



## ***Surviving an OSHA Audit***

Under federal law, states are permitted to implement occupational safety and health programs if they are at least as effective as those required by the Federal Occupational Safety and Health Administration (OSHA). References to "OSHA" in this document apply to both the Fed/OSHA and Cal/OSHA inspection/audit processes.

### **INTRODUCTION**

OSHA worksite safety and health efforts typically include two distinct programs: The **Compliance Inspection Program** and the **Onsite Consultation Program**.

The **Compliance Inspection Program** is a **mandatory** worksite inspection program. Upon arrival at your worksite, the OSHA Compliance Officer (CO) will conduct a review of safety program documentation, talk with employer and employee representatives and inspect the worksite for violations. Violations noted during this process may result in citations and/or fines.

The **Onsite Consultation Program** is a **voluntary audit** program. The OSHA Consultation Officer will conduct an inspection similar to a compliance audit. The Consultation Unit of OSHA works independently of the Compliance Unit. They do not share inspection results with the Compliance Unit unless the employer fails to correct identified violations. The voluntary audit results in a written report to company management but no citations or fines are assessed. Employers that participate in the voluntary inspection program are required to correct noted violations. The Consultation Officer will follow-up to ensure that violations have been corrected. Violations that are not corrected in a reasonable timeframe may be referred to the Compliance Unit. Participation in the voluntary consultation program may exempt the employer from certain targeted compliance audit programs.

While the consultation inspection will not typically result in citations and/or fines, the Consultation Officer does have the authority to stop all work activity and remove employees from a recognized eminent hazard. Should this occur, work activities will not be allowed to resume until the hazard has been corrected.

Nothing can fully prepare a company for an OSHA compliance inspection, but if you do a little preplanning and organizing you could make the inspection go smoother and faster. This document is intended to help employers understand OSHA compliance inspection procedures.

### **BEFORE OSHA ARRIVES**

Current regulations do not allow OSHA Compliance Officers (CO) to inform employers of an impending OSHA inspection. However, some events will almost guarantee an OSHA inspection. These events include:

- A fatality on the job site
- A serious accident that results in hospitalization of three or more employees, or
- An injury that results in dismemberment or disfigurement.

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You may know that employers are required to notify OSHA within 8 hours when the injuries described above occur. Most law enforcement agencies or paramedics will automatically contact OSHA if they are summoned to a place of employment to treat a serious work related injury.

Employers should consider establishing a site-specific action plan to be followed in the event of an OSHA inspection. The employer may consider requesting assistance from their workers' compensation insurance carrier in establishing their plan. Site-specific plans will review the items discussed in this presentation and policies and procedures to follow during an OSHA inspection. They will also address conditions unique to the site. Topics to include in establishing your company's site-specific plan include:

- Company policy regarding OSHA inspections
- Conduct during the Opening Conference
- Providing requested information
- Job site inspection
- Conduct during the Closing Conference
- Responding to the written report after the inspection

### **What is your company's policy concerning OSHA inspections?**

It is important that all of your employees know how to respond should an OSHA Compliance Officer (CO) arrive at your work site. Some companies require that the CO be referred to a company executive or site manager. While the Compliance Officer may arrive at the work site unannounced, they are not empowered to conduct an inspection/audit without first meeting with designated company representatives. The CO will wait a reasonable amount of time for the company representative to arrive. Employees may be instructed to ask the CO to wait until the appropriate company representative arrives at the site. Further, they may be instructed not to speak with the CO on issues related to safety and health matters until the CO has completed the opening conference.

Your company's preparation for an unannounced OSHA inspection may include:

- A written policy regarding OSHA inspections
- Designation of a company representative(s) and alternate(s)
- Training to ensure that the company's policies are followed, that the Compliance Officer's credentials are authenticated and that he/she is treated with respect.
- A procedure to refer the CO to a pre-designated company representative
- Instructions to provide the CO with a comfortable place to wait until the designated company representative arrives
- Admonitions not to discuss safety related matters until the company representative has arrived and an opening conference has taken place
- Procedures to follow during a work site inspection
- Your company's position regarding the taking of photographs or video during the inspection
- Procedures to have your policy reviewed by legal counsel prior to implementing or training employees
- Employee training requirements.

