Preparing for and Managing an OSHA Inspection

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– Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA

– Responds to and manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and chemical releases

– Handles all aspects of OSHA litigation, including criminal matters, appeals of citations, and negotiation of settlements to minimize effect of enforcement on civil actions and future enforcement

– Conducts safety training & compliance counseling

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Agenda

- OSHA’s, Employees’ & Employers’ OSHA Inspection Rights
- Preparing in advance for an Inspection
- Stages of an OSHA Inspection
- Managing an On-Going Inspections
- Post-Inspection/Citation Considerations
Goals of the Inspection

- Control Flow of Information
- Minimize Business Disruption
- Cast Workplace in Best Light
- Identify Potential Problems Early
The OSHA Inspection

Sec. 8(a) of the OSH Act:

“OSHA may inspect at reasonable times any workplace during regular working hours and at other reasonable times within such reasonable limits and in a reasonable manner.”
OSHA’s Inspection Rights

- Right to inspect workplaces (with probable cause/violations in plain view)
- No Advance Notice
- Right to inspect records
- Right to collect physical evidence
- Right to conduct interviews
Employees’ Inspection Rights

• Right to file a Complaint
• Right not to be discriminated or retaliated against
• Participation Rights:
  □ Opening Conference
  □ Walkaround
  □ Private interviews
  □ Closing Conferences
  □ Informal Settlement Conferences
  □ Access to inspection records
Employer’s Inspection Rights

• “Reasonable Inspection” at “Reasonable Times”
• Demand Inspection Warrants
• Hold Opening Conference
• Access a copy of Complaints
• Protect Trade Secrets/CBI
• Accompany the CSHOs during walkarounds
• Participate in Management Interviews
• A Closing Conference
• Challenge Citations
Pre-Inspection Checklist

- Review applicable special emphasis programs and compliance directives
- Review OSHA’s Field Operations Manual
- Audit written programs
- Implement comprehensive Safety Programs
- Think beyond a single facility
- Implement applicable safety programs:
  
  **Examples:** Confined space entry; Housekeeping; Preventive Maintenance, Emergency action plans; and Lockout/Tagout, Process Safety Management
Pre-Inspection Checklist

- Designate Inspection Team
  - Spokesperson
  - Escort
  - Photographer
  - Sampler
  - Walkaround Representative
  - Union/Contractor Liaison
  - Document Coordinator
  - Interview Representative

- Train Inspection Team on:
  - Who to contact
  - Inspection rights of OSHA, employers, and employees
  - OSHA Standards
  - Controlling information flow
Pre-Inspection Checklist

- Designate and audit walkaround routes
- Provide inspection tools:
  - Camera/Video Camera
  - Contact List
  - Document Control Log
  - Sampling Tools
  - Copy of OSHA’s FOM
  - Document Labels
  - Choice of Rep. Forms
  - Cover Sheets
- Determine warrant/consent philosophy
Warrant or Consent?

4th Am.: “The right of the people to be secure in their houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause....”

Benefits of Warrant:  
- Restraint on OSHA  
- Passage of time

Risks of Warrant:  
- Potential retaliation  
- Lose control of inspection

Benefits of Consent:  
- Appear cooperative  
- Easier to manage  
- Minimize business disruption

Risks of Consent:  
- Scope of inspection may expand

Practitioner’s Tip:  
Waive the warrant requirement and consent to an inspection, but only after negotiating an acceptable scope.
Stages of an OSHA Inspection

1. Opening Conference
2. Walkaround Inspection
3. Employee Interviews
4. Closing Conference
5. Citations Issued/Contested
Opening Conference

• CSHO arrives and displays credentials

• Opening Conference begins:
  – Employee reps. may participate
  – CSHO explain purpose of inspection
  – CSHO discuss scope and duration:
    • Wall-to-Wall
    • Complaint / Referral
    • NEP / LEP
    • Accident
  – Resolve warrant issue
  – CSHO requests documents/information
Opening Conference

Practitioner’s Tips:
• Insist on an Opening Conference
• Select location & participants in advance
• Ask for purpose/scope of inspection
• Introduce Inspection Team
• Explain Document Production Protocol
• Establish Interview Protocol
• Arrange for daily close-out meetings
• Arrange to screen photos/video for Trade Secrets/CBI
Document Production

• Insist on **written** requests for documents:
  – Except: OSHA Recordkeeping Forms

