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When NOSHA comes knocking: Do you know your rights and responsibilities?

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It is an uneventful Wednesday afternoon at your place of business. That is, until a stranger walks into your lobby and tells the receptionist that he is a representative of the Nevada Occupational Health and Safety Administration ("NOSHA") and wants to conduct an inspection of your premises. Your attorney is not immediately reachable, and the gentleman insists that he must inspect your workplace right away. Now what? Do you have to let him? Can you ask the NOSHA inspector what he is there to investigate? Does he have to be investigating a specific complaint? If he is there to investigate a complaint, will he tell you who complained and what the complaint was about? Can he demand to see your employee records? What if he wants to talk to your employees? This article will shed some light on these questions and provide a brief background on the scope of NOSHA's power to conduct workplace inspections.

How Did They Come to Be There in the First Place?

NOSHA's powers, rights and obligations are contained in NRS Chapter 618 and the corresponding chapter 618 of the Nevada Administrative Code. These statutory and code provisions mandate that every employer provide employment and a place of employment which are free from dangers likely to cause death or serious physical harm to employees. Employers are also obligated to use and furnish the requisite safety devices and safeguards and use employment practices and methods that are "reasonably adequate" to render the workplace safe. In addition, employers must post, at a prominent workplace location, employee rights and obligations under the Nevada Occupational Health and Safety Act, and designate at least one person to be in charge of workplace health and safety. Notably, NRS 618.375 provides that upon hiring an employee, employers must give the employee a document or a videotape, which contain the employer's and the employee's rights and responsibilities to promote workplace safety. According to NRS 618.376, both the employer and the employee must sign the document or receipt of the necessary videotape, and the document or receipt must be placed in the employee's personnel file.

With certain limited exceptions, NOSHA has jurisdiction over the working conditions in all places of employment, which includes the power to approve of certain safety devices and procedures as safe, and adopt and enforce reasonable safety standards. NOSHA may promulgate standards for the construction, repair, and maintenance of employment sites so as to

render them safe and has the broad power to "require the performance of any other act which the protection of the lives, safety and health in places of employment reasonably demands." Lastly, NOSHA has the power to conduct investigations, examinations, and inspections to ascertain whether employers follow its standards and regulations.

Although NOSHA has the right to conduct inspections at random, the more likely scenario is that they are visiting your workplace because of a complaint or a "referral." Complaints ordinarily come from current employees, whereas "referrals" usually originate with someone outside your workplace (e.g., a hospital official following a workplace incident, a disgruntled former employee, an insurance company representative, etc.). Regardless of the reason for the inspection or investigation, many of the same rules and rights apply. Retaliation for filing a complaint with NOSHA or participating in a NOSHA investigation is strictly prohibited.

What Can They Do and What Can You Do in Response?

Turning back to our scenario above, with certain limited exceptions, you have the right to refuse to permit the sudden inspection. Few employers are aware of that right and instead simply allow the inspector on their premises. Once on the premises, the inspector may not only examine the specific area or piece of equipment of interest, but may also ask to review employment records and speak to employees. Again, many employers oblige without hesitation. While such an approach certainly has its benefits because it creates the appearance of "I have nothing to hide," you should recognize that it also increases the risk of citation for several reasons. First, you may not have necessary documentation immediately available (e.g., proof of safety training). Second, you may also not have had a chance to apprise your employees of their rights not to speak to the inspector absent a subpoena or to request that a company representative be present when they speak to the inspector. This is important because a lot of employees feel pressured or intimidated when communicating with administrative agency officials. (You should, of course, also inform them that they have the right to speak with NOSHA privately, that you will not retaliate against them for doing so, and that they will not receive a reward for declining to participate in the investigation.) Third, it would not allow you the opportunity to survey your workplace and identify and correct any potential problems before you receive a citation.

On the other hand, declining an inspection will likely upset the unexpected visitor and raise a suspicion that you are engaging in something improper. Accordingly, you should carefully weigh the benefits and risks of denying NOSHA immediate access to your premises. When NOSHA is conducting a random or customary regulatory inspection, they are prohibited from notifying you when the inspection will occur. Because there is not much guidance on what constitutes "customary regulatory inspection" and how (if at all) it differs from a complaint or a "referral," it would be safer to assume that NOSHA will not give you notice of inspections or investigations. Therefore, you will do well to decide, in advance, what your response to an unanticipated NOSHA visit would be, so that you can avoid the last minute dilemma. You should also decide which employer representatives should be involved in the NOSHA inspection, so that they can be properly trained

on how to handle such inspections.

