

THE DOs AND DON'Ts OF AN OSHA INSPECTION

BY COURTNEY MALVEAUX

For some employers, it's a paralyzing moment. "OSHA!" someone announces at the door. It's a blue-clad inspector, foisting credentials for all to see. An uneasy silence ensues as managers, foremen and workers share uncertain glances.

How should employers react? Welcome the


inspector in? Shut down? Block the door and start calling lawyers?


When I served as Virginia's Labor Commissioner, I had many opportunities to be involved very intimately in every step of enforcement of the Occupational Safety and Health Act (OSHA), from the


knock on the door to issuing citations to legal review.

The responses of employers and their attorneys ran the gamut, from professional to disastrous. Here are some practical tips on how to get through every phase of an OSHA inspection, so you can get back to the business of doing business.


BEFORE THE INSPECTION DON'T


 Get a doormat for a safety specialist. Even the best experts are worthless if you don't heed their advice. If you don't, OSHA inspectors will find out through confidential interviews.


 Falsify reports. You can be criminally liable for falsifying data on OSHA 300 logs or other records.

 Fire a worker for absence due to a work-related injury. Termination could be deemed an unfair employment practice and invite a discrimination claim.

BUT DO


 Protect your trade secrets. Don't wait until you're under the pressure of an inspection. Identify records containing trade secrets now, especially safety audits.

 Get a reputable safety and health consultant or director. Ask around. Make sure they have the right credentials and a good reputation. Regulators know who's serious and who's faking it.


 Review your policies and procedures. You really can't claim employee misconduct if your policies aren't well-tailored in advance.


WHEN OSHA KNOCKS DON'T

 Block the door. Or be "too busy." The inspector can get a warrant anyway. You can request a short wait while you get a manager or safety director. If you're busy, have another safety professional or manager stand in for you.


 Take a sudden "lunch." Or shut down. Cat-and-mouse games could be viewed as obstruc-


tion, which can carry criminal penalties and make the process worse. You can try it, but you'll get inspected anyway, with a whole different tone.


 Lie or clam up. Obstructing an inspection can carry criminal penalties. So answer each question honestly and succinctly. Once you've answered a question, stop talking.

 "Coach" employee responses. Pressuring employees to answer questions your way could backfire. You don't want your employees telling the OSHA inspector one thing while you're in the room, and then giving a whole different story once they pull the door shut behind them on the way into a private interview.


BUT DO

 Show courtesy. The inspector knows this isn't a happy day for you. Being professional and courteous can go a long way in opening the lines of communication. You can reduce penalties significantly by demonstrating good faith, so set a constructive tone.


 Ask questions. You are entitled to know what is being inspected and how the process will proceed. Take advantage of the opportunity to learn what hazards exist at your workplace, and whether other employers have found quick, inexpensive ways to fix them.


 Take pictures. If you get cited, you will not have immediate access to the case against you. Have someone walk with the investigator, ask what he/she sees, and

take the same pictures, video and measurements he/she is taking. This information helps immensely in defending citation contests.

 **Let an employee representative participate.** Employees may select a representative to accompany the inspector during the inspection, and receive continued notice after the inspection. This occurs more often when employees are represented by a labor union.

AFTER THE CITATION DON'T

 **Assume a lull means you're in the clear.** OSHA can take up to six months to issue a citation. The more serious ones generally take much longer to prepare.


 **Fail to abate.** This is a great time to be proactive and show you're serious about safety. You want to be ready in case you get a follow-up inspection, as OSHA multiplies penalties if you fail to abate a cited hazard, repeat a violation or willfully fail to abate a known hazard.


 **Presume you have a target on your back.** Many inspections are directed by a random list of employers in high-hazard industries sent from the federal Department of Labor. Other inspections are opened because of a complaint or referral, a reported incident, or because an inspector noticed a hazard while

driving by. Leave the conspiracy thinking to the conspiracy theorists.

BUT DO


 **Post the citation.** Does it feel like a public hanging? Maybe. But employers are required to post citations. Your employees probably know (and may have reported) the hazard, so using this opportunity to acknowledge any deficiencies and address them could enhance employee confidence in your efforts on their behalf.


 **Consider the cost of contesting.** Once you receive a citation, you have just 15 business days to make an important decision. Should you circle the wagons and contest? Maybe, if the citation includes heavy penalties, or if abatement requires an unnecessarily burdensome change to your core business model. But contesting a violation not deemed "Serious" may drain time and resources unnecessarily. Good advice from experienced counsel can help you evaluate whether a legal contest is worth it.


 **Consider early settlement.** By requesting an informal conference, you can get quick answers as to whether OSHA might reduce, group or eliminate the initial penalties. Come in the spirit of cooperation, with knowledge of the regulations, safety technology and the personnel in the regional office.

Consider voluntary compliance. Employers with consistently low injury and illness rates and strong safety process management systems may be eligible for the Voluntary Protection Program or the Safety and Health Achievement Recognition Program. Participants are removed from scheduled inspection lists. They also enjoy significant Workers' Compensation, insurance and other cost savings, and are billed as preferred businesses and contractors.

AVOIDING RETALIATION CLAIMS DON'T


 **Fire a worker for absence due to a work-related injury.** An employer policy of discharging employees absent from work less than six months due to a compensable absence under a state Workers' Compensation statute may constitute an unfair employment practice.


 **Retaliate for "whistle-blowing."** Know how to make a bad situation worse? Try tracking down the employees who may have complained or were interviewed. Worse yet, try firing, threatening or taking any adverse action against them while sweating out the citation phase. These are great ways to bring another investigation and possibly an action for discrimination.

 **Go easy on safety scofflaws.** Suspending your internal disciplinary

program for safety infractions can make your situation worse. Being on pins and needles after an inspection is natural. Use the occasion as an opportunity to implement or reinforce your safety incentive/disciplinary system.

BUT DO

 **Be on your best behavior.** Call in your chain of command and make sure it is treating everyone well and fairly.

 **Hands off complainants and interviewees.**

Casual questioning by the boss can give the perception of a retaliatory witch hunt. This can only confirm that there's fire where there's smoke.

So when OSHA knocks, don't freeze up. Be prepared and follow your plan. And whether you contest or settle, draw on the advice of someone who knows OSHA inside and out. That way, you can walk away with the confidence of knowing you got the best outcome. •

ABOUT THE AUTHOR

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