

# OSHA Inspection Guide

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## What You Need to Know When OSHA's Knocking at the Door

Since OSHA inspectors usually show up unannounced to conduct workplace inspections for safety and health violations, employers need to be prepared and know their rights – in advance. This inspection guide is designed to inform employers of their most important rights and enable employers to manage an OSHA inspection with confidence and control.

### BEFORE OSHA SHOWS UP

*Get your house in order*

- Establish written work rules consistent with OSHA standards and communicate rules to employees.
- Provide necessary training and maintain records.
- Conduct inspections and self-audits to identify any hazards or violations of safety program.
- Create a progressive disciplinary program and share written program with employees.
- Ensure compliance with applicable OSHA standards, including any program or plan requirements.
- Prepare an OSHA response team and inspection protocol.
- Train employees on their rights and responsibilities in the event of an OSHA inspection.

### CRITICAL EMPLOYER RIGHTS

*And how to exercise them*

- Designate a company representative to accompany the OSHA inspector at all times.
- Ask the inspector questions.
- Take side-by-side photographs, record videos, and conduct the same tests and sampling as OSHA.
- Have an attorney or company representative present for management interviews.
- Prepare all employees for OSHA interviews.
- Insist that any document demands be put in writing.
- Do not disclose any documents to OSHA “on the spot” (unless SDS sheets or 300 logs)
- Ensure that the inspection remains limited to its proper scope and consistent with any agreed-upon protocol.
- Take measures to protect any trade secrets.
- Identify inspection routes and interview/document protocols in advance of the walkthrough.

### WHEN OSHA SHOWS UP

*Understand the inspection process*

- The 4th Amendment applies, so OSHA needs a warrant or your consent to enter and inspect. Consenting is usually advisable, but only after negotiating (and insisting upon) a proper scope and protocol for the inspection.
- If additional time is needed for a critical member of management to arrive, request that the inspection be delayed. Inspectors will usually wait up to one hour.
- Understand the main parts of an OSHA inspection:
  - i. the opening conference;
  - ii. the walkthrough (physical inspection);
  - iii. document demands;
  - iv. interviews; and
  - v. the closing conference.
- Understand that the OSHA inspector has the right to:
  - Perform a walkthrough of the facility (limited to the scope of the inspection)
  - Talk privately with non-management employees
  - Request documents, including 300 logs, written programs and plans, and SDS sheets
  - Take photographs, record videos, and conduct tests and sampling

**REMEMBER:** This guide is solely meant to provide suggestions and an overview of those most important rights. Each inspection will have its own unique aspects; based on the facts and circumstances of any particular inspection or business, additional considerations may be warranted.

## For more information, contact:

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**Webinar:**

**OSHA & the Crane and Rigging  
Industry: What You Need to  
Know**

**Including:**

**Top Ten Tips – Minimize and Eliminate Exposure**

January 30<sup>th</sup>, 2019

# Speakers



- Michael Rubin - Partner at Goldberg Segalla
  - Michael Rubin is chair of Goldberg Segalla's national OSHA and Worksite Safety Practice Group. A Certified Safety Professional (CSP), Michael focuses his practice on issues involving occupational safety and health law. He advises and represents employers across multiple industries and around the country in connection with OSHA inspections, investigations, and enforcement actions. He also develops and audits safety programs and policies and counsels employers on related risk-management strategies. He has hands-on experience managing accident investigations — including those involving multiple fatalities — and regularly represents employers before, during, and after the OSHA inspection process.
- Joseph Doerr – NBIS Program Manager for Crane & Rigging
  - Joe serves as the Program Manager for Crane & Rigging Program at NBIS. As program manager, Joseph partners with agents and insureds to sell comprehensive coverage and cross sell existing accounts, and work with active insureds on compliance and regulatory relevant updates and changes. Joe holds his producers license and is a member of TIDA, CVSA & SC&RA and IMUA.

