

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (OSHA) INSPECTION CHECKLIST

LABOR AND EMPLOYMENT PRACTICE

Occupational Safety & Health Administration (OSHA) has the authority to conduct inspections of workplaces and bring enforcement actions against employers found to be in violation of the OSH Act or health and safety standards. As OSHA conducts virtually all of its litigation “discovery” during the on-site inspection, and the OSH Act gives OSHA broad investigative authority during inspections, it is critical for employers to prepare, assert their rights, and manage the flow of information during inspections.

This OSHA Inspection Checklist reflects the collective experience of the national OSHA Practice Group at Epstein Becker Green, which has counseled and assisted clients nationwide in hundreds of OSHA inspections of all types. The checklist is intended to provoke thought and careful planning, not to proscribe a single, one-size-fits-all method for dealing with all OSHA inspections. Preparation now is more important than ever before because of the agency’s current enforcement-heavy philosophy.

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SECTION I: PREPARATION BEFORE AN OSHA INSPECTION

Develop and Implement a Comprehensive Safety and Health Program

- ❑ Ensure written safety programs are current, accurate, compliant, and implemented.
- ❑ Develop a formal program for reporting and resolving employee safety concerns.
- ❑ Establish a Safety Committee that includes employee representatives to:
 - evaluate safety programs as written and implemented;
 - audit the workplace for potential hazards; and
 - review and discuss workplace incidents and near misses.

Conduct Internal or External Safety and Health Audits

- ❑ Whenever possible, audits, whether conducted by your Safety Committee, safety or operational supervisors, or third-party safety and health consultants or counsel, should be conducted at the direction of in-house or outside legal counsel to protect the audit findings under the attorney-client privilege.
- ❑ Review recommendations from prior health and safety audits to ensure specific recommendations were addressed and problem areas are not ongoing concerns.
- ❑ Ensure that new health and safety audit recommendations are addressed and that the steps taken to address the recommendations are documented.

Train Staff

Familiarize Employees with OSHA Basics

Ensure employees understand:

- ❑ OSHA standards applicable to the employer's industry and workplace.
- ❑ Special emphasis programs relevant to the employer's industry and workplace.
- ❑ The employer's safety and health programs and procedures.
- ❑ Any site-specific safety and health programs and procedures.

Familiarize Employees with Employers' OSHA Inspection Rights

Employees should understand the employer has a right to:

- ❑ Demand an administrative warrant from the inspector. (For more information on whether to demand a warrant, see *Protect Employer Interests when OSHA Arrives*).
- ❑ Reasonable inspection at reasonable times (see *Protect Employer Interests when OSHA Arrives*).
- ❑ An opening conference. For more information, see *Opening Conference*.
- ❑ A copy of formal employee complaints.
- ❑ Escort Compliance Safety & Health Officer (CSHO) on inspections of the workplace (referred to as the "walkaround") (see *Walkaround Inspection*).
- ❑ Participate in management interviews. For more information, see *Employee Interviews*.
- ❑ Protect trade secret and confidential business information.
- ❑ A closing conference (see *Closing Conference*).
- ❑ Contest alleged violations (see *Post-Citation Considerations*).

Familiarize Employees with Employees' OSHA Inspection Rights

Employees should understand that employees have a right to:

- File a safety or health complaint with OSHA.
- Participate in the inspection by having a designated employee participate in the:
 - opening and closing conferences;
 - CSHO walkaround;
 - private interviews with OSHA; and
 - informal settlement conference.
- Access inspection records (e.g., citations, notice of contest, and abatement records).
- Protection from retaliation and discrimination for exercising these rights.

Familiarize Employees with OSHA's Inspection Rights

- Decline to provide advance notice of inspections.
- Inspect workplaces with probable cause, consent, or when hazards are in plain view.
- Inspect records.
- Collect evidence, for example, air or noise samples and photographs.
- Conduct employee interviews.
- Exercise their authority to issue subpoenas for records and interviews.

Establish an Inspection Team and Inspection Protocols

- Establish an Inspection Team and Inspection Protocols
- Prepare a notification plan, identifying who must be informed (and by whom) of the start of an OSHA inspection, including:
 - senior management;
 - field supervisors; and
 - OSHA counsel.

Designate an inspection team and assign the following responsibilities (one person can fill multiple roles):

- team leader (management spokesperson and OSHA point person; and, generally, OSHA counsel, site-safety director, or other senior management representative);
- opening and closing conference participants (generally, a senior management representative, the inspection team leader, walkaround representative, and document production manager);
- walkaround representative (escort OSHA throughout the inspection);
- document production manager (manage the document control system);
- photographer (take side-by-side pictures of the CSHO's pictures);
- sampler (coordinate industrial hygiene sampling and acquire parallel samples);
- contractor liaison (coordinate inspection activities with contractors);
- union liaison (coordinate inspection activities with the employees' union); and
- interview representative (prepare employees for interviews and participate in management interviews).

