Living with OSHA

Be prepared for the knock at your door. Avoid problems by knowing your rights.

By Mari M. Gursky

An employer can live more easily with OSHA by preparing for the knock on the door by an OSHA inspector.

Under government regulations, government inspectors enter to inspect a worksite during the regular working hours for violations of the act or its regulations. They gain access to the site after presenting their credentials to the person in charge.

Under OSHA regulations and the current state of the law, the OSHA inspector is not required to tell you that you have the right to demand a search warrant.

Very often, the appearance of the OSHA inspector is an employer’s first encounter with the super agency. Worse, for the construction subcontractor, his introduction through the knock on the door might be more abrupt. The general contractor for a job may have consented to the inspector’s entry to the site, and the subcontractor might not even see the OSHA inspector until that official has already been on the worksite and in the subcontractor’s work area.

Know your rights

The Supreme Court in 1978 held in a landmark decision, *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978), that unless an employer consents to an OSHA inspection, the OSHA inspector cannot enter his premises without a search warrant. Thus, if an OSHA inspector appears and he does not have a search warrant, you do not have to let him enter.

The Supreme Court in *Barlow’s* did not decide the question of whether the consent of one employer at a job site binds all employees at that site. In May 1977, though, the OSHA Review Commission in Western Waterproofing Co., Inc., 1977-1978, held that where a contractor has consented to a search of his premises he has consented to a search of the whole site and that any evidence obtained under such circumstances may be used against a non-consenting employer. The federal courts have not yet dealt with this question, and an employer’s rights in this, as well as a number of other areas where there are multiple employers, are as yet undefined. Thus, it is not clear that an OSHA inspector will seek your consent, if you are a subcontractor and the contractor has consented to the search before entering your work area.

It is important for all employers to plan in advance whether they are going to consent to an OSHA inspection and how they are going to handle the inspection. In a multi-employer site, advance planning and cooperation among employers is essential.

Making the plan

Before work starts, all employers at a site should sit down and decide on a unified approach. The group should decide whether to consent to a search or demand a warrant. A representative for each employer at the site should be designated to handle OSHA problems.

If you cannot agree on a unified approach, advance planning will at least increase the chances of preventing consensual inspections in those areas where the subcontractors do not want them. The subcontractor representatives should be notified immediately by the person in charge of the worksite if an OSHA inspector comes.

The advantages of demanding a search warrant are that many times the inspector will not return, the warrant may be denied, there may be a chance of excluding at later hearings some of the evidence gathered during the search, and the warrant, if issued, may limit the scope of the search.

On the other hand, some employers feel that since it is usually easy for OSHA to get a warrant, there is no point in demanding one. Others believe that an employer will be treated more harshly by OSHA if he demands a warrant. Many employers feel that they can work well with OSHA. (However, stories abound of employers who fell over their faces cooperating with OSHA inspectors and were rewarded with pages of nit-picking citations and heavy fines.)

In any event, the decision should be made as a
Plan in advance whether to consent to OSHA inspection.

group, if possible, and, at least tentatively, in advance.

When the inspector comes, ask him why he is there, and if you can examine any documents he has.

OSHA contemplates two kinds of inspections: inspections based on an organized administrative plan to inspect certain industries that have been found to be particularly hazardous as part of the general schedule inspection selection process; and inspections based on employee complaints. You should find out from the inspector the basis for the inspection he is proposing.

If the inspection is based on an employee complaint, the name of the complaining employee will probably not appear on the complaint. OSHA prohibits an employer’s retaliating against an employee for exercising his rights under OSHA, and OSHA protects complaining employees by withholding their names. The act also makes it a violation to discriminate against employees for bringing to the attention of OSHA or similar agencies safety problems or violations.

After you have gotten as much information—oral and written—as you can from the inspector, ask him to be seated for a few minutes and call your attorney. Do not on your own refuse to allow him to enter if he has a warrant. You are subject to contempt proceedings for failing to comply with a warrant issued by a Court.

Close encounters

If this is your first encounter with an OSHA inspector, he will probably not have a warrant. The regulations contemplate that OSHA not seek a warrant unless the employer has refused to consent to entry.

However, your attorney can be of most use to you if contacted as soon as you hear from an OSHA inspector, whether or not he has a warrant. If you wish to consent to a search, your attorney can help you deal with the inspector to limit the search. If you decide to demand a warrant, your chances of limiting or stopping a warrant from being issued are greater the earlier your attorney starts the attack.

In Cerro Metal Products, (E.D. Pa., November 10, 1978), and Fleck Industries, Inc., (E.D. Pa., March 19, 1979), the employers acted quickly to their advantage. Before OSHA was able to get a search warrant, the employers in these cases sued OSHA officials and got court orders stopping OSHA from seeking search warrants without giving them the opportunity to participate in the warrant proceedings. OSHA had planned on having the proceedings ex parte — that is, going before a magistrate without giving these employers an opportunity to be heard. The Orders in Cerro and Fleck meant the employers could be heard before the magistrate about the appropriateness of issuing a warrant and, if a warrant should be issued, what areas it should cover.

Once at the warrant proceeding, the employer can present evidence to show that no probable cause exists which would justify the issuance of a warrant. The government has been denied a search warrant where it failed to show in asking for the warrant that there existed probable cause to believe a violation of OSHA existed.

Also, if allowed to participate in the warrant proceeding, the employer can prove that the search should be confined to a small area. There is a big difference between a “wall-to-wall” search which can involve a many-weeks inspection of an entire facility and an investigation of an isolated area or piece of machinery. There is a very good chance that unless OSHA is restricted by a Court Order, it will search your entire facility.

If the warrant has already been issued by the time you get to Court, the challenge to the warrant is done by way of a Motion to Quash. The problem with this route is that unless the judge grants a stay, there is nothing to stop the OSHA inspector from inspecting while the Court battle is going on.

Togetherness first

It is important that you have advice during the in-
spection process because along the way there may be many judgments that have to be made about what or what not to allow the inspector to do.

You are entitled to have a representative accompany the inspector, and you should. Have materials available for your representative that he will need during the inspection—paper, pencils, a camera—and brief him ahead of time. He should take down everything the inspector does. Take pictures of anything the inspector photographs. Take notes, including specifics about what the inspector is observing, what work is being done while he is observing and what employees are in the vicinity. Any testing procedures and instruments used should be noted.

OSHA regulations provide that an inspector may question employees privately, but there is no requirement that you provide a place for this interview on your premises or that the interviews be done during working hours.

Nor is there a requirement that you provide the inspector with working space, demonstrate how your equipment works, describe your operation, or volunteer any information.

What tack you take on these and other matters should be worked out with advice before the inspection and reassessed as the inspection progresses.

Moreover, the rules respecting inspections are not clear and are changing. For example, OSHA regulations provide that an employee representative can accompany the inspector and in Chamber of Commerce of the United States v. OSHA, 1978 (D.C., September 29, 1978), a district court held that employee representatives must be paid for walk-around time. However, this case is currently being appealed.

There are certain kinds of documents that the regulations require you allow the inspector to examine, including certain records that OSHA requires you keep. If a warrant has been issued, the warrant should define what the inspector should be allowed to examine.

After “the” inspection the OSHA inspector may issue citations which range from non-serious to willful and with penalties of no more than $10,000 for each willful violation. Where there is a fatality, a willful violation can result in a referral to the Justice Department for criminal prosecution. The citation may also contain an abatement date, that is a date by which the violation is to be corrected.

Thus, OSHA inspections are serious matters that require careful preparation. Next month: Living With OSHA: If You Decide To Fight, Arrive At the Battle Field On Time.