

Texas Crane Owners Association

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Michael Rubin, Esq.

Ogletree Deakins

michael.rubin@ogletree.com

646-761-1692



Ogletree
Deakins

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- **Michael Rubin | Ogletree Deakins**
Esplanade Center III, 2415 East
Camelback Road, Suite 800 | Phoenix,
AZ 85016 | Telephone: 602-778-3770 |
Mobile: 646-761-1692
michael.rubin@ogletree.com
www.ogletree.com



- [OSHA matters in 30+ states](#)
- [OSHA inspections, citations, and trials](#)
- [Focus on crane OSHA matters](#)
- [Crane background \(NCCCO written core/specialty exams\)](#)
- [Wrote Crane OSHA Legal Defense Guide for SC&RA](#)
- [Former CSP, 20+ year attorney](#)

OSHA in 2024 (*and 2025?*)

- Increased number inspections
- Increased number of citations
- More items (less grouping) in citations
- Instance-by-instance (“IBI”) penalties
- Less negotiating during informal settlement conferences
- More contesting citations to OSHRC
- More litigating and more hearings
- More regulatory action and NEPs

Why OSHA Shows Up

- Severe injuries and illnesses reported to OSHA by employers
- Anonymous worker complaints
- Referrals of hazards from other federal, state or local agencies, individuals, organizations, or the media

- Programmed inspections - aimed at specific high-hazard industries or individual workplaces that have experienced high rates of injuries and illnesses; emphasis programs

Knock, Knock... OSHA's Here!

Learn Your Rights Before OSHA Shows Up

- You will get no warning – there is no *Miranda* warning
- OSHA is not a law enforcement agency
- It does not have to tell employers their rights.
- Once inspection begins, litigation has also begun – OSHA wants to prove its case – already (in its mind) has probable cause
- OSHA won't tell you all of your rights, including important ones

4th Amendment to the U.S. Constitution

- Protection from unreasonable searches and seizures
- OSHA needs a warrant OR your consent to do an inspection
- The danger of “implied consent” – you didn’t object, so you must have consented
- Your right to discuss the scope of the inspection

Practice Pointer: bring up the 4th Amendment and the warrant requirement

“We understand the 4th Amendment applies – we are inclined to consent to the inspection, but before we do, we want to make sure there is a clear understanding of the scope of the inspection and what you (the OSHA inspector) plan to do today.”

Important Rights – The Right to Say “No”

■ The right to:

- Refuse entry if no warrant
- Refuse to sign anything
- Refuse to be recorded
- Refuse to speak to the inspector (if no subpoena) – everything is **voluntary**
- Object to the inspector taking photos or video due a concern that trade secrets may be disclosed
- Refuse any “unreasonable” request (OSH Act of 1970)
- Refuse to perform a “demonstration” of any work process or activity

Understanding Your OSHA Response Plan

- Who is a part of the team
- Who does what? (define the roles/responsibilities of your team)
 - Initial reporting to OSHA, opening conference, negotiating the consent, the walkaround, etc.
- *Standard Work Procedures and Guidelines for OSHA Inspections & Major Workplace Accidents*
 - Supporting Forms: i) Incident Summary Form, ii) Trade Secret Notification Form, iii) Legal Counsel Memorandum, iv) Incident Investigation Memorandum, v) Injured Individual Statement Form, vi) Witness Statement Form; vii) OSHA Inspection Checklist & Note Taker Form; viii) Request for Warrant Form; ix) Scope of Search and Confidentiality Form; x) Record of OSHA Inspection Form
- *The Five Stages of an OSHA Inspection – What to Expect and Critical Employer Rights*

Accident Investigations

Two Interests (legal and safety), Not One

- Incident report within 24 hours versus root cause analysis
- Only facts, not opinions
- No admissions
- Understand the applicable legal and fact issues when investigating, interviewing employees yourself, and preparing employees for interviews by others
- **No check off boxes of all the things you did wrong or need to improve**

