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When OSHA Comes Calling: Legal Limits on OSHA Inspections

Matthew T. Deffebach, Partner
Texas Board of Legal Specialization
Haynes and Boone, LLP
Houston, Texas

Introduction

The purpose of this paper is to confront the legal limitations of how a company can and cannot respond to an Occupational Safety and Health Administration (OSHA) investigation. At the outset, some employers may question when it is appropriate to deny OSHA access to the workplace. Strategically, an employer may have reasons to delay an inspection, but must understand what can happen with future inspections. As such, we will discuss OSHA's warrant power and its ability to obtain anticipatory warrants for future inspections based on a company's refusal to permit OSHA on the property without a warrant.

Once OSHA begins an inspection, questions arise as to what OSHA legally is entitled to inspect. Readers will learn the "plain view" concept borrowed from criminal search and seizure law that allows OSHA to issue citations for any issues in plain view. When OSHA requests interviews, readers will learn when an employer can insist on its counsel being present. In turn, we will study what ramifications exist to employee representatives making statements without counsel present. Additionally, our overview will include when, if ever, an employer can obtain copies of these statements. This paper will also address how these issues differ in regard to supervisory interviews and statements, and how supervisory statements can bind the company under vicarious liability theories.

A related issue is what documents OSHA may obtain during an inspection and before litigation. Among other thorny issues we will tackle is the question of when OSHA may obtain internal audits and investigations. As such, this paper will examine how to conduct a privileged audit, and the role of counsel in securing a privileged audit. Of related importance is when a company may wish to waive the privilege of a properly done audit that is subject to attorney-client privilege.

Finally, when an OSHA citation is issued, numerous questions arise in terms of what defenses may be available, which must be timely raised or risk waiver. This paper will present a general overview of these defenses.

In all areas, this paper will provide an overview of what the law provides, what gray areas exist, and what are prudent and responsible strategies in permissibly defending against an OSHA citation.

Part One: General Overview of the Investigation Process

The Occupational Safety and Health Act (the Act) authorizes OSHA to conduct workplace inspections to enforce its specific and general standards. Every establishment covered by the Act is subject to inspections by an OSHA compliance safety and health officer. OSHA may randomly choose to inspect any employer. However, OSHA will usually conduct an inspection as a result of one of the following: (i) when there has been either eminent danger or a condition exists where there is a reasonable certainty of death or serious physical harm; (ii) where there has been a catastrophe or accident, resulting in death or hospitalization; (iii) where an employee has complained about eminent danger or a serious violation of the standards; (iv) through a referral from another agency; (v) as a result of a planned program inspection to high hazard industries; and (vi) as a follow-up to previous inspections.

OSHA will rarely give an employer advanced notice of an inspection. In fact, anyone who alerts an employer to in advance to an OSHA inspection may receive a criminal fine of up to $1,000, a six-month jail term, or both. The Act authorizes the compliance officer, at reasonable times and in a reasonable manner, to enter any factory, plant, or establishment (where work is being performed) to inspect and investigate the places of employment and all pertinent conditions, machines, equipment, and materials. Further, during the inspection, the officer may question any employer, owner, agent, or employee.

Generally, an employer should approach OSHA inspections in five stages: (i) advanced planning; (ii) OSHA's arrival and the opening conference; (iii) the walk-around; (iv) employee interviews and document review; and (v) the closing conference.

A. Stage One: Advanced Planning

Advanced planning is key to avoiding OSHA citations. Even before OSHA announces an inspection of a workplace, employers should implement the following precautionary policies:

- Make sure the receptionist knows to call the plant manager (or other designated official) when an OSHA inspector arrives. When choosing where to place the inspectors or where to escort them, employers must remember that anything in "plain view" is subject to inspection.

- If the plant manager (or other designated official) is not on site, ask the inspector to come back when the plant manager returns. If the compliance officer does not agree to leave, the employer representative can refuse entry *unless* OSHA obtains a valid and enforceable search warrant.

- The receptionist should inform either a designated corporate officer or legal department representative that an OSHA inspection has been requested.

- Inform all supervisors and contractors that OSHA is on site. The employer should have already briefed managers and supervisors concerning proper conduct during OSHA inspections, and their communications with OSHA inspectors.

B. Stage Two: OSHA'S Arrival and the Opening Conference

The opening conference is a forum for preliminary administrative matters where the employer and OSHA inspector have an opportunity to discuss generally the investigation. Before beginning the opening conference, the employer should be sure to ask for the inspector's credentials. If the inspector does not produce his OSHA credentials upon request, refuse entry to the workplace, and contact the OSHA area office. Keep in mind that OSHA's regional administrator and regional director have wide latitude to request either a warrant or administrative subpoena. Whether an

employer should demand a search warrant depends on the situation. Requesting a warrant will result in some delay of the inspection, and will provide the employer with extra time to prepare for the inspection. Furthermore, a warrant may clearly define the scope of the inspection. On the other hand, the request may alienate the inspector and create a hostile environment for the inspection. Hostile inspectors will be less reasonable and less receptive to the employer's perspective. Additionally, if an OSHA inspection has confronted prior resistance, it may seek an anticipatory warrant from a magistrate, and arrive at a subsequent inspection without notice with a warrant already in hand.

