

Answering Frequently Asked

A significant number of employers are likely to find themselves face-to-face with an inspector from OSHA, catching many off-guard. Employers should take a two-pronged approach to OSHA compliance.

First, make every effort to comply with OSHA's safety and health rules to protect your employees. Second, always be prepared in the event that OSHA initiates an inspection at your establishment. Having a plan in place that provides guidance to managers, describes the procedures employed by OSHA and what to expect during an inspection can minimize disruption of business and possible adverse consequences.

Here are answers to frequently asked questions about OSHA. The information pertains to enforcement procedures used by federal OSHA. Some states operate OSHA-approved state plans, which may utilize different procedures. Employers are encouraged to consult with their attorney or advisor following an OSHA inspection. A useful source of information on OSHA can be found on the internet at OSHA's website: www.OSHA.gov.

1. What is OSHA and its purpose?

The Occupational Safety and Health Administration known as OSHA, is an agency within the United States Department of Labor. OSHA's primary function is to inspect workplaces to ensure that employers comply with federal safety and health standards.

2. Who is subject to OSHA's requirements?

Most employers and their employees are subject to OSHA's requirements. Employees employed by the United States government, state or local governments are generally not covered by OSHA. Likewise, certain private sector workers are exempt from OSHA's requirements.

3. If OSHA shows up at my facility, do I have to allow the inspector in?

In most cases, OSHA must either obtain an owner's consent or have a warrant to enter the facility and perform an inspection. If denied entry to perform an inspection without a warrant, OSHA has the authority to obtain a warrant by *ex parte* application to the District Court.

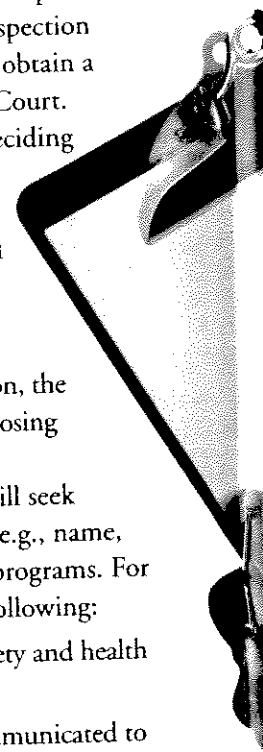
There is no clear cut formula to follow in deciding whether or not to grant OSHA permission to perform an inspection. That decision is best made as a matter of company policy developed prior to an actual inspection.

4. What does OSHA look for?

There are three phases to an OSHA inspection, the opening conference, the walkthrough and the closing conference.

At the opening conference, the inspector will seek general information concerning the business (e.g., name, address, etc.) as well as any safety and health programs. For instance, the inspector may inquire into the following:

- The comprehensiveness of the company's safety and health program;
- How the information on the program is communicated to employees;