## **Opening Conference**

Upon arrival at the site, the OSHA Compliance Officer is required to conduct an Opening Conference. This is usually done with the designated company representative on site. Ensure the Compliance Officer (CO) has all appropriate identification documents prior to beginning this conference. Although an unscheduled OSHA inspection is likely to result in a compliance audit, you may want to ensure that the OSHA representative is a Compliance Officer and not a Consultation Officer. This will help to clarify roles and responsibilities resulting from the audit.

Compliance Officers have the right to inspect anything applicable to safety, issue citations, mandate abatement and issue fines. Consultation Officers perform as safety consultants. They will review your written safety program, survey the work environment and generate a letter/report. This process is usually informal and no citations or fines will normally be issued. OSHA violations observed or identified by the consultation officer must be abated.

As an employer, you have the right to deny access to the Compliance Officer and request an inspection warrant. Requesting an inspection warrant may put your company in an adversarial position with the CO. Your company's senior executives and/or legal representative should be consulted before denying access to the OSHA Officer.

All key company representatives should be present at the opening conference. It may be possible to postpone the opening conference to accommodate the need to assemble key company representatives. If a request to postpone is made, make sure that the CO is informed that the request is based on the need to assemble participants and that your intent is not to require an inspection warrant.

During the opening conference, introductions will take place, and the CO will outline OSHA's procedures during an inspection. Although the CO is not required to divulge the reason for the inspection, you may ask questions or make suggestions to determine and limit the scope of the inspection. Remember to be courteous, but firm.

## **Providing Requested Information**

OSHA has developed a Policy & Procedures (P&P) document that outlines what the CO is to do during inspections. Following the opening conference and prior to a physical inspection of your work site, the Compliance Officer is required to review certain pre-determined safety program documents. The intent is to confirm the level of safety commitment at your company based on documented evidence. This is a critical point in the process as failure to adequately document a required safety program element is considered to be non-compliance.

OSHA's Policy and Procedure Document states the following items are to be reviewed by the CO as part of the compliance inspection process:

- Injury & Illness Prevention Program (IIPP)/Safety Program Documentation
- OSHA Posters
- Workers' compensation insurer and experience modification rate (EMR)
- OSHA 300 Form

It is in your company's best interest to ensure that documentation is up-to-date at each job location and that all documents are readily available for inspection.

## **Job Site Inspection**

Following a review of safety program documentation, the Compliance Officer will conduct an inspection of the work site. Company representatives are permitted to accompany the CO during the inspection process. If the CO observes a violation, you are permitted to ask questions or otherwise discuss the CO's observations. You are also allowed to address and possibly abate the condition observed. This will help the inspection proceed more quickly and may reduce the number of citations issued. If you were able to limit the scope of the inspection during the opening conference, try to focus the inspection to the areas or pieces of equipment agreed upon. This will help the inspection proceed more quickly.

Remember not to be intimidated by the Compliance Officer. If you do not know the answer to a question, or you do not want to answer a question, simply indicate this to the CO. It is always a good idea to avoid speculation or assumptions.

During the inspection the Compliance Officer may ask to take photographs or video. You may have addressed your company's position on this in pre-planning for an OSHA inspection. If so, then your company representatives should stand by and support the company's policy.

You are not required to allow the taking of photographs or video. Should you allow the Compliance Officer to take photographs or video, you may want to take photographs or video for your records as well. If you are unable to take photographs or video, ask the CO not to take photographs or video. This is a good reason to have an inexpensive (throwaway) camera in your office or vehicle.

If your policy allows for the taking of photographs and video and you are asked for permission, you may want to ascertain the purpose of the request prior to agreeing to the request. All information, including photographs and video gathered by the CO is confidential. If the request is not directly related to your operation or an observed violation, you may refuse the request. If the request is related to an observed violation, you may be able to abate the condition immediately, eliminating the need for photographs or video. This may also help you to avoid a citation for violation of an observed standard.

