Managing an OSHA Inspection* INTRODUCTION

We offer here suggestions for addressing the issues that arise in OSHA inspections. These guidelines represent the collective experience of Ogletree Deakins' nationwide OSHA practice in advising and representing clients in federal and state OSHA inspections.

Not every guideline or suggestion is appropriate for all inspections. Also, states that have state OSHA plans, such as Nevada, Arizona, and California, may have specific procedures or practices that may make it necessary to modify some of the following suggestions. In general, however, the approaches we suggest have proven effective in a wide variety of inspections.

In most instances, OSHA arrives to inspect a facility unexpectedly or when a major disruptive event, such as a fatality, catastrophe, or serious employee injury, has recently occurred. Too often, employers are not prepared to handle the inspection so as to minimize liability as well as reduce interference with operations. The result may be significant OSHA citations, civil liability, and even criminal penalties where a fatality occurs. This is especially so in the current environment of aggressive OSHA enforcement. Also, the outcome of the OSHA investigation may have an adverse effect on related liability issues, such as damage or personal injury claims.

To reduce this risk, the best way to address OSHA inspections is to prepare in advance by considering the issues that arise, and deciding to the extent possible how they will be addressed. While every inspection is different and relationships with local OSHA Area Offices may influence the approach to an inspection, there are certain issues which may be anticipated.

Of course, the best way to prepare for an inspection is to comply with applicable OSHA standards and regulations, and to practice sound safety and health principles. We also advocate striving for a professional relationship with OSHA representatives. *The main point, however, is that with proper preparation, the OSHA inspection process can be managed.*

If you have questions or would like to discuss any of these issues, please feel free to contact any of the Ogletree attorneys listed below, or your regular contact within the Firm.

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^{*} **Disclaimer**: The information contained herein has been abridged from laws, regulations, court decisions, administrative rulings and other sources and should not be construed or relied upon as legal advice. If you have questions concerning particular situations and specific legal issues, please contact your Ogletree Deakins attorney.

ADVANCE PREPARATION FOR OSHA INSPECTIONS

STEP 1: GOALS AND BASIC QUESTIONS

Recommended Inspection Goals:

- The inspection process should be managed so as to minimize operational disruptions;
- The employer should control (but not obstruct or misrepresent) the flow of information to OSHA;
- The facility should be presented in the best possible light;
- OSHA's compliance "concerns" should be discovered early in the process so that defenses to possible violations may be presented before citations are issued; and
- Liability should be minimized.

Issues to Consider in Advance:

- Who will determine if OSHA is allowed to inspect, or if a warrant will be demanded?
- Who will be the employer's principal liaison with OSHA and collective bargaining representatives, if any?
- Who will accompany OSHA during the walkaround inspection?
- Who will gather documents and arrange for employee and management interviews?
- Who will determine whether counsel is needed to assist with the inspection? If so, who will have authority to engage counsel?

STEP 2:

PREPARING FOR THE ARRIVAL OF AN OSHA COMPLIANCE OFFICER/INSPECTOR AT YOUR DOOR

A. OSHA Conducts Several Types Of Inspections:

Complaint: Inspection resulting from a complaint filed by an employee.
This may be an informal inquiry by telephone or letter ("phone and fax") or
an on-site inspection where an employee has filed a written, formal
complaint.

- Programmed: A randomly scheduled inspection resulting from a certain injury or illness rate or a "special emphasis program" applying to a particular industry.
- Referral inspection: An inspection resulting from a referral from another government agency, a complaint by a third party such as a neighbor, or a media story.
- Fatality/Catastrophe: Inspection resulting from a report of a fatality or the hospitalization of three or more employees.
- Imminent Danger: Inspection conducted because "a danger exists which could reasonably be expected to cause death or serious physical harm immediately."

B. No Notice of Inspection

No advance notice of inspections may be given. Under federal OSHA
advance notice may be given where (i) there is an imminent danger and
notice is necessary to get the employer to correct the danger as soon as
possible; or (ii) the agency determines that the employer's representative,
the employees' representative, or certain personnel should be present at
the inspection.