After the credential and warrant issues have been resolved, use the opening conference as an opportunity to define the scope of the investigation and set a tentative agenda. OSHA inspectors will generally be amenable to this since an organized approach will help them do their jobs. More importantly, having an idea of the inspector's schedule and focus will help the employer manage the inspection. Specifically, the employer will be better able to provide the information responsive to the inspector's concerns and more quickly conclude the inspection.

C. Stage Three: Walk-Around

Depending on the inspector and the motivation for the inspection, he or she may want to walk around the site right away or wait until the end of the inspection. Depending on the complexity of the situation, the inspector may want to tour the facility more than once. No matter when or how often, be sure to accompany the inspector on the walk-around. It is wise to bring either another manager or anemployee who is knowledgeable about the specific conditions in which the inspector has expressed an interest, and who has a working knowledge of the applicable OSHA regulations.

It is generally true that the inspectors do not want to disrupt the workplace. If it is either unsafe or problematic to escort the OSHA inspector through a particular work area, or if the timing of the walk-around is a problem, discuss the situation and your concerns with the inspector. The walk-around can usually be rescheduled or restructured to accommodate the situation.

The employer should provide the inspector with the same type of safety orientation as it would for any other visitor. Explain the facility's safety rules, and instruct the inspector on emergency procedures. If safety equipment (i.e., safety goggles), is required in the area to be inspected, make sure the OSHA inspector is properly outfitted, and insist that he or she adhere to all safety rules.

The compliance officer will ask the employer to select an employer representative to accompany him during the inspection. OSHA welcomes but does not require that there be an employee representative for each inspection. Under no circumstances, however, may the employer select the employee representative for the walk-around. In circumstances where there is a union present, the union will usually designate the employee representative to accompany the compliance officer. Likewise, if there is a plant safety committee (without a recognized bargaining unit), the employee members of that committee will usually designate the representative. In the case where there is neither a recognized bargaining unit nor a safety committee, the employees themselves may select an employee representative, or the compliance officer will determine if any other employee would suitably represent the interests of the employees. In the event that the employees cannot determine who should be their authorized representative, the compliance officer must consult with a reasonable number of employees concerning safety and health matters in the workplace.

Additionally, because information gathered during the walk-around will be used to support any resulting citations, it is important to take careful notes during the walk-around. Record the locations visited and the equipment or areas of interest to the inspector. If the inspector takes photographs, be sure to do the same. If the inspector takes samples, be sure to do the same. Employers and their lawyers are much better equipped either to negotiate or defend a citation when they have a thorough understanding of what the inspector viewed to reach his or her conclusions.

To summarize, employers should keep the following in mind during a walk-around with OSHA inspectors:

- Do not admit violations;
- Use expertise to explain what the company is doing in the situation OSHA is inspecting;
- Take notes of everything OSHA does—if the inspector takes a picture or sample, do the same;
- Do not perform demonstrations; and
- If OSHA points out items during the walk-around that can and should be corrected right away, do it.

D. Stage Four: Employee Interviews and Document Review

1. Employee Interviews

Expect an inspector to request interviews with supervisory and non-supervisory personnel. Supervisory personnel are generally those who either make hiring and firing decisions or who make recommendations concerning hiring and firing. Statements made by supervisory personnel to OSHA will bind the employer. As a result, an employer is entitled to have a representative, such as the company lawyer or a manager, present during the interview. Because supervisory personnel speak for and on behalf of the company, supervisors should be instructed to decline to give written statements to the inspector unless reviewed by counsel.

Unlike supervisory personnel, statements made by non-supervisory personnel do not bind the company. They are, nonetheless, extremely important. Employee comprehension of company health and safety policies is becoming increasingly important to the evaluation of a company's compliance with certain regulations, such as hazard communication policies. Because their statements do not bind the company, the employer does not have an absolute right to have his or her representative present during the interviews of non-supervisory personnel. If, however, the employee requests that a company representative be present during the interview, OSHA has historically honored the request.

If a private interview with an employee is scheduled, the company privately should tell employees to cooperate, but also advise them that they do not have to sign statements. If an employee does sign a statement, ask the employee to read it and make sure it is accurate in every detail before signing. Ask the employee to request a copy of any statement he signs (he is entitled to one) and provide it to the company. Afterwards, request that employees describe their interviews. Throughout this process, make no indication that the employee is required to do these things for the company. Participation is voluntary.

