

OSHA Inspection Dos and Don'ts for Construction Industry

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When the Occupational Safety and Health Administration (OSHA) arrives at a construction site for an inspection, knowing the OSHA requirements for the industry is extremely important to keep business moving. OSHA targets the construction industry like no other because operations are often in clear view and because the industry accounts for more occupational injuries than any other.

The following are some practical tips on each phase of an OSHA inspection that can help you get back to the business of doing business.

Before the Inspection

Don't:

- Falsify reports. Criminal liability can be brought 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.

Do:

- Protect trade secrets. Identify records containing trade secrets, especially from safety and health audits.
- Get a reputable safety and health consultant or director. Make sure the person has strong credentials and a solid reputation.
- Review policies and procedures, particularly with respect to training, discipline, and hazard assessments. Make sure policies are well-tailored and followed.

When OSHA Arrives

Don't:

- Trot out managers or supervisors for interviews. Managers and supervisors speak for the company, so their admissions are company admissions. The company determines consent to managerial interviews, and it can have an attorney in the room.
- Block the entrance. Or be "too busy" or shut down. Such games could be viewed as obstruction, which can carry criminal penalties and lead to unnecessary presumptions. The inspector can get a warrant and return with a sheriff. If necessary, ask the inspector to wait briefly until the manager or safety director is present.
- Coach employee responses. Pressuring employees to answer questions a certain way could backfire and cause resentment.
- Get intimidated. Get advice from your counsel, not from the agency.

Do:

- Show courtesy. Being professional and courteous can go a long way in opening the lines of communication. Penalties can be reduced significantly by demonstrated good faith. Set a constructive tone, even when asserting your rights.
- Ask open-ended questions. Inspectors want to say what they are seeing. Encourage that. Once the inspection is over, the inspection file may not be available for a long time.
- Take pictures. Have someone walk with the investigator, ask what they see, and take the same pictures, video, and measurements they are taking. Build a “dummy file” for the informal conference and a potential contest.
- Let employees know their rights in private OSHA interviews, especially with respect to consent, representation, written statements, and recordings. Employees who do not know their rights can be intimidated into signing statements and telling the inspector what they think the agency wants to hear.

After the Walkaround

Don't:

- Let the company safety professional play lawyer. Knowing the standards is not enough. You need to know how judges apply the law in order to weigh legal defenses.
- Concede to every request for information. Targeted and complaint-driven inspections should be limited to information that is relevant to the complaint or incident. Exhaustive employee lists and personal contact information, for example, can exceed the agency's authority.
- Reenact a scene. Reenactments can lead to inadvertent admissions and incorrect assumptions.
- Turn over a root cause analysis or internal investigation before it is completed or if it includes privileged information. Attorney review is an absolute must here.

Do:

- Consider the hidden costs of a citation. Is a contest worth it? Maybe, especially if a citation matures into a final order that mandates abatement that harms your business model, impairs your ability to bid on future work, or sets you up for a “repeat” citation later. An experienced OSHA attorney can help evaluate legal exposure and the likelihood of success.
- Consider changing the language of the citation. It is negotiable, and plaintiff's attorneys, unions, industry competitors, and news sources might use the language in the final order for their purposes.

Avoid Retaliation Claims

Don't:

- Retaliate for whistleblowing. Firing, threatening, or taking any adverse action against witnesses during the citation phase can bring another investigation for a whole new offense.

- Go easy on safety scofflaws. Suspending internal disciplinary program for safety infractions can make the situation worse. Instead, use the occasion to implement or reinforce safety incentive and disciplinary system.

Do:

- Be on best behavior.
- Be hands-off regarding complainants and interviewees. Even casual questioning can give the perception of retaliation.

Have a plan for when OSHA shows up to get the best result.

Jackson Lewis attorneys are available to answer inquiries regarding OSHA requirements for the construction industry.

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