

When Cal/OSHA Comes Knocking at the Door: How to Manage Cal/OSHA Inspections

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Agenda

- Prepare and Plan for Cal/OSHA Inspections
- *Case Study* - Know Employer Rights During Cal/OSHA Inspection
- Inspection and Inspection Tips



Plan and Prepare

DOSH Inspection Priorities

First Priority

- Complaint about, or observance by anyone of, an *imminent hazard*
- Fatal injury or illness
- Accident involving significant print or electronic media attention
- Complaint from a state or local prosecutor

NOTE: Fatalities and complaints alleging an imminent hazard, and complaints alleging a serious violation from state or local prosecutors must be investigated within 24 hours of receipt



DOSH Inspection Priorities

Second Priority

- Accident involving a serious injury
- Formal complaints, non-formal serious complaints (where an inspection is planned) and serious referrals

NOTE: Non-formal serious complaints may be investigated by a letter in lieu of an on-site inspection

Third Priority

- Programmed inspection

Impact of Cal/OSHA Inspections

- Broad impact of inspections beyond Cal/OSHA and employee safety and health:
 - Workers' compensation
 - ADA/FEHA
 - Union issues
 - Civil liability (e.g., third party tort litigation)
 - Criminal liability
- Increasing coordination among agencies and with organized labor
 - LEFT (Labor Enforcement Task Force) inspections – Cal/OSHA, DLSE and EDD



Caution: Employer/Supervisor Criminal Liability

- Fines and imprisonment (up to 6 months/1 year) for any **officer or manager/supervisor having management or control** of workplace who does *any* of the following:
 - Knowingly or negligently violates any Cal/OSHA standard or order, which is deemed to be a serious violation
 - Repeatedly violates any Cal/OSHA standard or order, creating a real and apparent hazard to employees
 - Knowingly fails to report to Cal/OSHA a fatality as required under the Cal/OSHA reporting standard
 - Fails to comply, after notification and expiration of any abatement period, with any such Cal/OSHA standard or order, creating a real and apparent hazard to employees
- Fines and imprisonment (up to 3 years) for **any employee having management or control**, or a workplace who **"willfully violates"** any Cal/OSHA standard or order, and that violation caused death to any employee, or caused permanent or prolonged impairment of the body of any employee
- Fines and imprisonment (up to 3 years) for any **manager** having "actual knowledge" of a **"serious concealed danger"** that creates a substantial probability of death, great bodily harm, or serious exposure and they do not notify DOSH and affected employees of the serious concealed danger



Elements of a Cal/OSHA Inspection

- The Knock at the Door
- The Opening Conference
- The Walk-Around
- The Closing Conference



How to Confidently Manage a Cal/OSHA Inspection

Know what employers need to know!

Where authorized to inspect?

When authorized to inspect?

Purpose of an inspection?

Employers' rights?

Case Study

Employer Rights During Cal/OSHA Inspection

Accident

- September 18, 2023: Employee accident involving a forklift occurred at 2:00 p.m. at the Santa Ana facility of ABC Company.
- Injured worker in the accident suffered an injury, drove himself to the hospital, and was admitted overnight at 5 p.m.



Day After Accident

Any obligation to call Cal/OSHA? Report Online? When?

A. Yes

B. No

Do you call your OSHA lawyer?

A. Yes

B. No



Cal/OSHA Reporting Requirements

- Every employer shall report ***within 8 hours*** to the Division of Occupational Safety and Health any ***serious injury or illness, or death***, of an employee occurring in a place of employment or in connection with any employment
- ***Serious injury:***
 - inpatient hospitalization, for other than medical observation or diagnostic testing
 - injury involving amputation, the loss of an eye, or any serious degree of permanent disfigurement

Made The “Call”...What Happens Next?

Plan and Prepare for the Inspection:

- Who should be at the facility for the inspection?
- Housekeeping?
- Security? Video?
- Recordkeeping?
 - documents on site
 - documents to review
- What do managers/supervisors need to know for the inspection?



Cal/OSHA... “Knock At The Door”

After the report is made...

Cal/OSHA Compliance Safety & Health Officer (CSHO) shows up later that day at the Santa Ana, CA facility, demanding to conduct an inspection.

- Do you have to allow this inspection?
- Can you delay access?
- Should you demand a warrant?



Should You Demand a Warrant?

- Few employers routinely require it (we often counsel against demanding one)
- May be necessary in *unique* circumstances.



Employer Rights During an Inspection

- You have rights for the inspection to be conducted:
 - During a reasonable time
 - In a reasonable manner
- Your site (your house):
 - Request and review credentials of CSHO
 - Immediately alert facility contact
- Cal/OSHA has 6 months to complete the inspection.