Equip the inspection team with the following materials:

- camera and video recorder;
- template for document production log;
- labels for designating documents as trade secret or business confidential;
- notebooks;
- contact list; and
- copy of OSHA's *Field Operations Manual*.

Designate walkaround routes for each area of the facility. In doing so:

- ❑ understand the “plain view doctrine,” which permits OSHA to investigate hazards in areas beyond the scope of consent or a warrant if the CSHO observes a hazard in plain view from an area within the scope of consent or the warrant;
- ❑ plan most direct route to inspection area (by exterior if possible); and
- ❑ avoid providing a full tour of the facility.

Designate in advance a location for the opening/closing conferences, employee interviews, and where the CSHO can work (see *Preliminary Inspection Issues*).

SECTION II: PRELIMINARY INSPECTION ISSUES

There are a number of steps employers can take at the beginning of the inspection that can help ensure that the inspection proceeds successfully.

Protect Employer Interests When OSHA Arrives

- ❑ When the OSHA CSHO arrives, notify your team leader, counsel, and others identified on your notification plan.
- ❑ If the team leader is not available, OSHA inspectors must wait a reasonable amount of time (normally not to exceed one hour) for management to arrive to represent the employer during the inspection. Employers should understand and exercise their right to have a representative present during the inspection, pursuant to:
 - ❑ i§8(e) of the OSH Act, which provides that “the employer shall be given an

opportunity to accompany the secretary during the physical inspection of the workplace”); and

- ❑ OSHA’s Field Operations Manual, which provides that “[w]hen neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the owner, operator or management official. the inspection shall not be delayed unreasonably to await the arrival of the employer representative. this delay should normally not exceed one hour.”
- ❑ Consider asking for a warrant. to enter a workplace to begin an inspection, OSHA must have an administrative warrant or employer consent. Employers should consider whether to demand a warrant instead of consenting to inspection when:
 - OSHA has no clear probable cause (e.g., no employee complaint, neutral inspection program, referral, or an accident);
 - the employer seeks additional time before the investigation; and
 - OSHA is unwilling to negotiate a reasonable scope and conditions for the inspection.
- ❑ Consider consenting to inspection instead of requiring a warrant. Generally, employers should waive the warrant requirement and consent to an inspection, but only after negotiating reasonable scope and conditions of the inspection. When evaluating whether to consent to inspection, consider:
 - the risk of potential retaliation by OSHA;
 - the risk of signaling to OSHA that the employer may have something to hide;
 - the loss of control over the inspection’s scope;

- the benefit of cooperating with OSHA; and
- the benefit of the opportunity to negotiate scope and conditions of inspection.
- ❑ regardless of warrant or consent, OSHA's inspection must be conducted:
 - at reasonable times (generally, during normal work hours);
 - in a reasonable manner; and
 - within reasonable limits.

Opening Conference

At the very start of its investigation, the DOL must conduct an opening conference. It is advantageous to understand the basics of an opening conference and requirements for the parties involved.

Understand and Enforce OSHA's Opening Conference Obligations

During the Opening Conference, the CSHO owes several duties to the employer. If the CSHO does not adhere to these obligations, employers may request clarification on all points. Obligations include:

- ❑ Explaining why the employer is being inspected, for example:
 - is this a routine, scheduled, or programmed inspection;
 - is this related to a referral, accident, or employee complaint; or
 - is this a Special Emphasis Program inspection?
- ❑ Producing a copy of an employee complaint that may have led to the inspection.
- ❑ Describing intended scope and duration of the inspection.
- ❑ Delivering OSHA's first request for documents and information.

Employer's Best Practices during Opening Conference

During the opening conference, the employer's designated team leader should:

- ❑ Introduce the inspection team to the CSHO.
- ❑ Resolve the warrant question (see *Protect Employer Interests when OSHA Arrives*).
- ❑ If the CSHO does not volunteer all of the information outlined above, ask for clarification on all points.
- ❑ Describe the employer's document production protocol (see *Adhere to Best Practices for Document Production*). The team leaders should request that OSHA's document and information requests be:
 - delivered in writing (note: 300 Logs & 300A forms must be produced to OSHA within four hours of a request, whether or not the request is in writing); and
 - be provided to the designated Document Production Manager.
- ❑ Discuss protocol for arranging employee interviews (see *Employee Interviews*).
- ❑ Expect the CSHO to request, and be prepared to provide, copies of:
 - at least the previous three years of OSHA 300 Logs and 300A Summaries;
 - personal protective equipment (PPE) hazard assessment;
 - emergency action plan (which may be required by particular OSHA standards);
 - numerous written health and safety programs (for example, a Lockout/Tagout program (LO/TO) or Permit-Required Confined Space program (PRCS)); and
 - employee training records.

