

SMALL BUSINESS GUIDE TO HANDLING OSHA INSPECTIONS

HELPFUL TIPS AND STRATEGIES TO HANDLE OSHA INSPECTIONS

- ✓ Being pro-active during an inspection by addressing OSHA's compliance concerns may persuade OSHA not to issue citations.
- ✓ An employer should designate a company decision-maker to act as OSHA's main contact during every inspection to control the flow of information.
- ✓ The OSHA Compliance Officer should be accompanied at all times by an employer representative during walk-around inspections of the worksite.
- ✓ The employer is entitled to have a representative present for all OSHA interviews with company decision-makers.
- ✓ The employer should insist that OSHA provide sufficient advance notice of industrial hygiene sampling so competent personnel can perform side-by-side sampling, which allows the employer to challenge defective samples taken by OSHA.
- ✓ The employer has the right to insist that the government protect any trade secret or business confidential information disclosed in an investigation.
- ✓ By being present during an employee interview, an employer may be able to anticipate defenses to OSHA's allegations of violations or clarify misunderstandings between the employee and the OSHA Compliance Officer.
- ✓ Before an OSHA interview with an employee, an attorney or an employer representative should meet with the employee if the employee consents to discuss the OSHA inspection process and the employee's rights during the process.
- ✓ An employee interview with OSHA is voluntary.
- ✓ An OSHA Compliance Officer has no authority to insist on immediate changes or to demand work to stop.
- ✓ By understanding OSHA's concerns early in the process, the employer can provide information to dispute OSHA's factual findings or interpretation of the OSHA standard or regulation.

**MORE TIPS AND STRATEGIES LIKE THESE
CAN BE FOUND IN THIS DOCUMENT
TO HELP EMPLOYERS AVOID THOSE COSTLY OSHA FINES!**

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INTRODUCTION

The NFIB Legal Foundation is pleased to provide you with this “Small Business Guide to Handling OSHA Inspections.” As you know, Occupational Health and Safety Administration (OSHA) inspections can be stressful for an employer. That is why we have commissioned the attorneys in the OSHA Practice Group at Arent Fox Kintner Plotkin & Kahn, PLLC in Washington, D.C. to develop this document. This guide is based on their collective experience in representing and advising employers across the country in OSHA inspections.

This document is NOT legal advice. The information contained herein merely provides an employer with useful tips and strategies to help minimize the employer’s liability that may result from an OSHA inspection. If a serious injury or employee fatality occurs, the employer should consider contacting an attorney experienced with OSHA since citations, civil claims, and, in the case of a fatality, criminal penalties are possible.



If you would like to know more about any of the enclosed information you should contact an attorney. If you would like assistance finding an attorney, you may visit the American Bar Association Lawyer Referral Service at:

<http://www.abanet.org/legalservices/lris/directory.html> or contact (800) 285-2221 for your state or county bar association.

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The information contained in this guide has been compiled as a helpful guide for independent businesses. This handbook should not be considered a legal resource. While we have attempted to provide accurate and complete information, the authors and publishers of this handbook cannot be responsible for any errors or omissions in its contents. **Note: This handbook is provided with the understanding that the NFIB Legal Foundation and Arent Fox are not engaged in rendering legal or professional advice in this document.**

The **NFIB LEGAL FOUNDATION** is the legal arm of the National Federation of Independent Business (NFIB). Established in 2000, the NFIB Legal Foundation is a 501(c)(3) public interest law firm designed to protect the rights of America’s small-business owners by ensuring that the voice of small business is heard in the nation’s courts. The Foundation also provides small-business owners advisory materials on pertinent legal issues.

WHY IS OSHA INSPECTING YOU?

OSHA performs inspections in two general situations. First, OSHA develops lists of worksites from all industries with injury and illness rates at or above certain levels and chooses worksites from that list to inspect. This type of inspection typically occurs at worksites for ten (10) or more employees. Similarly, OSHA may implement inspection programs through which it selects worksites in certain industries for inspection. Second, OSHA may inspect a worksite after a major accident or event occurs such as a fatality, catastrophe, or serious employee injury, and may also inspect in response to an employee complaint.

A. *Should you have an attorney?*

One of the first decisions an employer will need to make when an inspection occurs is whether or not to retain an attorney.

Each inspection is different, so the need for counsel will depend on individual circumstances. The level of counsel's involvement will also vary with the circumstances. On the one hand, a routine inspection that does not stem from a significant injury or fatality may be handled without an attorney. The employer may want to challenge any citations that are ultimately issued, and an attorney is helpful during that process, but the employer may be able to effectively handle this type of inspection using the tips and strategies in this document.

