

OSHA INSPECTIONS & CITATIONS

How to Prepare for & Defend against!

Presented by:

Marty Banks and Willa Perlmutter

Stoel Rives LLP

April 11, 2018

Utah Mining/Manufacturing Associations' Safety Conference



IMPORTANCE OF GETTING PREPARED

- Minimizes Risk of Penalty
 - Citation Penalties
 - Serious – \$250 - \$7,000
 - Willful – \$5,000 - \$70,000
 - Repeat – Maximum of \$70,000
 - Failure to Abate – Maximum of \$7,000 Each Day
 - Criminal Conviction
 - Willful with Death; Knowing False Statement – Guilty of Misdemeanor with a Maximum of 6 Months Imprisonment
 - Criminal Penalties
 - Willful with Death – Maximum of \$250,000 for Individuals and \$500,000 for the Organization

IMPORTANCE OF GETTING PREPARED (CONT.)

- Minimizes Risk of Abatement Costs (Capital and Labor)
- Minimizes Risk of Repeat Violation
- Minimizes Risk of Civil Liability (Evidence in most states (Utah) & Negligence Per Se in some states)
- Minimizes Risk of Business Interruption
- Minimizes Risk of Disclosing Trade Secrets
- Minimizes Risk of Negative Publicity

WARRANT REQUIREMENT

- OSHA Is Required to Obtain an Administrative Search Warrant to Enter the Premises of an Employer
- An Administrative Warrant Must Be Based On
 - (1) Specific Evidence of an Existing Violation, or
 - (2) General Administrative Plan for the Enforcement of the OSH Act Derived From Neutral Sources
- OSHA Normally Does Not Arrive with a Warrant in Hand

THE RISKS

- Potential Retaliation
- Loss of Control Over Inspection
- Labor Relations
- Public Relations



BENEFITS OF CONSENTING

- Appearance of Cooperation
- Opportunity to Manage Inspection
- Minimize Business Interruption

THE RISKS OF CONSENTING

- Scope of Inspection Expands to Other Parts of Facility – Plain View Doctrine

GENERAL RULE

- Consent to Entry

THREE PHASES OF THE INSPECTION

- Opening Conference
- Walk-Around
- Closing Conference



OPENING CONFERENCE

- Where OSHA Is Supposed to Explain:
 - Purpose of the Visit
 - The Scope of the Inspection
 - Records that Will Be Needed to Conduct Inspection

OPENING CONFERENCE (CONT.)

- If OSHA Has a Warrant, You Should Determine the Scope of the Inspection by Reviewing the Warrant
- If OSHA Does Not Have a Warrant, You May Consent to the Inspection or Make OSHA Get a Warrant

OPENING CONFERENCE (CONT.)

- You Should Set Reasonable Ground Rules
 - Ordinary doc request response – 10 14 days is reasonable
 - Document request point-person
 - No unproclaimed internal interviews

REASONABLE GROUND RULES

- Logistics Plan for Site Inspection
- Escort
- Employee Interviews
- Document Production
- Photographs/Videotaping
- Sampling
- Walk-around

LOGISTICS PLAN

- You Should Designate OSHA Entry for Inspection
- You Should Designate OSHA Location for Inspection
- You Should Designate Location for Employee Interviews
- You Should Require OSHA to Stay in the Designated Areas Until Request for Walk-Around

ESCORT

- You Should Escort OSHA at All Times
 - This Allows You to Gather Information About the Direction/Focus of the Inspection



EMPLOYEE INTERVIEWS

- 8(a)(2) of the OSH Act Allows OSHA to Question Privately Any Employee (Right Belongs to Employee, Not OSHA)
- You Should Inform Employees that They Can Have a Co-Worker, Management, or Counsel Present During Their Interview

EMPLOYEE INTERVIEWS (CONT.)

- Inform Employees that OSHA Has No Inherent Right to Tape-Record or Video-Tape Their Interview
- Inform Employees that OSHA Has No Right To Get A Signed Statement
- Inform Employees that They Can Inform OSHA That They Waive Confidentiality Regarding Their Statements (to ensure accompaniment)

EMPLOYEE INTERVIEWS (CONT.)

- You Should Require OSHA to Provide Reasonable Notice of Request for Employee Interviews
 - This limits business interruption
 - Allows You to Prepare and Inform Employees of their Rights
 - You Should Require OSHA to Conduct Only Brief Conversations with Employees During Walk-Around
- Five minute rule

EMPLOYEE INTERVIEWS (CONT.)

