

What to Do During a Worker Safety Inspection*

By Steve Parascandola, David Berry, & Caroline Nasrallah Belk

Newsletter sponsor feature article

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Health Government regulators have shown increased interest in the safety of workers employed at medical practices in North Carolina. The Occupational Safety and Health Division of the North Carolina Department of Labor ("OSHA-NC") has conducted over 100 inspections of medical practices in the first 6 months of 2010¹. This is an increase of 500% over the number of inspections of medical practices that were conducted in North Carolina in all of 2009. Almost half of these inspections revealed violations of the Occupational Safety and Health Act of North Carolina ("the Act").

During fiscal years 2008-2009, violations of the Act's bloodborne pathogens standard constituted the majority of citations and accounted for most of the penalties involving medical practices nationally. Examples of typical violations include deficiencies in written exposure control plans, lack of engineering and work practice controls to eliminate or minimize employee exposure, and failure to provide appropriate personal protective equipment². The most common violations at North Carolina medical practices this year have involved inadequate exposure control plans and inadequate employee training on bloodborne pathogens.

Another frequently cited standard involving medical practices nationally is the hazard communication standard, which requires employee access to hazard information. Examples of typical violations include deficiencies in the written hazard communication program, failure to list all hazardous chemicals used or stored in the workplace, inadequate container labeling, and deficient employee training³. During 2010, approximately 14 medical practices in North Carolina have been cited by OSHA-NC for deficiencies in their written hazard communication program⁴.

OSHA-NC's inspections are virtually always unannounced. An inspection may be triggered by an employee complaint or a tip-off from another agency, or it may be part of a routine inspection program. An inspection could also be triggered by an accident report or a report of imminent danger. This year, over 90% of the inspections in North Carolina have been planned, while just under 10% were triggered by a complaint.

Whatever the reason for the inspection, here are some important things to know if a government inspector shows up at your door.

OSHA-NC's Authority to Inspect Your Workplace

The Act allows OSHA-NC to enter any workplace "without delay, and at any reasonable time."⁵ The inspectors may "inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."⁶

OSHA-NC is generally prohibited from giving an employer advance notice of an inspection.

If an inspector finds a violation that is deemed to be willful and serious, the agent must return to re-inspect that place of employment.

What Can an OSHA-NC Inspector Do?

The inspector will be looking for violations of worker safety laws and collecting evidence of these violations. The inspector can do the following:

- Take environmental samples;
- Take photographs and videotape related to the inspection's purpose;
- Review records that are required to be kept under the Act, such as exposure control plans, hazard communication materials, and employee training records; and
- Interview the owner, operator, or any employees in private. An owner or employer can be barred from attending an inspector's interview with employees.

What Are the Requirements and Limitations Imposed on the Inspector?

Inspectors must present their credentials to the owner, operator, or other person in charge of the workplace and explain the nature and purpose of the inspection. The inspector must also generally describe the scope of the inspection and the records to be reviewed. An inspector may ask for additional materials. This exchange usually occurs during an "opening conference."

During the opening conference, the inspector also will provide an employer with a copy of any applicable safety standards and copy of an employee complaint, if that is what triggered the inspection. Names and other identifying information will be redacted from an employee complaint if the employee has requested anonymity.

The inspector is not allowed to unreasonably disrupt the workplace.

The inspector must comply with all safety rules of the workplace and must use the safety clothing or protective equipment required for the workplace. If there are restricted areas in your workplace that require special equipment, such as respirators, or that require up-to-date immunizations, the inspector must comply with these requirements before entering that area.

What Are an Employer's Rights During an Inspection?

You have a right to request an administrative warrant for the inspection, but requesting one is an important decision that should be discussed and carefully considered by management, in coordination with legal counsel. Generally, OSHA-NC has the legal authority to obtain the warrant, so it will usually only create a short delay in conducting the inspection. In addition, there are potential consequences to requesting a warrant, including the inspector's return with a warrant for a more expansive inspection than originally planned. Moreover, a decision to request a warrant may also be impacted by the specific, underlying cause(s) for the inspection, e.g., a workplace accident, a programmed inspection, or OSHA-NC's response to an employee complaint. In any event, this is, ultimately, a decision with significant legal consequences, and it should be treated as such.

An employer is not allowed to impose conditions on its consent to an inspection. Specifically, the employer cannot condition its consent to an inspection on the inspector's waiver of any right to issue a citation or impose a penalty for violations.

An employer may request that its attorney or a particular company officer be present during an inspection, but the inspector is not required to unreasonably delay the inspection. OSHA-NC instructs its inspectors that if the request appears reasonable, they may allow a delay of up to one hour.

Both employers and employees have a right to designate a representative to walk around with the inspector. Each may designate different persons to accompany the inspector during different phases of the inspection, so long as changing representatives does not impede the investigation. It is a good idea for an employer to

accompany the inspector or designate someone else to act as an employer's representative. This person should take detailed notes of every place the inspector visited and every employee interviewed, and the employer's representative should make copies of records the inspector reviewed, copied, or removed. If the employer or employer's representative has access to a camera, it may also be helpful to take duplicate photographs of anything that the inspector photographed.

Both employers and employees are allowed to consult with the inspector during the workplace inspection.

If the inspection is triggered by an accident, an employer can and should refrain from making unnecessary, voluntary statements during the investigation.

Personal identification information that is obtained during an inspection, such as social security numbers, tax identification numbers, company financial records, account numbers, internet passwords, and other similar information are kept confidential by OSHA-NC and will be purged from its file before it is closed.

Employers are allowed to protect their trade secrets. The employer may identify workplace areas that may contain or reveal trade secrets. The inspector may still review or copy this information, but OSHA-NC must take certain legally required precautions to protect it.

