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# Professional Safety

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## Worker Fatigue

Effects in  
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■ **Postural  
Control & Falls**  
The Influence  
of Age

■ **Best Practices**  
Preparing  
for an OSHA  
Inspection

# OSHA Inspections

## What to Do When OSHA Calls

By John Coniglio

*Responses to OSHA inspections should meet a minimum standard no matter what approach or guidelines the agency may follow at any particular time.*

Much is written, stated and advised when it comes to OSHA visits. This article is in no way meant to be a criticism or disapproval of the agency. OSHA has a job to do, and with limited resources, staffing and budget, it tries to do the best it can. This article is purely intended to provide a direct opinion from a business perspective on what to do when an inspector calls.

Further, this is not meant to downplay the non-delegable, absolute duty of the employer to provide a safe and healthy workplace. Rather, it is an attempt to provide insight into leveling the playing field so that business responses to OSHA inspections meet a minimum standard no matter what approach or guidelines the agency may follow at any particular time.

If the current approach of the agency as outlined in a letter by OSHA Administrator David Michaels entitled, "OSHA at Forty: New Challenges and Directions" became the agency's continuing marching orders with a consistent policy of enforcement, education, outreach and research, one could have an effective template for the agency to proceed. That would still require businesses to respond properly to protect their rights and keep enforcement directed effectively to the "bad guys."

### Developing Issues

For 40 years, OSHA has been working to "protect America's workforce" as required by the OSH Act of 1970. The prime objective is:

To assure safe and healthful working conditions for working men and women by authorizing enforcement of the standards developed under the act; by assisting and encouraging the states in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Section 8 of the act covers inspection, investigation and recordkeeping. It states:

a) In order to carry out the purposes of this act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

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 employer, owner, operator or employee.

Section 8 also includes provisions that address:

- requirement for witness testimony and evidence production;
- recordkeeping regarding activities relating to the act and its requirements;
- issuing regulations regarding postings;
- making reports on work-related deaths, injuries and illnesses;
- recording employee exposures to potentially toxic materials;
- allowing employer and employee representatives opportunity to accompany the secretary or authorized representative;
- employee rights to requesting an inspection and maintaining anonymity.

And for those who are curious, Section 8 (h) also states:

The Secretary shall not use the results of enforcement activities, such as the number of citations issued or penalties assessed, to evaluate [OSHA] employees directly involved in enforcement activities under this act or to impose quotas or goals with regard to the results of such activities.



Another note regarding inspections is the prominent decision made under *Marshall v. Barlow's Inc.* 436 U.S. 307 (1978). In that matter, Justice White delivered the opinion of the court:

Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA or act) empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the act's jurisdiction. The purpose of the search is to inspect for safety hazards and violations of OSHA regulations. No search warrant or other process is expressly required under the act.

Barlow refused to allow OSHA personnel access to inspect his premises. While the secretary argued that warrantless inspections to enforce inspections are reasonable within the meaning of the Fourth Amendment of the Constitution, the appellee (Barlow) petitioned that such warrantless inspections are unreasonable under the Fourth Amendment. The final ruling simply stated, "This court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes."

## OSHA Personalities

Changing times have seen changing approaches. Emphasis by the agency changes as often as the controlling party of Congress and the give and take of day-to-day politics. As Michaels indicates in his letter:

We do not have enforcement tools as strong as those of other regulatory agencies and too often the fines we are permitted to levy are not large enough to have an adequate deterrent effect. Our maximum fine, \$7,000 for a serious violation, is a small fraction of those imposed by other federal agencies. In comparison, the top penalty for violating the South Pacific Tuna Act is \$350,000. Similarly, the maximum criminal penalty for a fatality associated with a willful violation of an OSHA standard is a misdemeanor, up to 6 months in jail. Harassing a wild burro on federal land is a felony, with a sentence of up to a year.

It also should be noted that instructions to the agency (administrative doc-

## OSHA's Approach Today

OSHA's current approach can be read in OSHA Administrator David Michaels's "OSHA at Forty: New Challenges and New Direction." Some key points of the letter that indicate the need for vigilance in attending to and handling OSHA inspections follow.