According to OSHA, a third party is not allowed to be present during OSHA's private employee interviews. An employer, however, should have the right to be present if: (1) OSHA

subpoenaed the employee's testimony, or (2) the employee requests the employer's presence and OSHA does not object to it. Under these two provisions, an employer can inform its employees that they have the right not to consent to private OSHA interviews. If the employees exercise this right, OSHA is then compelled to obtain an administrative subpoena for their testimony, which should trigger the employer's right to be present. Otherwise, OSHA maintains that non-supervisory employee interviews are private; the employer does not have a right to be present.

2. Document Review

Document review will also be a part of the inspection. Safety and health manuals, hazard communication programs, and emergency action plans are typical documents that OSHA will want to review. An inspector will also usually request to review records that employers are required to maintain under the OSHA regulations. If an employer maintains a medical department on site, OSHA may also request employee medical records. Because of the employee's privacy interest in his or her medical records, do not produce records without the written consent of the employee. There are specific regulations that govern OSHA's access to these confidential records—insist that the inspector follow those regulations.

If the inspector wants to keep a document to include in his or her report, provide a copy. There is no need for the employer to relinquish an original document. Also, be sure to keep track of what documents the inspector retains. Finally, if proprietary information or trade secret is contained in a document, mark it "confidential/trade secret" and orally explain to the inspector that it is to be treated as confidential. Because OSHA's files are subject to public access under the Freedom of Information Act (FOIA), anything given to the inspector could be released to a requesting party. There are, however, procedures for protecting and withholding information that the employer has classified as trade secret or confidential.

E. Stage Five: Closing Conference

Once the inspector has concluded his or her inspection, a closing conference will be held. In the closing conference, the inspector will discuss with the employer any apparent hazards discovered during the inspection and will indicate what standards may have been violated. Employers should pay careful attention during this closing conference. A good understanding of why OSHA believes a violation has occurred will enable an employer to more effectively engage in informal settlement negotiations or, if appropriate, contest a citation.

The compliance officer will hold a separate closing conference with the employees or their representative if requested to discuss matters of direct interest to the employees and inform them of their rights following the inspection. Employers should also correct any violations while the inspector is present. As a result, the compliance officer will record those corrections to help evaluate the employer's good faith efforts to comply. Nevertheless, apparent violations that have been corrected will not prevent a citation. It may, however, reduce the fine or eliminate the fine based on the circumstances.

Part Two: The Scope, Resistance, and the Use of Warrants

At the outset, some employers may question when it is appropriate to deny OSHA access to the workplace. Strategically, an employer may have reasons to delay an inspection, but must understand what can happen with future inspections. As such, we will discuss OSHA's warrant power and its ability to obtain anticipatory warrants for future inspections based on a company's refusal to permit OSHA on the property without a warrant.

When OSHA appears at an employer's premises and seeks permission to enter, the great majority of businesses can be expected, in the normal course, to consent to inspection without requiring a warrant. However, on occasion, an employer may want to deny OSHA inspectors that access; there are no legal penalties for failing to grant consent to an OSHA inspector, but it is important to be aware what will follow if OSHA is still determined to gain entry. If consent is denied, OSHA has the ability to seek a federal warrant to allow them entry to the employer's business.

The United States Supreme Court has long recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes.[1] An owner or operator of a business has a reasonable expectation of privacy in commercial property.[2] This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence, but also with respect to administrative agency inspections designed to enforce regulatory statutes.[3] An expectation of privacy in commercial premises, however, is different from the expectation of privacy a person has in their home; a commercial occupant has a lower expectation of privacy in their premises.[4]

This commercial expectation is particularly attenuated in commercial property employed in "closely regulated" industries.[5] In *Marshall v. Barlow's, Inc.*, the United States Supreme Court went so far as to observe that "certain industries have such a history of government oversight that no reasonable expectation of privacy" can exist.[6] However, the Court also declined to uphold warrantless inspections made pursuant to the Occupational Safety and Health Act (OSHA) of 1970.[7] Therefore, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, apply to OSHA inspections.

To gain a federal warrant, OSHA must first show that they have probable cause for inspection to a federal judge. In the context of an administrative inspection, probable cause is "the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness."[8] Probable cause to issue a warrant exists if, in the applicable factual context, the extent of the invasion of privacy which the inspection entails is reasonable in light of the government's interest in the inspection.[9] OSHA's entitlement to inspection, therefore, depends on it demonstrating probable cause to believe that conditions in violation of OSHA exist on the employer's premises. Probable cause, in the criminal law sense, is not required. For purposes of an administrative search, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable

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[1] *See v. City of Seattle*, 387 U.S. 541, 543, 546 (1967).

