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Learn More:

Employer's Responsibilities
Under OSHA

OSHA Field Inspection
Reference Manual

Employer Rights and
Responsibilities Following
an OSHA Inspection

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OSHA INSPECTIONS HAVE INTENSIFIED UNDER THE OBAMA ADMINISTRATION: DO YOU, AS AN EMPLOYER, KNOW YOUR RIGHTS?

With an increased budget, OSHA inspections and enforcement have increased during the last two years. Beware! You, as an employer, may soon get a surprise visit from an OSHA inspector at your place of business or at a construction site. If you do, what do you do? What are your rights? In the criminal context, we are all familiar with the Miranda warning, but such warning does not apply for an OSHA inspection. OSHA inspectors are actually under no obligation to inform employers of their rights. While OSHA publishes a document on employers' rights after an OSHA inspection, it is curiously silent on employers' rights during an OSHA inspection. Employers in fact have a number of rights during an OSHA inspection. In the current atmosphere of heightened inspections, employers would be well served by understanding those rights, including the following:

- The employer has the right to refuse entry onto the site without a warrant from OSHA. OSHA must have legal probable cause to conduct an inspection at the site. Note, however, that the OSHA inspector has the right to inspect the job from a public area.
- The employer has the right to see the inspector's credentials (name, ID number and area office) and inquire as to the basis of the inspection. If the inspection is based on an employee complaint, the employer is entitled to receive a copy of the written complaint, but OSHA is not obligated to release the name of the complaining employee.
- The employer has the right to have a representative accompany the OSHA inspector during the walkthrough inspection.
- Before starting an inspection, the OSHA inspector is required to wait a reasonable time period (generally 30 minutes to an hour) for an employer representative to arrive at the site.
- If the employer voluntarily allows OSHA to inspect the site without a warrant, the employer has the right to limit the areas inspected. The employer should limit the scope of the inspection to areas and conditions listed in the written complaint, if one exists. If a warrant is issued, the scope of the inspection is limited to the areas and conditions listed in the warrant.
- The employer has the right to refuse inspection of documents beyond those required to be produced under the OSHA regulations, such as the official

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injury and illness logs (OSHA Log 300), written health and safety programs, and employee training records and certifications. If the OSHA inspector requests documents beyond those that are required to be produced, the employer does have the right to deny the inspector access to such documents. But such a denial may be perceived by the inspector as being uncooperative. To possibly avoid being viewed in such light, the employer could simply ask the inspector to send a written request for such documents, without making any commitment to produce such documents. This will provide the employer with additional time to make an informed decision as to whether to produce the documents.

- The employer has the right to be present during non-private employee interviews. Non-private employee interviews are those interviews conducted by OSHA during the employee's paid work time. The employer has the right to refuse or stop non-private employee interviews that unreasonably interfere with ongoing work operations at the site.
- OSHA has the right to conduct private employee interviews and the employer cannot prevent, interfere or disrupt such interviews from taking place, but the employer has the right, and should invoke such right, to inform its employees of their rights during an inspection and interview by OSHA. Such rights of the employee include: the right to decline the interview; the right to request representation by a union representative, employer supervisor, and/or legal counsel; the right to end the interview at any time; the right to decline the interview from being tape recorded and/or videotaped; and the right to decline signing any prepared written statement by the OSHA inspector. When informing employees of their rights, the employer should make it clear that the employer is simply advising them of their rights, and the employees are free to make their own decisions.
- The employer representative has the right to be present during any interviews of onsite supervisors or managers regardless if such interviews are private or non-private. The employer's supervisors and managers have the same rights as other employees.

The extent to which an employer will exercise its rights during an OSHA inspection requires a judgment call, which may be governed by the basis of the inspection, conditions of the site, details of the documents and experience of the company representative. Exercising any of the above-mentioned rights could be viewed by OSHA as being uncooperative, which could lead to a more diligent and tighter inspection by OSHA (either in the present or future) and stiffer violations and penalties. But it also could provide an opportunity for the employer to avoid potential violations and penalties.

For more information on OSHA inspections, or for any other questions you may have regarding construction law, please contact William D. Auxer at 610.941.2519 (wauxer@kaplaw.com). You can also contact any member of our Construction Law group.

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About the Practice
Construction Law Group

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