# 2018 OSHA Inspections

- FY 2018 total federal inspections: 32,020
- FY 2018 total State Plan inspections: 40,993
  
- Total Inspections: 73,013

# Overview - 10 Practical Tips

1. Appreciate the risk
2. Understand the process and your rights
3. Create an OSHA response plan
4. Get your house in order before OSHA shows up
5. Address the OSHA low-hanging fruit

# 10 Practical Tips Cont'd

6. Assert your rights during an inspection
7. Proactively establish your defenses
8. Understand the difference between supervisory / non-supervisory employees
9. Use inspection records to help you, not hurt
10. Assert your defenses & maximize your options

# The Risk of OSHA Citations

- Financial – plus much more

Type of Violation	2018 Penalty	2019 Penalty
“Serious” “Other-Than-Serious”	\$12,934 per violation	\$13,260 per violation
“Failure to Abate”	\$12,934 per day	\$13,260 per day
“Willful” or “Repeated”	\$129,336 per violation	\$132,598 per violation

# Additional Risk

- Negative publicity
- Loss of contracts
- Impact on related civil litigation
- Insurance premiums
- “Repeat” violations
- Indirect costs of injuries
- Qualify for SVEP (Severe Violator Enforcement Program)
- Defense fees/expenses



# Know Your Rights and the Process

- Stages of OSHA inspection
  - Opening conference
  - Walk-around
  - Interviews/document production
  - Closing conference
  - Citation
- Primary goals
  - Control the flow of information
  - Make strategic decisions

# OSHA's Inspection Rights

- Conduct “reasonable” inspection – 6 months to issue Citation
- Need warrant / employer consent to enter
- Document requests
  - 300 logs
  - Inspection/maintenance records
  - Written programs and plans
  - Disciplinary policy/records
- Employee interviews
  - On the spot / scheduled
  - Supervisory / non-supervisory
- Collect physical evidence
- Photographs and videos

# Employer's Inspection Rights

- Insist on warrant / consent subject to conditions
- Delay inspection one hour (Field Operations Manual)
- Establish an inspection protocol
- Basis for the inspection
- Accompany inspector at all times
  - Side-by-side photos & measurements
  - Ask questions
  - Participate in interviews of supervisory employees
  - Ensure inspector complies with protocol

# Create an OSHA Response Plan

- OSHA response team
- Warrant philosophy
- Document and interview protocol
- Inspection tools
  - Camera/video camera, contact list, document log, sampling tools
- Employee training
  - OSHA rights/responsibilities
  - Special emphasis programs
- Think beyond a single facility

# Get Your House in Order, Now! Before OSHA Shows Up

- Inspection records (1926.1412)
  - Each shift, monthly, annual comprehensive
- Cranes in compliance
- Hazard Communication Plan (e.g., SDS sheets)
- 300 logs
  - Retain for 5 years
  - 6 month limitations period
- Analyze effectiveness of your safety program – lagging indicators, leading indicators, management commitment, training
- ASME B30.5 – 2018: Mobile and Locomotive Cranes

# Address the OSHA Low-Hanging Fruit

- Top 10 Subpart CC violations
  - 1926.1428(a)(3) – signal person qualifications
  - 1926.1412(d)(1)(e)(1)(3)(f)(1)(2)(7) – inspections (each shift, monthly, annual)
  - 1926.1408(a)(1)(2) – power line safety/identifying work zone
  - 1926.1430(b) – signal person training
  - 1926.1417(a)(c)(1)(o)(3)(w) – operation / load charts / within rated capacity

# OSHA Low-Hanging Fruit

- 1926.1425(a)(c)(1)(3) – Keeping clear of load
- 1926.1424(a)(2)(ii) – Work area control
- 1926.1402(b) – Ground conditions
- 1926.1404(h)(2)(q)(2) – Assembly/disassembly, blocking material & outriggers
- 1926.1413(b)(1)(4) – Documented wire rope inspection

# Assert Your Rights During Inspection

- Opening conference
  - Limit scope of inspection
  - Ask for purpose of inspection
  - Establish document production & interview protocols
- Document production
  - Insist on written requests
  - Do not create documents, leave documents in plain sight, or volunteer information
  - No document production on the spot (unless SDS and/or 300 logs)
  - Keep copies (Bates stamped)



# Assert Your Rights During Inspection

- Walkaround
  - Accompany inspector at all times
  - Side-by-side photographs
  - Ask questions
  - Fix hazards identified by inspector but do not admit violations
  - Take detailed notes
  - Daily close out meetings
  - Address departures from agreed-upon scope/protocol

