

OSHA UPDATE PART II: STAGES OF A SOUTH CAROLINA OSHA INSPECTION AND CONTESTING CITATIONS

As we wrote in last month's OSHA Update, it is important for employers to know what they can expect in connection with—and how they can prepare for—an inspection. This month's update addresses the inspection and citation process.

Stages of an Inspection

Initial Contact. When an inspector arrives at a workplace ready to open an inspection, he or she will present agency credentials, including a photo ID. Employers are encouraged to call OSHA if there is any reason to suspect the visit is not an official inspection.

The employer does not have to let the inspector proceed unless the inspector has an administrative warrant. (There is an exception to this rule: worksites that can be viewed from a public area can be inspected without a warrant.) OSHA does not routinely obtain warrants in advance of an inspection.

If in doubt about whether to allow an inspection to proceed, the employer can ask the inspector to wait in a conference room while it consults with legal counsel. If the employer refuses access, OSHA will almost always try to obtain a warrant from a state circuit court judge. This is not difficult, as warrants are normally issued on an *ex parte* basis (without input from the employer).

An employer considering denying entry to an inspector who does not have a warrant must weigh the potential benefits of this denial against the likelihood that when the inspector returns with the warrant, he or she will carry out a more rigorous inspection.

Opening Conference. The inspector will begin by holding an "opening conference" with the employer's representatives (and, in some cases, an employee representative). During this conference, the inspector will explain the purpose, scope, and circumstances of the inspection. If the impetus for the inspection was a complaint, the inspector will give the employer a copy of the complaint. If a programmed inspection is to be conducted, the employer should confirm that its SIC code matches the SIC code the inspector is authorized to inspect. This opening conference provides an opportunity for the employer and the inspector to discuss the focus and scope of the inspection, any trade secret areas, and the procedure for conducting employee interviews and producing documents.

Establishment Inspection. Next comes the "walk around" inspection of work areas, during which the inspector seeks to determine if the employer is in compliance with specific standards as well as with the general duty requirement to provide a safe and healthy work environment. In a complaint or accident inspection, the inspector may focus on only part of the employer's facility. In a programmed inspection, the inspector will likely want to see all aspects of the operations. The employer's representatives should accompany

the inspector at all times, taking notes on what the inspector observes and says. Additionally, if the inspector takes a picture of something, the employer will want to take a picture of the same thing, from several angles if possible. If the inspector is using a video camera, the employer will want to use one, too. If the inspector measures or diagrams something, the employer will want to do the same.

- **Inspection of Records.** The inspector will ask to review various records, such as OSHA 300 logs, OSHA 301 or worker's compensation first report of injury forms, written programs, and training records. He or she will also check on whether the OSHA poster is displayed. The inspector is generally entitled to examine any record or program that OSHA regulates.
- **Employee Interviews.** As the inspector proceeds through the workplace, he or she will conduct "over the shoulder" interviews of employees. The inspector will ask employees about their job duties, training, and knowledge and recognition of potential hazards. Inspectors are supposed to schedule lengthier interviews at a time and under circumstances that will not interfere with the employees' duties or the employer's operations.

Closing Conference. At the conclusion of the inspection, the inspector will hold a "closing conference" to inform the employer of violations he or she noted and of suggested abatement procedures. The inspector will inform the employer of the citation process and provide an estimate of when the employer may hear further from OSHA.

Contesting Citations

After the inspector submits a report, OSHA will issue citations and impose fines and abatement dates for each alleged violation. Fines are determined based on the seriousness of the alleged hazard:

- "Serious" citations can result in penalties of up to \$7,000.
- "Repeat" and "willful" citations can carry fines of up to \$70,000.
- "Failure to abate" citations can result in penalties of up to \$7,000 for each day the alleged violation is not corrected, up to 30 days.

Penalties are adjusted for the employer's size, compliance history, and willingness to implement internal programs and procedures to achieve compliance with OSHA standards.

If the employer does not agree with a citation, or objects to the fine or the abatement date, it has 30 days from receipt of the citation to request a contested case hearing before the Administrative Law Court. South Carolina's OSHA regulations also provide for informal settlement conferences to resolve citations; however, requesting and having an informal conference does not postpone the 30-day period for seeking a contested case procedure. The informal conference system is often a cost-effective method by which to resolve issues such as the amount of a fine or the length of time set for abatement. If a citation cannot be resolved informally, it is critical that the employer request a contested case within the 30-day period.

Conclusion

Employers should make OSHA compliance a top priority and ensure that their programs and required documents are accurate, complete, and up-to-date. In addition, employers should routinely inspect their facilities to evaluate safety and health issues. Finally, employers should have a written protocol to be followed in the event of an OSHA inspection.

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