

## Part V: What to Expect During an OSHA Inspection

As discussed in Part IV, the best protection against the uneven scales of OSHA inspections and current improper enforcement trends is for employers and employees to have a comprehensive understanding of their rights and the CSHO's obligations during an inspection. The following is what can be expected during a typical OSHA inspection, and how employers, and employees alike, can ensure that they are best poised to beat an OSHA citation.

### *Initial matters – OSHA's arrival at your job site.*

After a CSHO arrives at a work site for an inspection, he or she is required to present credentials.<sup>27</sup> If the CSHO does not offer credentials, the employer should request them and, upon presentation, verify them.

Next, the employer should determine whether the CSHO has a warrant. If the CSHO does have a warrant, the employer should review it and make a copy. If, however, the CSHO does not have a warrant, the employer must decide whether to consent to the inspection. If the employer refuses to consent—which he or she has the right to do—the CSHO must obtain a warrant in order to conduct the inspection.

Remember, OSHA has a legal right to inspect your job site. As discussed in detail in Part IV, OSHA has what is called “administrative probable cause” to inspect and

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<sup>27</sup> 29 U.S.C. § 1903.7(a).

investigate your project. OSHA’s probable cause is more easily obtained than that of other agencies. An officer of the city, state, or federal law enforcement needs a much more specific probable cause to enter a private citizen’s property. This is not the case with OSHA. When an active construction job is taking place, there is an inherent risk of danger and injury, and this gives OSHA all the administrative probable cause it needs. So even though the right to refuse inspection without a warrant is always available, keep in mind that the CSHO is likely to obtain a warrant within a matter of only a few days.

An alternative to consenting or refusing consent is to request that the CSHO return at a later time or wait a reasonable amount of time if, for example, the proper personnel are not available at the moment. An important consideration here is the rapport with the CSHO. Although employers are justified in asserting their rights and refusing to consent to an inspection, if handled the wrong way, it could damage the rapport with the CSHO, which could cause more issues for the employer.

Commentators suggest that some CSHOs may be in more of a “violation-finding mood” if they are required to obtain a warrant and come back at a later time—regardless of the fact that such retaliation is improper. While it is never advised that employers simply surrender their rights, it is important to weigh the factors in each separate instance to achieve the best possible outcome. Often, by consenting to the inspection or agreeing to the inspection in the near future, and thereby maintaining rapport with the CSHO, employers are better able to maintain control of the scope of the inspection by reaching a clear agreement with the CSHO delineating the scope of the inspection.

The bottom line is that it is rarely a good idea to tell an OSHA compliance officer to get a warrant. The reasoning behind this has to do with the scope of OSHA's inspection rights under the C.F.R. The C.F.R. demands that OSHA's inspection be "reasonable." This essentially means that they are limited to inspect only the men, equipment, and materials which are within "plain view." "Plain view," as explained in Part IV, is a doctrine borrowed from criminal law and the Fourth Amendment of the US Constitution, which states that a government agent may not sample or manipulate anything that is not within his or her reasonable line of sight. If an agent violates this doctrine, the information obtained during an inspection may be deemed unconstitutionally gathered. In other words, it may be tainted in the eyes of the judiciary, and ultimately may be found to be inadmissible in a court of law. At a minimum, information collected in violation of the doctrine of plain sight should be considered suspect.

### *Opening conference.*

The first stage of the inspection is the opening conference. During the opening conference, the CSHO is required to explain the nature and purpose of the inspection and indicate generally the inspection's scope and the records he or she wishes to review.<sup>28</sup> The CSHO will identify the reason for the inspection. If the inspection is in response to a complaint, the CSHO must provide the employer a copy of the complaint.<sup>29</sup> If the inspection is part of a program, meaning the employer's work site was

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<sup>28</sup> *Id.* 1903.7(a).

<sup>29</sup> *Id.* 1903.11(a).

chosen based upon neutral and objective criteria, the CSHO will explain the program and how the work site was chosen.

During the opening conference, the employer's goal should be to clearly define the scope of the inspection. Determine whether the inspection is a comprehensive "wall-to-wall" inspection or a partial inspection focused on a particular location or operation. Where there is a warrant issued on the basis of a programmed inspection, a comprehensive inspection of the entire workplace will typically be allowed.<sup>30</sup> Where an inspection is based upon a complaint, the CSHO cannot expand the scope of the inspection beyond the location or hazard identified by the complaint without the employer's consent, unless the CSHO has a warrant or a hazard is in plain view.<sup>31</sup>

If it is a partial inspection, reach a clear agreement as to specific areas or equipment to be inspected, and the scope/manner in which employee interviews are to be taken. If the CSHO requests a general tour during a complaint-based inspection, employers can deny the general tour. Courts have held that the scope of the inspection must bear a reasonable relation to the complaint

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<sup>30</sup> See Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (9th Cir. 1980); Marshall v. Chromalloy American, 589 F.2d 1335 (7th Cir. 1979), cert. denied, 444 U.S. 884 (1979).

<sup>31</sup> See Donovan v. Sarasota Concrete, Co., 693 F.2d 1061 (11th Cir.1982); Marshall v. North American Car Co., 626 F.2d 320 (3d Cir.1980); Marshall v. Central Mine Equipment Co., 608 F.2d 719 (8th Cir.1979); In re Establishment Insp. Of ASARCO, Inc., 508 F. Supp. 350 (N.D. Tex. 1981).

and a full-scale OSHA inspection should not ensue from a limited complaint.<sup>32</sup>

### ***The walkthrough.***

During the inspection, the CSHO will make a walkthrough of the project. The inspector's main focus is usually fall protection equipment and fall protection practices of the crew. Always make sure every harness, rope, and lanyard on site is properly maintained. If a harness has been previously impacted, it does not need to be on a job site. Such equipment should be discarded and replaced immediately upon discovery—always. Contractors are cited far too often because an old harness or frayed rope remains on a truck when it should have been discarded. This is an easy citation to avoid.