# Assert Your Rights During Inspection

- Interviews
  - Supervisory versus non-supervisory (5 minute rule)
  - Pre-select office or conference room
  - Prepare all witnesses, including non-supervisory employees
  - Right not to be recorded; right not to sign statements
- Closing conference
  - Correct obvious errors/misimpressions
  - Identify alleged violations already corrected

# Proactively Establish Your Defenses

- What can you do to protect yourself (legally) and, at the same time, protect the safety of your employees?
- **What if your employee should have known better?**
- Case Example: Employee not wearing hard hat
- Best Defense:
  - A. Employee should have known better
  - B. Employee already had training and “came trained”
  - C. Employees told to be safe in morning safety meetings
  - D. Hard hats were available on site.
  - E. None of the above.**

# Proactively Establish Your Defenses

- Unpreventable employee misconduct defense – must PROACTIVELY establish
- How? Employer must show that it:
  - Established work rules designed to prevent the violation;
  - Adequately communicated the rules to its employees;
  - Has taken steps to discover violations of the rules; and
  - Effectively enforced the rules when violations have been discovered

# Unpreventable Employee Misconduct

- Work Rules – Requirement # 1
  - Rules must be rules: no ambiguity (“must”, “required”, “never”...)
  - Not general procedures, suggestions, or “best practices”
  - Same level of protection as OSHA standard
  - Balancing – too broad (“be safe”) versus too detailed (entirety of OSHA construction standards)
  - MUST be in writing
  - Document everything
  - Engage in hazard identification

# Unpreventable Employee Misconduct

- Communicate the Rules – Requirement # 2
  - Critical Distinction
    - Not just made available
    - Instead: Steps taken to ensure rules are understood and able to be followed
  - Distribute rules to each employee
  - Any non-English speaking workers?
  - Training
  - **Acknowledgment form: received, read, understands, agrees to abide, and will ask questions**

# Unpreventable Employee Misconduct

- Take steps to discover violations – Requirement # 3
  - Daily walkthroughs/site visits/audits by supervisors
  - Document the walkthroughs, including:
    - Date, time, how long on site
    - What safety policies the walkthrough was designed to observe (e.g., compliance with strict PPE policy, etc.)
    - The results (e.g., all employees wearing hard hats/PPE – or not.)
  - Consider using safety Apps

# Unpreventable Employee Misconduct

- Enforce the Rules – Requirement # 4
  - Must have a written disciplinary program
    - Share the program with all employees
  - Employee counseling form
    - Description of workplace performance issue/incident
      - “VIOLATION OF COMPANY SAFETY RULES”
    - Corrective/disciplinary action taken:
      - Oral warning, written warning, suspension without pay, final warning, discharge
    - Employee acknowledgement / statement
  - Must retain records



# Supervisory vs. Non-Supervisory Employees

“The Secretary has the burden to establish the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. Knowledge is imputed to the employer through its *supervisory employee*.”

- Who is a supervisory employee?
  - “An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purpose of establishing knowledge”
  - The formal title of the employee is not controlling

# Inspection Records – Can Help or Hurt

- How inspection records can HURT
  - Show notice to employer of dangerous/recurring condition
  - Can lead to “willful” violation and/or criminal penalties
  - Identified conditions not corrected (or corrections made, but not documented)
  - Records not truthful (employees say something different)
- How inspection records can HELP
  - Requirement # 3 (and possibly # 4) of employee misconduct defense
  - Required under Subpart CC
  - Prove the absence of a dangerous/recurring condition
  - Show company commitment to safety and continuous improvement



# Disclosure of Inspection Records

- Insurance carrier audits (discoverable)
- Audits protected by attorney-client privilege (protected)

# Assert and Establish Your Defenses

- OSHA must prove 4 elements to establish a violation
  - An applicable standard
  - Standard was not complied with and a hazard existed
  - An employee was exposed; and
  - The employer knew, or should have known, of the violation
- Consider your factual and legal defenses
  - No hazard
  - No exposure to the employee
  - No notice to the employer
  - Unpreventable employee misconduct

# Maximize Your Options

- OSHA voluntary withdrawal of citation
- Hearing (trial) – Judge decides
- Amend the cited standard
- Reduce or eliminate penalty
- Reclassify violation
- Perform enhanced abatement
- Notice of Contest (considerations)



# Questions?



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