

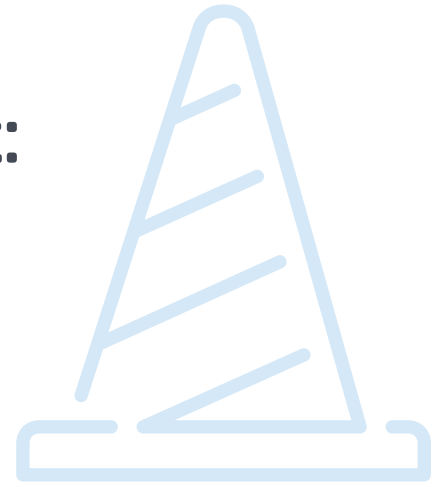
OSHA Inspection Toolkit

– An Employer’s Guide –

A ten-part series on preparation and management

From the Axcet HR Team

OSHA Inspection Toolkit: An Employer's Guide



Introduction

The Occupational Safety and Health Administration (OSHA) has broad authority to conduct workplace inspections and issue citations against employers found in violation of safety and health standards. OSHA gathers virtually all of its “discovery” during inspections. Therefore, it is critical for employers to prepare, assert their rights, and manage the flow of information during inspections.

OSHA has increased enforcement to levels never seen before from more compliance inspections to higher civil penalties, more citations characterized as “willful” or “repeat,” and more criminal referrals. OSHA has also introduced more aggressive strategies during inspections conducted pursuant to the Occupational Safety and Health Act of 1970 (OSH Act), creating a minefield for employers across all industries. The consequences for being caught ill-prepared for an OSHA inspection are more dire now than ever.

This OSHA Inspection Toolkit is a guide for employers to prepare in advance for an OSHA inspection, and once an inspection begins, to manage it to a successful outcome. The toolkit highlights key issues such as the rights of employers, employees, and OSHA during inspections, the various stages of OSHA inspections, and tips and strategies for how best to manage each stage.



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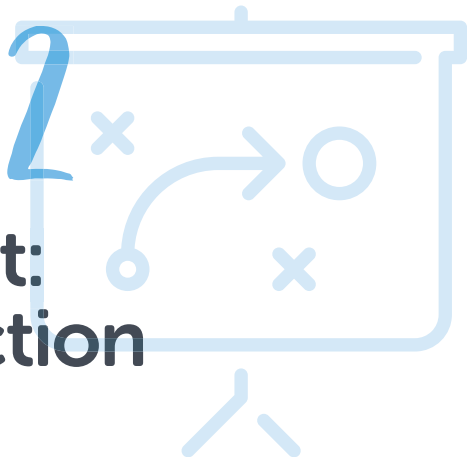
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OSHA Inspection Toolkit: Preparing for the Inspection

Develop and Implement a Comprehensive Safety and Health Program

- Develop written safety policies that are current, accurate, site-specific, and fully compliant.
- Ensure your written safety policies are implemented in the field as written.
- Develop a program for employees to report injuries and safety concerns.
- Establish a Safety Committee that includes both employer and employee representatives to:
 - Evaluate safety program as written and implemented
 - Audit the workplace for potential hazards
 - Review and discuss workplace incidents and near misses



Everyone Has Rights

Employers should understand that all parties have rights during an OSHA inspection. This table explains the rights of all involved parties including the OSHA inspector, employers, and employees:

Employee's OSHA Inspection Rights

- File a safety or health complaint with OSHA
- Participate in the OSHA inspection process, including designated employee representative participation in:
 - Opening Conferences
 - CSHO Walk Around
 - Private interviews with OSHA
 - Closing Conferences
 - Informal Settlement Conferences

OSHA's Inspection Rights

- Inspect workplaces with probable cause, consent, or when hazards are observable in plain view
- Decline to provide advance notice of inspections
- Inspect records
- Collect physical evidence; for example, air or noise samples and photographs
- Conduct employee interviews
- Issue subpoenas for records, physical evidence, and interviews

Employer's OSHA Inspection Rights

- Demand an administrative warrant from the Compliance Safety and Health Officer (CSHO)
- A reasonable inspection at reasonable times
- An Opening Conference
- A copy of formal employee complaints
- Escort the CSHO during inspections of the workplace, often referred to as the Walk Around Inspection
- Participate in management employee interviews
- Protect trade secret and confidential business information from public disclosure by OSHA after the inspection
- A Closing Conference
- Contest alleged violations and citations



Audit the Workplace for Safety Issues and Compliance with Safety Policies

- Audits, whether conducted by the Safety Committee, safety or organizational managers, or third-party safety consultants or counsel, should be conducted at the direction of in-house or outside legal counsel to protect the audit findings under attorney-client privilege, whenever possible.
- Review prior safety audits and audit recommendations to ensure that all recommendations have been addressed and documented, and to ensure that problem areas are not ongoing concerns.
- Ensure new audit recommendations are addressed and the steps taken to address the recommendations are documented.