On the other hand, employers must understand that an OSHA inspection is comparable to the evidence-gathering process in a lawsuit. Just as in litigation, OSHA has the right to interview witnesses and obtain documents and other evidence. It also has the right to physically inspect the worksite and to take photographs and videotapes.

In a case where significant liability is possible, most employers would not rely on non-lawyers to defend them against potentially damaging evidence. The same theory applies with OSHA inspections. The employer is strongly advised to have counsel directly involved during an OSHA inspection when a major accident or event such as a catastrophic accident, serious injury, or employee fatality has occurred.

If the inspection results from a fatality or serious injuries and/or you decide that you would like a lawyer during the inspection process, the compliance officer will typically delay for a short period. The best strategy is often to allow OSHA to perform the walk-around inspection and review documents and then to have an attorney present later in the inspection when OSHA wants to begin interviews.

Counsel should also be involved to prepare and represent company decision-makers in interviews by OSHA Compliance Officers. Finally, counsel handling the OSHA investigation should coordinate with insurers or other parties who may be protecting the company's interests regarding collateral issues such as damage or personal injury claims.

B. *The Importance of Preparing*

Significant OSHA citations, civil liability, and even criminal penalties for fatal accidents may result from an OSHA inspection. The outcome of an OSHA inspection may also result in liability arising from damage or personal injury claims or costs associated with changing work practices, policies, or equipment in response to OSHA citations.¹ As a result, it is important to prepare for an inspection so as to minimize these costs.

To reduce the risk of an adverse outcome with an OSHA inspection, the best approach is to prepare in advance by:

1. Knowing the common issues that come up during an inspection, and
2. Preparing a response to these issues if they should arise.

This document is designed to help employers prepare for an inspection by anticipating common issues and to manage an inspection so as to minimize liability.

C. *Types of OSHA Inspections*

A complaint inspection is the most common type of inspection that OSHA performs. Complaint inspections result from a formal complaint filed by a current employee. This type of inspection can also result from an informal complaint made by a current or former employee.

OSHA is only obligated to conduct an inspection when a current employee files a formal written complaint. However, if a current or former employee complains *informally* to OSHA, then OSHA may simply send a letter to the employer asking for information about the alleged hazard and how the employer plans to address it. If OSHA is satisfied with the employer's response to notification of an informal complaint, then it typically does not inspect the worksite.

¹ OSHA citations require employers to abate the violations by correcting the condition that caused the violations. For example, an OSHA citation alleging that a particular machine is improperly guarded will require the employer to install a guard on that machine, which abates the hazard. In addition, an employer who accepts a citation requiring a guard on one machine will likely be required to guard similar machines to avoid potential willful citations in the future. A violation of a standard is "willful" if the employer knowingly violates a standard or is indifferent to its requirements. A citation requiring a guard on one machine could be used as evidence that the employer knew that similar machines should be guarded and therefore willfully violated a standard.

Although the complaint inspection will most likely be the reason for an OSHA inspection of an employer's worksite, an inspection may alternatively fall into one of the four other categories of OSHA inspections:

- Imminent Danger: Inspection resulting from the presence of a danger which could “reasonably be expected to cause death or serious physical harm immediately.”
- Fatality/Catastrophe: Inspection resulting from a report of a fatality or the hospitalization of three or more employees. [NOTE: An employer must report an employee fatality or hospitalization of three or more employees to OSHA within eight hours after such an event occurs. Failure to do so is a citable violation.]
- Programmed: Randomly scheduled inspection resulting from a certain injury or illness rate or a “special emphasis program” applying to a particular industry. For example, each year OSHA develops a Site-Specific Targeting plan that identifies worksites with injury or illness rates at or above a certain level. In 2003, OSHA targeted worksites with a Lost Workday Injury and Illness Rate of 14.0 or above.² Worksites with 10 or fewer employees were not included in the program. OSHA’s current national special emphasis programs include worksites with lead or a risk of amputations from machinery, as well as nursing homes and personal care facilities. Regional or area offices may also develop local emphasis programs. For example, the Kansas City area office has an inspection program targeting worksites where methylene chloride is used, and the New England regional office is currently inspecting worksites that use forklifts.
- Referral Inspection: Inspection resulting from a referral from another government agency, a complaint by a third-party such as a neighbor, or a media story.

² The LWDII rate is calculated by dividing the number of lost workday injuries and illnesses by the total number of work hours, and then multiplying by 200,000.

