

NOVEMBER 17, 2015 | OSHA INSPECTIONS, CITATIONS & ENFORCEMENT

# 3 Rights Employers Should Understand and Assert During OSHA Inspections

By [Eric J. Conn](#) and [Lindsay A. Smith](#)

OSHA has broad authority to conduct workplace enforcement inspections, and such enforcement efforts have reached record levels under the Obama Administration. OSHA gathers virtually all of the evidence it needs to substantiate a citation during inspections. Accordingly, it is essential that employers know and assert their rights during OSHA inspections. Below are three specific, important rights that Employers have during OSHA inspections.

## 1. Insist on an Opening Conference

The Opening Conference is the most important stage of an OSHA inspection. Employers have the right to an opening conference, and should always require that OSHA provide one before officially beginning an onsite inspection. First, an Opening Conference is the employer's last chance to avoid an inspection altogether. During the Opening Conference, OSHA must explain why your workplace is being inspected, and if there are holes in that explanation (e.g., incorrect application of an emphasis program, non-credible employee complaint, or a

program inspections (or after an inspection), you could convince OSHA that the inspection should not proceed. If the inspection will proceed, the Opening Conference is the time for employers to negotiate the scope of the inspection. For example, if OSHA is there because of an employee complaint, employers should negotiate with OSHA to limit the inspection to only the subject(s) of the complaint, and not consent to a wall-to-wall inspection. Employers can also establish ground rules for the inspection (e.g., require written document requests, arrange employee interviews in advance, and require a management escort for access to the facility).



Another benefit of asking lots of questions, engaging in meaningful negotiations over the scope of the inspection and explaining your ground rules, in addition to ensuring a smooth inspection, is that a long lasting Opening Conference will allow managers time to conduct a final walkthrough of the facility to address any low hanging fruit and advise the workforce of OSHA's presence before the inspection starts in earnest.

**2. Accompany the CSHO at All Times**

As part of an inspection, the CSHO will conduct a walkaround of the workplace. During the walkaround, a management representative should always be present to escort the CSHO, ensure the CSHO abides by all your safety rules, and assert the employer's rights where and when appropriate. The representative should take detailed notes about everything the CSHO says, does or asks during the walkaround, and take side-by-side photographs, videos and samples to ensure the employer has all the evidence the CSHO collected. Moreover, the representative should inquire of the CSHO why certain photographs are being taken; essentially gather as much intelligence as possible, so issues can be nipped in the bud, addressed and/or defenses can be developed. Finally, the representative should take action to immediately correct any alleged hazardous conditions identified by the CSHO without admitting a violation.

**3. Participate in Management Interviews**

As part of an inspection, the CSHO will conduct interviews with hourly employees and supervisors. Non-supervisory employees have a right to a private interview with OSHA (note, that is the employee's right not

OSHA's, and that can be waived). Supervisory employees, however, do not have a right to exclude a management representative from an OSHA interview. OSHA imputes the knowledge of supervisors to the employer, which means their interview statements and admissions bind the Employer. These statements can be used not only to establish a violation, but also to support a Willful characterization. Therefore, Employers should always insist on participating and preparing management representatives for OSHA interviews.



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**Toolkit: Prepare for and Manage OSHA Inspections**

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 "right to refuse" 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, creating a model for employers across all industries. The consequences for being caught ill-prepared for an OSHA inspection are therefore more 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 employer, employee, and OSHA's inspection rights, the various stages of OSHA inspections, and tips and strategies for how best to manage each stage.

This OSHA Inspection Toolkit reflects the collective experience of Conn Maciel Carey's national OSHA - Workplace Safety Practice Group, which has represented and assisted clients nationwide through thousands of OSHA inspections. The Toolkit provides tips and suggestions, but does not provide a one-size-fits-all approach to all OSHA inspections.

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**Eric J. Cowan**  
 Chair, OSHA - Workplace  
 Safety Practice Group  
 202-909-2737  
[eric@connmaciel.com](mailto:eric@connmaciel.com)

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For more tips and strategies about how to prepare for and manage an OSHA inspection, check out the [OSHA Inspection Toolkit](#) prepared by Conn Maciel Carey's national OSHA Practice Group to help guide our clients and friends through the OSHA inspection maze. Also, check out this [link](#) to a webinar we conducted on this subject as part of Conn Maciel Carey's [2015 OSHA Webinar Series](#).