

DEALING WITH OSHA – THE MOST COMMON MISTAKE COMPANIES MAKE

Say an OSHA inspector shows up at your door, unannounced, and wants to conduct an inspection of your workplace. What do you do?

If your company is like most others, you let the inspector proceed. At the conclusion of the inspection, which could be days, weeks or months later, you find out if OSHA is going to issue any citations to your company. Then, if you are cited for one or more violations, you might for the first time in this process call your lawyer.

Compare that scenario to a visitor who is injured on your property and sues your company. You (or your insurance company) immediately hire a lawyer to defend the lawsuit. The lawyer is integrally involved in all aspects of discovery; depositions, document production, etcetera. By the time trial comes around, the lawyer has carefully prepared the case and knows all of the applicable facts about it.

Now think back to the OSHA inspection. That inspector was interviewing your employees (i.e. taking depositions), looking at your logs, records and written programs (i.e. reviewing your documents), and where was your lawyer? Not hired yet! Most companies let OSHA conduct and complete its discovery before even calling their lawyer. Big mistake! You would never do that with the personal injury lawsuit, so why do it with OSHA?

A lawyer who is knowledgeable about OSHA procedures and requirements can help a great deal with the conduct of the inspection, in many cases significantly affecting its outcome. I routinely tell my clients that while both are important, if they only are willing to have me involved with either the inspection or the contest phase defending the violation, I can usually help them more during the inspection.

OSHA inspections occur in several ways. In each case, the inspector is limited to inspecting the part of your operation that gave rise to the inspection, but no more. For example, if an employee complaint or an accident in your loading area lead to the inspection, the inspector is not supposed to delve into other areas of your operation. With that said, they can cite you for violations in other areas if they happen to observe them or learn of them during their inspection of your loading area. Many inspectors, if allowed, will gradually expand the inspection to encompass other areas of your business. Containing

the inspection to one particular area or operation and shielding others from view has obvious benefits to the employer.

Examples of ways that a given inspection can be contained or allowed to expand are too numerous to mention in this article. But the point is that it is OSHA's right to conduct the inspection it is there to conduct, not some broader one. The best way to keep it from expanding into a larger inspection, and a bigger deal, is by assigning someone to represent the company in the inspection who knows the OSHA procedures, requirements and case law. That person is your OSHA lawyer.

So, say you're now convinced that you should bring in an OSHA lawyer to represent your company during an inspection. How can you do that when the inspector has shown up at your door unannounced? Easy!

OSHA has two mechanisms for conducting a legal inspection, your voluntary consent or a valid search warrant. The OSHA inspector seldom shows up with a search warrant. Without a search warrant, the only way the inspection can proceed at that time is by you voluntarily agreeing to allow it. If you tell the warrantless inspector that you will allow the inspection, but only once your OSHA lawyer arrives to participate in it, the inspector has only two alternatives: 1) he or she can leave and either obtain a search warrant or forget about you; or, 2) agree to wait for your attorney. If the delay is limited to, say, an hour or two, they will usually wait for the lawyer. Getting the search warrant requires a considerable amount of bureaucratic red tape.

Another step that is useful in getting your company ready for a surprise OSHA inspection is an anticipatory meeting between your OSHA lawyer and your facility managers. At that meeting, the process suggested in this article can be explained to each manager who may be the one in charge at the time an inspector shows up, as well as considerably more details such as: how to handle the initial introduction; what to expect once the inspection proceeds; what equipment to keep ready (i.e. camera and film to take side-by-side pictures of whatever the inspector photographs); what to tell employees; etcetera. Such a briefing can usually be accomplished in one to two hours, and makes a big difference in how your company fares when that surprise visitor from OSHA shows up.