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THE FIVE STAGES OF AN OSHA INSPECTION WHAT TO EXPECT & CRITICAL EMPLOYER RIGHTS

STAGE ONE – The Opening Conference

➤ ***The OSHA inspector (hereinafter “CSHO”) will usually:***

- Research the establishment prior to appearing, including any prior violations;
- Arrive during regular working hours with no advance notice;
- Present his or her credentials and locate the owner, representative, or agent in charge;
- Arrive without an administrative warrant and ask the employer to consent to the inspection;
- Inform the employer of the purpose of the inspection;¹
- Advise the employer that an employee representative has the right to participate in the inspection – an employer representative and legal counsel may participate as well;
- Provide a copy of the written complaint (if any) that triggered the inspection;
- Outline in general terms the scope of the inspection; and
- Attempt to keep this stage of the inspection short.

➤ ***Employers may exercise these rights:***

- Negotiate a proper scope of the inspection and protocol prior to consenting to the inspection;
- Ask for a copy of the complaint (if any) that triggered the inspection – OSHA will likely redact the name of the complainant;²

¹ 29 CFR 1903.7(a) states, in part: “At the beginning of an inspection, [CSHOs] shall present their credentials to the owner, operator, or agent in charge at the establishment; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in §1903.3 which they wish to review.”

² 29 CFR 1903.11(a) states, in part: “Any employee ... who believe[s] that a violation of the Act exists in any workplace where such employee is employed may request an inspection of such workplace by giving notice of the alleged violation to the Area Director or to a [CSHO]. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees. A copy shall be provided the employer or his agent by the Area Director or [CSHO] no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available by the Department of Labor.”

- Ask for clarification on any aspects of the inspection, including whether the inspection is a “programmed” or “unprogrammed” inspection;
- Delay the start of the inspection for up to one hour pending a critical management representative appearing (if the representative is not on site at the time);³
- Alert employees that OSHA has arrived; and
- Refuse to consent to the inspection and insist that OSHA obtain a warrant.⁴

STAGE TWO – The Walkaround Inspection

➤ ***The CSHO has the right to:***

- Perform a walkthrough of the site (limited to the scope of the inspection);
- Talk privately with non-supervisory employees, although non-supervisory employees have the right to refuse to speak with the CSHO⁵ and also have the right to retain their own attorney;⁶
- Take photographs;
- Record videos;
- Conduct tests and sampling; and
- Expand the scope of the inspection if other safety and health hazards or violations are observed in plain view.

➤ ***Employers should exercise these rights:***

- Designate an employer representative (e.g., safety director, legal counsel, etc.) to accompany the CSHO during the walkaround – a good representative is critical because anything the representative tells the CSHO may later be used as an admission against the employer;
- Identify inspection routes and interview/document protocols before commencing the walkaround;
- Take detailed notes;
- Take side-by-side photographs, record videos, and conduct the same tests and sampling as the CSHO;

³ The OSHA Field Operations Manual (CPL 02-00-164, dated 4/14/20), Ch. 3, p. 6, states: “The inspection shall not be delayed unreasonably to await the arrival of the employer representative. If the employer representative is coming from off-site, the inspection should not be delayed in excess of one hour.”

⁴ 29 CFR 1903.4 provides that, if the employer refuses to consent to the inspection, the CSHO must terminate the inspection and report the refusal to the Area Director. In addition, the OSHA Field Operations Manual, Ch. 3, p. 7, similarly states that the CSHO shall leave the premises.

⁵ The OSHA Field Operations Manual, Ch. 3, p. 20, states that “if a non-managerial employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Area Director or designee, in determining the need for the employee’s statement.” Stated otherwise, employees are not required to give statements to OSHA. However, if an employee remains steadfast in the refusal to talk, OSHA can take it a step further and attempt to serve a subpoena on the employee.

⁶ The OSHA Field Operations Manual, Ch. 3, p. 22, states that “if the [non-managerial] employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request, and, before continuing with the interview, consult with the Area Director for guidance.” The Field Operations Manual, Ch. 3, p. 22, further provides that if the employer’s company attorney seeks to represent a non-management employee during an OSHA interview of the employee, this situation creates a potential conflict of interest. CSHOs should ask the affected employees whether they have agreed to be represented by the company’s attorney. If the employees indicate that they have, CSHOs should consult with the Area Director.

