Responding to an OSHA Inspection

By Richard D. Alaniz

Whether an OSHA inspection of your workplace or construction site is triggered by a workplace injury, a formal complaint, a programmed wall-to-wall inspection, or just a spot decision while OSHA happens to drive by your construction site, being prepared beforehand will help limit exposure and help defend against any citations that may be issued. A very basic first step is to review and update as necessary the written safety plan for your facility or project. Such plans have been long mandated in some states, and are clearly a necessity in today's workplace, no matter the industry. In conjunction with updating the plan, it is important to develop a protocol for responding to a potential OSHA inspection. Make sure that your receptionist, front office, or construction site office knows who to contact when that OSHA Compliance Officer appears. If you do not have a Safety Director, designate a specific manager(s) to take the lead and make sure that they know exactly how you expect the inspection to proceed from the company's perspective. Be sure to confirm that OSHA 300 logs are up to date and posted as required. They will be reviewed as part of any inspection. Likewise, have Safety Committee minutes organized and readily available for review as well. If the inspection is in response to a recent workplace accident, you should also have the incident investigation notes and related material readily available.

WARRANT OR WARRANTLESS INSPECTION

Since at least 1978, the U.S. Supreme Court has held that an employer may require OSHA, or its state counterpart, to obtain a warrant to conduct an inspection of an employer's premises.[1] Whether to insist upon a warrant is a significant decision that has, as one might expect, serious pros and cons. Among the more significant pros is the possibility of limiting the scope of the inspection and possible dismissal of citations unrelated to the specifics of the warrant. A frequently cited con is the potential that an irritated Compliance Officer, forced to seek a warrant, will strive even more to find violations. While such conduct is clearly contrary to OSHA's inspection procedures, human nature may prevail. Unless unique circumstances are present, most employers do not insist upon a warrant and seek to be as cooperative as possible. Maintaining a cordial relationship with OSHA is always preferable. You and the Compliance Officer share the same goal: a safe workplace for all employees.

Have your response checklist ready before you get hit with an OSHA inspection!

CONTROLLING THE WALKAROUND

After reviewing your OSHA 300 logs, the Compliance Officer will normally begin the tour of your facility or construction site. An employee representative is generally requested to participate. Compliance Officers are permitted to ask questions of both employees and supervisors/managers as they inspect your facility or construction site. Some employers, in hopes of avoiding an inadvertent but unsafe act by an employee that is observed by the OSHA representative, sometimes require all work operations to cease. It has become common practice for some construction contractors. This is an option you may want to consider.

Your designated management representative should carefully note all comments and questions from the Compliance Officer during the walkaround. You may have more than one management representative participating if you so choose, and many employers do so, especially on construction sites involving several employers. If any photographs or video are taken, your management representative should take the same photographs or video. They should also exercise as much control as possible regarding the scope of the inspection without creating a confrontation. Unless it is a scheduled wall-to-wall inspection, it should be an inspection of limited scope focusing on the equipment or area that prompted the complaint or the accident that caused the visit. Permitting the Compliance Officer to have unrestricted access to inspect all work-related areas and observe uninvolved equipment merely increases the potential for finding violations.

CONDUCTING INTERVIEWS

As part of any OSHA inspection, the Compliance Officer has the right to, and generally will, interview both employees and management representatives. Employers have a right to be present or have their attorney present at any management interviews. There is no right to be present at employee interviews. However, employees are not obligated to participate in any interviews and the employer can so inform them. While OSHA could seek a subpoena to compel employee participation, they generally do not go to that next step unless a serious injury, death, or other significant issue is involved. It is important that any manager or supervisor interviewed be truthful, but not volunteer information unrelated to the matter at issue. They should respond to questions as succinctly as possible. They should also request a copy of any statement that they are asked to acknowledge or sign. You should also ask any employees interviewed to request a copy of any statement they provide to the Compliance Officer.

MEDICAL MARIJUANA, WORKPLACE INJURIES, OSHA, AND POSITIVE DRUG TESTS

A potential new concern is that in a routine OSHA inspection, your drug testing policy may become an issue. Last year, OSHA, in comments regarding new reporting requirements, suggested that employers are prohibited from enforcing a blanket policy that requires employees to submit to drug testing after an accident because the policy may discourage employees from reporting injuries.[2] Currently, OSHA does not permit employers to have a policy requiring drug tests after every accident unless the employer is required to drug test employees due to some other federal or state law (such as regulations for drivers from the Department of Transportation). It does not appear that the rule is being enforced. Additionally, in June 2017, the Department of Labor issued a notice of proposed rulemaking to revise, reconsider, or remove portions of the rule. Therefore, the Trump administration may eventually revise OSHA's current policies forbidding employers from conducting post-accident drug tests anytime there is an accident.

On a related note, employers should be aware that four states (Connecticut, Massachusetts, Maine, and Rhode Island) have found that an employer could not fire or discipline an employee for a positive drug test for marijuana when the employee uses medical marijuana and the state prohibits discrimination based on this medical marijuana use. This is a significant change that will affect many workplaces. It is likely that more states will adopt this or similar policies. If there is a workplace accident in these states (or others, as the policy becomes more widespread), then OSHA and state law may prohibit a blanket policy of drug testing after an accident, or may prevent an employer from concluding that an employee was impaired during the accident, even if they have a positive drug test.

