



**SAFETY 26**

CONFERENCE + EXPO

# Preparing for and Handling an OSHA Inspection

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# Emergency Instructions

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# Presenter

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# Goals & Objectives

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- You will be better prepared for an inspection.
- You will understand strategies and tactics before you have to experience them.
- You will be able to customize specific advice for your own facility
- You will be able to prepare in advance what to do if Cal/OSHA shows up
- You will understand how you can minimize or avoid citation items, even in the event of a tragedy



# Why is Cal/OSHA Here?

- Enforcement of worker safety standards and regulations
- Programmed inspections – e.g., National Emphasis Program (“NEP”) on falls, amputations, etc.
- Warehousing operations are in OSHA’s crosshairs → new National Emphasis Program
- Unprogrammed inspections – complaint, reported event, CSHO observation from public place (“just happened to be driving by”)



# No “Miranda” – Style Warning

- Cal/OSHA is not a law enforcement agency
- It does not have to tell employers their rights.
- You must know your and the Company’s rights and responsibilities and what Cal/OSHA can and cannot do
- It is up to us to hold Cal/OSHA accountable to the law
- And you still should conduct yourself as if you have received a *Miranda-type* warning— you have a right to remain silent (with some exceptions); and **anything you as a management representative say can be used against the Company in an Cal/OSHA or related enforcement action**



# How to Avoid or Minimize a Citation

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1. Procedures and rules
2. Training
3. Compliance
4. Enforcement



# OSHA Inspection Overview

- Preparing
- Initiating Event (maybe)
- CSHO's Arrival
- Opening Conference
- Walkaround
- Employee Interviews
- Document Requests
- Subpoenas
- Closing Conference



# Employer's Rights

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- Employers' rights begin immediately upon the occurrence of an incident and before Cal/OSHA arrives on-site
  - Some of us have experienced CSHOs getting upset because we interviewed employees or conducted a comprehensive examination of equipment or machinery before Cal/OSHA arrived on-site.
- The employer has the right to – and should – conduct an investigation immediately following an incident.



# Employer's Rights

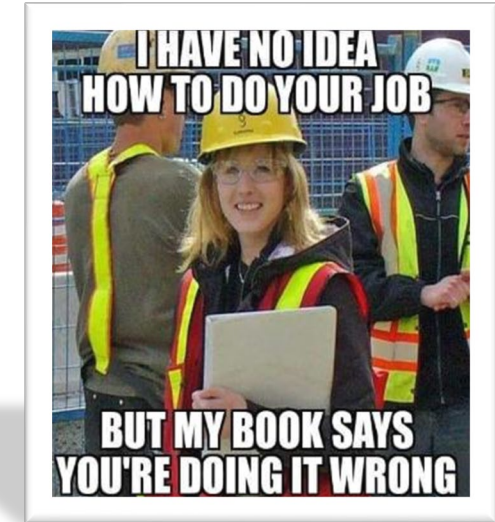
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- We do not have to leave the area of an incident untouched before Cal/OSHA arrives
- We have the right to place systems, machinery, or other equipment in service, or take them out of service, before Cal/OSHA conducts an inspection
  - We should consider Cal/OSHA goodwill, insurance coverage requirements, and potential litigation evidence preservation obligations in making this decision
- However, after ensuring medical attention is provided to any injured employee(s), if any, and ensuring the safety of employees and others, we should preserve the scene for our own, internal investigation.



# Timeline of an Cal/OSHA Inspection (Generally)

- 0 to 3 weeks
  - Opening / walk-around / initial closing
  - Initial document requests and witness interviews
- 3 weeks to 2 months
  - CSHO's internal review with AAD
  - Follow-up document requests / subpoena
  - Follow-up interviews
  - Third-party interviews (former employees and others)
- 2 to 5 months
  - AD/AAD internal review; District Manager, Regional Manager, Legal, etc.
- 5 to 6 months
  - Final closing
- Hard Deadline - 6 months from the alleged violation to issue a citation or forever barred by the OSH Act



# Reports by Employers-Required

- Section 342 = Reporting Work-Connected Fatalities and Serious Injuries:
  - (a) Every employer shall report immediately to the Division...any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment
  - As soon as practically possible, but not longer than 8 hours after employer knows or with diligent inquiry would have known of the death or serious injury or illness