STEP 1: PREPARING FOR THE INSPECTION

A. Why Prepare?

OSHA typically arrives unannounced to inspect a worksite or when a serious accident or fatality has occurred. As expected, the atmosphere at the worksite might be chaotic and an OSHA inspector can receive conflicting information from different sources. Consequently, an employer and the worksite may not be presented in the best possible light. **Being prepared for an inspection, by anticipating issues that are likely to arise, makes it easier for the employer to be pro-active in addressing OSHA's compliance concerns, which ultimately may persuade OSHA not to issue citations.**



B. The Employer's Inspection Goals

The steps discussed below are designed to help the employer put its best foot forward with OSHA, to manage the inspection process, and to minimize OSHA liability. During any inspection, an employer's goals should include:

- Managing the inspection process to minimize operational disruptions;
- Controlling the flow of information to OSHA so that when the inspection has ended, the employer understands the significance of the evidence OSHA has gathered;
- Presenting the worksite in the best possible light;
- Being pro-active by addressing OSHA's compliance concerns during the inspection so OSHA does not issue citations; and
- Minimizing liability.

C. Questions to Consider in Preparation

By answering the following two questions in advance, the employer will have a better chance of achieving their inspection goals.

1. Should an employer demand an inspection warrant?

An OSHA Compliance Officer does not have the right to enter and inspect a facility unless the employer consents or OSHA obtains a warrant. In the vast

majority of cases, it makes the most sense to consent to an OSHA inspection. OSHA has broad inspection powers and will usually be able to get a warrant if the employer refuses consent. If OSHA must ask a judge or magistrate for a warrant, OSHA may ask for a warrant that allows it to conduct a broader inspection than it would otherwise conduct.

For example, an employer's consent to a complaint inspection may be limited to the items or areas referenced in the complaint. A warrant obtained by OSHA in the same situation is likely to go beyond the complaint items. In addition, OSHA may consequently suspect worksite OSHA violations if forced to obtain a warrant. If the employer believes that OSHA is not authorized to inspect the worksite, the employer should contact an attorney before demanding a warrant.

2. Should an employer designate a principal contact for an OSHA inspection?

An employer should designate one principal contact person to act as OSHA's main contact during every inspection to control the flow of information. A company decision-maker who focuses on the safety of the worksite often serves as the principal contact person. OSHA should be instructed to submit all written document requests to this contact person. In addition, the contact should be responsible for scheduling all requested employee and employer interviews, gathering and producing any requested documents, and coordinating the arrangements for OSHA's worksite tours.



Designating one person as the principal contact with OSHA allows the employer to control the flow of information so that at the end of the inspection, the employer knows exactly what information OSHA has gathered. More importantly, designating a principal contact person *before* an inspection occurs allows the employer to provide training on the OSHA inspection process and the employer's rights during an inspection.

STEP 2: NEGOTIATING GROUND RULES IN THE OPENING CONFERENCE

Upon arriving at a facility, the OSHA Compliance Officer will conduct an opening conference with the employer. The opening conference is the first opportunity for the employer to start managing the inspection process.

OSHA's primary purpose in conducting an inspection is to gather evidence of violations. An inspection is therefore analogous to the start of a lawsuit where each side gathers facts to support their claims or defenses.



As in a litigation setting, OSHA expects the employer to represent the interests of the worksite. And, like litigation, the inspection process may be contentious at various stages, and the opening conference is no exception. Company decision-makers must remember that they are responsible for acting as advocates for the facility. OSHA Compliance Officers understand that the employer must ensure that the inspection is not unduly disruptive and proceeds as efficiently as possible, and that companies will defend their safety programs by acting as advocates.

OSHA is obligated under the Occupational Safety and Health Act (OSH Act) to conduct a "reasonable" inspection. Most Compliance Officers will usually consider the six requests listed below "reasonable." Not all of the following issues will arise during the opening conference; however, the employer should be prepared throughout the inspection process to insist on the procedures discussed below. Perhaps more importantly, the employer should determine how these issues should be handled *before an OSHA inspection ever occurs*.

A. Scope of the Inspection

At the opening conference, the employer should ask the Compliance Officer to:



- 1. Identify the type of inspection to be conducted (e.g., complaint inspection), and**
- 2. State the reason for the inspection and the scope of the inspection.**

The employer should request a clear explanation of the issues to be investigated and the areas of the worksite to be observed. If OSHA is investigating a complaint, the employer has the right to see the complaint, although OSHA will redact the name of the person who initiated the complaint.