Under OSHA law, anyone who gives an employer notice of an inspection without authority from OSHA faces possible fines (up to \$2,000) and jail time (up to six months in prison).

• If advance notice is received, the employer must share the notice with the employees' representative or with "a reasonable number" of employees.

Federal OSHA has the authority to apply for a warrant compelling the employer to permit entry.

C. The Opening Conference

Upon arriving at a facility, the Compliance Officer (Inspector) will conduct an opening conference with the employer and employees' representative, if any. The opening conference is the first opportunity to begin managing the inspection. Therefore, planning for the opening conference is important.

The Compliance Officer should be asked to identify the type of inspection to be conducted, and state the reason for and scope of the inspection. The employer should press for a clear understanding of the issues to be investigated, and the areas of the facility to be observed. Absent an agreement to limit the scope of the inspection, or unless the employer declines consent, the Compliance Officer may inspect any portion of a worksite. Inspections are to be "reasonable" in the way they are conducted.

Remember that before entering a facility or worksite, OSHA Compliance Officers must undergo the same orientation as any other visitor, such as a video on site safety procedures, the meaning of alarms, and evacuation procedures. Also, Compliance Officers must wear personal protective equipment in those areas where it is required of employees.

D. Managing the Inspection

As mentioned, OSHA is obligated to conduct a "reasonable" inspection. Our experience has been that, while occasionally there will be some resistance or reluctance, most OSHA Compliance Officers will agree to the following protocols as "reasonable." Employers should be prepared to persevere and insist on the following:

- Document requests must be in writing and submitted to a single management representative. No other personnel will provide documents.
- Compliance Officers must be accompanied at all times by management representatives.
- Although OSHA Compliance Officers may have brief, i.e. 2-3 minute, conversations with employees at their work stations during the walkaround, lengthy interviews are disruptive. The management representative designated as OSHA's main contact will arrange for a conference with any employee with whom OSHA desires to speak. This allows the employer to plan for a replacement worker during longer interviews.
- The employer is entitled to have a management representative present for all interviews of managers. This may be an attorney or another manager.
- The employer as matter of policy will not permit its managers and supervisors to sign statements prepared by the Compliance Officer or "sign off" on the Compliance Officer's notes of the interview. Also, the employer will not allow interviews of supervisors to be tape-recorded or videotaped.
- Advance notice of industrial hygiene sampling will be required so that the employer can assure that it has competent personnel on site, such as an industrial hygienist, to perform side-by-side samples.
- Where the nature of the business makes it necessary, photographs and videotapes taken by OSHA must be reviewed for trade secret/business confidential information.

STEP 3: PREPARING THE WALKAROUND TEAM

An employer has the right to accompany OSHA inspectors during the walkaround inspection of the facility. The employer representative or representatives who participate in the walkaround should understand the facility's safety procedures as well as the operations in the area of the facility being inspected.

The selection of management members of the walkaround team will depend upon the type of inspection OSHA is conducting. For example, a programmed, wall-to-wall inspection may require a safety department representative and managers from several departments. A one-item complaint inspection may require only a safety department representative.

In addition to understanding the technical aspects of equipment and safety policies, potential walkaround team members must be aware of the employer's rights during an OSHA inspection, the potential for OSHA liability, and OSHA's purpose in conducting an inspection.

The walkaround must be considered an interview. As such, team members should answer questions truthfully and accurately, but should refrain from offering additional information or admitting that a condition or practice is a violation.

The walkaround representative must pay close attention to the concerns OSHA raises and areas of particular interest. He or she essentially functions as the company's "eyes and ears," and his or her input is vital to anticipating possible violations and developing defenses.

