

OSHA Inspections – What to Expect

In 2019, the Occupational Safety and Health Administration (OSHA) has continued to operate much as it did in 2018 and under the prior administration. Inspection data show that the agency is operating in a manner similar to that of the last two years of the Obama administration. The agency made 32,020 inspections in FY 2018 compared to 31,948 in FY 2016. This has been at least in part due to the fact that as of March, 2019 President Trump's appointee as Assistant Secretary of Labor, Occupational Safety and Health Scott A. Mugno has not yet been confirmed. He was first nominated in late 2017. This lack of new guidance from Washington means that employers can expect the focus to continue on the traditional enforcement priorities with which most employers are familiar, especially responding to employee complaints. OSHA has made great efforts to raise employee awareness and made the filing of complaints an easy process.

Central to OSHA enforcement is workplace inspections. They can be initiated because of routine inspection programming, as the result of an employee complaint, or as part of a workplace accident investigation. While an employer may not have control over why or when an inspection is to take place, they have a great deal of control over its results. Proper planning for an eventual OSHA inspection can mean the difference between a clean bill of health or multiple citations and their attendant fines.

Preparation For Inspection

The first preparatory steps should be taken well before there is even notice of a possible OSHA investigation. If there is not a Safety Manager on staff, a responsible senior manager should be designated as the point person for responding to an inspection notice. Before OSHA visits your facility be sure that all required OSHA-related posters are posted. When the OSHA Compliance Officer appears at the plant for the inspection, often at a date and time agreed upon in prior discussions, he/she should be referred to the designated manager who should verify the officer's credentials. The inspector should not be granted access to any part of the plant prior to meeting with the designated manager.

The Inspection

There will be a brief opening conference during which the reason and scope of the inspection should be established. At this opening conference the OSHA inspector will also usually request the OSHA 300 log, Form 301, and Form 300A. OSHA regulations require that these forms be provided within eight (8) hours of their request. There is no reason to risk a citation and monetary fine for failing to provide them in a timely manner especially since they are all required to be maintained. The Compliance Officer will also request any required or voluntary written safety plans or programs, as well as all employee training records on such programs.

At the opening conference, the management representative should also include an employee(s) that the employer proposes to participate in the inspection, usually a member of the employee Safety Team or Committee. The employee(s) should have been identified previously and been informed of the possibility of an OSHA inspection and their role as an employee representative. The employee should be familiar with the company's safety policies and programs. If a union represents the workforce, the OSHA inspector will include an employee designated by the union to join in the inspection as the union representative. In some instances, a union official may also choose to participate in the inspection.

If the OSHA inspection is in response to a workplace injury, the inspector will request all documents related to the incident at the opening conference. This includes any incident reports, witness statements, safety programs and policies, and any policies or procedures related to equipment, if any, that may have played a role in the accident. The documents provided should include such information as lock out/tag out procedures for the specific equipment or machinery at issue and any training documentation related to the equipment. If there has been an investigation and analysis of the accident by the employer, those documents will be requested as well. Be aware that it is not uncommon for the person assigned to investigate an injury incident to include sympathetic comments that may imply that the company must not have done everything possible to prevent the injury simply because someone was injured. The more serious the injury the greater the tendency to include such potentially incriminating comments. The person or persons investigating the accident should be instructed that such speculation must be consciously avoided. For this and other legitimate reasons many employers perform such accident investigations under the advice of counsel. If counsel is not

involved, the attorney-client privilege may be waived by providing the investigation report and analysis to OSHA. All incident documentation should be reviewed by counsel before it is provided to the inspector.

Once the physical inspection of the workplace begins, it is important that the management representative document any comments made or questions asked by the Compliance Officer. Similarly, if the Officer takes photos of any equipment, condition or work area, the company representative should likewise take pictures. While conducting a wall-to-wall inspection generally entitles the OSHA investigator access to any part of the facility, that is not the case where a workplace accident is being investigated. It is in the company's best interest to restrict the inspection to the specific machinery and work area involved in the accident. The OSHA inspector may insist upon a more wide-ranging inspection, but it should be resisted. They can obviously obtain a warrant if they truly wish to expand the inspection. It is a case-by-case determination, but the company representative may sometimes agree in order to avoid a confrontation. It is a judgment call, and may not even be an issue if the remainder of the plant is fully compliant as it should be. A detailed self-inspection of the entire workplace should always be conducted before the beginning of any OSHA inspection irrespective of how confident the employer feels about being in compliance.

Employee Interviews

One area regarding inspections that bears specific emphasis involves the employee interviews that are generally part of any OSHA inspection, especially one triggered by a workplace accident. Employees that are likely to be interviewed, such as those in the same work area where an incident occurred, should be prepared as you would any witness in a legal proceeding. The majority of OSHA citations against employers are the result of unintentional statements or admissions made by unprepared employee witnesses. While company counsel has the right to and should be present for the OSHA interviews of any supervisor or manager, that is not the case with employees. Employee witnesses should also be instructed to request a copy of any statement that they sign. OSHA will generally not provide copies of employee statements to the employer, even if requested. An employer is clearly entitled to any statements given by managers or supervisors.

The Closing Conference

At the conclusion of the on-site inspection, the OSHA inspector will normally conduct a brief closing conference with the company representative. Any union representative is generally permitted to attend as well. The OSHA compliance officer will usually explain any citations that they will recommend be issued, any applicable OSHA standards, and potential abatement action to be taken. If a condition that potentially poses an immediate danger to employees has been observed, it is certain to be mentioned so that steps for abatement can begin immediately. The company representative should not be reluctant to ask about the factual basis for any citations that are mentioned. Investigators often share their factual and legal conclusions if asked directly. If the Compliance Officer has misunderstood any facts surrounding an incident that triggered the inspection, or possibly reached erroneous or unfounded conclusions in the view of the company, the closing conference is the time to clarify the record.

Appeal of Citation

If OSHA issues any citations as the result of the inspection, the employer has a fifteen (15) working-day period to file a written contest or appeal of the citation(s). The citation(s) and any associated penalties become a final order if not contested within the 15 days. Upon request, the employer may participate in an informal conference at the OSHA area or regional office. The purpose is for the employer to seek to have the citation withdrawn or at least amended to "other than serious" if possible. This informal opportunity to more fully explain why no citation is warranted or why its level should be reduced should always be taken. The employer representative must be fully prepared to present the factual and legal defenses relied upon. The outcome can be quite significant for several reasons. OSHA's 2019 revised penalties are as follows:

- "Serious", "other-than-serious" and posting citations - \$13,260 per violation
- Failure to abate: \$13,260 per day beyond the abatement date
- "Willful" or "repeated" violations: \$132,598 per violation

As if such monetary penalties were not enough, every violation creates a five-year period during which any subsequent violations that are "substantially similar" will

be considered as “repeat” violations. That should be more than adequate incentive for any employer to make every effort to maintain an OSHA compliant workplace and seek to have any alleged citations, should they occur, vacated.

Conclusion

Even if your workplace has never been the subject of an OSHA inspection, planning and preparing for such an inspection is critical if an employer hopes to avoid costly penalties.

Richard D. Alaniz is a partner at Alaniz & Associates, a labor and employment firm based in Houston. He has been at the forefront of labor and employment law for over forty years, including stints with the U.S. Department of Labor and the National Labor Relations Board. Rick is a prolific writer on labor and employment law and conducts frequent seminars to client companies and trade associations across the country. Questions about this article, or requests to subscribe to receive Rick’s monthly articles, can be addressed to Rick at (281) 833-2200 or ralaniz@alaniz-law.com.