If there is an OSHA investigation, then employers may be liable for accidents caused by employees that failed drug tests because they use medical marijuana off-duty. Currently, drug tests for marijuana cannot gauge whether an employee was under the influence of marijuana at work because marijuana can stay in someone's system for days or even weeks. Employers that conduct drug tests after an accident should be aware that unless the Obama-era rule is rescinded, OSHA might determine that the drug testing is retaliatory if the employer has a blanket drug testing policy and are not required to drug test by federal or other law.

SILICA RULE

Of at least equal concern, at least to certain employers, is the fact that on September 23, 2017, OSHA began enforcing its new rule on respirable crystalline silica (silica dust). A 30-day compliance assistance period was provided for employers to take necessary action for complying with the new rule. It is now fully in effect. The rule reduces the Permissible Exposure Limit (PEL) for work at construction projects from 250 to 50 micrograms of silica per cubic meter of air, averaged over an 8-hour day.[3] Silica dust is recognized as a workplace hazard, causing silicosis, lung cancer, chronic obstructive pulmonary disease (COPD), as well as other illnesses. Employees are exposed to silica dust in several industries, including foundries, fracking operations, and especially in the construction industry where stone and sand products are present and certain tasks involve the use of crystalline silica.

The rule is the result of years of study by OSHA and has been challenged by the Chamber of Commerce and trade groups from a variety of industries. One study by the Construction Industry Safety Coalition suggests that the costs of the rule were underestimated by as much as several billion dollars.[4]

The U.S. Court of Appeals for the D.C. Circuit recently rejected all of the issues raised by industry groups concerning the rule. However, the Court remanded for review by a lower court an issue raised by labor unions concerning the absence of medical removal protection for workers. Medical removal protection generally requires employers to protect workers from exposure when recommended by a medical

It is dusty!

determination. Employees are also usually entitled to "normal earnings as well as all other employee rights and benefits" during this period.[5]

The rule creates two sets of requirements for reducing employee exposure to silica dust. One is for the construction industry and the other for general industry and maritime employers. The rule provides an exception for construction industry employers who can demonstrate that employee exposure will remain below 25 micrograms per cubic meter of air, averaged over an 8-hour work shift.[3] For construction industry employers, virtually all the requirements of the rule (discussed in the following) are already applicable. Employers subject to the general industry and maritime standards are not required to comply until June 23, 2018.

In addition to the primary requirement of reducing the acceptable level of employee exposure to silica dust by the implementation of proactive measures, the rule requires significant specific measures by construction industry employers. They are required to: assess the actual exposure of all employees who are, or may reasonably be, expected to be exposed to silica dust at or above an "action level" of 25 micrograms; post signage near and limit access to regulated areas where silica dust exposure occurs; implement a respiratory protection program and provide respirators to all employees entering any regulated areas; implement engineering and work proactive controls, as well as housekeeping measures to reduce employee exposure; create and update as needed on an annual basis a written exposure control plan; offer free medical surveillance to any employee exposed to silica dust at or above 25 micrograms per cubic meter of air "action level" for 30 or more days per year; include silica dust in the employer's hazard communication program; and implement recordkeeping requirements to track all of the obligations referenced earlier.[3]

The most essential part of the new rule, and the best guidance for construction industry employers, is OSHA Table 1 (**https://www.osha.gov/silica/SilicaConstruction-RegText.pdf**), which matches routine construction tasks with effective dust control methods. The table sets out three separate columns that provide the specific guidance. The first column lists the task or equipment being used. The second column lists the method for controlling dust. The third column lists the type of respiratory protection needed when performing the task. Unfortunately, Table 1 does not directly cover shotcrete placement equipment or operations.

EFFECTIVE CLOSING CONFERENCE

At the end of the inspection process, a closing conference is routinely held. The Compliance Officer normally will reference any standards that they feel have been violated, as well as possible abatement measures that could or should be taken. The management team representative should take the opportunity to obtain as much detailed information as possible, including all possible violations that may result from the inspection as well as the specific OSHA standards involved. If there are any unique problems with abatement, those should also be thoroughly discussed, including any efforts already taken to abate the condition and eliminate any employee exposure to a hazard.

You'll want to miss this conference, but attendance is required!

OSHA inspections do not have to be the traumatizing experience generally envisioned by most employers. Proper planning and preparation, as well as reasonable efforts to control the scope of the inspection as it is occurring, will greatly increase the employer's opportunity to limit or even avoid costly OSHA citations.

References

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2. "Employee Involvement," *Code of Federal Regulations*, U.S. National Archives and Records Administration, Title 29, Section 1904.35, 2017.

3. "Respirable Crystalline Silica," *Code of Federal Regulations*, U.S. National Archives and Records Administration, Title 29, Section 1926.1153, 2016.

4. "New Study Finds that OSHA Officials Underestimated Cost of Silica Rule for Construction Industry by $4.5 Billion a Year, Adding to Growing List of Concerns about the Flawed Rule," Associated General Contractors of America, Arlington, VA, Mar. 26, 2015, https://www.agc.org/news/2015/03/26/new-study-finds-osha-officials-underestimated-cost-silica-rule-construction-industry. (last accessed Dec. 19, 2017)

5. North America's Building Trade v. Occupational Safety and Health Administration et al., case number 16-1105, in the U.S. Court of Appeals for the District of Columbia Circuit, https://www.cadc.uscourts.gov/internet/opinions.nsf/03C747A5AB141C90852581FE0055A642/$file/16-1105-1710179.pdf. (last accessed Dec. 19, 2017)

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