# Reporting Issues

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- Amputation v. avulsion
- Hospitalization for observation v. care/treatment
- Information gathering
- Work-relatedness
  - What if the worker was not actually engaged in work at all when s/he collapsed?
- **What about 911 calls?**



# Before OSHA Arrives (Plan Ahead)

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- ❑ Accident Investigation
- ❑ Accident report – internal, external, or both
- ❑ Access - warrant or controlled consent (4<sup>th</sup> Amendment)
- ❑ Operations - pause or limit during inspection
- ❑ Team – members and leadership (legal counsel)
- ❑ Cal/OSHA 300 logs – last 5 years upon request
- ❑ Other key documents – IIPP, safety program, training materials, compliance, and enforcement
- ❑ *Pre-walkaround* – look for any possible hazards or violations that might be seen by the CSHO during the walk-around (Compliance Risks!)



# Involving Legal Counsel

- An employer may choose to conduct an internal investigation under attorney-client privilege
- Why? To protect investigation, work product and final report from disclosure to OSHA and other third parties
- For work product to remain privileged, certain protocols must be followed
- How does it work? Investigation team works at the direction of legal counsel to gather the facts necessary to provide legal advice
- Report can be “unprivileged” if it ultimately makes sense to produce it to Cal/OSHA



# Involving Legal Counsel

- Text messages/emails/documents created before privilege is established are discoverable
- Example: Front-line supervisor sends a text to boss immediately after an accident stating: “We screwed this up. We were in a hurry and did the job without fall protection” – this is discoverable.
- Supervisors need to understand this, and protocols for privileged investigations must be in place in advance



# Involving Legal Counsel

- When? No hard and fast rule –
  - Fatality/injury cases (particularly when contractors are involved) can result in significant civil liability.
  - Cal/OSHA may be targeting a particular hazard in a specific injury and looking to make an example of a company (current example = ergonomics).
  - How important is your citation record to your business?





- A CSHO cannot enter a worksite without the employer's permission or a warrant (not recommended).
- Absent extraordinary circumstances, the employer may require an OSHA inspection to occur during normal business/operation hours.

# Anticipating the CSHO's Arrival

- If a warrant is required, brace yourself.
  - Cal-OSHA is 800 lb. gorilla in the room.
  - 
  - Do you really want to get it upset?
  - Unless the fear of an immediate inspection is greater than the fear of an agitated Cal-OSHA, it may be the wiser choice to answer to grant permission.



# Pre Walk-Around

## Common Hazards (“Low-Hanging Fruit”):

- Forklifts
- Material Handling
- Pallets
- Slips, Trips, Falls/Housekeeping
- Electrical hazards
- Hazardous Chemicals / Batteries
- Fall Protection
- LOTO
- Heat Illness
- Stress / Fatigue (Quotas)
- Blocked Aisles / Exits
- Foot, Eye, Hand, Hearing Protection



# Navigating the Inspection

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- Key goal: Control the scope
  - **It is up to you!**
- Second goal: Control the flow of information
  - At the end of the inspection, we want to know everything OSHA knows (and more)



# CSHO Arrives — Opening Conference

- Presentation of credentials (not a badge!)
- Introductions; background and experience of CSHO
- Relationship building matters
- Reason for and scope of the inspection – ask questions
- Address abatement of any lingering hazards
- Limitations on operations
- Discuss walk-around and plans for the initial phase
- Trade secrets, confidential information, sensitive areas
- Confirm CSHO is opening the inspection with the correct employer



# Other Opening Conference Tips

- We have right to receive a copy of the written complaint, if any
- We have right to be told the general scope of the inspection
- We have right to be told the nature and purpose of the inspection, including whether it is programmed or unprogrammed
- We have right to insist that OSHA not turn a single-incident inspection into a comprehensive inspection absent lawful justification
- We have right to insist that OSHA not turn an unprogrammed inspection into a programmed inspection
- We have right to insist that OSHA not use OSHA logs to expand the scope of an inspection beyond the subject(s) of the complaint



# Scenario #1

CSHO Alec shows up unannounced and proceeds to show his badge (i.e., laminated credentials). Safety Manager Emma wants to assemble the team and politely offers that CSHO Alec can wait in a conference room while she gathers the relevant stakeholders. CSHO Alec says he will not wait and if Emma doesn't allow him to start his inspection immediately, he will leave and come back with a warrant and make things “uncomfortable.”

What would you do?

Can we ask a CSHO to wait? How long?



