Coping With An OSHA Inspection

Under the Occupational Safety and Health Act, OSHA compliance officers have the authority to enter your workplace and inspect and investigate conditions that may affect employee safety and health. The inspection may be performed during the normal business hours or at other reasonable times.

The property owner, his designated representative, the general contractor, or the construction manager may request that the compliance officer first obtain a warrant. A recent study by OSHA Data Corporation of Maplewood, New Jersey revealed that employers who require inspection warrants are charged with almost twice as many violations per inspection and are assessed nearly double the total penalties of those who do not. If the construction site is in plain view from the street, citations frequently are issued without any “entry”.

In cases where the contractor is taking advantage of OSHA’s free consultative services, it is important to immediately advise any compliance officer of that status as soon as the officer comes on site. If the compliance officer is on site to make a planned inspection and not to investigate an accident, complaint, or referral, the officer will generally discontinue the visit.

Construction is a high risk industry that, in the past, has accounted for as much as 60% of all OSHA inspections.

What triggers an OSHA inspection?

What makes OSHA decide to inspect a construction site? An inspection can be prompted by any number of factors. Some of the most common are:

- A recent accident with a fatality, or where three or more employees were hospitalized;
- An employee complaint to OSHA about job site safety or health;
- A follow-up on past citations;
- Types of construction that have a high risk potential;
- Problems caused by other contractors on your site. Once a compliance officer is on site, the officer may inspect the operations of any or all other contractors.

Few companies can avoid an OSHA inspection, but all contractors should prepare for the inevitable.

The following is a series of suggestions for coping with an OSHA inspection. This information should be periodically updated for your company, with information gathered during OSHA inspections of your jobsites.
**Appoint a Competent Person to Handle OSHA Matters**

1. Every contractor should have a competent staff person assigned to represent the company during OSHA inspections. A trained alternate should be available for times when your OSHA representative (OR) is unavailable. These are the only people in the company who should be authorized to deal with an OSHA compliance officer.

   Note: From this point on in this Bulletin, it is the Company’s OSHA representative (OR) that is being addressed.

   Should an OSHA compliance officer knock on your door, make them comfortable until the company’s OSHA representative arrives. Do not be intimidated by an OSHA compliance officer. All dealings with OSHA personnel are the exclusive responsibility of the person (or alternate) assigned to represent your company. No one else should become involved in safety or business discussions with the compliance officer.

2. Greet the compliance officer, check their credentials, and record their name, address and the telephone number. Ask why your company has been selected for inspection and record the response for the file. If the inspection is prompted by a complaint, the compliance officer must provide you with a copy.

**Some Contractors Require OSHA Inspectors to Have a Warrant for Entry**

3. Some contractors have a policy that requires a warrant for entry. If this is your company’s policy and the compliance officer does not have a warrant, politely explain that this is a company policy. Should the compliance officer ask why this is the policy, tell the officer it is against company policy to provide any information in the absence of a warrant.

   If the job site is open to public view, a warrant is not required. If you are a subcontractor, it will be the owner or the general contractor who gives permission for entry of the compliance officer. If the owner or general contractor gives permission for the compliance officer to enter the job site, they should alert all subcontractors that an inspection is in progress. Keep in mind that construction contractors have Fourth Amendment rights.

   If the compliance officer has a warrant, read it carefully and carry it during the inspection. The warrant will state the time limits and the ground rules for the inspection. Should the warrant refer to any other documents, insist on obtaining copies for your files.

4. Treat the compliance officer with the respect due any guest. But do not be overly friendly. Call the compliance officer Mr. Jones or Ms. Smith. Some compliance officers turn what should be an arms-length business discussion into a personal relationship. It is more difficult to say no to a “friend.”

**THE OPENING CONFERENCE:**

5. Most OSHA inspections start with an opening conference. The compliance officer gathers basic information on what your company does, the number of employees, and the legal form of the busi-
ness (corporation, partnership, etc.). Any time you are asked a question you can’t answer, excuse yourself to confer with others. You can have as many of these time-outs as you need. Remember, however, that anything the compliance officer sees or hears during the opening conference may find its way into a written OSHA file.

