A Strategy For OSHA

You Can Lose Your Legal Rights If YOU Aren’t Prepared to Defend Them

(Editor’s Note: Much of the advice given in this article may be impractical given the realities of the construction industry process, but the general thrust of this article does present for subcontractors an understanding of confronting the OSHA inspector—especially when the subcontractor is dealing with his own private property, i.e., his warehouse, headquarters, etc. Congressman Hansen is nationally known for his successful efforts to make OSHA conform to the constitution—and Schein has played an active role in carrying out the Congressman’s program.)

The contracting industry faces a unique situation with regard to the Occupational Safety and Health Administration (OSHA). This uniqueness means that there can be a loss of legal rights unless a contractor is prepared to defend his rights.

The single most important fact for the subcontractor to keep in mind when dealing with OSHA is—Be Prepared! The best offense is still a good defense.

And careful preparation is the key element of that good offense. First, remember that there should be no mistake or confusion among subcontractors with respect to who has the authority to consent to an inspection. The general contractor or his designated representative are the only individuals with the authority to authorize an OSHA inspection. Therefore, a sub-contractor must take additional steps in order to protect his legal rights.

When signing a contract under the best of conditions the sub-contractor would have included a clause with language similar to the following:

“The general contractor is the only individual who may authorize an OSHA inspection. Upon application by an officer representative or the Occupational Safety and Health Administration to inspect the worksite, the general contractor will reject any attempt by an OSHA officer to inspect the worksite without a warrant based on probable cause properly issued by a magistrate. The general contractor will then immediately notify all sub-contractors that application has been made and rejected for OSHA to inspect. The general contractor will then immediately notify the local OSHA solicitor and the local federal/state magistrate and request a full adversary hearing when OSHA applies for a warrant.”

Obtaining such a contractual agreement would be most problematic—but the thrust of this language does reflect the over-all objective for the sub.

An alternative method would be to try and obtain a collateral agreement between all sub-contractors and the general contractor that a warrant will be demanded whenever OSHA attempts an inspection. At the very least, it should be understood that the GC ONLY will have authorization to give or refuse OSHA inspections.

Second, if an agreement is reached among your peers on your plan of action you must now communicate this plan to your employees. You should even make your desires known in writing to your management staff/foreman, so that there will be no question if the need for action should arise.

NOTE: OSHA’s understanding of who has the legal capacity to consent to an inspection may not be consistent with your understanding. Have a copy of the above clause on hand to be delivered to a compliance officer if one should arrive on the worksite. Remember once OSHA has obtained entrance to your worksite it is more difficult and time-consuming to stop the agency’s actions against you.

Due to the nature of the industry several precautions should be taken immediately upon discovering the arrival of an OSHA agent. First, act quickly to eliminate or minimize contact between the agent and your crews. Such action will effectively eliminate any potential opportunity for the inspector to pick up information which he may later use in applying for a warrant. Second, if possible make the compliance officer wait outside the jobsite or in the contractor’s office. Third, try to conduct your business with the agent away from the jobsite. Go across the street to the coffee shop or go into your private office.

Make sure that your foremen are familiar with the above outlined procedures, and be sure that they realize that any conversations which they might have with the inspector may be used by OSHA against you.

Several questions should be asked of the compliance officer upon his arrival which will assist in making a decision on whether or not to allow the inspection: Continued on next page
1. Determine who the individual(s) are - make them present their credentials.
2. Ask whether they are from state or federal OSHA.
3. Ask why they want to inspect:
   a. Has there been a complaint?
   b. Was there an injury or death among your employees?
   c. Is this a random inspection?
4. Ask whether or not they have a warrant.

a. Does the warrant outline specific areas or things to look for?
b. Was the warrant issued in accordance with the Barlow decision?
c. Has legal counsel examined the warrant carefully?