• Voluntary vs. Subpoena

• Do not create new documents

• Do not leave documents in plain sight

• Do not volunteer information
  – Except: Without more information, OSHA will misunderstand a fact to your detriment

• Review for responsiveness, privilege or trade secret/CBI
Document Production

• Keep a copy of all documents produced
• Maintain a Document Control Log

**OSHA Inspection Document Control Log**

<table>
<thead>
<tr>
<th>REQ #</th>
<th>DATE REC'D</th>
<th>DESCRIPTION OF REQUEST</th>
<th>EMPLOYEE ASSIGNED</th>
<th>DATE OF ACTION</th>
<th>DOCUMENTS PRODUCED</th>
<th>TRADE SECRET OR CBI</th>
<th>BATES RANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-2</td>
<td>3/22/11</td>
<td>Completed Bin Entry Permits for the last year</td>
<td>J. Smith</td>
<td>3/24/11</td>
<td>Copies of completed PRCS entry permits for entries into grain bins dated 1/1/10 - present</td>
<td>X</td>
<td>OSHA000011 - OSHA00036</td>
</tr>
<tr>
<td>1-3</td>
<td>3/22/11</td>
<td>Bin Entry Procedure</td>
<td>J. Smith</td>
<td>3/24/11</td>
<td>Copy of Permit Required Confined Space Procedure</td>
<td>X</td>
<td>OSHA000037 - OSHA00054</td>
</tr>
</tbody>
</table>
Walkaround Inspection

- Scope depends on nature/purpose of inspection
- Always accompany the CSHO
- Employee representative permitted to accompany
- Take side-by-side images
- Act professionally but protect your rights
- Fix hazards identified by CSHO but do not admit violations
- Require CSHO to follow safety rules
Walkaround Inspection

Practitioner’s Tips:

• Escort OSHA at all times
  – Gather information about focus of inspection
  – Control flow of information
  – Ensure safety of CSHO

• Ask for notice of sampling

• Take detailed notes

• Hold daily close out meetings
  – Ask about concerns
  – Ask about interviews and tasks for next visit
OSHA Inspection Interviews

- Arrange through interview procedure
- Pre-select office or conference room
- Stop and Talk vs. Interview
  - 5 Minute Rule
  - OSHA must be reasonable
- Voluntary vs. Subpoena
Hourly Employee Interviews

• OSHA demands privacy for hourly employee
  – Per FOM and experience
  – Union Representation
  – Right to private interview belongs to employee
  – Consider a “Choice of Representative” Form

• Do not coerce or intimidate employees
• Do not discriminate against employees
Management Interviews

• Supervisor’s knowledge imputed to employer
• No impromptu management interviews
• Participate in all management interviews
  – Right belongs to employer, not the witness
• Prepare all management witnesses
Prepare All Employees for Interviews

- Explain Witness’ Rights
  - Voluntary interview
  - Right to reasonable schedule
  - Right to be represented
  - Right to not be recorded
  - Right to not sign/write/draw
  - Right to examine documents
  - Right to take a break any time

- Give Interview Tips
  - Always tell the truth
  - Listen carefully
  - Answer only the question asked
  - Short, concise answers
  - Stick to the facts
  - Do not guess or speculate
  - No silence is awkward
  - Don’t let CSHO answer for you

- Review Substantive Issues
Closing Conference

• Held at close of inspection
  – May occur weeks after on-site inspection
• CSHO explains post-citation rights
• CSHO communicates findings:
  – Standards allegedly violated
  – Bases for alleged violations
  – Possible abatement and abatement dates
  – Usually will not share classification or penalty
Closing Conference

• Correct obvious errors/misimpressions
• Identify alleged violations you already corrected
• Request time to offer additional information
• Offer no commitments about abatement
• Ask about citation classifications and penalties
• Take detailed notes
Post-Citation

In response to a citation, employers may:

• Pay the fine and accept the citations

• Request a variance

• Resolve citations at Informal Settlement Conference

• File a Notice of Contest, and then:
  – Negotiate Formal Settlement with OSHA’s attorney (Solicitor of Labor)
  – Proceed to hearing
Post-Citation Considerations

• Are citations accurate?
• Potential exposure to “Repeat” violations?
• Proposed penalties appropriate?
• Abatement requirement clear and feasible?
• Other locations able/willing to conform?
• How quickly can you prepare for follow-up?
• Does proposed citation qualify you for SVEP?
• Do citations relate to a potential civil suit?
QUESTIONS?