- ❑ Arrange for daily close-out meetings with the CSHO and the opening conference representatives in order to:
 - learn about concerns the CSHO has identified;
 - consider proactive presentations regarding the CSHO's concerns (it is much easier to avoid violations before citations are issued, so if the CSHO expresses concerns about a missing program element or training, considering putting together slides to demonstrate how the employer complies);
 - plan the next day's inspection activities;
 - learn who OSHA wants to interview and schedule the interviews; and
 - learn what sampling OSHA wants to do and prepare for sampling.

Conduct a Management Walkthrough during the Opening Conference

During the opening conference, management personnel should conduct a walkthrough of the facility to:

- ❑ Clean up disorganized work areas.
- ❑ Ensure employees are wearing appropriate PPE.
- ❑ Ensure employees are working safely and complying with safety programs and policies.
- ❑ Advise employees and contractors of OSHA's presence.

SECTION III: DOCUMENT PRODUCTION

Adhere to Best Practices for Document Production

- ❑ Label all documents produced with identifying numbers for tracking and for future reference during settlement negotiations and litigation.
- ❑ If the employer produces trade secret or confidential business information (CBI):
 - clearly label information as trade secret or CBI; and
 - produce documents under cover sheets setting forth protections of the US Trade Secret Act (*18 U.S.C. § 1905*).
- ❑ Redact personally-identifiable medical records (exception if OSHA obtains medical access order).
- ❑ Make and keep duplicates of every record produced to OSHA.
- ❑ Track all documents produced on the Document Control Log. Avoid

Common Document Production Mistakes

- ❑ Do *not* generate non-privileged documents during an inspection.
- ❑ Do *not* leave documents or information in plain sight (for example, file away loose documents or erase information left on a whiteboard from earlier meetings).
- ❑ Do *not* volunteer information (unless OSHA will misunderstand a fact to the employer's detriment without additional information).

SECTION IV: WALKAROUND INSPECTION

The CSHO will conduct a “walkaround” inspection of the facility looking for violations of the OSH Act or OSHA’s standards.

Understand the CSHO’s Activity During the Walkaround

During the audit, the CSHO may:

- Take photographs;
- Conduct Industrial Hygiene (IH) monitoring (testing and recording employee exposure to workplace hazards);
- Conduct brief “stop and talk” interviews with hourly employees;
- Take handwritten notes of potential conditions that violate the OSH Act or OSHA’s standards; and/or
- Identify alleged hazards and suggest corrective action.

Employer Participation in the Walkaround

During the walkaround, the employer should:

- Escort the CSHO at ALL times while at the inspected facility.
- Require the CSHO to abide by all employer safety rules (including wearing any required PPE).
- Be cordial and professional, but protect the employer’s rights.
- Gather intelligence about the inspection’s focus by tracking:
 - where the CSHO asks to go;
 - the subjects of the CSHO’s questions;
 - what the CSHO photographs; and
 - the subjects of the CSHO’s written notes.

- Take detailed notes about everything the CSHO says, does, or asks.
- Pay close attention to how sampling or air monitoring is conducted and in what activities any monitored employee is engaged.
- Take side-by-side photographs, videos, or samples.
- Immediately correct alleged hazards identified by the CSHO without admitting a violation.
- Do not demonstrate work tasks or the operation of equipment not otherwise scheduled pursuant to the ordinary course of business.

SECTION V: EMPLOYEE INTERVIEWS

The CSHO will conduct employee interviews of managers and hourly employees.

Understand Role of CSHO in Employee Interview Process

During inspection interviews, the CSHO may:

- Demand privacy for hourly employee interviews. This right, specified in OSHA’s Field Operations Manual, belongs to the hourly employees, not OSHA. Note: management employees do not have a corresponding right to a private interview.
- Take handwritten interview notes.
- Ask to audio or video record the interviews.
- Ask witnesses to write statements, or review and sign the CSHO’s notes.
- Ask questions about documents (written programs, training records, operating procedures, etc.) that have been produced during the inspection.