# Cal/OSHA's Obligations to Employers

- To tell us of any safety and health violations at the time the CSHO documents them.
- To evaluate our safety and health management system to determine our “good faith effort” for the purpose of penalty calculation.
- “To record, at a minimum, the identity of the exposed employee, the hazard to which the employee was exposed, the employee’s proximity to the hazard, the employer’s knowledge of the condition, the manner in which important measurements were obtained, and how long the condition has existed.” (FOM)



# Start at the Beginning

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- Employer may ask the CSHO to delay the inspection (up to One to one and a half hours), pending arrival of the employer representative – **NEGOTIABLE**
- The CSHO does not have to be allowed on-site to wait. If allowed to wait inside the gate as a courtesy – away from open administrative offices; away from safety office; away from production areas; and away from employee break room.
- If company representative has not arrived timely, opening conference can be prolonged by employer questions.



# Walkaround

- Limit those who accompany the CSHO
- Limit CSHO access by using a controlled pathway
- Explain basics of operation, not details
- Avoid discussing the incident (if any) or alleged exposures
- DO NOT SPECULATE OR GUESS
- “Plain view” – most direct route may not be best
- No employee interviews until scheduled/arranged; no demonstrations
- Take the same pictures/video; ask why if not obvious
- *Tip*: CSHO may address any hazards or violations in plain view
- *Tip*: Anything management says can be used against the Company
- Union involvement
- Reason for any expansion must be given



# Walkaround

- We can control the path to the inspection site and places the inspector is allowed to go
- We can demand that a company representative accompany the inspector during the physical inspection
- We may take photographs/video of same items and from same viewpoint as CSHO
- We may prohibit CSHO from taking photographs or video due to concerns of trade secrets being disclosed.
- **NEVER LEAVE THE CSHO UNATTENDED**



# Walkaround

- At the end of each day, ask:
  - What is next and when
  - What did the CSHO identify that might be problematic
  - What did the CSHO see that s/he liked



# Scenario #2

There has been a forklift incident on the first shift resulting in a serious injury. CSHO Alec starts the walk-around during the second shift and states he wants to shut down all operations and interview everyone on the second shift.

What would you do?

Do we have to make everyone available and stop operations?



# Document Requests

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- OSHA Logs (300, 301, 300A) within 4 business hours
- All Other Documents
  - Restrictive: Provide only what OSHA requests
  - Effective: Consider providing what helps avoid or minimize a citation even if the CSHO did not specifically ask for it
  - Consider what we need to show to establish a defense
- May also include
  - Safety Programs
  - Training Records
  - Accident Investigation
  - Witness Statements
  - Photos/Videos



# Document Requests

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- Insist on a single written request at end of day and establish tentative deadlines (except for 300 Logs, Forms 301 and 300A Annual Summaries)
- Make sure records produced are accurate, up to date, and complete

# Document Requests

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- Tracking system
- Require requests be made in writing
- Bates-stamp documents to track what was submitted, when, and how
- Mark all as confidential



# Subpoenas for Documents or Witnesses

- Emerging trend in some Cal-OSHA regions and area offices
- Don't panic
- Subpoenas are actually an opportunity to engage with OSHA's counsel directly during inspection on contested issues, such as scope and privileges
- Might we actually request Cal-OSHA to issue a subpoena?



# Scenario #3

CSHO Alec asks for the personal contact information for everyone employed at the DC. He wants personal cell phone numbers, email addresses, and personal home addresses.

What would you do?

Why do you think the CSHO wants this?

Any way to push back?

Are there privacy issues?



# Interviews - Non-management Employees

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- All employees have right:
  - Not be interviewed at all
  - To have personal attorney or representative present - Union, co-worker, attorney, manager
  - To refuse to give an interview under oath or penalty of perjury
  - To refuse to sign a statement written by the inspector
  - To refuse to sign a statement under oath or penalty of perjury
  - To take a written statement out of presence of investigator for review and correction for later submission to OSHA inspector
  - To be provided a copy of the OSHA interview statement

# Employees' Interview Rights



# Hourly Employee Interviews

- OSHA has right to “question privately” any non-management employee; employees have right to be questioned privately
- Allow interviews to be conducted on-site, on the clock
- Consider interviewing hourly employees after OSHA’s interview
- Interviews are voluntary, unless OSHA issues subpoena
  - But don’t encourage workers not to cooperate with OSHA



# Non-management Employee Interviews

- We may/should prepare employees
  - Inform of rights
  - Discourage allowing recording of interviewing, signing of interview notes
  