Eventually, NIOSH will gain access to your premises, records, and employees because they have the right to obtain a warrant to access your workplace, take depositions, issue subpoenas, compel the attendance of witnesses; and compel the production of books, papers, records, documents and testimony. According to NRS 618.325, such inspection and investigation is supposed to occur during regular working hours or at other reasonable times and within reasonable limits. (It is unclear what this means.)

As for whether you can ask the inspector who lodged the complaint and what he is there to inspect, you are not likely to receive an answer to the first question because NIOSH is precluded from revealing the names of complainants. This is presumably intended to prevent retaliation. With respect to the specific scope of the inspection or investigation, the inspector is not likely to reveal anything on the subject until after access is granted. The rationale behind this is that the employer, who has the right to refuse the inspection, will learn about the alleged problem, then decline the inspection and use the time while NIOSH is obtaining a warrant to fix the problem. Once access is granted, NAC 618.6434 obligates the NIOSH inspector to explain the nature and purpose of the inspection, generally disclose the scope of the inspection, and indicate which documents he wishes to review. (The fact that the inspector's original designation of records for inspection does not include certain documents does not stop the inspector from seeking access to additional records, if he deems them necessary.)

The inspector may take environmental samples, take relevant photographs, and question privately any employer, agent, or employee. Generally, the inspector may seek the issuance of a subpoena to compel the testimony of a witness. However, until such subpoena is issued, an employee's participation in NIOSH's investigation is voluntary, and the employee has the right to speak or not to speak with the inspector as the employee chooses to do. It is advisable to apprise employees of their rights in the event of an inspection. If the employee elects not to speak with NIOSH voluntarily, NIOSH would have to compel the employee's testimony at a deposition, in which case the employee can seek attorney representation, and the company would be allowed to be present at the deposition (with or without counsel). Accordingly, if the employee states that he or she wants to have counsel present when voluntarily speaking to NIOSH, the inspector faces the choice whether to allow the attorney's presence at the informal interview or have to obtain a subpoena, in which case the attorney would still be present. In our experience, NIOSH would likely agree to allow counsel to be present if the employee so requests. If a high level managerial employee is being questioned, it is advisable to request that at least another company representative be present to protect the company's interests. Alternatively, other administrative agencies such as the Department of Labor have resorted to sending questionnaires to employees in lieu of interviewing them.

In addition, the inspector can use special devices and sampling equipment to measure the content of hazardous materials at the workplace to which

employees are exposed. In conducting the inspection of investigation, the NIOSH inspector must not unreasonably disrupt the employer's operations and must comply with the employer's health and safety rules, including wearing the necessary protective equipment. A representative of the employer or the employees, or both, have the right to accompany him during the inspection.

The Bottom Line

First and foremost, if a workplace accident occurs, be sure to investigate it immediately. This is important not only for safety purposes, but also for purposes of determining whether any resulting injury may be compensable under your workers' compensation insurance. Take pictures, interview witnesses, and take statements. If you determine that a safety violation has occurred, correct it promptly. It is advisable to institute a drug/alcohol testing policy that would require employees involved in accidents of certain magnitude to undergo drug and/or alcohol screening. Such screening is essential to ensure workplace safety and fight a potential workers' compensation claim by an employee who was working under the influence of drugs and/or alcohol.

Be cognizant of your safety obligations toward your employees. Make the proper postings, designate at least one person to be in charge of safety, and conduct the requisite trainings. It is also advisable to create a safety committee, which would analyze and investigate workplace incidents and recommend further precautionary measures as necessary. You should recognize that the vast majority of inspections are not random, but result from a complaint or an accident at your workplace. If you have a practice of promptly investigating and correcting any issues, the decision to allow NIOSH on the premises would be easy, and this should be your preferred approach. Further, you should determine in advance who will participate in NIOSH inspections on behalf of the company and train them how to handle such inspections properly.

Keep organized records of any safety policies and training you conducted, as well as sheets reflecting who attended the training. Be sure to place employee acknowledgments of completed safety training in the respective personnel files. You should also keep the training materials provided to employees. All of these documents will be helpful to you if NIOSH suddenly comes to your door. If an accident happens, make sure you have quick access to any relevant training and other documentation with respect to the particular piece of equipment or procedure involved in the accident, so that you can quickly produce it in the event of an inspection.

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