Controlling the Flow of Information

OSHA may take (and take) what you give

- Need to know the limits of OSHA's enforcement authority – so you can effectively limit what OSHA does on site
- OSHA has six months to complete inspection and issue citation
- There are separate, well-defined stages of an OSHA inspection
 - OSHA Field Operations Manual - <https://www.osha.gov/enforcement/directives/cpl-02-00-164>
 - Part 1903 - <https://www.osha.gov/laws-regs/regulations/standardnumber/1903>

Five Stages of an OSHA Inspection

- Opening conference (after an event that triggers the inspection)
- Document requests
- Walkaround inspection
- Interviews
- Closing conference

OSHA Inspections Must Be Reasonable

- OSH Act of 1970, Sec. 8 – Inspections:
 - OSHA is authorized to “enter ... at reasonable times ... to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner ...”

Limit First Day of Inspection Disclosures

The First Day an OSHA Inspector Shows Up, REMEMBER:

- Unless the inspector has subpoena, no obligation to speak with inspector
- Schedule any formal management interviews for later date
 - Distinction: full interview versus sharing basic facts
- No management interviews before managers are prepared
- No documents given on site first day (exception: 300 logs, if requested – within four hours)

- Must get an understanding of the probable cause and limit the inspection
 - Use words like “*Fourth Amendment*,” “*warrant*,” “*consent*,” “*clear understanding of the scope*”

Stage One – Opening Conference

- OSHA will arrive with no notice given
- Ask to see badge/credentials
- Inspector should tell you (and you have the right to know):
 - Why OSHA is there (e.g., accident, employee complaint, reported injury, programmed inspection, etc.)
 - What and where are the potential hazards
 - What the inspector plans to do
- Recent Examples: (1) NEP (but NEP not published); (2) Scope of Fatality Inspection

Opening Conference – Practice Pointers

- Insist on an opening conference (mention “opening conference”)
- Conduct opening conference in an office or “safe” place
- Agree upon an inspection protocol with the inspector before it starts; address as many aspects of the inspection as possible – no surprises
- Bring up the Fourth Amendment (and that OSHA needs your consent since the inspector has no warrant) and use that as leverage to properly limit the scope of the inspection.

Stage Two – Document Demands

- Inspector will ask you to produce documents
- 300, 300A, 301 Logs – must be given w/in 4 business hours of request
(recent example – *inspector waived right?*)
- No set time limit for other documents
- Requests must be limited to scope of inspection/probable cause (e.g., training records, inspections, etc.)
- Requests must be related to incident/relevant issues

Understanding What Documents & Information You Need to Share With OSHA

You Must Know What the “Probable Cause” Is for the Inspection

- What is probable cause? The legal justification/grounds for the inspection.
- Why is it important? The inspection must be limited to the probable cause.
- Discussion: (1) Unprogrammed versus Programmed Inspections; (2) Limiting the Scope (Your Rights)

Document Demands – Practice Pointers

- Request that CSHO to put document demands in writing
- Do not disclose any records on the spot, except 300 logs (4-hour rule)
- Object to any demands that are beyond the scope of the inspection
- Only give records that are requested – review before disclosing
- Keep an index of everything produced, Bates stamp
- Protect trade secrets/confidential business information – “Confidential – Trade Secret”

Documents OSHA Usually Wants (and Why)

- Corporate safety records/plan/programs
- Site-specific safety records
- Training records/certifications of employees
- Worksite inspection records
- Daily/weeks/monthly, etc. JSAs, JHAs, pre-task plans, toolbox talks
- Disciplinary records – both a written plan and records of discipline
- Job logs
- Photos
- **Accident report**

Stage Three – Walkaround

- CSHO has the right to collect evidence (photos, videos, samples, **speak with employees**)
- Insist on proper PPE for CSHO
- Employer has the right to have a representative accompany CSHO
- Any violations the CSHO views is plain sight can expand the scope of the inspection

Walkaround – Practice Pointers

- Accompany the CSHO everywhere
(discuss example: knowledge of walkaround rep)
- Plan route to inspection area in advance – clear route
- Ask the CSHO questions
- Take identical (side-by-side) photos as the CSHO
- Detailed notes
- Make no admissions
- If alleged violation or unsafe condition pointed out, immediately correct but do not admit