The potential management walkaround representative(s) should be identified in advance. These potential team members should be trained in the following:

> OSH Act basics

- Obligation to comply with standards and the General Duty Clause
- Employer's right to accompany inspectors on site
- Employer's right to take side-by-side photographs and samples

Means of controlling the flow of information

- Documents are given to OSHA only by the designated OSHA contact
- Interviews are scheduled through the designated OSHA contact

OSHA's purpose -- to gather evidence of violations - they have not come to "help"

• Everything said by managers during a walkaround can potentially be

- evidence of a violation. There are no "off-the-record" conversations with an OSHA Compliance Officer.
- Team members should answer questions truthfully, but avoid volunteering unnecessary information
- Facts, not guesses or opinions, are all that will be given
- Admissions -- such as agreeing that a condition is a violation -- must be avoided

Concept of "plain view"

- Even though the scope of an inspection may be limited, OSHA can cite an employer for any violation that is in "plain view" *i.e.*, that can be observed while walking around the facility.
- Team members must be aware of the scope of the inspection and limit inspectors to these areas as much as possible to minimize "plain view" citations.

STEP 4: DESIGNATING OSHA'S MAIN CONTACT PERSON

During every inspection, a single management representative should act as OSHA's main contact. A representative of the facility's Safety Department, if there is one, is typically designated. As noted, OSHA should be required to submit all written document requests to this contact. The contact would schedule all employee and management interviews and gather and produce the requested documents.

INSPECTION ISSUES

In the course of an OSHA inspection, particularly an extended one, a variety of issues arises. Presented below is a discussion of issues typically encountered.

Should Legal Counsel Assist In The Inspection?

Each inspection is different, so the need for counsel and the level of counsel's involvement will depend on the circumstances.

It is important to understand that an OSHA inspection is the equivalent of the beginning of the litigation discovery process. Just as in litigation, OSHA has the right to obtain documents and other evidence, and interview witnesses. It also has the right to physically inspect the facility, and to take photographs and videotapes.

In a case where significant liability is possible, most employers would not entrust non-lawyers to defend against an opponent's discovery. The same applies to OSHA inspections. We recommend, therefore, that counsel be involved directly in dealing with the inspection when there has been an employee fatality or serious injury, or a catastrophic accident has occurred. This is especially so as to preparing and representing supervisors and managers in interviews by OSHA Compliance Officers. It is also important that counsel handling the OSHA investigation coordinate with insurers

or others who may be protecting the company's interests as to collateral issues, such as damage or personal injury claims.

Where an inspection raises issues that may implicate production methods or result in substantial capital outlays to achieve compliance, it may be worth considering involving counsel.

Photographs, Videotaping and Sampling

OSHA has the right to photograph or take a video of the workplace it inspects. We strongly recommend that the employer take its own photos and video of whatever OSHA decides to record, at the very same time that OSHA makes it recording.

Sometimes, OSHA will offer to provide copies of its photos and video to the employer, to dissuade the employer from taking its own pictures. We do not recommend this. More than occasionally, OSHA does not follow through on these promises, or takes months to provide copies.

If OSHA desires to photograph equipment or processes that the employer regards as a trade secret or business confidential, insist that OSHA allow the employer to take those photos and provide copies to OSHA. Be sure to label the copies as such when they are provided to OSHA.

In industrial hygiene inspections, OSHA may collect samples, such as by conducting monitoring of airborne substances, or collecting wipe samples from workplace surfaces. Employers are best advised to conduct parallel sampling. Without its own data, an employer has little ability to challenge OSHA's analytical methods or results.

Responding To Requests for Documents

OSHA requests at least a few documents during the vast majority of inspections. In some inspections, the volume of documents OSHA requests may be quite large. When reviewing OSHA's written document requests, the designated OSHA contact who will gather and produce the documents should consider the following:

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

Under OSHA standards and regulations, there are certain documents that an employer is required to make available to OSHA upon request. Failure to produce them can be a separate violation. These include, for example, illness and injury logs, a facility's hazard communication program including material safety data sheets, and a lockout/tagout program. *Under federal OSHA regulations, OSHA Form 300 and 301 logs must be produced within four hours after they are requested.*

 Employers with fewer than 10 employees are subject to far less restrictive recordkeeping requirements.

Is the request reasonable?

OSHA must limit other document requests to relevant information generated during a reasonable time frame. For example, a document requests for all of the accident reports completed during the facility's entire history is likely unreasonable. Similarly, a request for the personnel files of every employee at the facility is not reasonable and may also infringe on the privacy rights of employees.