As a general practice, OSHA-NC inspectors typically avoid duplicative efforts and should endeavor to obtain information in ways that will impose a minimal burden on the employer.

What Are My Duties as an Employer During an Inspection?

An employer is not allowed to unreasonably restrain the inspector. In fact, an employer is required to assist the inspector by making information available, including necessary personnel or inspection aids.

An employer must provide records and reports that are required by the Act, including written plans and policies, any accident reports made to the North Carolina Industrial Commission, and required postings.

The inspector is allowed to review medical records without consent if those records are required to be maintained by the Act. Normally, medical records will be reviewed on site and will not be copied or removed from the workplace. If copies are required, a written request will be made for records to be sent to the agency by hand delivery, certified U.S. mail, or by courier. OSHA-NC will not request that medical records be emailed or faxed to the agency, although the employer may request that it be allowed to send records by fax.

An employer is not allowed to discriminate against any employee who has made a complaint to OSHA-NC, has testified in a proceeding, or has otherwise exercised rights under the Act.

The Closing Conference

The closing conference occurs at the end of the inspection, and it is an opportunity to sit down with the inspector to discuss the findings. During the closing conference, the inspector will discuss any apparent safety or health violations revealed during the inspection and possible abatement measures. The employer should take this opportunity to raise questions about the bases for alleged violations and the specifics of any required abatement measures and deadlines. It is also an opportunity to offer explanatory or other pertinent information about workplace conditions. Typically, the employer does not have counsel at a closing conference because counsel has not been called to attend the inspection. There are pros and cons to having legal counsel present, and factors to consider include whether the inspection is triggered by an accident or employee complaint and the complexity and nature of the alleged violations.

There is generally limited discussion of proposed penalties during the closing conference, but the inspector can discuss an employer's right to an appeal.

During the closing conference, an employer should receive a copy of the booklet, "Employer Rights and Responsibilities Following an OSHA Inspection." This booklet also can be viewed online at

<http://www.osha.gov/Publications/osha3000.pdf>.

Investigation Records

An employer may obtain a copy of the investigation file only after OSHA-NC issues a citation or determines that no citation will be issued. Initially all personal identifying information will be redacted from employee complaints and witness statements, or handwritten statements may be transcribed to maintain anonymity. The employer may obtain unredacted complaints and witness statements shortly before a scheduled enforcement hearing.

A copy of the citation and penalties may be released to the public by OSHA-NC, but the records of the inspection and investigation are not subject to public disclosure while the investigation or proceeding is ongoing. After a final order is entered, however, the redacted file will be made available to the public upon request in accordance with the North Carolina Public Records Act.

Personnel and medical records contained within an investigation file are not released outside the agency unless certain additional procedures are followed.

Results of the Inspection

OSHA-NC will notify employers by certified mail or by personal service whether any citations will be issued and penalties imposed. This citation must be posted in the workplace, and instructions on when and where to do this will be included. An employer has the right to appeal a citation, including the type of violation, the abatement dates, and the penalties. Instructions on how to appeal, when to appeal, and other options available to the employer are usually provided by OSHA-NC along with the citation and notice of penalty. Employers should review this information carefully, note the deadlines indicated, and consult with legal counsel as appropriate.

In addition to appealing a citation, an employer has the option to attend an Informal Conference. An Informal Conference is an informal meeting with OSHA-NC personnel about the citation and notice of penalty. As a general rule, we encourage employers to take advantage of the Informal Conference. It is an opportunity to learn more about OSHA-NC's view of the matters involved, to discuss abatement dates or problems, to present mitigating information, and to negotiate an informal resolution to the citation. An employer can choose to have counsel present at this conference. The decision whether to have counsel attend the Informal Conference depends on a variety of factors, including the complexity of the issues, the severity of the citation, the employer's compliance history with OSHA-NC, your attorney's experience and relationship with relevant agency personnel, the likelihood of agency counsel attending, and the possibility of over-formalizing the meeting.

Editor's Note

Steve Parascandola, David Berry, and Caroline Nasrallah Belk are attorneys in the Environmental, Health and Safety Law practice group at the Smith Anderson law firm in Raleigh, North Carolina. Prior to joining Smith Anderson, both Mr. Parascandola and Mr. Berry were Assistant Attorneys General with the North Carolina Department of Justice, and each has had significant experience in agency enforcement actions, on both the government side and in counseling private defendants. Ms. Belk practices regularly in the areas of compliance counseling and enforcement defense, and has had significant experience representing private companies in connection with OSHA enforcement matters.

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1. Data available from U.S. Department of Labor, Occupational Safety & Health Administration, at <http://www.osha.gov/pls/imis/industry.html>.

2. See 29 C.F.R. § 1910.1030. The Act's bloodborne pathogens standard covers any employee who has occupational exposure to blood or other potentially infectious materials. Thus, many physicians, physician assistants, nurses, nurse practitioners, and other employees in hospitals, clinics,

physicians' offices, dentists, dental hygienists, nursing homes, long-term care facilities, and diagnostic laboratories are covered, assuming they have the opportunity for occupational exposure to blood or other potentially infectious materials. Any employer with employees covered by the standard is required to have a written exposure control plan.

3. See 29 C.F.R. § 1910.1200.

4. Also during 2010, approximately 18 medical practices in North Carolina have been cited for safety violations involving portable fire extinguishers, including the inadequate provision of accessible extinguishers, inadequate inspection and maintenance of extinguishers, and inadequate employee training on how to use extinguishers. See 29 C.F.R. § 1910.157.

5. N.C. Gen. Stat. § 95-136(a)(1).

6. N.C. Gen. Stat. § 95-136(a)(2).