

How to Survive a North Carolina Department of Labor OSH Investigation

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Introduction

Your business may be subject to an investigation by the North Carolina Department of Labor, Occupational Safety and Health Division ("OSH") at any time. Investigations may occur because of an on-the-job accident or a fatality or as a result of a complaint. Proper planning and understanding of the investigative and post-investigation process can alleviate stress and possibly help avoid expensive penalties.

First Things First

Prior to ever having an OSH representative visit your worksite, designate the employee or employees who will be the only ones authorized to interact with the OSH investigator on the company's behalf if/when OSH does come calling. Although some OSH audits result from employee complaints (more on that later), many come about as the result of an auditing selection process and you may not have prior notice of OSH's arrival.

Although you want to request identification, it's not recommended that you request a warrant, because that will give the wrong impression to OSH, and may result in OSH expanding its investigation beyond its original scope.

Cooperate But Be Vigilant

Typically, the OSH investigator will conduct an opening conference during which you will receive an explanation of the purpose of the inspection, and then the investigation proceeds. Although a particular issue may have brought the OSH investigator to your door, it is within OSH's authority to expand the investigation into any other areas it desires. To that end, it is helpful to have a knowledgeable, designated employee to help guide the investigator(s) throughout the worksite and answer any questions.

You or your authorized employee should take notes and pictures. Don't assume that the notes and pictures developed by OSH will always accurately describe the actual circumstances at the time.

The OSH investigator is allowed to interview rank and file employees outside the presence of management (anyone with authority to bind your business) or its counsel. On the other hand, if management is going to be interviewed, you have the right to have your counsel attend such interviews.

The OSH investigator may request certain documentation. Always keep track of what you turn over and in what order (and keep your own clean copy to be used later, if necessary).

Once the investigation is concluded, the OSH investigator will hold a closing conference at which point the investigator's findings and proposed citations, if any, will be issued. You will never have to pay any monetary penalties on the spot; instead you will have 15 days from the time that any citation is issued to either accept the citation(s), pay the corresponding monetary penalty(ies), or request an informal conference.

If a Citation Is Issued, Always Request an Informal Conference and Consider the Assistance of Counsel

If a citation is issued, always request an informal conference. It is your chance to meet with the OSH district supervisor and discuss how the citation and monetary penalties may be reduced or stricken. The informal conference also is a chance to hear more of OSH's thought process on the citations. Often, you will come away from the informal conference with additional suggestions on how to make your workplace even safer. Regardless of whether the informal conference is successful in regard to reducing or waiving penalties, it tolls the 15-day deadline to request a formal hearing on the citations.

Depending on your comfort level, you may want to have counsel present for the investigation and/or the informal conference.

Retaliation

As noted earlier, an OSH investigation may be the result of an employee complaint. Never retaliate against an employee for reporting you to OSH or because of something the employee said during the OSH investigation, even if what is said is untrue. There are stiff penalties for retaliation, along with private causes of action that whistleblower employees can bring. Don't take any negative job action against such an employee—you do not want to turn a baseless OSH complaint into a valid lawsuit.

Conclusion

The best defense is a good offense, and an ounce of prevention is worth a pound of cure. Before OSH ever arrives, have your legal counsel review your safety and health program, safety management practices, and ensure robust training for your employees, so that when OSH does appear, you're prepared—and you send your folks home safe.

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