During the inspection, the Compliance Officer may ask to interview employee(s) or worker(s). The CO has the authority to perform these interviews. Employee(s)/worker(s) have the right to speak with CO alone, not at all, or have someone (employee representative) present. They are entitled to speak with the CO outside of the presence of the company representative. Interview witnesses may include a foreman, supervisor, union representative, or attorney. Prior to an interview you may want to ensure that the employee(s)/worker(s) understand their rights before the interview is allowed to begin. During the interview, the CO will ask the employee/worker questions related to the company's safety program. The CO is trying to determine if the company's safety program is effective.

As part of the audit process the CO may ask for additional documentation of safety program elements not previously reviewed during the opening conference phase. Requests for additional documentation are usually the result of information gained during the inspection process. Requests for additional documentation should be in writing and provide a reasonable time for you to comply. While not required, you may want to have a request form available that the CO is required to complete before obtaining additional documentation.

During the inspection of your work site, the Compliance Officer may observe an eminent hazard. Should this occur, the CO has the authority to stop all work activity related to the observed hazard and remove all potentially affected employees. The operation will be tagged and cannot resume until you have demonstrated that the observed eminent hazard has been abated. Observation of an eminent hazard by the CO will result in the issuance of a citation.

### **Conduct During The Closing Conference**

The Closing Conference is usually conducted on the day the inspection is completed. In some cases the closing conference may be delayed at the request of either party. The Compliance Officer is permitted to return on another day to conduct the Closing Conference.

During the Closing Conference, the CO will discuss findings or indicate citations that will be issued as a result of the inspection. You are permitted to ask questions in an effort to determine the exact safety regulation violated. You may also ask under what classification the citation will be categorized. Your company representative should not agree nor admit to any issues presented or citation(s) issued at the closing conference.

The Compliance Officer will not discuss specific fines associated with violations. At the end of the closing conference you will know the nature of the violations only.

### **AFTER THE INSPECTION**

After the inspection, OSHA has up to 6 months to issue citations resulting from an inspection. Citations will be in writing and are usually sent by mail to the affected work site. Citations will include abatement date(s) if the violation(s) were not abated during the inspection. OSHA currently has five different classifications of citations. The classifications of citations are as follows:

- Regulatory: Violation of record keeping, posting, reporting or permitting are examples of regulatory citations
- General: Violation of a safety order, but the violation is not determined to be serious in nature
- Serious: The violation could result in death or serious physical harm to employees or workers. One of the requirements for a serious violation is that the employer had "actual or constructive knowledge" of the hazard/violation
- Repeat: The employer is cited for the same violation that they were previously found to have violated. This repeat violation must occur within 3 years of the first violation, and within the same OSHA region
- Willful: The employer committed an intentional violation and the employer is conscious of this fact.

### **Penalties**

Penalties are assigned based on the severity, or seriousness of the violation cited. They may range from several hundreds of dollars for minor infractions to several tens of thousands of dollars for the most serious violation. The size of a penalty may be adjusted to reflect factors not directly related to the infraction such as the size of the company, good faith gestures during the inspection and company safety and health history.

In some instances, penalties may be on a "per day" basis. In these cases, the penalty applies for each day in which the violation is permitted to go unabated.

### **Special Order**

You may receive a "special order" from OSHA instead of a citation. A special order is a written order to correct an unsafe condition, device, or place of employment, which poses a threat to the health, and safety of employee(s) that cannot be made safe under an existing safety regulation. Civil penalties may not accompany the order, but you are required to comply with the order and post the order near the hazardous condition.

### **APPEAL PROCESS**

As an employer, you have the right to appeal or comply with and pay any citation, penalty or special order issued by OSHA. If you elect to appeal, you have 15 working days from the date you received the citation(s) to file your appeal. There are several conditions under which you may appeal a citation:

- The violation did not exist
- The violation classification is incorrect
- The penalty is excessive, or
- For other reasons you or your legal counsel feel appropriate.

You may wish to retain the services of an attorney specializing in OSHA law to help make a decision to appeal a citation and to defend the company during the Appeal Hearings.