- We may “debrief” employees



# Preparing Non-Management Employees for Interviews

- Why is OSHA here and how the process works
- No individual liability and no job risk
- Employee's rights
- Scope of inspection
- Employee's role and likely discussion points
- Consider a mock interview
- Tell the truth!
- Don't speculate/guess
- Interview is voluntary, but we encourage participation
- Employee does not have to read or sign CSHO notes/review recordings
- Remind employee about safety training and company policies



# During and After Employee Interviews

- Why is OSHA here and how the process works
- No individual liability and no job risk
- Employee's rights
- Scope of inspection
- Employee's role and likely discussion points
- Consider a mock interview
- Tell the truth!
- Don't speculate/guess
- Interview is voluntary, but we encourage participation
- Employee does not have to read or sign CSHO notes/review recordings
- Remind employee about safety training and company policies



# Interviews – Managers and Supervisors

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- Statements by managers/supervisors are binding on employer
  - We therefore are entitled to have a management representative or attorney present
  - Typical ground rules
    - No audio or video recording of interviews
    - No reviewing or signing of statements – next slide
- Prepare managers/supervisors who will be questioned
  - Like a deposition, not a conversation
- Lying to CSHO is criminal offense and OSHA will prosecute

# Management Interviews



- Managers don't read and don't sign CSHO's notes
- Tell CSHO in advance
- Participate to clarify or explain – be helpful
- Avoid “objecting” or treating as a formal deposition; don't interfere but don't let confusion or lack of clarity stand either
- No Adjectives
- Take pictures of any diagrams drawn or any notes made on documents

## Management Interviews



# Do Not Retaliate

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- Section 11(c) of the OSH Act prohibits employers from retaliating against any employee (management or not) for engaging in protected activities, such as:
  - Filing a complaint with OSHA
  - Participating in an OSHA inspection
  - Complaining to employer
  - Complaining to media
  - Exercising any other rights under the Act



# Less is More

- Pleasing the CSHO  $\neq$  no citations
- It is not true that, if we simply give the CSHO everything he or she wants, it will all go away<sub>52</sub>
- Too much information can expand the inspection – scope and time
- “Helping” CSHO can lead to additional citations



# Scenario #4

Part 1: Employee Richard injured himself on an order picker. CSHO Alec asks to interview Richard near the order picker.

What do you think the CSHO may ask Richard to do during the interview?

Part 2: CSHO Alec asks Richard to demonstrate how the incident happened.

What would you do?  
How do we push back?



# After the Walkaround

- Follow-up interviews
- Follow-up document request(s)
- Possible additional walkaround
- What is Cal-OSHA doing that you may not know about? – e.g., third party interviews and document requests
- Do we need an expert? – e.g., forensic engineering experts can help determine why a structure collapsed
- What else do you need to do? – Don't just wait on Cal-OSHA to take additional action
- Calendar Cal-OSHA's 6-month statutory deadline



- Usually, a brief phone call with CSHO saying the citation for A, B and/or C is on its way – or no citation!
- Dinosaur
- More of a listening exercise – what will OSHA cite? How will the violations be characterized (not always known)? Not a time to argue
- Don't make it worse: “We never shutdown that line for maintenance because it takes too long to bring it back up.”
- Confirm the correct employer will be named
- Once the closing is over, think about whether there is concrete evidence you can send to OSHA to refute the CSHO's recommendations (if the citation isn't already in the mail)
- But, time to get ready for the citation and informal conference or contest

# Closing Conference



# General Inspection “Rules”







# Drafting Accident Investigation Documents

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1. Keep in “draft” form and confidential until finalized
2. Facts Only
3. No adjectives
4. No opinions
5. No Speculation
6. Do not rush to cause or contributing factors
7. Competing purposes – prevention and liability
8. Words matter – lay terms versus legal terms



1. Not having an OSHA inspection protocol/procedures
2. Not training all employees on the protocol/procedures
3. Over-reporting to OSHA
4. Rolling out the red carpet for OSHA
5. Allowing the CSHO to observe plain view hazards during the walkaround

## Top 10 Mistakes



6. Not preparing employees for interviews
7. Managers reading and signing CSHO interview notes
8. Rushing the internal investigation and report
9. Not disciplining for safety violations
10. Writing investigation form that is a roadmap to citations

## Top 10 Mistakes



# Open Discussion/Questions and Answers, Etc.

