

Writer's direct phone
(312) 460-5877

Writer's e-mail
mlies@seyfarth.com

Writer's direct fax
(312) 460-7877



233 South Wacker Drive
Suite 8000
Chicago, Illinois 60606
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

OSHA EMPLOYEE INTERVIEWS - LEVELING THE PLAYING FIELD

By: Mark A. Lies, II*

INTRODUCTION

As anyone who has ever experienced an OSHA inspection is well aware, a key element is the agency's interviews of employees by the compliance officers from the U.S. Occupational Safety and Health Administration (OSHA). It is generally recognized that a majority of OSHA citations are based upon OSHA interviews of management and hourly employees. Unfortunately, a lot of confusion has occurred over the respective rights of OSHA, the employer and the employees. This article will attempt to strip away the veil of misunderstanding in this area.

INSPECTION CONDUCT

During any inspection, the compliance officer will request employee interviews (both management and non-management employees) in order to gather facts as to whether there may have been violations of the agency's regulations. Many employers fail to advise their employees of their rights during such interviews and these rights are never exercised. If the employee gives

* Mark A. Lies, II is a Labor and Employment Law attorney and Partner with Seyfarth Shaw LLP, 233 S. Wacker Drive, Suite 8000, Chicago, Illinois 60603; 312-460-5877; mlies@seyfarth.com. He specializes in Occupational Safety and Health law and related employment law and personal injury litigation.

inaccurate, incomplete or confusing responses, these statements can be the basis for civil citations with monetary penalties, or worse, criminal liability. The general rights¹ of the various parties are as follows:

EMPLOYEE RIGHTS

- Has a right to a private one-on-one interview with the compliance officer which is confidential and is considered “protected activity”. The employee cannot suffer any “adverse action” from the employer for exercising this right. The compliance officer cannot disclose the contents of the interview.
- Has a right to refuse to be interviewed by the compliance officer. Many employees are reluctant to speak to compliance officers because they have been emotionally impacted by an accident in which a co-employee has been injured or they are fearful of speaking to a governmental representative. Some employees feel that they may be intimidated or manipulated during the interview to expose them to liability. In this regard, an employee cannot be forced to have a private one-on-one interview. These interviews are totally voluntary. If the employee declines to be interviewed (and the employee need not give any reason for the decision) the agency will have to decide whether to obtain a subpoena to require the interview. If the agency obtains a subpoena, the employee has the full scope of rights to respond, including the right to counsel.
- Has a right to decline to have a one-on-one private interview and the right to have a person of their choice attend the interview and, if the compliance officer refuses to allow this person to attend, decline to be interviewed. Some employees feel comfortable being interviewed if they have another person present during the interview. Again, if the compliance officer refuses to allow this other person to attend, the employee can decline the interview for no reason.
- Has a right to end the interview at any time for any reason. Since the interview is completely voluntary (unless OSHA has obtained a subpoena in which case the employee has additional rights and should consult legal counsel) the employee can end the interview at any time and can leave without any explanation.

¹ We have attached to this article a two page summary sheet, Employee Rights During An OSHA Inspection, which can be used to prepare employees for interviews. Many employers also provide a copy to their employees. A number of employers have translated it into other languages.

- Has a right to refuse to sign a statement, be tape recorded or photographed. Again, since the interview is voluntary, the employee cannot be required to sign a statement. Under most state eavesdropping laws, any individual can refuse to be tape-recorded and no reason be given. In a number of states, it is a criminal offense to tape record a conversation without the permission of all persons to the conversation. Finally, any person can refuse to have their photograph taken.
- Has the right to refuse to provide any private contact information, such as home address and telephone number.
- Has the right to require the interview to occur at the workplace.

OSHA RIGHTS

- The compliance officer has the right to interview the employee in private, if the employee consents.
- Has a right to have truthful responses to their questions.

EMPLOYER RIGHTS

- Has the right to inform its employees of their rights during the inspection.
- Must allow the employee to be interviewed by OSHA if the employee consents.
- Has the right to participate in non-private employee interviews (those attended by a third party, such as a union representative) and, if the compliance officer refuses, require that the interviews occur on non-paid work time.
- Has the right to attend interviews of employer management representatives since they are agents of the employer.
- Has the right to end the interviews if they become disruptive, that is, unreasonably interfere with ongoing work, or become confrontational, in which case the employer should consult legal counsel regarding the termination of the inspection.