After determining if the inspectors have a warrant, you must decide if you wish to allow the inspection to proceed. According to the Barlow decision an employer can demand that OSHA obtain a warrant. Several factors should be kept in mind when considering whether you will allow the inspection of your business establishment:

1. Don’t be fooled by the inspector’s offers to “go easy” on you if you don’t make him get a warrant. The law requires a compliance officer to cite an employer for every violation of OSHA regulations.
2. By demanding a warrant, you are exercising your Constitutional prerogative to protect your business from harassment.
3. The warrant procedure merely allows a neutral party (the magistrate) to examine the evidence presented by the Department of Labor to see if circumstances dictate allowing the invasion of your privacy.

Remember you are perfectly within your rights to demand a warrant. The famous Barlow decision noted that OSHA’s warrantless inspections were unconstitutional. The court decided that any employer could demand a warrant by the OSHA inspector prior to allowing him in to inspect. This warrant must be on a reasonable or probable cause and properly executed before a federal or state magistrate. The actual significance of the Barlow decision is that it places for the first time a neutral third party in the person of a magistrate between the employer and the federal government.

It is of paramount importance that an employer consult with counsel prior to any refusal of OSHA’s request to enter a worksite. This determination is one which must be made by each individual employer on the basis of all relevant circumstances, including the peculiarities of each individual worksite and the local judicial system.

If you should decide to require that the OSHA inspector obtain a warrant, then you must take immediate steps to insure that your rights are protected.

If you have not yet consulted with your attorney, then you should do so immediately.

Next, it is imperative that you or your attorney contact the office of the local federal magistrate (state magistrate if state OSHA inspectors) and request a hearing on the warrant if one is requested by the solicitors of
the Department of Labor. This action must be taken within the same business day that the OSHA inspector originally attempted to inspect your business. Quick action on your part is essential at this point.

Also, advance preparation should include the preparation of an “emergency” inspection kit from among the following items:

1) one (1) field bag with over the-shoulder strap.
2) one (1) instant camera (Polaroid or Kodak etc., two styles currently available) with carrying strap.
3) four (4) flashbars for instant camera or electric flash attachment with extra batteries. (Always carry a spare flashbar just in case though).
4) four (4) packages of instant film.
5) notebook and pen.
6) portable cassette tape recorder with carrying strap.
7) extra batteries for tape recorder.
8) eight (8) 60-minute cassette tapes.
9) one (1) box of plastic “baggies”.
10) one (1) air sampling device.
11) one (1) box of labels to use on “baggies”.
12) one (1) pair of walkie-talkies with extra batteries (you keep one of the walkie-talkies in your office and the other one in the emergency kit. This will enable you to keep in touch at all times.).

An emergency kit should be kept at the jobsite in case an OSHA inspection is unavoidable. In the event of an inspection such a kit will enable your representative to accompany the inspector and keep a careful record of everything that is said and done. Information of this type would be useful for any, appeal action you may want to take concerning citations which may be issued because of the inspection.

A key part in contesting an OSHA citation is the documentation which you provide in your behalf. Remember that the outcome of your appeal may very well hinge upon the integrity of your safety program.

NOTE: You should always document your safety meetings. When and where were they held? What subjects were discussed? Who participated in the meetings? What kind of programs were developed because of the meetings? Who was responsible for putting on the meetings? Was the meeting formal or informal (in other words, was it a regularly scheduled meeting in a predetermined place or was it a meeting that was hastily called and held in any place that was handy?). It’s vital, too, to maintain employee training records. They play a key part in any appeal. Show proof that your employees were provided with the ‘proper protective equipment in order to safeguard them from any potential hazards within their work environment. Document that all employees have been properly trained in the use and maintenance of their safety equipment. Be ready to furnish proof that your employees have been properly instructed in how to do their jobs.

You must be thoroughly familiar with the safety rules, training specifications and standards of other companies which perform work similar to yours.

The basic thing to keep in mind when contesting an OSHA citation is to always be prepared and never give up.