In many cases, the scope of the inspection will be limited. For example, a complaint may allege a particular machine is not guarded or employees working with a particular chemical do not have proper personal protective equipment. Similarly, an accident may

implicate only one machine or area of the worksite. In these cases, the employer should clarify to the Compliance Officer that the employer is consenting only to an inspection of the worksite areas cited in the complaint or relevant to the accident.

Consent should be limited because the employer wants to prevent OSHA from expanding the inspection area outside what is necessary. As such, the employer must make it clear from the beginning that it is consenting only to a limited inspection.³

B. Requests for Information

The employer's principal contact should be introduced to OSHA during the opening conference. **The Compliance Officer should communicate all requests for documents, tours of the worksite, and interviews with personnel to the principal contact. The employer should also instruct OSHA to submit document requests in writing, not as a technique for delay, but to allow the employer to carefully consider what is being produced to OSHA. Written document requests also eliminate confusion because there is a record of what OSHA requested. Provided that the employer responds fully to the written requests, OSHA will not be able to argue later that evidence or documents were concealed.**



C. Tours of the Facility

The Compliance Officer should be accompanied at all times by an employer representative during any walk-around inspections. Employee representatives are also permitted to participate in the walk-around inspection. For a unionized workplace, an employee representative is typically a union steward. In non-unionized workplaces, there is normally no employee representative to participate in the walk-around inspection or other parts of the inspection. During the walk-around, the employer must also require the Compliance Officer to follow all safety rules that apply to visitors, including the use of personal protective equipment where required and the completion of any safety orientation that a visitor would normally be required to complete.



D. Interviews with Employees and Company Decision-Makers

Although Compliance Officers may have brief conversations (*i.e.* 3-5 minutes) with employees at their workstations during the walk-around, lengthy interviews are disruptive and may even be dangerous if employees are distracted from their jobs. Rather than allowing extended impromptu interviews, the principal contact should arrange for a scheduled meeting with any employee OSHA requests to interview. This allows the employer to plan for a replacement worker during longer interviews, prevents distractions, and allows production to continue.

³ Even if the employer limits its consent, OSHA is permitted to investigate hazards that are in “plain sight” when Compliance Officers inspect the worksite.



An employer can have a representative present for all interviews of company decision-makers. All supervisors as well as management personnel, such as the owner or president of a company or a human resources representative, are considered company-decision makers. The statements of a company decision-maker are considered admissions that are binding on the employer. If, for example, a company decision-maker tells the OSHA Compliance Officer that he or she knew that a particular chemical was hazardous and required certain personal protective equipment, then the employer has essentially admitted an OSHA violation. During interviews of company decision-makers, the employer is permitted to have a representative present. The representative may be an attorney or another company decision-maker. ***The employer is strongly recommended to exercise this right.***

If the issue arises, the employer should also inform OSHA that, as matter of policy, the employer will not permit its decision-makers to sign statements prepared by the Compliance Officer. Nor should the employer permit company decision-makers to “sign off” on the Compliance Officer’s notes of the interview. Furthermore, the employer should prohibit OSHA from tape-recording or videotaping any interviews conducted with company decision-makers.

The employer should inform employees who are not company decision-makers that it is the employee's choice whether to sign statements or allow recording of employee interviews. The employee’s only obligation during an OSHA interview is to show up at the interview and tell the truth. The employee is not required to sign a statement or allow the interview to be recorded in any way. If an employee does elect to sign a statement, however, the employee is entitled to a copy of it upon written request to OSHA.

E. Industrial Hygiene Sampling

The employer should insist that OSHA provide sufficient advance notice of industrial hygiene sampling so competent personnel such as an industrial hygienist can perform a side-by-side sampling.⁴ Without its own samples, the employer will be hard-pressed later to challenge OSHA’s potentially flawed technical analyses. Where exposure to toxic substances is involved, sampling results are often the basis for significant citations. Such citations may require costly corrective measures to reduce impermissible exposures.



⁴ OSHA may conduct industrial hygiene sampling at worksites that use hazardous chemicals to determine the level of employee exposure.

F. Trade Secret and Business Confidential Information

The employer has the right to insist that the government protect any trade secret or business confidential information disclosed in an investigation. An employer may protect information by affixing a label or statement on a document, photo or other evidence declaring that the material is trade secret or business confidential. Any documents that would usually not be shared with competitors or the general public are typically considered business confidential. Unique formulas or processes may be considered trade secrets. The employer should review all photographs and videotapes taken by OSHA and all documents given to OSHA for trade secret or business confidential information.