Understand Role of Employer in Employee Interview Process

With respect to employee interviews, the employer:

- Must never discriminate against employees for agreeing to be interviewed or because of anything they say to OSHA during an interview.
- Should schedule interviews in advance.
- Should object to impromptu, in-plant interviews that last more than approximately five minutes.
- Does not have a right to participate in hourly employee interviews, but does have a right to participate in all management interviews, and should exercise that right.
- Can request alternative times and locations for interview if the interview unduly hinders production.
- OSHA must be reasonable in its response to alternative time and location requests.
- Should prepare all employees for their interviews (see below).

Prepare All Employees for Interviews

The employer should prepare employees for OSHA interviews by:

- Using an attorney.
- Not coercing or intimidating employees into:
 - refusing an interview;
 - providing specific answers; or
 - requesting a manager be in the interview.
- Informing employees that the interview is voluntary, but that the OSH Act authorizes OSHA to issue investigative subpoenas to compel testimony.

- Describing the employees' interview rights, including the right:
 - to have a representative with them during the interview;
 - not to be video or audio recorded;
 - not to write out or sign their own statement or the notes of the CSHO;
 - to demand a copy of the statement if one is written or signed;
 - to examine document(s) that are the subject of interview questions; and
 - to take a break at any time for any reason.
- Offering employees interview tips, including:
 - always tell the truth;
 - listen carefully to the question;
 - answer only the question asked;
 - give short, concise answers, and wait for the next question (do not fill awkward silences);
 - stick to the facts and provide only firsthand knowledge;
 - do not guess or speculate;
 - "I don't know" and "I don't remember" are acceptable if true;
 - be positive and confident; and
 - do not let the CSHO put words into your mouth.
- Reminding employees of applicable safety rules and safety training they have received. Use records to refresh their memory.

Provide Additional Preparation for Management Employees

- Inform management that OSHA treats them as agents of the employer, and their statements, admissions, and knowledge are attributed to the employer.
- When participating in management interviews (or hourly employee interviews at the request of the hourly

employee), the Interview Representative should:

- take detailed notes (who, where, when, about what, and what documents were referenced by the CSHO); and
- help witnesses speak up for their rights.

SECTION VI: CLOSING CONFERENCE, CITATIONS AND POST-CITATION CONSIDERATIONS

Closing Conference

If OSHA intends to issue citations, it must conduct a closing conference. A closing conference is generally held at the close of the inspection, which may be weeks after the close of the on-site inspection (generally, a few days before delivery of citations).

Between the close of on-site inspection activities and the closing conference, the CSHO:

- Reviews:
 - documents;
 - interview notes;
 - sampling results; and
 - other physical evidence collected during the inspection.
- Researches:
 - standards;
 - interpretations; and
 - directives.
- Writes proposed:
 - citations;
 - penalties; and
 - abatement dates and requirements.
- Gets the citation package approved by the CSHO's superiors and finalized.

At the closing conference, the CSHO generally will:

- Explain the employer's post-citation rights.

- Communicate OSHA's findings, including:
 - standards allegedly violated;
 - bases for alleged violations; and
 - possible abatement and abatement dates.
- Not share:
 - characterization;
 - penalty; or
 - the actual citations.

During the closing conference, the employer should:

- Listen carefully and take detailed notes.
- Avoid damaging admissions.
- List for the CSHO any alleged violations that have already been corrected.
- Make no abatement or abatement date promises.
- Ask CSHO about characterizations and penalty amounts.
- Ask when the employer can expect to receive citations.
- Request time to provide supplemental information to correct any factual errors that form the basis of a proposed citation item.

Issuance of Citation

Employers should be aware that:

- No citation may be issued six months after the occurrence of a violation (as a practical matter, within six months of the start of an inspection).
- Citations are delivered by hand or certified mail with return receipt requested.
- If the proposed penalty exceeds \$40,000, OSHA will likely issue a negative enforcement press release.

Post-Citation Considerations

- Pay the fine and accept the citation. This is never the best option.
- Request a variance. This is rarely a possible option.
- Resolve citations at an informal settlement conference. This has recently become a less effective option.
- Contest the citation and negotiate a formal settlement with OSHA's counsel.
- Contest the citation and proceed to a hearing before an administrative law judge with the OSH
- Review Commission.

In deciding whether to contest citations, consult counsel and consider:

- Are alleged violations accurate and do they amount to an actual violation of an OSHA standard?
- Does the citation expose the employer to future, costly "repeat" violations?
- Are proposed penalties excessive?
- Is the required abatement action clear and feasible?
- Are the employer's sister facilities able and willing to conform to the required abatement?
- Does the proposed citation qualify the employer for the Severe Violators Enforcement Program?
- Do the citations relate to an injury or a potential civil suit?

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This Guide reflects the law as of the date of publication. You should consult with an attorney before relying on any information contained herein, as the law may have changed, and outcomes may vary depending on individual circumstances.