• Is any of the information privileged or trade secret/business confidential?

Privileged documents may be withheld from production. Trade secret or business confidential information should be marked as such.

Is the document responsive to OSHA's request?

The information or documents produced should be limited to the items OSHA is actually requesting. For example, a request for the written Hazard Communication program should not result in production of training records or audits of the program.

Organizational Issues

During many inspections, particularly those in which a large volume of documents will be requested, it is worth taking a few extra steps to organize the documents produced.

<u>First</u>, the employer should consider including a written cover sheet with each document production. The advantage to using a cover sheet is that the document can be described. If, for example, OSHA requests all audits, but does not include a time limit, the document response sheet could state that all of the audits for the past year are being produced. If no documents are being produced, the written response may say that "no documents responsive to the request have been located." By using this language, the employer is protected in the event documents that are responsive are found later in the process, a common occurrence in large facilities with many possible locations for documents. In addition, the document response cover sheet may be used to designate documents containing trade secret or business confidential information.

<u>Second</u>, the employer should consider attaching an individual number to each page of produced documents. By individually identifying each page, the parties are able to communicate effectively during the inspection and any subsequent litigation. For example, a question from OSHA regarding the provisions of a particular written program could be answered with a reference to the information or provisions on Page 00015. The ability to use this type of "shorthand" is particularly important during settlement discussions where letters or position statements regarding defenses are likely to change hands.

Interviews of Non-Supervisory Employees

Most of the evidence of violations that OSHA will gather is likely to come from employee interviews. This part of the inspection is, however, the most difficult to control. In addition, employer involvement in employee OSHA interviews may be a sensitive labor-management issue, particularly during accident or complaint inspections. As such, good judgment and careful evaluation of the specific situation is essential.

Preparation

Prior to an OSHA interview, counsel or a management representative should meet with the employee if the employee is willing to have such a meeting, and the meeting does not create labor relations problems. Several issues should be discussed during the meeting.

<u>First</u>, the employer should make crystal clear that anyone interviewed by a federal or state officer is obligated to tell the truth, and that the employer expects the same. Indeed, it can be a crime to lie to a federal investigator, even if not under oath. As mentioned, it is a criminal offense to lie to a federal OSHA Inspector.

<u>Second</u>, information regarding the OSHA inspection process, the reason for the inspection and a description of the employee's rights should be conveyed. Specifically, the employee should be told that an OSHA interview is voluntary. If, however, an employee refuses to be interviewed, OSHA has the authority to issue a subpoena. In addition, the employee should understand that OSHA may want to videotape or audiotape the interview and may ask the employee to sign some sort of statement. The employee is not required to allow the interview to be taped and is not obligated to sign a statement.

Third, the questions OSHA is likely to ask should be discussed. The information OSHA obtains during employee interviews may be based on misunderstandings because of a simple failure to communicate. For example, the Compliance Officer may ask an employee if he or she has had the training required under the Hazard Communication standard. The employee may have had the training, but be unfamiliar with the terminology the Compliance Officer uses. As such, the employee and management representative or counsel may review documents and training records so that the employee is aware of his or her training as well as provisions of relevant procedures.

<u>Finally</u>, the employee should be assured that nothing he or she says to OSHA will result in discipline or any adverse change in job conditions. Section 11(c) of the federal OSH Act prohibits employers from "discharg[ing] or in any manner discriminat[ing] against an employee because such employee has filed any complaint" or "because of the exercise of...any right afforded by the [OSH] Act," including discussing working conditions with the Compliance Officer.

Management Presence During the Employee Interview

The OSH Act grants the employee the right to be interviewed privately by OSHA. At least one court has held that while employees may choose to be interviewed in private, they may also elect to have counsel or a management representative present. See Reich v. Muth, 34 F.3d 240 (4th Cir. 1994). OSHA's policy is that an interview is considered private even if a union representative is present.

Policies regarding the employer's presence during employee interviews vary widely among OSHA Area Offices and even individual Compliance Officers and Inspectors. Some Compliance Officers allow employer representatives to be present during interviews if the employee affirmatively elects to have the representative present. Other Compliance Officers and Inspectors refuse to allow an employer representative to be present even if the employee requests it.