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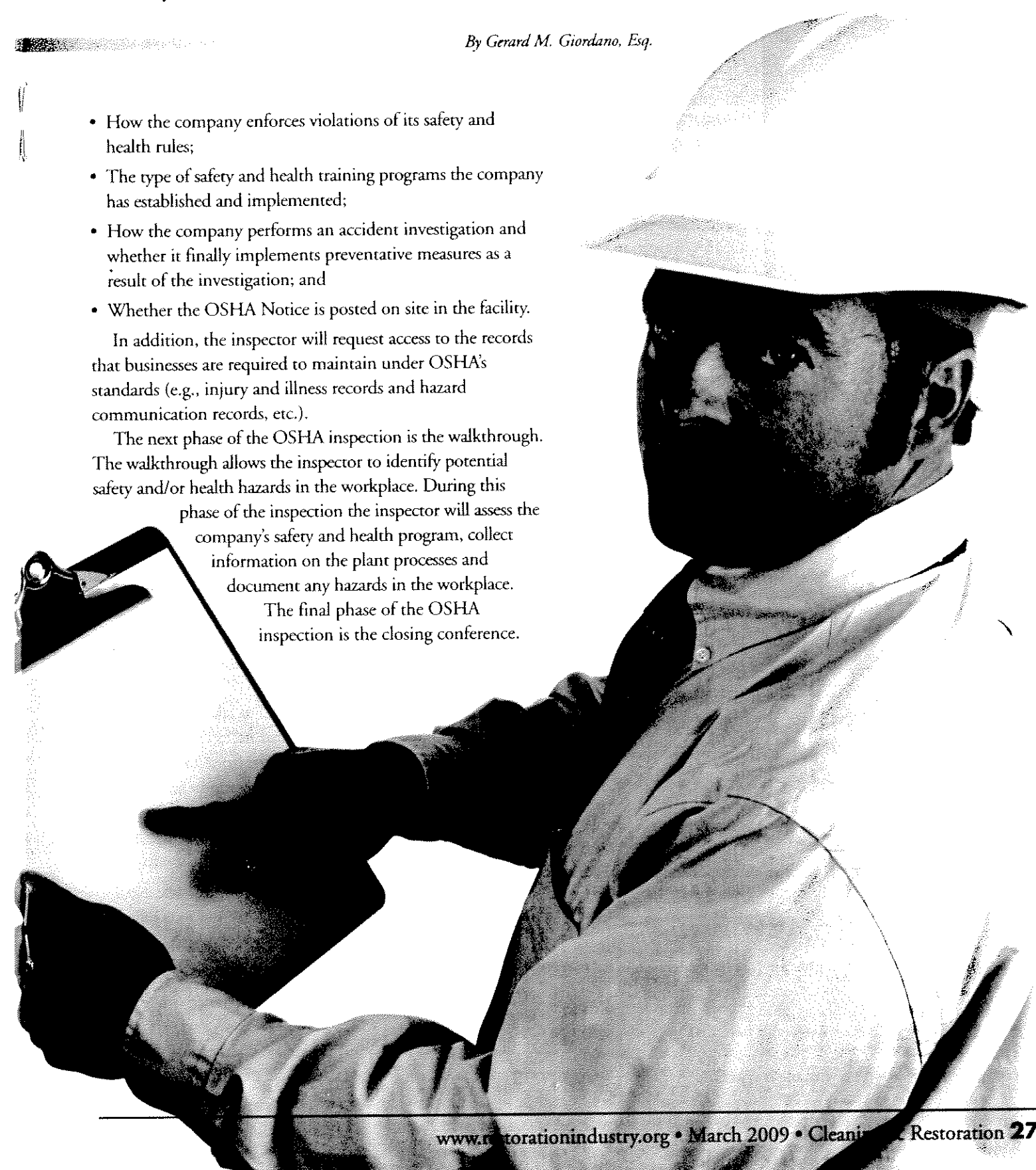
By Gerard M. Giordano, Esq.

- How the company enforces violations of its safety and health rules;
- The type of safety and health training programs the company has established and implemented;
- How the company performs an accident investigation and whether it finally implements preventative measures as a result of the investigation; and
- Whether the OSHA Notice is posted on site in the facility.

In addition, the inspector will request access to the records that businesses are required to maintain under OSHA's standards (e.g., injury and illness records and hazard communication records, etc.).

The next phase of the OSHA inspection is the walkthrough. The walkthrough allows the inspector to identify potential safety and/or health hazards in the workplace. During this phase of the inspection the inspector will assess the company's safety and health program, collect information on the plant processes and document any hazards in the workplace.

The final phase of the OSHA inspection is the closing conference.



At the closing conference the inspector will describe any and all alleged violations observed during the inspection and identify the applicable sections of the OSHA standards or Occupational Safety and Health Act (the "OSH Act") that were allegedly violated. Citations are not usually issued at the

closing conference, but are issued at a later date under the signature of the area director. The inspector is required to advise both the employer and the employees' representative of their rights following an OSHA inspection.

5. What should I do or not do during an inspection?

There are certain actions that an owner should take to protect his/her interests during an OSHA inspection. These actions include:

- Check the inspector's identification to ensure he/she is who he/she says he/she is.
- Ascertain from the inspector the reason for the inspection. If the inspection is the result of a complaint, request a copy of the complaint.
- Have someone from management escort the inspector through the entire inspection process (i.e., from opening to closing conference).
- Document the inspector's activities (i.e., who does the inspector interview, what measurements does the inspector make, etc.).
- Sit in on any interviews that the inspector may conduct with employees if allowed to do so by the inspector.
- If the inspector performs any monitoring (e.g., noise or air), consider performing similar monitoring at the same time to document and confirm the results obtained by OSHA.
- Consult an attorney at the time an OSHA inspection is initiated and at any time when unsure how to respond to a certain request made by the inspector.

The following is a list of "don'ts":

- Do not forcibly interfere with the inspection.

- Do not discriminate against or punish any employee who cooperates with OSHA or who may exercise his or her rights under the OSH Act.
- Do not provide the compliance officer with false or misleading information. Providing false information to OSHA is punishable as a crime under the OSH Act.
- Do not argue with or antagonize an inspector during an inspection.