By law, OSHA is not permitted to disclose documents or other information that is designated as trade secret or business confidential information in response to a Freedom of Information Act request. By designating documents and photographs appropriately, an employer protects the information from disclosure to competitors. In the event of a worksite accident that results in a lawsuit, the information is also protected from parties to the litigation.

STEP 3: CONDUCTING THE WALK-AROUND TOUR

After the opening conference, the Compliance Officer will likely ask for a tour of the relevant parts of the worksite. OSHA has the right to do this, and **an employer has an absolute right to accompany OSHA inspectors during the walk-around inspection of the worksite.** The employer representative who participates in the walk-around should understand the worksite's safety procedures as well as the operations in the worksite area being inspected. As stated, in a unionized worksite, a union steward typically serves as the employee representative and participates in the walk-around inspection. In a non-unionized workplace there is normally no employee representative to participate in the walk-around inspection or other parts of the inspection.



A. The Walk-Around is an Interview



In addition to understanding the technical aspects of equipment and safety policies, potential employer walk-around representatives 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 walk-around should be treated as an interview because OSHA will hold an employer accountable for anything its representatives may say, even in casual conversation. As a company decision-maker, statements made by the employer representative during the walk-around inspection are binding admissions. Therefore, while representatives participating in the walk-around should answer questions truthfully and accurately, they should refrain from offering additional information or admitting that a condition or practice is a violation.

The walk-around representative must also pay close attention to the concerns OSHA raises and areas of particular interest to OSHA. **The employer representative essentially functions as the company's "eyes and ears," and is vital to anticipating possible violations and providing adequate responses.**



B. Walk-Around Representative Should Be Trained

The employer's walk-around representative should be selected in advance of the inspection. The representative should be trained in the following:

- OSH Act basics
 - Employer has the obligation to comply with standards and the General Duty Clause.
 - Employer has a right to accompany inspectors on site.
 - Employer has a right to take side-by-side photographs and samples.
- Controlling the flow of information
 - Only the principal contact provides requested documents to OSHA.
 - Interviews are scheduled only through the principal contact.
- OSHA's purpose to gather evidence of violations
 - Anything said by representatives during a walk-around may be used as evidence of a violation.
 - Representatives should answer questions truthfully, but avoid volunteering unnecessary information.
 - Only facts, not guesses or opinions, should 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".
 - Representatives must know the scope of the inspection and limit inspectors to these areas as much as possible to minimize "plain view" citations.

STEP 4: GATHERING THE INFORMATION

After the walk-around inspection, the Compliance Officer will typically request other information to assist in gathering evidence of violations. Specifically, the Compliance Officer may take photographs or make videotapes, conduct industrial hygiene sampling, request documents, and interview decision-makers and employees.

A. Photographs, Videotaping And Sampling

OSHA has the right to photograph or videotape the worksite it inspects. We strongly recommend that the employer take its own photographs and videotape of the same areas and at the same time as the compliance officer.

Sometimes, OSHA will offer to provide copies of its photographs and videotaping to the employer to dissuade the employer from taking its own pictures. **This alternative is not recommended because OSHA may not follow through on these promises or can take months to provide copies.**



If OSHA wants to photograph equipment or processes the employer considers a trade secret or business confidential, the employer should insist that OSHA allow the employer to take those photos and provide copies to OSHA. The copies also should be labeled accordingly before they are provided to OSHA. If OSHA will not permit the employer to take the photographs, the employer should send a letter to the Compliance Officer stating that all photographs and videotapes taken at the facility during the inspection are considered trade secret/business confidential information that may not be released to the public in any form.

If issues concerning employee exposure to hazardous chemicals arise, OSHA may collect samples by monitoring airborne substances or collecting wipe samples from worksite surfaces. **Employers are best advised to conduct parallel and simultaneous sampling. Without its own data, an employer has little ability to challenge OSHA's results.**



B. Responding To Requests For Documents

OSHA will request at least some documents in the vast majority of inspections. With some inspections, however, the volume of document requests may be quite large. When reviewing OSHA's written document requests, the principal contact gathering and producing the documents should consider the following:

1. Required Responsive Documents

Under certain OSHA regulations and standards, an employer is required to provide certain documents to OSHA upon request. Failure to disclose can be a violation. These examples include the OSHA-required injury and illness logs, hazard communication programs, and energy-control (lockout/tagout) programs.

2. Reasonable Document Requests

OSHA must limit its document requests to relevant information for a reasonable time frame. A document request for all of the accident reports completed during the worksite's entire history is likely an unreasonable time frame. Similarly, a request for the personnel files of every employee at the worksite is probably unreasonable and may even infringe on the privacy rights of employees. To obtain individual employee medical records, OSHA must present a "Medical Access Order."