Understand the OSHA Basics

- Employer's representatives need to understand:
 - OSHA standards applicable to the employer's industry and workplace
 - Special emphasis programs relevant to the employer's industry
 - Employer's safety and health programs and procedures



OSHA Inspection Toolkit: Preliminary Inspection Issues

There are a number of issues that should be addressed by an employer prior to an OSHA inspection. Here are our top 6:

1. Establish an Inspection Team and Inspection Protocols

Prepare a notification plan, identifying who must be informed (and by whom) of the arrival of an OSHA CSHO, including:

- Senior management;
- Field supervisors; and/or
- Outside OSHA counsel.



2. Designate an inspection team and assign the following responsibilities (one person can fill multiple roles):

- Team leader (management spokesperson and OSHA point of contact, generally OSHA counsel, a site-safety director or other site manager);
- Walk around representative (escort OSHA throughout the inspection);
- Document production manager (manage the document control system);
- Photographer (take side-by-side pictures of the CSHO's pictures)
- Sampler (coordinate industrial hygiene sampling and take side-by-side samples of the CSHO's samples);
- Contractor liaison (coordinate inspection activities with contractors);
- Union liaison (coordinate inspection activities with the employees' union);
- Interview representative (prepare employees for interviews and participation in management interviews); and
- Opening and Closing Conference participants (generally only OSHA counsel, the inspection team leader, walk around representative and document production manager).

3. Equip the inspection team with the following materials:

- Contact list;
- camera;
- video recorder;
- template for document production log;
- labels for designating documents as trade secret or business confidential; and
- OSHA's Field Operations Manual.



4. Designate walk around routes for each area of the facility. In doing so:

- Understand the “plain view doctrine” which permits OSHA to investigate a hazard located in areas beyond the scope of the employer’s consent or inspection warrant if the CSHO observes the hazard in plain view from an area within the scope of consent or the warrant.
- Plan route to inspection area that circumvents sensitive areas of the facility (even by exterior routes); and avoid providing a full tour of the facility.

5. Designate, in advance, the location where the Opening Conference and employee interviews will be held, and where the CSHO will be permitted to work.

6. Establish interview and document protocols.



OSHA Inspection Toolkit: Overview of an OSHA Inspection

Be prepared for the following stages of an OSHA inspection by knowing what to expect.

Opening Conference

- Clarify what prompted the inspection
- Negotiate with OSHA over the scope of the inspection
- Establish protocols for document production and employee interviews

Document Production

- Require that all requests be made in writing
- Do not volunteer documents not expressly requested
- Keep a duplicate set of all documents produced to OSHA

Walkaround Inspection

- Escort OSHA Inspector at all times in the workplace
- Take side-by-side photographs
- Ask the inspector what is being photographed or noted and why



Employee Interviews

- The right to a private interview with OSHA belongs only to non-supervisory employees
- Prepare employees for interviews (review their rights, interview tips and substance)
- Ensure management representatives understand that their statements are binding on the company

Closing Conference

- Make no admissions
- Ask about the characterizations and penalty that can be expected
- Consider requesting time to provide supplemental information to correct OSHA errors

Citation and Post-Citation

- Citations should be issued within six months of inspection start
- The best outcomes typically come after a Notice of Contest is filed, but before a hearing
- In deciding whether to contest citations, consider potential repeat violations (10x higher penalties, cost and feasibility of abatement, and impact of citations on personal injury suits)



OSHA Inspection Toolkit: Opening Conference

At the start of its inspection, OSHA must conduct an Opening Conference. Employers should understand the basics of this Opening Conference, and should understand and enforce OSHA's Opening Conference obligations.

During the opening conference, the CSHO owes several duties to the employer. If the CSHO does not adhere to these obligations, employers may request clarification on all points.

Obligations include:

- Explaining why the employer is being inspected, for example:
 - Is this a routine, scheduled, or programmed inspection;
 - Is the inspection related to a referral, accident, or employee complaint; and/or
 - Is this a Special Emphasis Program inspection.



- Producing a copy of an employee complaint that triggered the inspection.
- Describing intended scope and duration of the inspection.
- Delivering OSHA's first request for documents and information.

Best practices during Opening Conference

During the Opening Conference, the employer's designated team leader should:

- Introduce the inspection team to the CSHO.
- Resolve the warrant question.
- If the CSHO does not volunteer all the information outlined above, ask for clarification on all points.
- Describe the employer's document production protocol.

The Team Leaders should request that OSHA's document and information requests be:

- Delivered in writing (note that 300 Logs and 300A forms must be produced to OSHA within four hours of a request, whether or not the request is in writing); and
- Provided to the designated Document Production Manager.

