COMPLIANCE

A**n Ounce of Prevention**
Do's and Don'ts for an OSHA Inspection

By Steven John Fellman and Brendan Collins
GKG Law, P.C.
Washington, D.C.

Recently, TRSA members have reported increased incidents of unannounced inspections by OSHA. Since it is probable that an OSHA inspector will visit your plant, you should review some simple do's and don'ts in order to make sure that you are properly prepared when the inspector knocks on your front door.

Staff Preparation

Before the inspector arrives, each plant should have a person or persons who are trained to represent the company during an inspection. OSHA inspectors will arrive unannounced during normal operating hours. You should have a specifically trained person on your staff who is familiar with your company policies and knows what to do during the inspection. The Supreme Court in *Marshall v. Barlow's Inc.* 436 U.S. 307 (1978) held that OSHA's statutory authorization for warrantless searches was unconstitutional. Thus, an employer has the right to refuse entry to an OSHA inspector who does not have an inspection warrant. Ordinarily, however, we do not recommend denying entry to OSHA inspectors on that basis because while probable cause is required for issuance of an administrative inspection warrant, it is not the probable cause required in a criminal law sense. Instead, a warrant may issue upon an *ex parte* showing of the relaxed standard of "administrative probable cause," which merely requires a showing of reasonableness. *Griffin v. Wisconsin*, 483 U.S. 868, 878, n. 4 (1987). In the case of a "programmed" inspection, it is sufficient for OSHA to show that the site has been chosen for search on the basis of a general administrative plan. If the search is non-programmed, a warrant may be issued upon a showing of a reasonable belief that a violation has been or is being committed and not upon a desire to harass the target of the inspection. *Martin v. International Matex Tank Terminal-Bayonne*, 928 F.2d 614, 624 (3d Cir. 1991). Given

the liberal standard for the issuance of a warrant, ordinarily there is little benefit to be gained by insisting that OSHA obtain an administrative inspection warrant.

When the OSHA inspector arrives, he or she will go to the plant office and inform the receptionist that OSHA wants to inspect the plant. The receptionist should be trained to ask the inspector to sit down while the authorized company representative is called. The OSHA inspector should not be permitted to enter the plant until the inspector is joined by the authorized company representative.

The authorized company representative should inform the inspector that it is the company's policy to fully cooperate with OSHA. He should obtain the name and address of the inspector and then initiate an "opening conference." During this opening conference, the company representative should find out why the inspector is there; what does the inspector want to do; and how the inspector wants to proceed. It is important not to "volunteer" information. Answer questions truthfully and directly, but do not go overboard and point out problem areas.

In this opening conference it is important to determine whether the inspection is programmed, or in response to a complaint or referral as this may help define the scope of the inspection. If the inspection is programmed, you should expect OSHA to conduct a comprehensive inspection of the entire facility. If the inspection is an unprogrammed inspection, however, the scope may be less than wall-to-wall. The scope of the unprogrammed inspection must bear an appropriate relation to the violation alleged. Thus, OSHA normally may not conduct a wall-to-wall inspection based only on an employee complaint and efforts should be made to limit the inspection to the scope of the alleged violation. (If OSHA insists upon a comprehensive inspection despite the fact that it is an unprogrammed inspection, the scope of the inspection may be challenged in the course of proceedings before the OSHRC.) You should also recognize, however, that OSHA may expand the scope of the inspection based upon information gathered during a record review or walk around inspection.

Employers who participate in selected voluntary compliance programs may be exempt from programmed inspections. If you are participating in such a program, you should bring it to the OSHA inspector's attention during the opening conference, as it may determine whether an inspection is permitted.

Employee Participation

Employee representatives must be given the opportunity to participate in OSHA inspections. The Act defines an "employee representative" as: 1) a representative of a certified or recognized bargaining agent, or, if none; 2) an employee member of a safety and health committee; or 3) an individual employee who has been selected as the walk around representative by the employees of the establishment. OSHA encourages a joint opening conference with both the employer and the employee representative but allows for separate conferences if the employer objects. The OSHA inspector may consult with any employee who wants to discuss a possible violation and take a written statement from the employee.

The company representative should be clear on what company records have to be made available to the inspector and what company records are confidential. The company attorney should have provided the company with specific advice regarding what records the company will agree to make available. If the inspector asks to see records that he is authorized to inspect, let him see the records. If he wants to copy a document, make sure that you make yourself a copy of the document.

OSHA has broad leeway in terms of inspecting documents and records. OSHA inspectors are also normally entitled to take photographs and to videotape during an inspection. Nonetheless, it is important to identify any company trade secrets or other confidential information so as to limit disclosure of such information to third parties. OSHA defines trade secrets as "matters that are not of public or general knowledge," including "any confidential formula, pattern, process equipment, list, blueprint, device or compilation of information" used by an employer to gain a business advantage over competitors that do no t know or use the information. Trade secrets can include not just written documents but photographs, computer tapes, databases and other forms of

information. To obtain protection of such information, you must notify the OSHA inspector when granting access to information that you think it is a trade secret. Once inspectors are on notice, they must handle the information in a confidential manner to ensure that it is not intentionally or inadvertently disclosed to the public. OSHA will label information considered a trade secret as "Administratively Controlled Information; Restricted Trade Information." OSHA officials who fail to abide by these restrictions face the risk of criminal penalties.