EMPLOYEE RIGHT TO LEGAL COUNSEL

Since every employee has the right to decline a private interview unless the employee is allowed to have a person of their choice attend the interview, it is obvious that the employee has the right to have legal counsel present as that person. A more fundamental right of every employer (and citizen) is to have representation by counsel in any administrative or judicial

proceeding. In addition, in most jurisdictions, the employer has an obligation to defend its employees when they are faced with liability for their acts which occurred within the scope and course of their employment. Thus, the right to have legal counsel if the employee so elects is unquestionable. If OSHA refuses this request, the employee can decline to be interviewed.

EMPLOYEE POTENTIAL CRIMINAL LIABILITY

Another significant issue which may arise in an OSHA inspection after a serious accident involving a fatality or multiple injuries is potential criminal liability for the employer and individual employees. A basic right under the United States and state constitutions is against self-incrimination (under the Fifth Amendment).

Unfortunately, when the inspection occurs, it is impossible to determine whether criminal charges may result, months or years later, by which time an employee may have incriminated him/herself in the OSHA interviews and exposed themselves to criminal liability. For this reason, it is even more important that legal counsel be consulted for the OSHA interviews.

NO CRIMINAL MIRANDA WARNINGS

Another potential problem which warrants legal counsel is the fact that the OSHA compliance officer is not required to give the employee the Miranda warnings that inform the employee that in the interview:

- the employee has a right to remain silent
- the employee's statements can and will be used against them
- the employee has a right to have an attorney
- the state must provide the employee with an attorney if the employee cannot afford an attorney

Thus, an employee may unknowingly expose him/herself to criminal liability during the interview and no warnings have been given by the compliance officer during the interview because they are not required to be given since the compliance officer is not a police officer and

the employee has not been placed under arrest. The employer should engage legal counsel to evaluate whether the employee may need to exercise these rights.

OSHA OBJECTIONS TO LEGAL COUNSEL

Unfortunately, in many inspections, OSHA objects to the employee having another person present, including legal counsel. In those instances where OSHA agrees to allow the employee to have legal counsel, the agency objects to allowing the employee to utilize the employer's attorney who has been provided at no cost to the employee. OSHA claims that such attorney may have a conflict-of-interest representing the employer and also representing the employee in the interview. It should be noted that it is not OSHA's right to object to any potential conflict-of-interest. Rather, that is solely the right of the employee who is free to accept the attorney so long as the attorney has discharged his/her legal obligation to discuss potential conflicts-of-interest with the employee and any potential conflict can be knowingly waived.

OSHA also objects to the employer's legal counsel provided at no cost because the employee may be exposed to retaliation by the employer for what is said in the interview. This argument is likewise without foundation because the employee is protected from retaliation under Section 11(c) of the Act for participating in the interview or inspection with OSHA. Thus, it is patently inappropriate and unfair for the agency to object to the presence of legal counsel provided at no expense by the employer in an interview where an employee could face potential civil or criminal liability arising out of an accident and which will force the employee to retain other legal counsel at the employee's expense if the employee wishes to exercise these rights. In most cases, the employee cannot afford to retain counsel and thus is effectively denied legal counsel.

LANGUAGE BARRIER ISSUES

Because of the diverse nature of many workplaces, an issue arises concerning language barriers between the employee being interviewed and the compliance officer. It is critical that a competent interpreter be made available by the employer to ensure that the employee being interviewed can understand the questions and respond accurately and truthfully. The employer frequently will make available a co-employee who is bilingual to perform this role. OSHA may attempt to discourage this other employee from participating in the interview by claiming that the compliance officer is bilingual and can interpret. As we have seen above, the employee who is being interviewed has the right to refuse to be interviewed if the employee is denied the interpreter. In addition, the employer should be cautious about accepting an interpreter offered by OSHA since there is the potential for this interpreter to pose the questions to the employee in a technical manner which the employee may find confusing. In addition, there have been instances where the OSHA interpreter does not speak the particular dialect of the language of the interviewed employee, in which case there is further opportunity for confusion. Unfortunately, when an employee gives responses that are confused or incomplete because the employee cannot understand the questions, this provides an opportunity for citations to be issued to the employer on the grounds that employees are not properly trained and do not understand the employer's safety and health programs.