### **Serious & Willful**

It should be noted that in some jurisdictions OSHA violations may be admissible in workers' compensation proceedings. If an employee suffers a work related injury, illness or death, the employee or family may be able to file a "serious & willful" charge against the company. OSHA violations associated with an injury may also be used as evidence in workers' compensation hearings. Compensation to the injured employee or family because of such action is usually not insurable.

### **Pre-Hearing**

Once you begin the appeals process, there are documentation and posting requirements your company must complete. OSHA will provide these documents, It is important that you complete and return documents in the allotted time or your appeal may be dismissed. Before the hearing, you may request a Pre-Hearing, otherwise known as an Informal Conference. This hearing can be conducted in person or by telephone. The purpose of the pre-hearing is to resolve the citations either partially or totally before the hearing. A pre-hearing judge who will not preside at any future hearings conducts this pre-hearing.

## **Hearing**

If all appeal-related items cannot be resolved during the pre-hearing then a formal hearing will be scheduled. You will receive a Notice of Appeal indicating the time, date and location of the hearing. The hearing will be performed before an administrative law judge of the Appeals Board or another authorized hearing officer. Do not be surprised if the hearing date scheduled is 6 months to a year or more away. With the increasing number of appeals filed, hearing date schedules have been growing.

The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence will be admitted if it is the sort of evidence on which responsible persons are accustomed to relying on in the conduct of serious affairs. The Division of Occupational Safety and Health (DOSH) has the burden of proof during the hearing. DOSH must prove all elements of the charges alleged in the citation. DOSH must show that a safety regulation was violated and that the classification of the violation and computation of the penalty is supported by the evidence.

Preparation is the key to successfully appealing OSHA citations. All evidence, statements and defenses should be gathered and documented as soon as feasible following the decision to appeal. Many things may change before the hearing date arrives. In many cases documentation is misplaced; employees/witnesses relocate; and/or employees/witnesses forget what actually occurred on the date of the inspection. Your position is strengthened if you enter the hearing with documentation, statements and other evidence to support your position on the appeal. In your appeal you will be well-served if you address the specific issues cited as a result of the citation. It is also important that the company and its representatives understand the technical content of violation(s) cited, DOSH's position and the evidence they are likely to present. The services of an experienced attorney in the appeals process can be helpful to your position.

It may be helpful to know that the hearing will be conducted in the English language. An interpreter can be requested if necessary and the Appeals Board is obligated to provide one. The request for an interpreter must be made no later than 10 days before the hearing. If for some reason the company and/or its representatives fail to appear at a hearing, the company has 10 days to file a written motion that contains sufficient facts to establish a reasonable basis for the failure to appear at the hearing. The Appeals Board will consider the motion and determine if the proceeding will be reinstated. To protect your rights, be sure to confirm these procedures and determine if there are any local requirements that must be followed.

## **Decision Following An Appeal**

The administrative law judge will prepare and submit to the Appeals Board a decision or proposed order after hearing evidence from both sides. A copy of the proposed order or decision will be made part of the public record. The Appeals Board may confirm, adopt, modify or set aside the proposed order or decision of the administrative law judge and may, with or without further proceedings and with or without notice, enter its order, finding, or decision based upon the record in the case. The Appeals Board is required to take action on the proposed order or decision within 30 days after the case is submitted by the administrative law judge. You will be notified by mail of the results of the decision or order.

If you do not agree with the decision or proposed order reached by the Appeals Board, you have 30 days to file a petition for reconsideration with the Board. The reconsideration is required to be based on one of the following five reasons:

- The Appeals Board acted without or in excess of its powers
- The order or decision was procured by fraud
- The evidence received by the Appeals Board does not justify the findings of fact
- The petitioner has discovered new material evidence which the petitioner could not, with reasonable diligence, have discovered and produced at the hearing,
- The findings of fact do not support the order or decision.

If you have questions about issues discussed in this document, or would like assistance in developing policies and procedures on this subject, please call your local Loss Control Consultant or contact our Loss Control Division at:

Telephone Hotline: 1.800.588.5200

Email: [losscontrol@eig.com](mailto:losscontrol@eig.com)

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