3. Privileged, Trade Secret, or Business Confidential Information

Privileged documents such as attorney-client communications may be withheld from OSHA. Trade secret or business confidential information, however, cannot be withheld and should be marked as such before the documents are provided to OSHA.

4. Adequate Responses to Document Requests

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. At the same time, OSHA is permitted to gather documents that give an overall picture of the facility's safety programs. For example, the Compliance Officer may request the employer's safety manual. Although not all of the programs will be directly relevant to the inspection, the employer should consider producing the entire manual or producing the table of contents and



allowing the Compliance Officer to choose which complete programs he or she wants to review.

5. Substantial Document Requests

Particularly for inspections in which a large volume of documents is requested, it is worth taking a few extra steps to organize the documents produced.



a. Cover sheets

The employer should consider including a written cover sheet with each document produced. The advantage of using a cover sheet in responding to a document request is that the document can be described to satisfy OSHA's request.

For example, OSHA may request all safety and health audits without indicating a time limit. The employer's cover sheet could then state that all of the audits for the past year are being produced in response to OSHA's request. If no documents for the past year can be produced, the employer's written document response can state, "No documents responsive to the request have been located."

By using this language and method of responding to OSHA requests, the employer is protected in the event responsive documents are located later in the process. The cover sheet may also be used to designate documents containing trade secret or business confidential information. Finally, like written document requests from OSHA, cover sheets help eliminate disputes about which documents were requested and produced.

b. Unique Page Numbers

The employer should designate unique page numbers to the document produced so the parties can communicate more 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 0015". The ability to use this type of "shorthand" is particularly useful during settlement discussions where letters or position statements regarding defenses are likely to change hands.

6. Employee Interviews

Most of the evidence of violations that OSHA will gather will likely come from interviews with employees. The OSH Act gives OSHA the right to “question privately” any employee. At least one court has held that while employees may choose to be interviewed in private, they may also elect to have an attorney that represents the employer present. *See Reich v. Muth*, 34 F.3d 240 (4th Cir. 1994).

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

An employer gains two advantages from being present during an employee interview. First, the employer gets to hear first-hand the evidence OSHA gathers during an interview, which is helpful in developing defenses to OSHA’s allegations of violations. Second, the employer may be able to clarify misunderstandings that arise if OSHA asks questions an employee does not understand.



For example, the Compliance Officer may ask if the employee has received training under OSHA’s Hazard Communication standard. Although the employee may have received training about Material Safety Data Sheets (*i.e.* where they are kept and how to read them), the employee may not understand the specific terminology the Compliance Officer uses and answer in the negative.

When OSHA is reluctant to allow an employer representative to be present during employee interviews, deciding whether or not to push the issue requires careful consideration and good judgment. As discussed above, the benefits to being present in employee interviews may be significant. If the Compliance Officer strongly objects, the benefits must be weighed against the disruption to the inspection process that is likely to result from forcing the issue.

Even if the employer is not present during employee interviews, the following strategies will help the employer understand the evidence that employees are likely to provide.

7. Preparation

Before an OSHA interview, an attorney or an employer representative should meet with the employee if the employee consents. Several issues should be discussed during the meeting including:

- Review information about the OSHA inspection process, the reason for the inspection, and a description of the employee’s rights such as:
 - **An employee interview with OSHA is voluntary**, however, OSHA can issue a subpoena to the employee if the employee refuses to be interviewed. 
 - OSHA may want to videotape or audiotape the interview, but **an employee can refuse to allow any taping.** 
 - OSHA may ask the employee to sign some sort of statement, but **an employee can refuse to sign any statements.** 
- Review questions OSHA is likely to ask. To prevent any misunderstandings about work practices or training, the employer should review documents and training records with the employee so the employee is aware of his or her training and relevant work practices.
- **Assure the employee that nothing the employee says to OSHA will result in discipline or any adverse change in job conditions.** 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 any complaint” or “because of the exercise of...any right afforded by the [OSH] Act,” including discussing working conditions with the Compliance Officer. 

8. Debriefing

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.

- a. Interviews With Company Decision-Makers

The employer has the right to have a representative present during any OSHA interviews with company decision-makers. 

Statements made by company decision-makers are generally binding on the company. They are legally considered admissions against the employer's interest. As such, it is worth investing the time to prepare the company decision-makers for their interviews.