The benefits to being present in employee interviews may be significant. The employer is able to correct any misunderstandings regarding the information the employee is providing and to understand OSHA's compliance concerns. If the Compliance Officer strongly objects, however, these benefits must be weighed against the disruption to the inspection and resentment that is likely to result from forcing the issue.

Debriefing

If an employer representative is not present, the employer should meet with the employee after the interview. The questions the Compliance Officer asked should be discussed to determine the areas upon which OSHA is focusing.

Interviews of Management Employees

The employer has the right to have a representative present during any interview of a management employee. In general, a management employee is one who has any type of supervisory responsibilities and is paid on a salaried basis. The Company's right to be present should not be given up. Most Compliance Officers recognize this right, but even if resistance is encountered, it is not advisable to give up this right.

The reason is that statements made by management employees are nearly always binding on the company. They may be considered legally as admissions against the employer's interest.

As such, it is worth investing the time to prepare management employees for their interviews. They must, of course, be instructed to answer questions truthfully, but carefully. Management employees should be urged to answer only the question asked without volunteering information and to avoid admitting that a certain condition or practice violates an OSHA standard. As noted above, there is no requirement that an

employer allow a manager to sign a statement or permit recording of the interview. We recommend taking the burden off the manager-witness by having the employer inform the Compliance Officer of this policy in advance of the interview.

Demonstrations of work or processes

The employer is not required to stage demonstrations for OSHA. OSHA is entitled to observe work as it is being performed, but cannot insist that it be shown how equipment operates, or how particular operations are performed.

Sometimes, however, it is to an employer's advantage to stage such demonstrations, as when it is necessary to clarify misunderstandings or simply to impress the Compliance Officers. Be mindful, however, that "Murphy's Law" is operative, and that even the best planned demonstrations sometimes go astray at just the wrong time.

OSHA demands to stop work

Some Compliance Officers will tell an employer to stop performing a certain operation because it is dangerous, or a violation. It is important to understand that a federal Compliance Officer has no authority to direct the cessation of work. Under the federal OSH Act, only a federal district court judge has the power to enjoin work, and then only where OSHA has shown that an imminent danger exists.

Of course, if a Compliance Officer or Inspector points out an obvious danger or hazard, it should be corrected immediately.

Communicating With OSHA

The employer should gauge the Compliance Officer's compliance concerns throughout the inspection, both by observing the Compliance Officer's focus and asking him or her directly about possible violations. By understanding OSHA's concerns early in the process, the employer can provide information about its defenses to the alleged violations and possibly avoid citations. For example, the employer may present information to refute potential violations during the closing or informal conference. The information presented may include additional documents that OSHA did not request during the inspection, OSHA interpretation letters or compliance directives, or industry standards. By continually evaluating the Compliance Officers compliance concerns, the employer will be ready to present this type of information before the citations are actually issued.

Post-inspection Procedures

Closing Conference

After the inspection is completed, the Compliance Officer will hold a closing conference that includes management and union representatives. The purpose of the closing conference is to inform the parties of the possible violations OSHA found.

The employer's role in the closing conference can vary. If the management representatives are ready to present defenses during the closing conference, then the closing conference may be used for that purpose. If possible, the employer should ascertain the position of the union (if any) regarding the possible violations before presenting defenses so that any objections can be anticipated. In the alternative, the employer may choose to listen to the Compliance Officer's recitation of the potential violations and try to obtain additional information, such as the likely fines and characterizations.

Informal Conference

After the citations are issued, OSHA will offer to hold an informal conference with the parties. The informal conference typically includes management and union representatives as well as the Compliance Officer / Inspector and OSHA Area Director or Assistant Area Director. The informal conference is the most common forum for presenting defenses to citations. To prepare, the employer should gather information about the cited standards, such as relevant interpretation letters, excerpts from compliance directives, and industry standards and should provide any additional information from the facility, such as training records or safety and health policies.

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.