After you find out how the inspector wants to proceed, you may want to suggest to the inspector more efficient ways of proceeding. Don't hesitate to suggest ways to schedule the inspection so that plant operations are not disrupted.

As the official company representative, you are entitled to walk around with the inspector during the plant's inspection. It is a must that you do this. Take a pad with you and take careful notes of exactly what the inspector does and what he or she says. Taking of photographs may also be appropriate. If you see certain hazards, abate them immediately, if possible. However, do not concede that a violation has occurred.

After the Inspection

When the inspection is completed, you are entitled to have a closing conference with the inspector. Ask the inspector what problems he or she found. Find out what the company needs to do to correct the problems. Find out what time framework the inspector feels is reasonable for the corrections to be made. Tell the inspector what you have done with regard to any simple hazard that you have abated during the walk-around, and explain what immediate steps you may take to abate other hazards that the inspector has noted.

If you get a formal citation, you are required to post the citation on the company bulletin board and then try to correct the problems. If you are going to contest the citation, you must contest the citation within 15 days of your receipt of the notice. 29 U.S.C. §65(a). In your letter to OSHA contesting the citation, you must explain in detail

why you are contesting the citation, and you must post a notice of the fact that you are contesting the citation on your bulletin board. The notice must explain why you are contesting. It must explain exactly what violations you are contesting. The notice must also disclose the fine proposed by OSHA. You should consider setting up a meeting at the Regional Office and attempt to negotiate a settlement.

Once you have filed a formal notice that you are contesting the citation, the matter is referred to the OSHA Review Commission. The OSHA Review Commission will docket the case and file a formal complaint. After you receive the complaint, you have 20 days to answer. Obviously, by this time, you should have an attorney involved to assist you. Your answer must respond to each allegation in the complaint and must raise any and all affirmative defenses that you must have.

Most textile rental companies have an experienced OSHA attorney work with them in developing their OSHA compliance program. Based on your product mix, the attorney will help you decide how to structure your safety program and what types of records you are required to keep. The attorney will also advise you as to when you need to file reports of workplace injuries.

TRSA has many publications that can assist you in dealing with OSHA and other compliance issues. To order from a list of TRSA publications, check the TRSA Web site at www.trsa.org.

Fines and Judgments

For cases where the proposed fine is under $20,000, OSHA has an E-Z trial procedure. Under this procedure, there is an abbreviated, informal trial designed to resolve the issues quickly. For cases involving penalties of $200,000 or more, there is mandatory mediation and then a formal trial.

Almost all cases presented to the OSHA Review Commission do settle. Between the time that the complaint is issued and the answer is received, counsel for OSHA and

counsel for the company sit down and discuss the various aspects of the case, and a settlement is reached. Most settlements have significantly lower penalties than those originally proposed by OSHA. Usually settlements have a lower classification of violations, provide the company with more time to correct the violations, and contain a statement that the company is settling without any admission of fault. However, if no settlement is made, the case goes into the discovery mode and eventually there is a trial before an administrative law judge.

If the matter goes to a full trial, the company is entitled to assert specific affirmative defenses. The company can allege that the practice in question is not covered by the statute. If a standard is involved, the company can allege that the practice is not within scope of the standard. The company can claim that the problem was due to employee misconduct. The company can claim that to correct the problem would expose the employees to a greater hazard. The company can claim that the practice was a de minimis practice, or an isolated instance. The company can challenge the classification, the reasonableness of the penalties, or the time within which the company is given to abate the hazard. The administrative law judge will consider each of these defenses during the course of the trial.

After the matter is tried before the administrative law judge, counsel will submit briefs and ultimately the administrative law judge will issue an opinion. The decision of the administrative law judge may be appealed to the full OSHA Review Commission. The matter will again be briefed and argued, and the OSHA Review Commission will issue a decision.

The decision of the OSHA Review Commission can, in turn, be appealed directly to the United States Court of Appeals.

Litigating a matter before the OSHA Review Commission is time consuming and expensive. Legal fees will be high and it will take a significant amount of time for key

employees in your business to participants in the company defense. In most instances, matters can be resolved before trial.

You should know your rights and make sure that the OSHA inspector understands that you will fight, if necessary. Don't be afraid to ask for an informal conference, and then file a notice that you are contesting a specific finding that you have violated the Act. In most instances, by contesting the citation, you will wind up with a lower fine, a reduced category of violation, or more time within which to abate the hazard.

Your Safety Policy

Unfortunately, employers who are cited for OSHA violations usually review the facts and say: "If only I had paid more attention to my safety program!" Your company's safety program should be an integral part of your business operation.

Responsibility should start at the top. Your company safety policy should be signed by the company president. Your plan must be well conceived, properly implemented and fully documented. You will need to train supervisors, as well as workers. You will need to provide necessary safety equipment, reward safe performance, and discipline employees who violate the safety program and engage in hazardous activities.

You will find that the amount of time that you spend in making your safety program effective will definitely prove to be worthwhile. Workplace safety is one area where the old adage, "an ounce of prevention is worth a pound of cure" always proves to be true.

Steven John Fellman is a Partner with GKG Law, P.C. He is General Counsel for TRSA. **Brendan Collins** is a Partner with GKG Law, P.C. specializing in litigation matters.

#275061