- "We are a small agency. With our state partners we have about 2,000 inspectors responsible for the health and safety of 130 million workers employed at 7 million worksites around the nation."

- "We do not have enforcement tools as strong as those of other regulatory agencies and too often the fines we are permitted to levy are not large enough to have an adequate deterrent effect."

- "After 40 years OSHA needs a fundamental transformation of the way we address workplace hazards, and in our relationship to employers and workers."

- "Focus must be placed on key areas such as stronger enforcement (some employers need incentives to do the right thing). Toward this objective under the leadership of the director of enforcement programs, we have recently announced two significant policy changes: An alteration in the way penalties are calculated that will result in increased employer fines; and the new severe violator enforcement program."

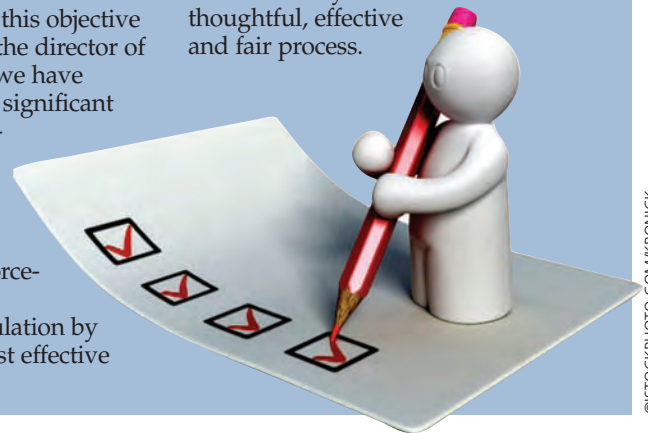
- "In some cases, regulation by shaming may be the most effective

means for OSHA and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger."

Certainly, one cannot argue the need for effective enforcement and penalty for those workplaces that arrogantly allow unsafe conditions to exist and promote hazardous conditions, while thinking that this increases competitiveness. Those work locations need to be targeted.

However, the typical workplace does not fit that category and exercising rights during inspections is an absolute necessity to make sure the characterization of violations is accurate and that their portrayal is not based on misquoted statements taken out of context to support a greater severity to the violation, if it exists.

Accurate enforcement will be obtained through a codified approach to inspections, adequate forensic investigation of facts and information obtained to characterize violations determined by a thoughtful, effective and fair process.



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trine) often covered in documents such as the field operations manual give a clue to the current personality of the agency. Other documents, such as Michaels's letter on July 19, 2010, give clues about the current agency approach and demeanor. It has gone from enforcement to VPP candidates to outreach, to partnerships, back to enforcement.

Currently, enforcement is a primary focus. It is distinct and uncompromising. Willful and egregious willful citations are again the rule, not the exception. When well placed and directed toward the true offenders, one cannot argue the approach. However, when agency personnel are inspecting your site and you are accused of being a willful violator, you may certainly take exception.

Perhaps the current unofficially communicated attitude puts it forth best: If it is an excavating contractor and the trench is bad, it is a willful violation. How can the contractor not know the right way?

As OSHA states, "In practical terms, OSHA inspections are actually used to collect evidence. This evidence will eventually be used against the employer to prove various OSHA violations."

This is not about opinion on the need for greater penalties, whether OSHA should emphasize enforcement, education or grants, but the simple fact that one needs a consistent plan to respond to what can be an inconsistent approach by an agency of the U.S. government (or state) that can compromise a business.

Often, these inspections turn into a “who said what” scenario. A misunderstanding often goes to the knowledge, lack of knowledge, bias or simple intent of the party and then it has to be sorted out.

The approach businesses must take is not to simply put up walls but to exercise their rights as they relate to the physical premises and operations. In the best of worlds, strict enforcement policy will be directed against the “bad actors.”

But, that is not always the case and from experience all allegations presented, particularly when willful and egregious, do not properly color the seriousness of the alleged violation or promoted citation.

### What to Do When OSHA Calls

In the author’s experience, OSHA bases many of its prosecutions on what it claims employees have said to investigators during an inspection. Alleged statements are becoming the primary evidence in many trials. What employees talk about during an inspection has lasting implications for the employer.