Company decision-makers should be instructed to answer questions truthfully, but carefully. The employer should also urge them to answer only the question asked without volunteering additional information. This practice will help the individuals being interviewed to avoid implying or admitting a certain condition or practice violates an OSHA standard.

b. Demonstrations of Work or Processes

The employer is not required to stage demonstrations of work or processes for OSHA. OSHA is entitled to observe work *as it is being performed*, but it 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 when it is necessary to clarify misunderstandings or simply to impress Compliance Officers. Be mindful, however, that Murphy's Law is operative, and that even the best-planned demonstrations sometimes go astray at the wrong time.

c. OSHA Demands to Stop Work

Some Compliance Officers will tell an employer to stop performing a certain operation or make a correction because a condition is dangerous or violates OSHA regulations. **A Compliance Officer has no authority to insist on immediate changes or to demand work to stop.** Under the OSH Act, only a federal district court judge has the power to stop work. Even then, a judge can only demand work stop when OSHA has shown that an imminent danger exists.



Nonetheless, if a Compliance Officer points out an obvious danger or hazard, or a condition that the employer recognizes as a violation of law or its own policies, the condition should be corrected immediately.

STEP 5: COMMUNICATING WITH OSHA

Communicating with OSHA is included in this document as one of the last steps in the inspection process; however, this step should actually be taken throughout the inspection process. **One of the employer's most important goals is to gauge the Compliance Officer's concerns by:**

1. **Observing the Compliance Officer's focus, and**
2. **Asking the Compliance Officer directly about possible violations.**



By understanding OSHA's concerns early in the inspection process, the employer can provide information that refutes OSHA's factual findings or interpretation of the OSHA standard or regulation. This information may ultimately convince OSHA not to issue citations, or at least to minimize penalties.

For example, the Compliance Officer may say that interviews with employees indicate that they are not well trained on the emergency evacuation plan. Training records and information about evacuation drills the employer has conducted can offset this concern. Similarly, the Compliance Officer may say an injury occurred because an employee apparently did not understand or follow a work rule prohibiting employees from lifting machine guards while a machine is running. The employer can counter this finding by showing that it has a work rule prohibiting employees from lifting guards, provided training on the rule to the employee, and disciplined employees in the past for violating work rules.⁵

A. Timing of Presentation

The employer's goal is to stop a citation from ever being issued because it may be more difficult to convince OSHA to withdraw a citation once issued. The timing of the presentation of information disputing a potential violation may vary. If the inspection lasts only one day, the employer may not have time to gather evidence to refute a violation. If, however, the inspection lasts more than one day, the employer should communicate with the Compliance Officer throughout the inspection process so pertinent evidence may be presented near the end of the inspection before citations are issued.

⁵ This defense is known as the "unpreventable employee misconduct" defense. To prove the defense, the employer must show: (1) the employer had written safety rules that implement the substance of the applicable OSHA standard; (2) the rules were communicated to employees; (3) the employer employs methods to ascertain if employees are obeying the rules, such as inspections or audits; and (4) when violations of safety rules are discovered, employees are disciplined, typically through some type of progressive discipline policy that begins with a verbal warning for a single violation and ends with termination for certain types or numbers of safety rule violations. Employers typically have difficulty in proving the fourth element because supervisors may be reluctant to impose progressive discipline and written records of discipline may not be maintained.

B. Information Presented

The information presented by the employer to the Compliance Officer may include additional documents that OSHA did not request during the inspection such as work rules or training records, or OSHA guidance on how a standard should be interpreted. OSHA publishes several types of guidance documents:

- Interpretation Letters. OSHA responds to letters from individual employers asking for interpretations of standards.
- Compliance Directives. Compliance Directives provide instructions to Compliance Officers on how to interpret a standard and how to determine whether an employer has violated it.
- Preambles. Each time OSHA issues a standard or regulation, it develops a detailed rulemaking record known as the Preamble. The Preamble explains OSHA’s interpretation of the standard and includes information about what the language in the standard means.⁶
- Small Entity Compliance Guides and Fact Sheets. OSHA publishes guidance documents designed to explain the requirements of OSHA standards to small businesses, as well as “fact sheets” on individual standards.

An employer should visit <http://www.osha.gov> for more information.

OSHA guidance documents can provide evidence that the Compliance Officer is incorrectly interpreting a standard. For example, the Compliance Officer may take the position that the administration of oxygen to an employee results in an injury that must be recorded on the OSHA 300 log. The Compliance Directive for the record keeping regulations states that oxygen administered as a purely precautionary measure does not result in a recordable incident.



Once the Compliance Officer’s concerns are understood by the employer, the employer should look at the information on OSHA’s website (<http://www.osha.gov>) to see whether the compliance guidance addresses the issues in dispute.