- Ensure that the inspection remains limited to its proper scope and consistent with any agreed-upon protocol (any departures from an established protocol should immediately be brought to the CSHO's attention and resolved);
- Protect trade secrets and confidential business information ("CBI");⁷ and
- Ask the CSHO questions.

STAGE THREE – Document Demands

➤ ***The following are examples of documents the CSHO may request:***

- OSHA Forms 300, 300a, and 301 for the past three to five years;
- Company health and safety plan, injury and illness prevention program, and/or site specific safety plans;
- Any applicable OSHA-required written programs (e.g., hazard communication program);
- Any applicable OSHA-required inspection records;
- Written certification that a hazard assessment was performed in accordance with 1910.132(d);
- Inspection records/audits;
- Employee training and disciplinary records;
- Contracts/subcontracts; and
- Accident Reports.

➤ ***Employers should exercise the following rights:***

- Insist that OSHA put any document demands in writing;
- Object to any document demands that request documents outside the scope of the inspection;
- Take measures to protect any trade secrets⁸ or CBI;
- Not produce any documents to OSHA on the spot; however: 300 logs must be provided to the CSHO within four business hours;⁹
- Identify an internal company document production protocol;
- Bates label all documents;
- Keep a copy of all documents produced and a document/privilege log; and
- Ensure that any company records disclosed to OSHA are reviewed by management and/or legal counsel prior to disclosing.

⁷ If an employer objects to a CSHO taking photos and/or video due a concern that trade secrets would or may be disclosed, the OSHA Field Operations Manual, Ch. 5, p. 13, indicates that CSHOs should advise employers of the protection against such disclosure afforded by the OSH Act and section 1903.9. If the employer still objects, CSHOs shall contact the RSOLs office, Area Director, or designee for guidance.

⁸ 29 CFR 1903.9(c) provides: "At the commencement of an inspection, the employer may identify areas in the establishment which contain or which might reveal a trade secret. If the [CSHO] has no clear reason to question such identification, information obtained in such areas, including all negatives and prints of photographs, and environmental samples, shall be labeled "confidential—trade secret" and shall not be disclosed except in accordance with the provisions of section 15 of the Act." (Emphasis added).

⁹ See 29 CFR 1904.40(a).

STAGE FOUR – Employee Interviews

➤ ***The CSHO has the right to:***

- Interview non-supervisory employees privately (and, oftentimes, will seek to do so shortly after arriving at the site or facility);
- Obtain an administrative subpoena compelling an employee to participate in an interview if the employee refuses the CSHO's request for a voluntary interview; and
- Request interviews of both supervisory and non-supervisory employees.

➤ ***Employers should understand:***

- A notable distinction exists between CSHO interviews of (1) supervisory employees and (2) non-supervisory employees;
- A CSHO may interview non-supervisory employees privately, although a non-supervisory employee has the right to request that a representative and/or personal legal counsel be present during his or her interview;
- An employer has the right to have a representative (including legal counsel) participate in any interviews of management and supervisory employees;
- An employer should prepare all employees in advance of any interviews, including show them documents to refresh their memory;
- Employees are not required to sign a statement or the CSHO's notes of any interviews;¹⁰
- Employees are not required to give video or audiotaped statements;
- Employers should resist any inclination to produce supervisors on the spot for interviews without first preparing them; and
- If necessary, employers should remind the CSHO that OSHA has six months to issue any citations, so there is no prejudice in scheduling any interviews of supervisory employees for a later date (as opposed to conducting the interviews the first day the CSHO arrives).

STAGE FIVE – Closing Conference/Issuance of Citation(s)

➤ ***What to Expect:***

- After the above four inspection stages have been completed, OSHA will hold a closing conference with the employer (often by phone) and then may issue one or more citations to the employer. The closing conference may occur days, weeks, or even months after the walkaround stage of the inspection, although OSHA is required to issue any citations within six months of the date the violations occurred.

¹⁰ The OSHA Field Operations Manual, Ch. 3, p. 22, states that employees "shall be encouraged" to sign and date any statements and, if the employee refuses to sign, the CSHO "shall note the refusal on the statement." Stated otherwise, employees aren't required to sign or write anything, regardless of any encouragement by the CSHO.