Discuss protocol for arranging employee interviews. Expect the CSHO to request and be prepared to provide copies of:

- At least the previous three years of OSHA 300 Logs and 300A Summaries;
- A personal protective equipment (PPE) hazard assessment;
- An emergency action plan;
- Numerous written safety and health programs (for example, a Lockout/Tag out program or Permit-Required Confined Space program); and
- Relevant employee training records.



Arrange for daily close-out meetings with the CSHO in order to:

- Learn about concerns the CSHO has identified;
- Consider proactive presentations regarding the CSHO's concerns (it is easier to avoid citations before they are issued, so if the CSHO expresses concerns about a missing program element or training, consider demonstrating how the employer complies);
- Plan the next day's inspection activities;
- Learn who OSHA wants to interview, schedule the interviews, and prepare the interviewees; and
- Learn what sampling OSHA has planned and prepare for sampling.

Conduct a management walkthrough during the Opening Conference

While the CSHO is occupied at the Opening Conference, management should conduct a walkthrough of the facility to:

- Clean up disorganized work areas.
- Remind employees to wear appropriate PPE.
- Ensure employees are working safely and complying with the employer's safety programs and policies.
- Advise employees and contractors of OSHA's presence.





OSHA Inspection Toolkit: Document Production

Adhere to best practices for document production.

- Label all documents produced with unique identifying numbers for tracking and future reference during settlement negotiations and litigation.
- If the employer produces trade secret or confidential business information (CBI) to OSHA:
 - Label information as trade secret or CBI; and
 - Produce documents under cover sheets invoking the protection of the U.S. Trade Secret Act (18 U.S.C. § 1905).
- Redact personally-identifiable medical records (except if OSHA obtains medical access order).
- Make and keep duplicates of every record produced to OSHA.
- Track all documents produced on a Document Control Log.



Avoid common document production mistakes

- Do not generate non-privileged documents during an inspection.
- Do not leave documents or information in plain sight (for example, file away binders and loose documents, and erase whiteboards from earlier meetings).
- Do not volunteer information that OSHA did not request.



OSHA Inspection Toolkit: Walkaround Inspection

The CSHO will conduct a “walk around” inspection of the facility looking for violations of the OSH Act or OSHA’s standards.

Understand the CSHO’s activity during the walkaround

During the walkaround, the CSHO may:

- Take photographs.
- Conduct industrial hygiene monitoring (testing and recording employee exposures to health hazards).
- Conduct brief “stop and talk” interviews with non-management employees.
- Take hand-written notes of potential violative conditions.
- Identify alleged hazards and suggest corrective actions.



Employer strategy during the walkaround

During the walkaround, the employer should:

- Escort the CSHO at all times while at the facility.
- Require the CSHO to abide by all employer safety rules (including use of required PPE).
- Be cordial and professional, but assert your rights.
- Gather intelligence about the CSHO's focus by tracking:
 - Where the CSHO asks to go;
 - The topics of the CSHO's questions;
 - What the CSHO photographs; and
 - The subjects of the CSHO's written notes.
- Take detailed notes about everything the CSHO says, does, or asks.
- Pay close attention to how sampling or air monitoring is conducted and what activities monitored employees are doing.
- Take side-by-side photographs, videos, and samples.
- Ask the CSHO what is being photographed and why.
- Immediately correct alleged hazards identified by the CSHO without admitting a violation.
- Do not demonstrate work tasks or the operation of equipment not otherwise scheduled to be performed in the ordinary course of business.



OSHA Inspection Toolkit: Employee Interviews

Know and understand the roles of all parties involved in employee interviews and their rights.

Understand the CSHO's role in employee interviews.

During the walkaround, the CSHO may:

- Demand privacy for hourly employee interviews. This right, however, belongs to the hourly employee, not OSHA, and management-level employees do not have a corresponding right to a private interview.
- Take hand-written interview notes.
- Ask to audio or video record the interviews.
- Ask witnesses to write statements, or review and sign the CSHO's notes.
- Ask questions about documents (for example, written programs, training records, or operating procedures) that have been produced during the inspection.



Understand the employer's role in employee interviews.

With respect to employee interviews, the employer:

- Must never discriminate against employees for agreeing to be interviewed or for anything they say to OSHA in an interview.
- Should attempt to schedule interviews in advance.
- Should object to impromptu interviews in the work area that last more than approximately five minutes.
- Has a right to participate in all management interviews, and should exercise that right.
- Does not have a right to participate in hourly employee interviews, unless the employee requests it without coercion.
- Can request alternative times and locations for an interview if the interview unreasonably hinders business.
- Should prepare all employees for their interviews.

Prepare all employees for interviews.