Inspection Process and “Tips”



Inspection – The Opening Conference

- **When**? Immediately after the CSHO is permitted access
- **What**? Explains the nature (type) and scope (complete, partial) of the inspection.
 - Background questions regarding nature of business.
 - Review written safety and health programs, 300 logs, training records.
- **Who**? If unionized, the CSHO will seek permission to include the employee representative

Inspection – The Opening Conference

Determine the Purpose and Scope of the Inspection...

CSHO says Cal/OSHA intends to expand the scope of the inspection to include ABC

Company's:

- Ladders program
- LOTO program
- Emergency action plan

Q: How do you respond?



The Opening Conference

Or...

CSHO states since ABC Company is on the emphasis program list, Cal/OSHA will be expanding the scope of the inspection to a comprehensive or "wall-to-wall"

Q: How do you respond?



Opening Conference – Tips

- Set ground rules for inspection
- **Don't volunteer information**
- Treat the CSHO with courtesy and respect
- Notify corporation officials/counsel.
- Flag trade secret issues
- Coordinate with contractors/on-site vendors



Opening Conference – Document Requests

During the Opening Conference, the CSHO asks for a copy of the following:

- The entire LOTO program;
- PPE purchase invoices for last 3 years;
- OSHA 300/300A forms for last 3 years;
- Injury Illness and Prevention Program (IIPP);
- Forklift training records for the last 2 years.

Q. Must these documents be produced during the opening conference?



The Walk-Around - What to Expect?

- Purpose – observe the workplace for possible violations
- Inspection may start and end the same day it begins **OR** take several months to complete
- Employer has ***absolute right*** to ***accompany*** the inspector
- *What area(s) is the CSHO allowed to visit?* (Employers can **limit** the area(s) seen by the compliance officer and **require compliance** with all safety and health rules, if applicable (e.g., PPE))
- Inspector has the right to **privately interview non-management employees.**

Back to the Inspection at ABC Company...

As part of the walk-around, the CSHO goes outside the three-story warehouse where 3 employees of a subcontractor are working to install equipment about 25 feet above the ground.

- *There is no fall protection for the employees of the subcontractor.*

The CSHO takes a video of the work being done and asks ABC Company's manager on the walk-around whether he thinks the workers "*should have fall protection*"



The Walk-Around – Photos & Videos



Q. Do you have to allow the CSHO take photos or videos?

The Walk-Around – Photos & Videos



Answer:

- **CSHO may take photos and video.**
 - You have the right to protect proprietary processes/information.
- **CSHO may take sampling/tests.**

The Walk-Around – What Should You Do?

- Take accurate notes on each area inspected
- Copy the inspector's actions (e.g., photograph what the inspector photographs, tests, etc. from the same viewpoint)
- Take the inspector on a pre-determined route, if appropriate
- Have a “team” go ahead of the inspector to identify and fix obvious problems (hopefully these issues are minor and corrected already)
- Have a “team” trail behind the inspector to immediately abate identified problems (demonstrate good faith)



The Walk-Around – Interviews

As the CSHO is doing the walk-around, he overhears ABC Company employees talking....one ***supervisor*** and one ***hourly worker*** drive by on forklifts discussing whether the subcontractor employees should be wearing fall protection.

The CSHO wants to interview... both the hourly worker and supervisor.



Interviews – What to Expect

- Do you have to permit these interviews?
- Can someone from the employer sit in on those interviews?
- Should interviewees sign a witness statement?
- Do the interviewees need to give their contact information?
- May CSHO record the interview?
- May union representative attend these interviews?



Interviews – What Should You Do?

- Schedule interviews away from production floor (conference rooms if possible).
- Pre-select employees to interview if available.
- Advise employees of their rights, including option to decline interview and requirement to tell the truth!



Inspections – Other Considerations

- Potential BOI involvement?
- Need to let your supervisors know of potential criminal liability?



Closing Conference – What to Expect?

- **What?** A meeting (telephonic or in person) with the inspector, employer and employee representative.
- **Why?** Inspector explains the apparent violations found and the violation classifications. Also reviews the strengths and weaknesses of the safety program, as well as abatement dates, possible abatement methods and posting requirements for citations issued.
- Abatement period only begins when employer receives Citation and Notification of Penalty.
- Employer is ultimately responsible for choosing an appropriate abatement method.

Closing Conference – What Should You Do?

- Employer's opportunity for free discovery.
- Usually, brief description as to possible violations.
- Note any abatement made during the inspection.
- Discuss appeal rights.
- Not a time for debate.
- Take good notes and attempt to better understand any possible citations.



QUESTIONS?



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