[2] *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[3] *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312–13 (1978).

[4] *Donovan v. Dewey*, 452 U.S. 594, 598–99 (1981).

[5] *New York v. Burger*, 482 U.S. 691, 700 (1987).

[6] 436 U.S. 307, 313 (1978).

[7] 29 U.S.C. § 657(a); *Id.* at 313–14.

[8] *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).

[9] *Michigan v. Tyler*, 436 U.S. 499 (1978).

legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."[10] This second category would include a specific business, which has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act; for example, a business chosen from a neutral source, such as a list of a particular type of industry, across a particular area. To meet this second type of probable cause, OSHA must show that: (1) a reasonable legislative or administrative inspection program exists and (2) the desired inspection fits within the program.[11]

The issuance of a warrant also controls the scope of the inspection. Courts are split on the issue of the permissible scope of OSHA inspections based on employee complaints. A number of courts have suggested that a specific employee complaint supports inspection of a company's entire workplace.[12] Another group of courts have held that a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint.[13]

Within the Fifth Circuit, the dominant rule is that an employee complaint inspection must bear an appropriate relationship to the violation alleged in the complaint.[14] In *ASARCO*, Judge Robinson of the Northern District held that the issuance of a wall-to-wall inspection warrant is not mandated in every case initiated by an employee complaint.[15] Judge Robinson found that the warrant therein was correctly limited to the specific areas covered by the complaint because the ASARCO refinery was large and compartmentalized, and the geographic locations of the employee complaints were set forth clearly. However, she also found that OSHA should not be limited to searching only for the violations specified in the warrant in those areas, but rather could conduct a general inspection in those areas. In addition, Judge Robinson found that the general allegations in the affidavit of excessive noise and poor housekeeping were inadequate to support a wall-to-wall inspection, but that OSHA should be allowed to inspect for those violations within the specific areas authorized for inspection. This same approach was also adopted by the Northern District in *In Re Texas Steel Company*. In that case, a company attacked an OSHA warrant on numerous grounds including its scope and the court held that the warrant should have

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[10] *Camara*, 387 U.S. at 538.

[11] *Chicago Zoological Society v. Donovan*, 558 F. Supp. 1147 (N.D. Ill. 1983).

[12] For example, *Hern Iron Works, Inc. v. Donovan*, 459 U.S. 830 (1982); *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (the Seventh Circuit approved the issuance of a wall-to-wall inspection warrant on facts indicating that hazardous conditions existed throughout the work place); *In re Establishment Inspection of Seaward International, Inc. v. Marshall*, 510 F. Supp. 314 (W.D. Va. 1980) *aff'd*, 644 F.2d 880 (4th Cir. 1981) (without opinion).

[13] For example, *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir. 1982); *Marshall v. North American Car Co.*, 626 F.2d 320, 324 (3d Cir. 1980) (the Third Circuit rejected the contention that the issuance of a wall-to-wall inspection warrant is mandatory in OSHA inspection cases); *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719, 720–21 n.1 (8th Cir. 1979) (an OSHA search made pursuant to a specific report of a violation must be no more intrusive than necessary to investigate that violation; in cases such as this, in which the workplace is large and compartmentalized, the geographic scope of the inspection may be limited without rejection or diminution of the government's legitimate interest in correcting the alleged violation); *In re Establishment Inspection of ASARCO, Inc.*, 508 F. Supp. 350, 353 (N.D. Tex. 1981)).

[14] *In Re Texas Steel Company*, No. 4-81-284-E, 1984 WL 146448 (N.D. Tex. Feb. 17, 1984). *Id.*

[15] *In re Establishment Inspection of ASARCO*, 508 F. Supp. at 353.

been limited to the scope of the employee compliant, which had provided OSHA with the requisite probable cause to inspect.

Where a judge has issued an order directing that OSHA administrative inspection warrants be issued forthwith, and that the employer involved permit entry of OSHA inspectors, an employer can be found in civil contempt for refusing to honor those warrants, provided they were issued with sufficient probable cause.[16] For example, if an employer refuses to honor a warrant within the Fifth Circuit, OSHA has undertaken the practice of showing up with the federal marshals and forcing their way into the premises.