The employer should prepare employees for OSHA interviews by:

- Using experienced OSHA defense counsel.
- Not coercing or intimidating employees into:
 - An interview;
 - Providing specific answers; or
 - Requesting a manager is in the interview
- Informing employees that the interview is voluntary, but that OSHA may issue subpoenas to compel testimony.



- Describing employees' interview rights:
 - To have a representative with them;
 - Not to be video or audio recorded;
 - Not to write out or sign a statement or sign the CSHO's notes;
 - To demand a copy of a statement if one is written or signed;
 - To examine documents that are the subject of interview questions;
and
 - To take a break at any time for any reason.
- Offering employees interview tips:
 - Always tell the truth;
 - Listen carefully to the question;
 - Answer only the question asked;
 - Give short, concise answers and wait for the next question (do not fill awkward silences);
 - Stick to the facts and provide only first-hand knowledge;
 - Do not guess or speculate;
 - "I don't know" and "I don't remember" are appropriate if true;
 - Be positive and confident; and
 - Do not let the CSHO put words in your mouth. Reminding employees of applicable safety rules and safety training they have received. Use records to refresh their memory.



OSHA Inspection Toolkit: Closing Conference

If OSHA is going to issue citations, it must conduct a Closing Conference. A Closing Conference is generally held at the end of the entire inspection, which may be weeks or months after the close of the on-site inspection.

Between the close of the on-site inspection and the Closing Conference, the CSHO:

Reviews:

- documents;
- interview notes;
- sample results; and
- other physical evidence collected during the inspection.

Researches:

- standards;
- interpretations; and
- compliance directives.



Writes proposed:

- citations;
- penalties; and
- abatement requirements.

Gets the citation package approved by the CSHO's superiors.

Typical duties of the CSHO and employer during the Closing Conference

At the Closing Conference, the CSHO generally:

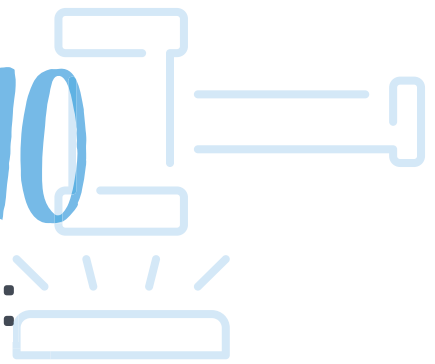
- Explains the employer's post-citation rights.
- Communicates OSHA's findings, including:
 - standards allegedly violated;
 - bases for alleged violations; and
 - possible abatement and abatement dates.

At the Closing Conference, the CSHO generally does not share:

- Characterization (e.g., willful, repeat, serious);
- Penalty amount; or
- The actual citations.

During the Closing Conference, the employer should:

- Listen carefully and take detailed notes.
- Make no admissions.
- Identify for the CSHO any alleged violations that have already been corrected.
- Make no abatement or abatement date promises.
- Ask the CSHO about characterizations and penalty amounts.
- Ask when the employer can expect to receive the citations.
- Request time to provide supplemental information to correct factual errors that form the basis of proposed citations.



OSHA Inspection Toolkit: Citation and Post-Citation

Issuance of citations

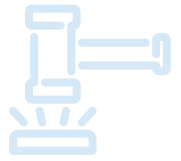
Employers should be aware that:

- No citation may be issued six months after the occurrence of a violation (as a practical matter, within six months of the start of the inspection).
- Citations must be delivered by hand or certified mail with return receipt requested.
- OSHA can release negative press releases at the time the citations are issued following a significant safety violation, a high-profile accident, fatality, or catastrophe, at a workplace especially if it results in substantial citations or penalties.

Post-citation considerations

It is important to give proper consideration for how to respond to OSHA citations. The best option will vary based on the situation. After receiving an OSHA citation, employers may:

- Pay the fine and accept the citation.
- Request a variance.
- Resolve citations at an informal settlement conference.



- Contest the citation and negotiate a formal settlement with OSHA's counsel.
- Contest the citation and proceed to a hearing before an administrative law judge under the OSHA Review Commission.

In deciding whether to contest citations, employers should consult with OSHA defense counsel and consider:

- Are the alleged violations accurate?
- Does the citation expose the employer to future, "repeat" violations with 10x higher penalties?
- Are the proposed penalties excessive?
- Is the required abatement action clear and feasible?
- Are the employer's sister facilities able to conform to the required abatement?
- Does the proposed citation qualify the employer for the Severe Violator Enforcement Program?
- Do the citations relate to a potential personal injury or wrongful death civil suit?

About Axcet HR Solutions

Axcet HR Solutions is an IRS-certified PEO serving the Greater Kansas City Metro area since 1988. We provide professional Human Resources, benefits, payroll, safety, and workers' compensation services to small- to medium-sized business. Our mission is to empower small business owners with the time, confidence, and security to focus on their core business and not complex, confusing, and cumbersome human resource responsibilities.

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