CONCLUSION

Since OSHA will not inform employees of many of these rights, and the typical employee is simply unaware of these rights, it is critical that employees be advised of their rights prior to and during the inspection so that they can exercise them. There is nothing in the law that prohibits employers from informing employees of their rights prior to the employee interview. If

employees are not so informed, they may waive significant legal rights and expose themselves and the employer to potential legal liability.

Mark A. Lies, II is a Labor and Employment Law attorney and Partner with Seyfarth Shaw LLP, 233 S. Wacker Drive, Suite 8000, Chicago, Illinois 60603; 312-460-5877; mlies@seyfarth.com. He specializes in Occupational Safety and Health law and related employment law and personal injury litigation.

Employee Rights During An OSHA Inspection

The following information is intended to provide general information regarding employee rights during an OSHA inspection. Please note that the Company is committed to the safety and health of our employees and is providing you this information because the OSHA inspector may not inform you of your rights and the Company wants you to be aware of this information so you can exercise your rights in an informed and voluntary manner.

From time to time, Company facilities may be inspected by the Occupational Safety and Health Administration (OSHA). During those inspections, the OSHA inspector may ask to speak with you about your experiences with or training regarding the Company's safety and health programs, or about certain events that have taken place at your Company location. You are entitled to certain rights and subject to certain obligations during an OSHA inspection as follows:

YOUR RIGHTS

- You have the right to speak with the OSHA inspector. You also have the right not to speak with the OSHA inspector. It is *your decision* whether to voluntarily speak with the inspector or not.
- You have a right to be interviewed at the Company's location and can decline to answer questions from an inspector who may contact you at home by telephone or in person. You can tell the inspector to arrange the interview at the Company's location.
- Your participation in an OSHA inspection is considered "protected activity," and the Company cannot and will not retaliate against you *in any way* because of your participation in an OSHA inspection.
- If you decide to speak to the OSHA inspector, it is *your decision* whether to speak with the inspector in private or with someone else present. You have the right to ask another partner or a member of Company Management to be present during your interview.
- You have the right to take a break or end the interview at any time for any reason. The interview is not supposed to take an undue period of time. Remember, it is *your decision* whether to speak voluntarily with the inspector at all.
- If you decide to speak to the OSHA inspector, you have the right to understand the questions being asked of you. If you do not understand a question, you may ask the OSHA inspector to repeat the question. The inspector is supposed to ask you for information and not to tell you that you must agree to certain information. If you have difficulty speaking or understanding English, you may request that an interpreter be provided for you. You also have a right to have another individual of your choice present to act as your interpreter.
- You have a right to decide whether to sign a statement at the end of your interview. You may decline to sign a statement if you so choose. You may sign a statement if you so choose. If you do decide to sign the statement, you are entitled to receive a

copy at the time of the interview and **do not sign it** until the inspector tells you he or she will provide you a copy at the end of the interview. If you decide to sign a statement, make sure that you read it and tell the compliance officer to correct any errors or mistakes before you sign it.

- If the inspector wants to ask you questions about information contained in a written document, such as training records, safety programs or policies, you have a right to ask to be shown the document before answering the question or you can decline to answer any questions regarding any written document.
- You have a right to decide whether to be voluntarily photographed, videotaped, or recorded during your interview. You may agree to be photographed or recorded. You may decline to be photographed, videotaped or recorded.

YOUR OBLIGATIONS

- If you decide to voluntarily speak with the OSHA inspector, you **must** answer his or her questions ***truthfully***.
- You can decline to answer any particular question during the interview and do not have to explain the reason for your refusal to answer.
- If you decide to voluntarily speak with the OSHA inspector, you must answer his or her questions based on ***your own personal knowledge*** and ***to the best of your recollection***. You must not speculate about any events which you did not personally observe or for which you were not actually present to observe. You also must not relate “hearsay” (i.e. gossip or rumor) which may not be truthful or accurate.