Stage Four - Interviews

- Critical distinction exists between interviews of:
 - management/supervisors; and
 - non-supervisory employees
- All interviews are voluntary, unless OSHA issues a subpoena
 - If no subpoena, employee can decline or end interview

Interviews of Management/Supervisors

- Statements by managers/supervisors are binding on the company
- Managers and supervisors are entitled to have a management representative or attorney present
- Not required to sign statement or be recorded
- **Prepare managers as if it were a deposition**
- **Schedule the interview – not the first day of inspection when CSHO first shows up**

OSHA's Interviews of Non-Supervisors

- Hourly (non-supervisory) employees can have representation, but only if they ask for their own attorney/representative, not the company attorney, etc.
- OSHA can insist on a private interview – company representative cannot participate
- **Prepare non-supervisory employees (e.g., what to expect, pertinent issues, etc.)**

Stage Five – Closing Conference/Issuance of Citation(s)

- Closing conference
 - Correct obvious errors/misimpressions
 - Identify alleged violations already corrected

It Wasn't Me...

Reasons to never admit any wrongdoing to OSHA

- You don't have to. OSHA has the burden of proof.
- Your admission might be incorrect.
- You don't gain anything by doing it.
- It's not your job to admit. You very likely won't be the only person analyzing the situation and relevant issues.
- In view of the existence of related civil litigation, many companies, for strategic reasons, never admit to any wrongdoing and include a non-admission clause
- So you can preserve, not waive, the right to think of other valid factors (some unbeknownst to you at the time) later.

Can OSHA Meet It's Burden of Proof?

The Four Elements OSHA Needs to Prove for any One Alleged Violation

- Discussion of four elements
 1. Standard applies
 2. Standard was violated (not complied with)
 3. One or more employees had access (or was exposed) to the hazard
 4. Employer actually knew, or (in the alternative) should have known of the alleged violation or hazardous condition
- These elements impact i) company investigation, ii) preparation for OSHA interviews
- OSHA inspectors are not lawyers
- **Never assume you will lose because OSHA can meet the first two elements, or even all four!**

Potential Affirmative Defenses

- Unpreventable employee misconduct
- Supervisory misconduct (*example, NY trial*)
- Greater hazard posed by compliance
- Impossibility/infeasibility of compliance
- Statute of limitations
- Another federal agency has jurisdiction
- *De minimis* violation

10 Things Employers Wish They Had Done Before Getting Cited

1. Learned their rights and the process before OSHA showed up.
2. Created a written OSHA response plan.
3. Done what they said they would in their written safety and health plan.
4. Contested a prior OSHA violation that has now formed the predicate for a “repeat” violation
5. Documented their periodic inspection efforts to confirm employee compliance with their safety and health plan - the third element of the unpreventable employee misconduct defense.

What Employers Wish They Had Done

6. Documented their prior discipline of employees - the fourth element of the unpreventable employee misconduct defense.
7. On a multi-employer worksite, entered into a contract/subcontract that better described the company's true level of involvement and responsibility for safety
8. Prepared employees for their interviews with OSHA, pointing out the relevant issues
9. Read the actual OSHA standards to understand what exactly was required.
10. Finished the items on their safety "to do" list.

Common Crane Defenses

- ASME B.30.5 – (*limited*) responsibilities of crane operator
 - Contract/crane ticket/MSA
 - Riggers/signal persons employed by other entities
 - No knowledge of violation/hazard
 - *Example*: hoisting route (no control over scheduling, other contractors, or OSHA)

Crane Defenses (cont.)

- Unpreventable employee misconduct
 - Rule to prevent the violation
 - Training of employees on the rules
 - Inspections/walkthroughs of the site
 - Disciplinary program/discipline of workers
- Recent case example
- Importance of documentation/evidence

Questions – Thank you

Michael Rubin, Esq.
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.

michael.rubin@ogletree.com

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