FREQUENTLY ASKED QUESTIONS ABOUT OSHA CITATIONS

When should I file the notice of contest?

The notice of contest must be filed no later than the 15th working day after receipt of the citation and proposed penalty. Filing is accomplished by mail so long as the notice of contest is postmarked on the 15th working day. Saturdays, Sundays and Federal holidays are excluded in calculating the 15 working days.

What must the notice of contest contain?

The notice of contest need only contain a statement of what citations are being contested, as well as which proposed penalties. You should not contest a proposed penalty of \$0, although you can contest the underlying citation.

What about the informal conference?

The government encourages you to meet with the area director after receipt of the citations to see whether they can be resolved without the necessity of litigation. Even if an informal conference is scheduled or held, this does not change the 15-working day period in which the citation must be contested. Additionally, even if the area director agrees to amend the citations, the notice of contest must be filed within 15 working days. As a general rule, the contest can always be withdrawn at a later date, so if in doubt, file it.

What happens after the notice of contest is filed?

The notice of contest is transmitted to the Occupational Safety and Health Review Commission, and attorneys for the Department of Labor are required to prepare and file a formal complaint. Typically, this takes approximately 45-60 days after the notice of contest is filed. Once the employer receives the complaint, 30 days are provided to file an answer.

The case is assigned to an administrative law judge, and is usually set for hearing within the next 90-180 days. Depending upon the issues in the case, there may be some discovery (interrogatories or requests for production) filed by either side.

Do cases ever settle before the hearing?

It is common for cases to settle prior to the hearing, when the attorney for the Department of Labor meets with the employer or its counsel. In many cases, there is a genuine meeting in the middle where penalties are reduced and the alleged hazards are abated.

If there is a hearing, what will happen?

The attorney for the Department of Labor and the employer or its counsel will present their cases to the administrative law judge. The primary witnesses for the Department of Labor are generally the compliance officer, and perhaps one or more company hourly employees. The employer's witnesses are generally managerial employees and sometimes (rarely) hourly employees. It is the government's obligation to prove the basic elements of a violation, and the employer is trying to counter these. Each side presents its testimony. After the hearing closes, a transcript is available and the parties are generally given additional time to file a brief in support of their positions with the judge. After reviewing the record and briefs, the judge issues a decision

Do the employees play any role in the hearing?

Under the law, employees are entitled to assert party status and participate in the hearing, just as the Department of Labor and the employer do. This means they can be represented by counsel, can offer and cross-examine witnesses, and can submit a brief.

What appeal is there from a Judge's decision?

Any party may petition the Occupational Safety and Health Review Commission for review of the administrative law judge's decision. If review is granted, the Review Commission accepts briefs and in rare instances, takes oral argument. No new evidence may be presented. A party aggrieved by the decision of the Review Commission, whether a refusal to grant review or a decision on the merits, may appeal to a Federal Circuit Court of Appeals.

What are the factors which usually govern whether a citation should be contested?

These vary according to employer and particular situation, but certainly the following are significant:

- A willful citation where an employee death has occurred. This should be contested, because if a willful violation is found under these circumstances, it opens the door to criminal prosecution under the OSH Act.
- Any citation where the penalties are great, this being relative of course.
- Any case where, regardless of proposed penalty, the abatement required would be impossible or costly, either directly or indirectly through disruption of the established work procedures. Thus, if the employer believes it cannot live with the abatement required, the citation should be contested.
- Any citation which the employer believes to be improper, whether because the cited regulation is not applicable or because the employer believes its conduct did not violate the act or regulations, should be carefully considered for contest.

Is it expensive to have legal counsel represent the employer in a contest of a citation?

While the answer is relative, it depends on the issues involved. It is not generally complicated for counsel to review a citation and proposed penalty and discuss with the employer the ramifications this has on the employer's operations.

Similarly, it is not particularly time-consuming to file a notice of contest, or even to file an answer to a complaint involving a citation of only a few items. The greatest cost would come where a case is actually litigated through the hearing stage with briefs filed thereafter, but as with all legal expenses, the cost of the consequences of not fighting a citation could end up to be even greater.

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