**Keep Your OSHA Log 300 Current**

The compliance officer will ask to see your OSHA Log 300. The information must be up-to-date within five working days. If the log is not maintained on site, it is good practice to have it faxed to the site immediately. If this is not possible it should be mailed or personally delivered to the compliance officer. Non-maintenance or falsification of this record is the most frequently cited OSHA regulation.

The compliance officer may ask for a copy of your safety program. Provide a copy for the officer to review in your office. You are not required to give the inspector a copy to carry away. If the compliance officer asks to see something that does not seem appropriate ask why this is requested and record the answer. If the officer insists, take time out to confer with management or your consultant on safety and OSHA matters.

**THE WALK AROUND:**

6. The compliance officer will make a walk around inspection to get an overview of the job site, to see what type of work is underway and to observe the working conditions and practices.

If the inspection is caused by an accident or a specific complaint, take the compliance officer directly to the vicinity in question.

The compliance officer may conduct a more intensive inspection of those areas which may not meet OSHA requirements. The officer will want to question employees, foremen and supervisors, take photographs, take measurements and conduct other examinations.

**Stay With the Compliance Officer**

7. Stay with the compliance officer at all times. Take notes, photographs and measurements. This is your company being inspected, act accordingly. If you are ever in doubt about anything, call for a time-out and seek advice. Should a court case occur, the compliance officer will use these measurements if asked to testify. Having your own measurements and photos may give you the information needed to refute the compliance officer’s data. A video camera can be a valuable addition to your still camera. The compliance officer also may videotape the inspection. Take photographs of everything the compliance officer photographs and of the surrounding area.

Don’t hesitate to ask the compliance officer questions and record the answers. Ask why a measurement has been taken, what the officer thinks is being shown in a photograph, and what has been written in the compliance officer’s notebook. Ask about the officer’s experience and background on a piece of equipment or a process in which interest is expressed. Should the compliance officer be unfamiliar, make a written note. Such information may be valuable should you be wrongly cited for a violation.
8. The compliance officer will ask you, (or others) to explain what specific employees are doing, how equipment works, what substances and materials are involved, how much or how often. This is not idle curiosity. The compliance officer is gathering an information base to see if your firm meets OSHA regulations. The officer watches employees to see if they are exposed to dangerous practices or conditions. This process may take a few hours, days, weeks, or months depending on conditions, what is learned, and how long the compliance officer is permitted to stay. A compliance officer without a warrant is there with your consent. You can withdraw your consent at any time.

9. Some compliance officers may try to give orders to you or your employees. The officer does not have that authority. If a friendly reminder doesn’t work you may have to telephone the compliance officer’s OSHA area director.

Don’t Volunteer Information

10. The compliance officer may point out what the officer believes to be OSHA violations. If you agree, you will most certainly be cited and fined, even if you correct the situation while the officer watches. What you say can and will be used against you. Don’t volunteer information and don’t engage in idle chitchat. Compliance officers record comments (often out of context) to support their position as the case proceeds.

11. Do disagree about whether a particular condition or practice constitutes a violation. Compliance officers are not infallible. For a violation to exist, there must be a reasonable probability that a condition or practice could result in injury or illness to the employee. If you have a valid reason why a citation should not be issued, voice it.

Ask Questions and Seek Verification Before Acting on an Officer’s Advice or Instructions

12. Never automatically accept a compliance officer’s advice or instructions. It is prudent to first obtain verification from a reliable source. Few, if any, compliance officers are experts on every nuance of every OSHA requirement. Many or most OSHA compliance officers are not safety or loss control experts. Do not be intimidated nor falsely led into assuming they know how to do things safely.

13. Do not conduct demonstrations for the compliance officer’s benefit. In an attempt to gather evidence that a machine is in violation, the compliance officer may ask that the machine be started and operated. Thousands of citations have been based on nothing more than an employer’s willingness to conduct such a demonstration. A simple refusal is all you need to handle this potential problem.