Remember, if OSHA is there for only a partial inspection, it is important to prevent a partial inspection from becoming a comprehensive inspection. Frequently, an inspection starts as a partial inspection but “mission creep” sets in and during the walk-around, the CSHO may begin asking about unrelated issues or stop and observe areas or equipment in route to the *designated* areas or equipment. Oftentimes, CSHOs may even ask employees questions about unrelated issues such as wage and hour requirements, when these topics are significantly beyond the scope of the

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<sup>32</sup> Trinity Indus., Inc. v. O.S.H.R.C., 16 F.3d 1455, 1460 (6th Cir. 1994); Marshall, 626 F.2d at 324 (stating that an OSHA search pursuant to an employee complaint must be related in scope to the complaint); Donovan v. Fall River Foundry Co., 712 F.2d 1103, 1111 (7th Cir. 1983) (holding that “[t]he Secretary has an obligation to limit its inspection of documents to those that bear some clear relevance to the conditions about which complaints have been received”).

inspection. In fact, topics such as these are covered by an entirely different division of the Department of Labor—not OSHA. Such occurrences underscore the importance of clearly defining the scope of the inspection and maintaining the scope when faced with efforts, whether intentional or not, to expand the scope.

### ***The role of the superintendent during an inspection.***

When OSHA is on site, the superintendent should remain alert, aware, and advocate for his or her company. The superintendent has specific rights granted to them under the C.F.R., and they must assert those rights in order to protect themselves, the business, and the men and women who rely on that business for their livelihood.

The superintendent has the right to accompany inspectors wherever they go on site, and he or she should do so. The inspector should be followed in the trench, on the roof, through the rafters, and wherever else they intend to go. The superintendent also needs to ask a few key questions of the inspector and needs to ask them often. Mainly, he or she should inquire as to why OSHA is there, what the scope of their investigation is, and what particularly they are there to see or “uncover.” Once the superintendent knows what OSHA wants, he or she can then limit them to what they can see. If an inspector attempts to go outside that scope, then the superintendent needs to notify them immediately.

Throughout the walkthrough, CSHOs may perform brief interviews with the crew and question them on various issues relating to the inspection. OSHA has the right under the C.F.R. to perform these interviews in

private, away from the superintendent. Although the questioning can be private, it must also be brief. A superintendent should object to any questioning that exceeds a “reasonable” amount of time, as well as personally note in his or her own records that he or she made such an objection.

### *On-site interviews.*

As part of the inspection, CSHOs are able to question privately any employer, owner, operator, agent, or employee of an establishment, as long as it does not exceed the scope of the inspection.<sup>33</sup> Unfortunately, however, there are far too many tales of situations where interviewees have been forced to participate through intimidation and/or being told that they could be in trouble if they refuse to participate. This is entirely untrue and inappropriate because the interviews are completely voluntary without a valid subpoena.

Furthermore, employees are entitled to have a representative (any person of the employee’s choosing) present during the interview. This person can be an attorney and can be the employer’s attorney if the employee and attorney discuss potential conflicts of interest and the employee knowingly waives any potential conflict. CSHOs often object to the employer’s legal counsel being present, alleging conflict of interest. However, it is not OSHA’s right to object; rather, that right is held solely by the interviewee.

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<sup>33</sup> 29 U.S.C. § 1903.7(b).

Possibly the most important right of any employee, however, is his or her right to refuse to prepare a written statement and/or sign any documents, not only during the interview but during the entire inspection. Often, a CSHO will prepare a written statement summarizing the employee's interview and ask the employee to sign it. Almost as often, employees report feeling "pressured" by these CSHOs to sign the statement. In fact, OSHA's Field Operations Manual goes as far as to provide that interviewees "shall be encouraged to sign and date the statement."<sup>34</sup> Despite any pressure or "encouragement," employees have a clear right to refuse to sign any statement. Once an employee refuses to sign a statement, the CSHO will read the statement to the employee and make a note of the refusal. A management employee, as well as his or her employer, has the right to obtain a copy of a written statement, whether signed or not. Interviews and witness statements are explored further in Chapter 2.

### ***Closing conference.***

Following the walkthrough, the CSHO and employer will hold a closing conference. At this time, all unsafe conditions observed will be discussed and a penalty may be issued or recommended. The employer should produce records relevant to unsafe conditions and work with the CSHO to prevent an unreasonably short abatement deadline from being set. If OSHA decides to issue a citation, it must do so within six months of the inspection.

With proper planning, employee training, and careful handling, an employer can maintain control of an

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<sup>34</sup> Field Operations Manual, Chapter 5, section VII.A.

OSHA inspection and protect its rights. This preparation and awareness is even more critical today, where OSHA appears to be stepping up its enforcement, and stories abound of improper actions by CSHOs.

***Remember your rights.***

OSHA inspections are frustrating and can be costly. Generally speaking, a contractor may defend against costly citations by teaching satisfactory safety techniques within the crew, updating and maintaining required safety equipment, and remembering its rights when OSHA visits the job site.