Once an employer institutes a practice of denying OSHA entry without a warrant, it should be prepared that OSHA may secure an anticipatory warrant for a future inspection, where the employer will have no notice of OSHA's arrival and must allow OSHA access when it arrives with a warrant in hand. OSHA may obtain an anticipatory warrant under 29 CFR 1903.4, under the following circumstances:

> (a) When the employer's past practice either implicitly or explicitly puts the Secretary on notice that a warrantless inspection will not be allowed;
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> (b) When an inspection is scheduled far from the local office and procuring a warrant prior to leaving to conduct the inspection would avoid, in case of refusal of entry, the expenditure of significant time and resources to return to the office, obtain a warrant, and return to the worksite;
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> (c) When an inspection includes the use of special equipment, or when the presence of an expert or experts is needed in order to properly conduct the inspection, and procuring a warrant prior to an attempt to inspect would alleviate the difficulties or costs encountered in coordinating the availability of such equipment or expert; and
>
> (d) With the approval of the Regional Administrator and the Regional Solicitor, compulsory process may also be obtained by the Area Director or his designee.

Part Three: Interviews and Statements by Management

Although OSHA's field guides and instructions briefly state that employee interviews are to be conducted in private, the source and the scope of this pronouncement is difficult to ascertain. In examining the Occupational Safety and Health Act (the Act), the Code of Federal Regulations (CFR) promulgated under the Act, OSHA's internal policies and guidelines, Occupational Safety and Health Review Commission (OSHRC or the Commission) decisions, and various federal court decisions addressing the subject, surprisingly little discussion of exists what defines or delimits a "private employee interview."

A. The Act and the CFR

The Act and OSHA's regulations reveal that the statutory and regulatory language allows an OSHA representative to "question privately any employer, agent, owner, operator, or employee," but does not define or delimit the key qualifier, "privately." The table below contains the precise statutory and regulatory language that provides OSHA with the authority to conduct private employee interviews:

[16] *Marshall v. Pool Offshore Co.*, 467 F. Supp. 978 (D.C. La. 1979).

Statute/Regulation and Title	Language
29 U.S.C. § 657(a)(2) ("Inspections, investigations, and record-keeping")	In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized— (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to ***question privately any such employer, owner, operator, agent or employee.***
29 U.S.C. § 657(e) ("Employer and authorized employee representative to accompany Secretary or his authorized representative on inspection of the workplace")	Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

Table 1. Statutory and Regulatory Language that Provides OSHA with the Authority to Conduct Private Employee Interviews (emphasis by the author) (*Source:* OSHA)

B. OSHA's Internal Policies and Guidelines

OSHA guidelines support the basic principle that OSHA interviews are private:

- The compliance officer determines the route and duration of the inspection. While talking with employees, the officer makes every effort to minimize any work interruptions. The compliance officer observes safety and health conditions and practices; ***consults with employees privately, if necessary;*** takes photos . . .[17] (emphasis by author).

- ***Private interviews may be conducted at any time*** during an inspection, but must be conducted in a reasonable manner[18] (emphasis by author).

[17] OSHA Inspections, OSHA 2098, p. 6 (2000).

[18] OSHA Standards Interpretation and Compliance Letter, May 28, 1997.

C. OSHRC Opinions

OSHRC's decisions also shed little light on what constitutes a "private interview." This is unfortunate, given that OSHRC had the opportunity to address directly whether an employer representative had the right to be present during employee interviews in *Astra Pharmaceutical Products, Inc*.[19] There, an ALJ concluded, among other things, that an OSHA compliance officer was in "clear violation of the Act" when he excluded an employer from OSHA's private conferences with Astra Pharmaceutical's (Astra) employees. The Commission, however, dodged the ALJ's finding, based on Astra's failure to raise the employer representation issue when the Secretary of Labor appealed the decision. Rather, the Commission vacated the ALJ's decision on other grounds and avoided addressing the issue.[20] Without any guidance from the Commission, an employer's sole source of OSHRC authority is a pro-OSHA ALJ opinion, which provides an employer with no right to be present during employee interviews: "[P]rivate employee interviews do not violate an employer's rights under Section 657(e) to accompany an OSHA representative during a physical inspection. The employer cannot participate in the private interviews, but is not barred from accompanying the OSHA inspector during the inspection."[21]

D. Federal Court Opinions

Following OSHRC's lead, the Fifth Circuit Court of Appeals also had the opportunity to address the issue of employer representation, but avoided the question on procedural grounds. Trinity Industries, Inc. (Trinity) appealed an OSHRC opinion through the federal courts on the question of whether it had the right to be present during employee interviews, but the appellate court never addressed the merits of the case.[22] Instead, the court vacated and dismissed an appeal from a district court's award of summary judgment in favor of Trinity, based on Trinity's lack of standing: Trinity's alleged injuries were "too speculative" to give it standing to raise the issue on appeal.[23]

E. Employer Representation Following the Issuance of an Administrative Subpoena

While these decisions do not shed any significant light on what rights an employer has under the Act's broad "investigate privately" provisions, other federal court opinions do signal at least one

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[19] 9 OSHC (BNA) 2126 (1981).