- You Should Prepare Employees for Interviews
 - Preparation Will Help Employees Know What to Expect and Feel Comfortable During the Interview
 - Most Employees Will Agree to Preparation

EMPLOYEE INTERVIEWS (CONT.)

- You Should Tell Employees Nothing They Tell OSHA Will Result In Any Adverse Job Changes – 11(c)
- You Should Tell the Employees To (1) Tell The Truth, (2) Provide Facts Based On First-Hand Knowledge, (3) Do Not Guess or Speculate, (4) Listen Carefully To the Question, and (5) Answer the Questions Asked
- You Should Go Over Basic Facts Regarding Job Duties, Incidents, Documents, and Training

EMPLOYEE INTERVIEWS (CONT.)

- You Should Debrief Employees After Interviews
 - To Determine Whether You Are Preparing Them Sufficiently
 - This Allows You to Gather Information About the Direction/Focus of the Inspection



DOCUMENT PRODUCTION

- Have the Documents Ready Beforehand
 - General Safety – Lockout/Tagout, Emergency Action Plan, etc.
 - Specific Documents – Look at the National or Local Emphasis Program Document

DOCUMENT PRODUCTION (CONT.)

- You Should Require OSHA's Requests for Documents to be in Writing and Directed to One Designated Representative
 - This Enables You to Control the Flow of Information
 - You Are Not Required to Answer Interrogatories or Create Documents
 - If the Request Is Not Clear, Ask that the Request Be Re-Written

DOCUMENT PRODUCTION (CONT.)

- You Should Review Documents Before Producing
 - This Ensures Responses Are Not Over or Under-inclusive
 - Preserves Confidentiality of Trade Secrets
- You Should Stamp Documents Being Produced as Trade Secret to Preserve Confidentiality
 - OSHA is Required to Maintain Confidentiality of Trade Secrets Under Section 15 of the OSH Act
- You Should Bates Stamp Documents Being Produced

DOCUMENT PRODUCTION (CONT.)

- You Should Make a Copy of Documents Being Produced
- You Should Maintain a Log with Bates Stamps
- You Should Respond in Writing
 - This Enables You to Ensure Responsiveness to the Request
 - This Will Also Help You During the Litigation Phase

PHOTOGRAPHS AND VIDEOTAPING

- OSHA Can Take Photographs and Videotape the Worksite
- You Should Require OSHA to Submit Photographs and Videotaping So that You Can Review for Trade Secrets
- You Should Take Shadow Photographs and Videotaping of Whatever OSHA is Photographing

SAMPLING

- OSHA May Use Sampling Devices to Monitor Employee Exposure to Toxic Substances
- You Should Require OSHA to Provide 24 Hours' Notice Prior To Any Sampling
 - This Allows Time to Arrange Parallel Samples
 - This Ensures Proper Methodology for Sampling
 - Ask for Sampling Results from OSHA



WALK-AROUND

- 8(e) of the OSH Act Authorizes the Employer and the Exclusive Bargaining Representative to Accompany OSHA During the Walk-Around
- You Should Require OSHA to Provide Reasonable Notice for the Walk-Around
 - Determine Route to Area Needed to be Inspected

WALK-AROUND (CONT.)

- You Should Require OSHA to Stay in Designated Route
- Do Not “Admit” that a Condition in the Workplace Exposes Employees to a Safety or Health Hazard
- Take Notes During Walk-Around
- Debrief Employer Walk-Around Representative

CLOSING CONFERENCE

- Findings of Compliance Officer
- Chance to Shed Light on any Issue in Dispute
 - May ward off potential Citation items
 - An ounce of prevention is worth a pound of cure

PREPARE FOR AN OSHA INSPECTION

- Designate Team and Assign Responsibilities (Spokesperson, Escort, Document Controller, Walk-Around Representative, Sampler, Photographer)
- Equip the Team (Camera, Sampler, Stamps For Privilege, Business Confidential, and Trade Secrets)
- Train the Team on How to Manage an OSHA Inspection

QUESTIONS?



Marty Banks

801.578.6975

marty.banks@stoel.com



Willa Perlmutter

503.294.9462

willa.perlmutter@stoel.com