Derechos de los empleados durante una inspección de OSHA

La siguiente información tiene la intención de proporcionar información general sobre los derechos de los empleados durante una inspección de OSHA. Tenga en cuenta que la Compañía está comprometida con la seguridad y la salud de nuestros empleados, y le brinda esta información porque el inspector de OSHA no puede informarle sobre sus derechos y la Compañía desea que tenga conocimiento de esta información para que pueda ejercer sus derechos de una manera informada y voluntaria.

De vez en cuando, las instalaciones de la Compañía pueden ser inspeccionadas por la Administración de Seguridad y Salud Ocupacional (OSHA). Durante esas inspecciones, el inspector de OSHA puede solicitar hablar con usted sobre sus experiencias o capacitación con respecto a los programas de seguridad y salud de la Compañía, o sobre ciertos eventos que han tenido lugar en las instalaciones de su Compañía. Usted tiene ciertos derechos y está sujeto a ciertas obligaciones durante una inspección de OSHA de la siguiente manera:

SUS DERECHOS

- Usted tiene el derecho de hablar con el inspector de OSHA. También tiene el derecho de no hablar con el inspector de OSHA. Es *su decisión* hablar voluntariamente o no con el inspector.
- Usted tiene derecho a ser entrevistado en las instalaciones de la Compañía y puede negarse a responder preguntas de un inspector que pueda comunicarse con usted en casa por teléfono o en persona. Puede decirle al inspector que coordine la entrevista en las instalaciones de la Compañía.
- Su participación en una inspección de OSHA se considera “actividad protegida”, y la Compañía no puede y no tomará represalias contra usted *de ninguna manera* debido a su participación en una inspección de OSHA.
- Si decide hablar con el inspector de OSHA, es *su decisión* hablar con el inspector en privado o con alguien más presente. Tiene derecho a solicitar que otro compañero o miembro de la administración de la Compañía esté presente durante su entrevista.
- Tiene derecho a tomar un descanso o terminar la entrevista en cualquier momento y por cualquier motivo. La entrevista no debe tomar un período de tiempo excesivo. Recuerde, es *su decisión* hablar con el inspector voluntariamente.
- Si decide hablar con el inspector de OSHA, tiene derecho a comprender las preguntas que se le hacen. Si no entiende una pregunta, puede solicitar al inspector de OSHA que repita la pregunta. El inspector debe pedirle información y no decirle que debe aceptar cierta información. Si usted tiene dificultad para hablar o entender inglés, puede solicitar que se le proporcione un intérprete. También tiene derecho a tener presente a otra persona de su elección para que actúe como su intérprete.
- Usted tiene el derecho de decidir si firma una declaración al final de su entrevista. Si lo desea, puede rechazar firmar una declaración. Puede firmar una declaración si

usted así lo decide. Si decide firmar la declaración, tiene derecho a recibir una copia en el momento de la entrevista y **no firmarla** hasta que el inspector le indique que le proporcionará una copia al final de la entrevista. Si decide firmar una declaración, asegúrese de leerla y decirle al oficial de cumplimiento que corrija cualquier error o equivocación antes de firmar.

- Si el inspector desea hacerle preguntas sobre la información contenida en un documento escrito, como registros de capacitación, programas de seguridad o políticas, usted tiene derecho a solicitar que se le muestre el documento antes de responder la pregunta o puede negarse a responder cualquier pregunta con respecto a cualquier documento escrito.
- Usted tiene derecho a decidir ser fotografiado, grabado o grabado en video voluntariamente durante su entrevista. Puede aceptar ser fotografiado o grabado. Puede negarse a ser fotografiado, grabado o grabado en video.

SUS OBLIGACIONES

- Si decide hablar voluntariamente con el inspector de OSHA, **debe** responder a sus preguntas **con sinceridad**.
- Puede negarse a responder cualquier pregunta en particular durante la entrevista y no tiene que explicar el motivo de su negativa a responder.
- Si decide hablar voluntariamente con el inspector de OSHA, debe responder a sus preguntas basándose en **su propio conocimiento personal** y **lo mejor que recuerde**. No debe especular sobre evento alguno que no haya observado personalmente o para el cual no estuvo presente para observarlo. Tampoco debe relatar “habladurías” (por ejemplo: rumores o chismes) que pueden no ser veraces o precisos.