[20] "On review, Astra specifically declined to pursue the issue regarding the exclusion of an employer representative from a compliance officer's interview of an employee on the grounds that the judge's discussion of the issue was merely dicta since he decided the case on the basis of the Secretary's failure to prove a violation and he specifically declined to rule on Astra's affirmative defense. Under these circumstances, we consider the argument abandoned." *Id.* *12 n. 10.

[21] *The Metal Bank of America, Inc.*, 1983 OSAHRC LEXIS 155, *7 (1983).

[22] *Trinity Indus., Inc. v. Marrin*, 963 F.2d 795, 803 (5th Cir. 1992).

[23] Moreover, the vacated district court opinion fails to offer any additional arguments in favor of employer representation. The district court reasoned that Trinity had the right to be present based on a former version of the FIRM which gave employee's the option to be questioned privately. The court reasoned that this "option" also gave employers the right to be present during the interview. *Trinity Indus., Inc.*, 760 F.Supp. 1194, 1200 (N.D. Tex. 1991).

avenue for employer participation during employee interviews: by legal counsel following the issuance of an administrate subpoena.[24]

For example, in an unrelated *Trinity Industries* opinion, *Dole v. Bailey*, Trinity Industry employees refused to participate in OSHA interviews and, accordingly, the OSHA compliance officer served them with administrative subpoenas.[25] Trinity's corporate attorney then informed OSHA that he would represent both the employees individually and the corporation during the interviews. After a Dallas federal court upheld the issuance of the subpoenas, it addressed whether it was proper for Trinity's attorney to jointly represent both the corporation and the employees. Although the court found that such "dual representation" would necessarily have to create a conflict of interest, it did not object to either party having counsel during the interviews: "Neither Trinity nor any other attorney that represents Trinity shall represent the defendants in connection with this matter. Defendants are entitled to be represented by other counsel if they desire." For authority, the court cited the administrative agency procedures of the U.S. Code, which grant the right to attorney representation and, potentially, non-attorney representation in administrative proceedings to: (i) the person being compelled by the subpoena; and (ii) the party to the agency action.[26] Accordingly, under *Bailey* and the U.S. Code, both the *company* and its employees may be represented by counsel during OSHA's subpoenaed interviews.

While requesting OSHA to subpoena a company's employees may not be the preferred course of action, it does not necessarily have to signal confrontation or employer interference; OSHA's regulations do not require that there be a breakdown in employer compliance with OSHA before the agency can voluntarily subpoena testimony.

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[24] In accordance with § 657(b) of the Act, whenever there has been a reasonable need for records, documents, testimony and/or other supporting evidence necessary for completing an inspection or an investigation of any matter properly falling within the statutory authority of the agency, the OSHA Area Director may issue an administrative subpoena if such evidence was not produced voluntarily. 29 U.S.C. § 657(b).

[25] 1990 U.S. Dist. LEXIS 10512, *10 (N.D. Tex. 1990).

[26] This authority is from 5 U.S.C. § 555(b) and states:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

Part Four: Documents and Privileges

A related issue is what documents OSHA may obtain during an inspection and before litigation. Among other thorny issues is the question of when OSHA may obtain internal audits and investigations; how to conduct a privileged audit; and the role of counsel in securing a privileged audit. Of related importance is when a company may wish to waive the privilege of a properly done audit that is subject to attorney-client privilege.

To encourage corporations to conduct audits, a number of state legislatures have enacted statutes granting some form of audit privilege or immunity from use of occupational health and safety audits against the corporation. Most of these statutes contain a particular set of conditions which must be strictly followed. Occupational safety and health audits are internal reviews voluntarily conducted by companies to measure their compliance with various laws and regulations. These audits are often conducted by teams consisting of one or more technical experts, often including independent outside consultants, company personnel, and sometimes in-house or outside counsel.

The audit privilege has been recognized in certain jurisdictions to encourage corporations to conduct self-evaluations, an area in which there is a strong public interest that honest evaluations be performed. The more common protections appear in regards to environmental audits but some protections have been drafted to also protect occupational health and safety audits. The need for the privilege is based on the concern that if the products of audits were discoverable in court actions or used in investigations against the company, there would be a disincentive to perform the audits. This disincentive would outweigh any benefit the company may derive from self-policing its own policies and procedures. The risk of adverse use would simply overwhelm any interest in conducting an audit.

Courts have neither consistently defined, nor predictably applied, the audit privilege. Further, there is even disagreement among the courts as to whether such a privilege should be recognized at all. Under the federal rules, privileges are be created and interpreted by Congress and the courts. In the federal courts, privileges against discovery of certain materials and communications are recognized pursuant to Rule 26 of the Federal Rules of Civil Procedure and Rule 501 of the Federal Rules of Evidence. Rule 26 of the Federal Rules of Civil Procedure provides that there shall not be discovery of privileged communications, documents, and other materials; whereas, Rule 501 of the Federal Rules of Evidence provides that evidentiary privileges shall be created and interpreted in keeping with federal common law.

