employee is willing and such a meeting does not cause labor relations problems
  – Discuss OSHA inspection process generally
  – Discuss reasons for specific inspection
  – Inform employee of their rights - specifically that the interview is voluntary
OSHA Inspection

• **Interviews of Non-Supervisory Employees**

• **Preparation (cont’d)**
  
  – Inform employee that OSHA may audio or videotape the interview
  
  – May have employee sign a statement
  
  – Inform the employee that they are not required to allow audio or videotape nor are they obligated to sign a statement
OSHA Inspection

- **Interviews of Non-Supervisory Employees**
- **Preparation (cont’d)**
  - Cover the questions that OSHA is likely to ask
  - Important to avoid misunderstandings
  - Employee may be unfamiliar with terminology used by the C.O. (e.g. “HAZCOM training?”)
  - Consider reviewing training records with employee, as well as, provisions of relevant procedures used at the worksite
OSHA Inspection

- Interviews of Non-Supervisory Employees
- Preparation (cont’d)
  - Assure employee that nothing he or she says to OSHA will result in discipline or adverse change in job
  - Section 11(c) of the OSH Act prohibits employers from “discharg[ing] or in any manner discriminat[ing] against an employee because such employee has filed a complaint” or “because of the exercise of … any right afforded by the [OSH] Act,” including discussing working conditions with the C.O.
OSHA Inspection

- Interviews of Non-Supervisory Employees
- Management Presence During Interview
  - The OSH Act grants the employee the right to be interviewed by OSHA privately
  - Courts have held that employees may elect to have management or counsel present (*Reich v. Muth*, 34 F.3d 240 (4th Cir. 1994))
  - OSHA’s policy – interview is private even if union representative is present
OSHA Inspection

- **Interviews of Non-Supervisory Employees**
- **Management Presence During Interview (cont’d)**
  - OSHA policies regarding employer presence vary widely between Area Offices and C.O.’s
  - Presence is beneficial e.g. correct misunderstandings, understanding OSHA’s compliance concerns
  - If C.O. objects, benefits must be weighed against disruption and potential resentment that will result from forcing the issue
OSHA Inspection

- Interviews of Non-Supervisory Employees
- Management Presence During Interview (cont’d)
  - Debriefing
  - If employer representative is not present, then meet with employee after the interview and discuss the questions asked by the C.O. to determine the areas of concern
OSHA Inspection

• Interviews of Management Employees
• Employer has the right to have representative present during interviews
• Generally – “management” has supervisory responsibilities and paid salary
• Statements are generally binding on the employer
  – Legally considered “admissions” against employer’s interest
OSHA Inspection

- Interviews of Management Employees (cont’d)
- Employer should invest the time to prepare management employees for their interviews
  - Answer truthfully, but carefully
  - Answer only question asked – don’t volunteer
  - Avoid admitting that certain condition is a “violation”
  - No video/audio or signing a statement
  - Inform OSHA of this policy in advance
OSHA Inspection

- Demonstrations of Work or Processes
- Employer not required to stage demonstrations for OSHA
- OSHA is entitled to observe work as it is being performed
- Cannot insist to be shown how equipment is operated or performance of operations
- However, may be beneficial for employer to stage a demonstration to clarify any misunderstandings, etc.
- Beware of Murphy’s Law
OSHA Inspection

- **OSHA Demands to Stop Work**
- Compliance Officer has no authority to direct cessation of work
- OSH Act – only a federal district court judge has the power to enjoin work and **only** where OSHA has shown that an imminent danger exists
- An “imminent danger” is a danger “which could reasonably be expected to cause death or serious physical harm immediately”
- If C.O. points out an obvious hazard, it should be corrected immediately
OSHA Inspection

- **Communicating With OSHA**
- Ask C.O. questions throughout the process
- Need to understand OSHA’s concerns early
- Can provide defenses during inspection and avoid citations
- Provide additional relevant documents during inspection that OSHA did not request
- Provide OSHA interpretation letters, compliance directives or industry standards
- Continually evaluate C.O.’s concerns and present defensive information
Post-Inspection Procedures
Post-Inspection Procedures

• Closing Conference
  • After inspection, C.O. will hold a closing conference
  • Includes management and union representatives
  • Purpose is to inform of the possible violations
  • Employer should consider voicing defenses at this time
  • Employer should consider union position and anticipate responses
  • In alternative, simply listen and obtain additional information, such fines and characterization (e.g. Serious, Repeat, Willful)
Post-Inspection Procedures

- Informal Conference
- After citations are issued, OSHA will offer to hold informal conference
- Management, Union, C.O., Area Director, Assistant Area Director
- Most common forum to present defenses
- Gather information regarding cited standards (e.g. interpretation letters, compliance directives, industry standards)
- Provide additional information from facility/worksite (training records, safety and health policies, etc.)
Post-Inspection Procedures

• **Employer Contests**

• Employer has 15 working days from date of receipt of citation to file a notice of contest

• Weekends, federal holidays, and date received are excluded from 15 day deadline

• Must be in writing and mailed to Area Director

• Beware of partial notice of contest

• After 15 days – citation deemed a final order of the OSHRC
Conclusion

By preparing in advance and carefully considering inspection protocols, the employer can assert some measure of control of the inspection process and may be able to significantly reduce OSHA and other liability.
Thank you for coming!
How to Survive an OSHA Inspection

Questions:
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Your ToolKit includes:

• **Model Policy** to Prepare Your Employees and Supervisors on How to Respond If an OSHA Inspector Shows Up
• **Model Instructions** for Employee Representatives Who Accompany OSHA inspectors During Walk-Around Inspection
• **Management Briefing:** How OSHA Decides Who to Inspect and Why
• **Model Instructions** to Staff Telling Them What They Must Do to Protect Your Company’s Trade Secrets during an OSHA Inspection
• **Model Notice** to OSHA Requesting Trade Secret Protection
• **Model Form** to Request More Time to Abate a Violation