6. How long will OSHA be at my facility?

OSHA will remain at a facility until it completes its investigation. The inspection could last a couple of hours or up to several months. The length of time is determined by the scope of the inspection and whether it is confined to one area or the entire facility. It is also dependent on the type of inspection. That is, whether the inspector will be required to make subsequent visits to the facility to perform monitoring to establish employee exposure to workplace contaminants or noise.

7. Do I have to let my employees talk to the OSHA inspector?

OSHA inspectors are authorized to use various investigatory techniques, such as observing employees' activities in the workplace, conducting employee interviews, and taking photographs and measurements in the workplace (i.e., air and noise monitoring).

The OSH Act authorizes OSHA to interview employees privately to obtain whatever information is necessary or useful for the inspector to perform his or her inspection effectively. The interviews, however, must be conducted in a reasonable manner and within a reasonable time limit. OSHA's regulations afford any employee the right to bring any alleged violation to the attention of the inspector.

OSHA inspectors are also authorized to take photographs whenever such photographs are deemed necessary. Generally, an employer cannot prohibit an inspector from taking photographs because a certain process or equipment is a trade secret. To protect a trade secret, inform the inspector of the process or equipment that is proprietary. Once informed of trade secret status, the inspector is obligated to treat the information obtained from the inspection in a manner assuring confidentiality.

8. What happens after OSHA completes its inspection?

Unless your establishment is in full compliance with OSHA's standards, you will receive a "Citation and Notification of Penalty" from OSHA. A Citation includes: the type of violation (classification); the standard, regulation or



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section of the OSH Act that was violated; a description of the violation; the abatement date; and the penalty.

9. If OSHA issues a Citation to my company, what should I do?

Once an employer receives a Citation, it must be posted at or near the place where each violation occurred so that employees are able to review it. The purpose of this is to make employees aware of the hazards to which they may have been exposed. The Citation must remain posted for three working days or until the violation is corrected, whichever is longer. Employers are required to comply with these posting requirements even if they subsequently decide to contest the Citation.

An employer complies with the Citation by correcting the alleged violations by the date specified in the Citation and paying any penalty that may have been assessed. The company will be required to certify to OSHA that the alleged violation(s) have been corrected. The certification will have to be posted as well. If a company does not contest the Citation, the Citation will become a final order in 15 working days after receipt. Once the Citation is a final order, it is binding and will not be subject to review by any court or agency.

The other option is to contest the Citation following the procedure outlined by OSHA in the Citation. The company has 15 working days from the date of receipt of the Citation to contest the Citation.

However, before deciding which course to take, a company should take advantage of an OSHA process known as the Informal Conference. An Informal Conference can be requested and scheduled with the OSHA Area Office that issued the citation within the 15 working day contest period.

10. Should I challenge the OSHA Citations?

There is no universal formula to assess whether a company should challenge the OSHA Citation. The decision must be determined based on the facts, which include consideration of the alleged violation, its impact on employee health and safety, the classification of the violation, the method of abatement and the cost involved in abating the alleged violation.

11. If I do challenge an OSHA citation, what should I expect?

Once a notice of contest is filed, jurisdiction over the matter rests with the Occupational Safety and Health Review Commission (the "Commission"). The Commission, sometimes called "OSHRC," is an independent agency not connected in any way with OSHA. Its primary purpose is to adjudicate contested cases arising from citations issued by OSHA. It neither performs investigations nor promulgates safety or health standards.

Once the notice of contest is filed with the OSHA area office that issued the citation, the OSHA area director will

forward a copy of the Notice of Contest to the Commission. The Commission will appoint an administrative law judge who will preside over the hearing and render a decision, which can be appealed by the employer or OSHA.

12. How can I clear my company's record from any citations issued by OSHA?

There is no method to clear the company's record of past citations issued by OSHA. However, the longer a company operates without OSHA citations the better. OSHA can use past citations as a basis to issue citations that have a more severe classification with increased penalties.

13. Can OSHA re-inspect a facility? If so, are there any actions that can be taken to prevent OSHA from inspecting the facility in the future?

Yes. While a company cannot prevent OSHA from re-inspecting its facility in the future, they can minimize the chances of that occurring by being proactive. Establishing safety and health programs that incorporate coordination and communication of safety and health issues among personnel; means for planning and implementing needed training and job orientation for employees; and means for identifying and controlling workplace hazards and monitoring the effectiveness of such program, can minimize workplace hazards and thus, reduce the chances of OSHA re-inspecting the facility. In certain situations utilize the services of a safety and health consultant to assess the workplace and make recommendations to better comply with OSHA's standards. An attorney can assist an employer with deciding whether to retain a consultant to evaluate the workplace. ■

Disclaimer: This article is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of a client.

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