Federal courts are reluctant to create new privileges or to broadly apply existing privileges; instead, they prefer to wait for Congress to set out a new privilege, after input from the legislative process. However, courts have recognized an audit privilege without a legislative scheme having been created. In *Bredice v. Doctors Hospital, Inc.*, the court announced that a privilege would apply to protect a hospital peer review report from discovery. [27] Since that case, federal courts have applied an audit privilege to a number of specific types of audit materials, including cases arising under securities law, employment law, academic and medical peer review contexts, product safety assessments, and in railroad accident cases.[28]

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[27] *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

[28] Margaret S. Lopez, *Application of the Audit Privilege to Occupational Safety and Health Audits: Lessons Learned from Environmental Audits*, 12 J. NAT. RESOURCES & ENVTL. L. 211, 216 (1996–1997).

In general, however, courts tend to consider four factors in deciding whether the materials in question will be privileged:

(1) Whether the material sought to be discovered was the product of an internal self-examination by the corporation;

(2) Whether the corporation intended to and did keep the material confidential;

(3) Whether there is a strong public interest in encouraging such audits to be performed; and

(4) Whether there is a strong possibility that denial of the privilege will chill the performance of such audits in the future.

In addition to the audit privilege, companies occasionally invoke the attorney-client privilege and the work product doctrine to protect audit reports. In general, these have proven to be less satisfactory than the protections under the audit privilege. This is largely due to a mismatch between the purposes behind these doctrines, and the reason for conducting most internal audits. For example, the purpose behind the attorney-client privilege is to encourage honest and open communication between a client and an attorney. In contrast, the reason for conducting internal audits is not necessarily to receive legal advice or to prepare for litigation.

Generally, the following conditions must be met for the attorney-client privilege to apply:

(1) The asserted holder of the privilege is, or sought to become, a client;
(2) The person to whom the communication was made:
    (a) is a member of the bar of a court, or his subordinate; and
    (b) in connection with this communication is acting as a lawyer;
(3) The communication relates to a fact of which the attorney was informed:
    (a) by his client:
    (b) without the presence of strangers;
    (c) for the purpose of securing primarily either:
        (i) an opinion on law;
        (ii) legal services; or
        (iii) assistance in some legal proceeding; and
    (d) not for the purpose of committing a crime or tort; and
(4) The privilege has been:
    (a) claimed; and
    (b) not waived by the client.

For reference, the work product doctrine rule generally protects documents prepared by an attorney in anticipation of litigation. This is a narrower protection.

State legislation providing for an occupational health and safety audit generally falls into two categories: (1) allowing companies to shield audit reports from discovery and also shield their use in any stage of an administrative, civil or criminal action; and (2) providing some level of immunity for violations found by an audit, which the company then promptly reports to the appropriate government agency. For example, the Texas Environmental, Health, and Safety Audit Privilege Act provides that an audit report is privileged. An audit report is defined as, “each document and communication . . . produced from an environmental or health and safety audit.” Further, an environmental or health and safety audit is defined as a systematic voluntary

evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws that is:

(1) conducted by:

(a) an owner or operator,

(b) an employee of the owner or operator, or

(c) an independent contractor of the owner or operator; and

(2) regarding:

(a) a . . . facility or operation [regulated under an environmental or health and safety law], or

(b) an activity at a . . . facility or operation [regulated under an environmental or health and safety law].

This statutory language is very important, as there are few cases or formal opinions interpreting these provisions in the various states.

Part Five: Defenses to Citations

Following the inspection, if OSHA issues a citation, the citation will inform the employer and the employees of: (i) the regulations and standards the employer allegedly violated; (ii) any hazards covered by the general duty clause of the act; (iii) the proposed length and time set for abating the hazards; and (iv) any proposed penalties. OSHA will send the citations and notices of penalties to the employer by certified mail, and the employer must post a copy of each citation for three days at or near the place either where the violations occurred or until the employer abates the violation, which ever period is longer.

> The employer has 15 working days (*not including weekends and federal holidays*) to contest a citation; otherwise, *it becomes a final, non-reviewable order*.

If the employer neither contests the citation nor enters into an informal settlement conference, the employer must pay the penalty and abate the hazard(s) by the citation abatement date. Most abatement dates will be less than thirty days, unless the compliance officer discusses (in the closing conference) that a long-term abatement period may be necessary, which is usually in cases where the correction of the hazard will require significant engineering changes.