⁶ There are no Preambles for standards issued prior to 1974. The OSH Act gave OSHA a three-year window to adopt industry standards as OSHA standards, and as a result, there is no rulemaking record for these early standards.

STEP 6. AVOIDING CITATIONS DURING POST INSPECTION PROCEDURES

A. Closing Conference

After the inspection is finished, the Compliance Officer will hold a closing conference that includes an employer representative and employee representative, if any. The purpose of the closing conference is to inform the parties of possible OSHA violations.

The employer's role in the closing conference can vary. **If the employer is ready to present defenses, then the closing conference can be used for that purpose.** Alternatively, the employer may choose to simply listen to the Compliance Officer's recitation of the potential violations. If the employer chooses this role, the employer should also ask questions about the characterizations of the alleged violations and the likely fines.



B. Citations

The penalties with OSHA citations depend upon the characterization of the violations.  A characterizes violations as follows:

OSHA Violation	Description of Violation	Maximum Penalty
De Minimis	A technical violation of an OSHA standard that poses no direct threat to the health or safety of employees. For example, ladder rungs thirteen inches apart rather than the twelve inches required by the standard would generally be characterized as a De Minimis violation.	De Minimis violations carry no penalty.
Other-Than-Serious	A violation that is not likely to cause death or serious physical harm	\$5,000
Serious	A violation that could cause death or serious physical harm.	\$7,000



OSHA Violation	Description of Violation	Maximum Penalty
Willful	<p>A violation that was either “intentional” or committed with “plain indifference” to the requirements of the standard.</p> <p>A violation is generally intentional when the employer knew the requirements of the standard and was aware of the violation, but did nothing to correct the condition.</p> <p>“Plain indifference” is generally shown when the employer did not know the requirements of the standard, but the employer knew about the hazardous condition and made no effort to correct it.</p>	\$70,000
Repeated	<p>A violation that is repeated when the employer previously committed a violation of the same standard or a similar standard. The previous violation is generally called the “predicate.”</p> <p>OSHA must prove the employer either (a) did not contest the predicate violation and agreed to accept the predicate violation in a settlement agreement, or (b) contested the predicate violation and was found to be in violation by an administrative law judge.</p>	\$70,000
Criminal	<p>A violation that is willful and causes the death of an employee.⁷</p>	<p>A misdemeanor conviction that carries a maximum penalty of \$500,000 for each count of the indictment and up to six months of imprisonment.</p> <p>Prison time is generally not sought where the employer is a corporation, but sole proprietors or owners of smaller companies have been criminally fined or imprisoned when they provide day-to-day direction to workers.</p> <p>If an employer commits a second criminal violation, a maximum of a one-year imprisonment may result.</p>

⁷ The employer is strongly advised to contact an attorney in the event of an employee or contractor death. In addition to substantial OSHA civil liability, a fatality is likely to result in a civil lawsuit and possibly a criminal investigation.

C. Informal Conference

After the citations are issued, OSHA will offer to hold an informal conference with the parties. **The purpose of the informal conference is to reach a settlement agreement.** In a settlement agreement, OSHA may agree to withdraw some or all of the citations, change the characterizations of the violations, or reduce the penalty.



The informal conference typically includes an employer representative and an employee representative, if any, the Compliance Officer, and the 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. The employer should also provide any additional information about the worksite such as training records or safety and health policies. Even if the employer has not involved an attorney in the inspection process, it often makes sense to have representation during an informal conference, particularly if the citations that have been issued carry steep penalties or require substantial changes to the worksite.

D. Notice of Contest

If no settlement agreement is reached at the informal conference, the employer may accept the citations as written, remedy the hazards alleged in the citations, and pay the penalty.

Alternatively, the employer may file a notice of contest. Once a notice of contest is filed, the litigation process begins. OSHA will transfer its file to an attorney in the Office of the Solicitor of Labor in the Department of Labor, which prosecutes all OSHA violations.

A notice of contest must be filed within fifteen (15) working days of the date the citations are received. If this deadline is missed, the employer loses all rights to appeal any OSHA violations. No extensions of time are possible.



CONCLUSION

By preparing in advance and carefully considering inspection protocols, the employer can assert some measure of control over the OSHA inspection process. In addition, an employer may be able to significantly reduce OSHA and other resultant liabilities by using the strategies discussed in this document. Finally, this document serves only to provide insightful information about effectively handling an OSHA inspection so as to minimize liability. Employers are advised to contact an attorney to obtain legal advice or answers to any legal questions they may have regarding an OSHA inspection.