If possible, the company and its employees should be assisted and fully represented during all stages of an inspection. Having an expert involved for the benefit of the company in many cases makes the difference between getting a citation (and all the time and expense that goes with it) and not getting a citation.

The best time to take action is at the inception of the investigation, not after citations have been issued. If OSHA shows up at a work site, its goal is to find deficiencies in the safety program and issue citations.

### If OSHA Calls on You

Given OSHA’s current “get tough” policy, employers must be prepared.

#### Know Your Rights as an Employer

1) Be polite, professional and honest.  
2) Supervisory/management personnel should not permit the inspection to start until proper assistance is obtained. The following minimum safeguards are recommended:

- Hire a safety director knowledgeable in the inspection process who can manage the inspection. (It is not management’s job to make OSHA happy. Management is there to protect the rights of the employer and the employee.)

- No conversations with OSHA agents should be conducted without either a witness present or a tape recording of the conversation made (advise all parties of this expectation).

- If no in-house safety director is available, call for a third-party expert to manage the inspection.

- Call an attorney knowledgeable in

the OSHA process to fully protect the company and its employees.

3) If OSHA threatens to issue a search warrant or subpoena, employees should insist that it does so to protect their rights. By getting a warrant or subpoena, OSHA is forced to justify its actions before it proceeds. It also gives the company many important procedural rights.

4) Do not say anything and do not sign anything without input from a safety expert or an attorney.

#### Know Your Rights as an Employee

During an OSHA inspection, the OSHA investigator may request an interview with an employee. Employees have a constitutional right to:

- 1) decline to be interviewed;
- 2) request a third-party witness to be present;
- 3) refuse to give a statement or sign any document.

No one can force an employee to talk to an OSHA official without his/her permission. That is a constitutional right.

In addition, no one can force or direct an employee not to talk to an OSHA official. It is that individual’s decision alone. However, the author encourages representation if one does choose to make statements to a trained OSHA investigator. Be aware that anything said may be used against the individual or employer.

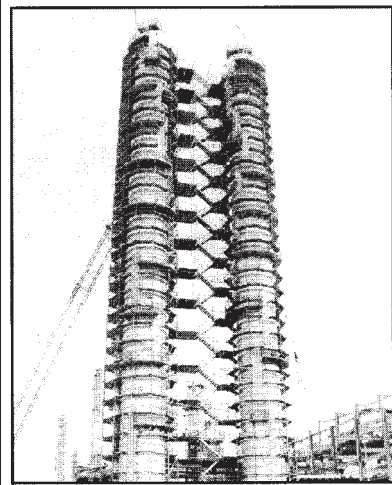
It is important to understand that OSHA may seek arrest and prosecution if it thinks that anything that was said to an OSHA investigator is inaccurate or untruthful. OSHA claims it can do so under the U.S. Code, Title 18—Crimes and Criminal Procedure, Part I—Crimes, Chapter 47—Fraud and False Statements.

### Conclusion

An OSHA investigation should be taken seriously. If the FBI, IRS or the state police shows up at your office and advises you that its personnel are investigating a complaint that the company had been committing serious crimes, how would you react? Most people would call an attorney or other trusted advisor and seek immediate advice.

The same should be true with an OSHA investigation, especially in the current climate. A willful citation carries a possible \$70,000 fine and could preclude the company from bidding on many jobs.

*John Coniglio, CSP, CHMM, CHCM, has been a safety professional for more than 30 years, working in the risk management, chemical process, steel manufacturing and consulting industries. He is an owner of Occupational Safety & Environmental Associates Inc., and author of General Industry Safety Basics. He is a professional member and past president of ASSE’s Niagara Frontier Chapter.*



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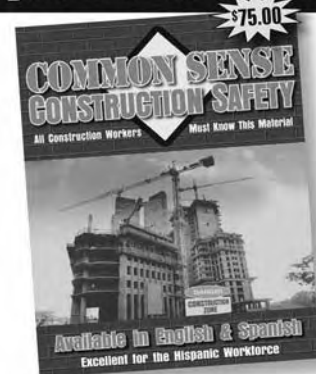
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