Under the Act, an employer may notify the OSHA Area Director (in writing) that it intends to contest the citation or proposed penalty. The notice of contest must be postmarked within 15 working days after the employer receives the notice of the citation and proposed penalties. *This 15-day period is a firm one.* The employer must conduct any informal conference within that time period. Thus, an employer's inability to meet with the OSHA inspector or director for whatever reason before the expiration of the 15-day period *does not* toll the time period or the ability to contest.

In preparing to contest a citation or at any stage of conciliation with OSHA, an employer may establish various affirmative defenses. The employer should note, however, that once a

claim is before the ALJ or OSHRC, an employer's failure to assert an affirmative defense can waive the defense.

1. *Pre-emption***.** An issue that may be raised as a defense and, if applicable, should be discussed with the inspector at the start of an inspection is that of preemption. The OSH Act does not apply to working conditions over which other federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. Agencies that have preempted OSHA's jurisdiction over a particular work site include the Federal Railroad Administration and the Federal Aviation Administration.

2. *Impossibility or Infeasibility.* This defense allows an employer to show that compliance with the cited standard is impossible, and that alternative means of protection either were in use or were unavailable. If an employer asserts this defense, it must be prepared to show that all alternative means of protection were thoroughly researched.

3. *Greater Hazard.* This defense allows an employer to show that compliance in the particular situation would result in a greater hazard to employees than noncompliance. The employer must also show that alternative means of protection were either in use or unavailable. More importantly, the employer must also show that a variance application either is unavailable or inappropriate. Furthermore, if the alleged greater hazard could be avoided if the employer altered its work practices, the defense will fail.

4. *Employee Misconduct.* An employer may effectively contest a citation if it can show that the violation resulted from an employee's unpreventable misconduct. This requires a showing by the employer that an employee violated a company work rule that is effectively communicated and uniformly enforced. The employer must be prepared to demonstrate that it has an effective, ongoing safety program and that employee violations of the program, particularly the work rule in question, are rare and, when discovered, result in disciplinary action.

5. *Procedural or Substantive Invalidity of the Cited Standard.* When promulgating standards or regulations under the OSH Act, OSHA must comply with the rule making procedures of the Act and the Administrative Procedure Act. If the cited standard were promulgated without adhering to those procedures, it is procedurally invalid and, therefore, unenforceable.

Enforcement of a standard may also be challenged on substantive grounds. First, although rarely successful, an employer may challenge a standard on vagueness grounds. If a standard does not provide adequate warning of what is required to ensure compliance, it may be unenforceable. This type of defense is typically used when a standard is new. If a standard imposes arbitrary and capricious requirements, it may also be subject to challenge.

6. *Statute of Limitations.* The OSH Act imposes a six-month statute of limitations on the issuance of citations. Once six months has elapsed from the date of the violation, OSHA is precluded from issuing a citation.

7. *Multi-Employer Worksite.* If an employer's workers are exposed to a hazard that the employer did not create and cannot control, that employer may successfully defend a citation. The employer must prove that it did not create the hazard. Furthermore, the employer must prove that it either took reasonable steps to protect its workers from the hazard or that it did not have the necessary expertise to recognize that a hazard existed.

An employer can offer evidence of different actions it took to protect its workers. One method is to complain to the responsible employer about the hazard. Going to the source of the problem is a reasonable approach. If, however, repeated complaints do not result in correction of

the problem, additional steps may need to be taken to protect employees. Removing employees from the worksite, providing equipment to lessen the impact of the hazardous condition, or refusing to do the particular work that involves the hazard are a few examples.

The practical effect of the multi-employer worksite defense is that employers are not just responsible for the safety of those with whom they have a legal employment relationship. Instead, when an employer creates or controls a hazard, it will be responsible for that hazard and any related OSHA liability. An employer that neither creates nor controls a hazard that affects its employees may be able to successfully defend against an improper citation.

8. *De Minimis Violation.* A *de minimis* violation may be issued when either: (i) the employer complies with intent of standards, but deviates from a particular requirement that has no direct relationship on employee safety or health; (ii) the employer complies with a proposed or "consensus" standard rather than OSHA standard, and that standard provides equal to or greater protection than the OSHA standard; or (iii) the employer's company is "state of the art," outdating the standard, but providing equal to or greater protection to its employees. In such a situation, the employer can request OSHA to assign a $0.00 penalty.

Summary

The purpose of this paper was to confront the legal limitations of how a company can and cannot respond to an Occupational Safety and Health Administration (OSHA) investigation. At the outset, some employers may question when it is appropriate to deny OSHA access to the workplace. Strategically, an employer may have reasons to delay an inspection, but must understand what can happen with future inspections. As such, we will discuss OSHA's warrant power and its ability to obtain anticipatory warrants for future inspections based on a company's refusal to permit OSHA on the property without a warrant.