14. The compliance officer may want to interview some of your employees privately. This is permissible if it does not interfere with their work. If it can be done at the place where the employee is working and when they are not otherwise occupied, stand within view, but out of earshot. Make notes on who is interviewed as well as the time when the interview starts and finishes. If the interview cannot occur without interfering with the employee’s work, do not permit the interview. Tell the compliance officer he is free to obtain the employee’s name and telephone number to arrange the interview for another time and place.

Keep in mind that it is against the law to intimidate or otherwise discriminate against employees who cooperate with, or participate in, the OSHA investigation process.
15. At times compliance officers may ask to use your employees as test subjects to monitor noise levels or the level of pollutants in the air during construction. To do this the officer may want to attach measuring devices to the employee’s clothing or bodies. OSHA does not have the right to do this if the employee objects or if it will unreasonably interfere with work. If compliance officers do not advise workers of their rights, you should.

*Never Give Estimates*

16. Never give estimates. You may, in error, provide false information to OSHA which is a criminal offense, or you may wrongfully convict your company of an OSHA violation. If you do not have accurate information, say so. Make sure, however, that the inspector knows that the information may be available elsewhere in your company.

17. If the compliance officer wants to interview other management people, and you decide to allow it, you should be present. Sometimes a compliance officer will get contradictory statements that can create problems.

18. At the end of each inspection, go over your notes and measurements. Make sure they are accurate and complete. Record the date they were taken, the name of the compliance officer, and specify who said what to whom. Keep your notes intact, even if retyped. They are useful for future inspections and will help you to better understand and comply with OSHA requirements.

19. Often the compliance officer will give you copies of publications or documents. Don’t refuse them even if you have copies. Keep them and note the date they were given to you and by whom.

20. You do not have to give the compliance officer any company records unless required by a subpoena. When a subpoena is issued, it usually will authorize the compliance officer to inspect and copy certain records. Let the compliance officer look only at the records specified. The compliance officer can copy the records by hand if desired. Be aware that you can negotiate the terms of a subpoena.

**THE CLOSING CONFERENCE: IMPORTANT!**

21. At the end of the site tour OSHA procedures generally call for a closing conference. This is not a friendly chat or a chance to talk the compliance officer out of a citation. This is the time when the compliance officer discusses the officer’s findings and looks for admissions of fact that will help OSHA prove its charges. Most admissions are made by employers during the closing conference and the compliance officer will take note of them. OSHA’s Operations Manual requires the compliance officer to report information from the closing conference that substantiates the employer’s general attitude, any admissions of violations and any agreement about abatement dates. For example, an employer will respond to a compliance officer’s description of a condition by saying, “Well, we have been trying to get that changed, but can’t do it”. This is evidence of knowledge that a substandard situation has been allowed to exist for some time and could generate a “willful” violation.

The compliance officer will use the closing conference to advise you of “apparent violations” observed. If the officer uses the word violations do not agree. Semantics are important here. You may
concede that a particular condition or practice exists but don’t agree that it constitutes a violation. Ask the compliance officer why and try to find out what, in the officer’s opinion, would constitute a feasible means of abatement. If the officer says, “I don’t know”, make a note of the response and move on to the next topic.

Some compliance officers will try to conceal their lack of experience by claiming that you are free to choose any effective method. Long-standing case law holds that OSHA is required to identify what steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and practicality of those measures. Keep in mind that they are “compliance officers” and should know what is needed for compliance.

Get the compliance officer’s thoughts on what you should do to correct or prevent any condition or practice the officer says is an apparent violation. Get all details on abatement methods, relevant programs (disciplinary, instructional, employee training) and necessary equipment and materials along with their costs, where acquired, what they will accomplish, and precisely where they must be employed. Also ask what health and safety benefits your employees can expect if you do what the compliance officer wants.

22. Be especially careful if you are asked how much time you will need for abatement. An unexplained time estimate by you can be admission of a violation and acknowledgment that your company can abate the violation within the time period estimated. Don’t worry if the compliance officer tells you that an arbitrarily brief abatement period will be assigned. If you disagree that a cited condition constitutes a violation, your contesting suspends abatement until the citation is affirmed by the appeal process.

Be Careful How You Answer Questions

23. Compliance officers may ask “Are you familiar with the OSHA standards?” If you say yes, it can hurt if the inspector finds a violation, since you have conceded that you are familiar with the regulations. If you say no, it shows you are indifferent to your OSHA responsibilities. Instead, ask the compliance officer why the officer asked that question. Should the officer persist, respond by stating that you believe that all personnel are required under the OSH Act to be familiar with applicable standards. Another favorite twist on this same question is, “Who is in charge of safety here?” If you name one person, all information gleaned from that person can be used to support OSHA’s case against the company. The correct answer is the same as above – “everyone”; everyone from the CEO to the newest hire is an employee of the company.

24. You are not required to have a closing conference. If you lack the confidence or the skills to avoid unexpected admissions, tell the compliance officer that you do not want a closing conference. You can also ask that the closing conference be conducted by telephone. OSHA will often agree to such a request. Keep in mind, however, that a closing conference can be as much of a fact finding event for you, as for OSHA, if you are able to make it so.

If the compliance officer says a hazard exists and you disagree, tell the officer. For example; at a closing conference the compliance officer says nearly 100 violations were found and asks why the company has so many violations. The safety director replies “I am only one person and can only do so much.” The compliance officer treated that reply as an admission that the company knew about the alleged violations and cited all violations as willful, with a penalty of $300,000 rather than the $30,000 fine the officer was considering. The willful citations probably would not have been issued
if the safety director had replied by asking the inspector to itemize his claim.

25. The OSHA write-up of the inspection may take days or weeks. You may get telephone calls for additional information or a request for documents. You have the same right to say no or to delay a response until you have had time to talk to your attorney.

26. The compliance officer compiles a Case File and submits it to the area director who will issue citations and penalties that will come by certified mail or messenger. OSHA acts through citations. A compliance officer may overlook this fact and tell you what must be done. Such verbal orders are not enforceable and you are not under legal obligation to observe them. It is a wise policy to get it in writing. This applies to all orders, advice, or instructions the compliance officer gives. If the officer refers to a particular publication, ask for the specific section, sub-section, paragraph, page and sentence. Do not accept generalities.

27. Citations and notification of penalties will be in writing. They appear on a government form accompanied by a form letter from the OSHA area director, a booklet explaining your rights and responsibilities, and perhaps other handouts.

THE CRITICAL POINT

You Can Contest Citations

At this juncture your actions are critical. You may assent to the citations and notifications of penalties or you may contest them. As an interim measure and prior to formal contest, (within 15 working days from your receipt of citations) you may request an informal conference with the Area Director to discuss the citations and penalties. In many cases, the Area Director will use the meeting as an opportunity to “fill holes” in the construction of a legally insufficient case file. As an inducement to get the case settled and keep the compliance officer on the street, the Area Director will often agree to lower the penalties by as much as half. However, remember that the affirmation of a citation, regardless of penalty, is basis for repeat and willful violations from future inspections. Because a construction contractor is far more likely to be inspected, chances are that a “citation history” can haunt you in a variety of ways down the road. In addition to “repeat” citations, many owners and general contractors are screening contractors with significant OSHA citation histories as part of their invitation to bid process.

You May Want Legal Counsel for the Informal Hearing

Should you not feel comfortable representing yourself at an informal conference after receiving a citation, you should consider retaining counsel with experience in these matters. Before retaining an attorney ask two questions: 1) What other contractors have you represented in OSHA–related cases? (Then contact these persons about their cases). 2) Exactly how much will your charges be to handle the case through an informal conference, the complete discovery process, and up to the date of the trial before an OSHA Review Commission Administrative Law Judge? (The decisions you make concerning negotiated settlements are your own. OSHA wants to make case law. If your case will not make good case law, they probably will not want to go to trial). Call the ASCC Safety Hotline if you have any questions.

The information and suggestions contained in this publication have been developed from the above source and is believed to be reliable. However, neither the American Society of Concrete Contractors nor CNA Commercial Insurance accepts legal responsibility for the correctness or completeness of this material or its application to specific factual situations.