

Jim Lang  
Attorney, Pender & Coward, P.C.  
Virginia Beach, Chesapeake, Suffolk  
[www.pendercoward.com](http://www.pendercoward.com)  
(757) 502-7326 (work) / (757) 777-6382 (cell) / [jlang@pendercoward.com](mailto:jlang@pendercoward.com)

## **PROTOCOL OUTLINING HOW TO HANDLE THE UNEXPECTED WORKSITE VISIT FROM OSHA/VOSHA**

### **A PRESENTATION FOR THE HAMPTON ROADS UTILITY AND HEAVY CONTRACTORS ASSOCIATION SEPTEMBER 28, 2011**

Things to do **before** the Compliance Safety Health Officer (CSHO) shows up:

1. Identify and train at least one, and preferably two, Employer's Representatives who will be available at all times to report to the worksite. These are the individuals you will call to the worksite when the CSHO shows up. One will handle communications with the CSHO. The other will document what takes place during the inspection.
2. Have a pre-prepared CSHO toolkit (notebook, camera, tape recorder, video recorder, test equipment, trade secret stamp). The Employer's Representative brings this toolkit to the worksite.
3. Written Safety and Health Program [25% discount for Good Faith].
4. Conduct regular employee health and safety training (documented in company records) [Isolated Occurrence/Employee Misconduct Defense].
5. Discipline employees who do not comply with health and safety procedures (documented in company records) [Isolated Occurrence/Employee Misconduct Defense].
6. Employees should know that, if a CSHO comes to the worksite: (i) It is okay for Employees to answer the CSHO's questions but there is no requirement that Employees do so (unless the CSHO has a subpoena); (ii) The company will not retaliate against Employees if they decide to answer the CSHO's questions; (iii) If Employees decide to answer the CSHO's questions, the best policy is to provide truthful answers that are directly responsive to the question that was asked and to avoid volunteering "extra information"; (iv) Employees can request to have the Company Representative present during the interview; (v) Employees can request to have a copy of any written statement that they sign for the CSHO.
7. Have a written protocol for what to do when the CSHO shows up at the worksite
8. Required records and notices
  - Hazardous communication plan at worksite
  - Material Safety Data Sheets at worksite
  - OSHA Poster at worksite
  - OSHA Form 300 Log for prior year at worksite

- OSHA Form 300 Logs and OSHA 301's for past 5 years available at worksite or home office
9. Have a well-run job. Identify and correct the hazards likely to hurt your employees, and keep an eye out for “gotcha” items in your industry. Go to the OSHA web site and look up the history of your competitors, and of your industry segment by SIC code. These records of violations are a clear road map of what the CSHO will be looking for if he/she inspects your job. Regularly inspect your jobs for instances of likely violations and train your employees to prevent them from occurring to begin with.
    - <http://osha.gov/pls/imis/establishment.html>
    - <http://osha.gov/pls/imis/citedstandard.html>
    - [http://www.doli.virginia.gov/vosh\\_enforcement/25\\_mfv\\_construction.html](http://www.doli.virginia.gov/vosh_enforcement/25_mfv_construction.html)
    - <http://osha.gov/pls/imis/industry.html>
  10. “Gotcha” items: Every CSHO has his own little violations that he loves to cite. While they may in theory be capable of leading to “death or serious injury” in reality the probability of this happening is extremely low, and the instances of the hazard are very frequent. “Gotcha” violations can typically be found on EVERY construction job site, EVERY day. If you and your employees can keep the “gotcha” items to a very minimal number, the CSHO will be pleased with the quality of your safety program and you should get a clean bill of health. Examples of “gotcha” items include:
    - Missing grounding prongs on extension cords
    - Lack of ground fault circuit interrupter protection when using an extension cord
    - Inoperative backup alarms and horns
    - Discharged, inadequate, or missing fire extinguishers
    - Ladders used improperly, such as a step ladder leaned against a wall as opposed to opened up, or an extension ladder slid apart and used as two separate ladders
    - Clean, stocked toilet facilities with handwash (CSHOs WILL look for paper towels, soap, etc.)
    - Clean drinking water, cups, trash receptacle

Things to do **when** the CSHO arrives:

1. Employer Representatives mobilize to the worksite ASAP with the pre-prepared CSHO toolkit mentioned in prior section
2. Tell your attorney that the CSHO has arrived and that you may need access to your attorney for advice during the course of the inspection (if the inspection is due to a serious injury or fatality then you should mobilize your attorney to the worksite)
3. Onsite personnel request CSHO wait a “reasonable time” to allow Employee Representatives to arrive at worksite. If CSHO declines then remind the CSHO of Employer’s right to request a warrant and from there negotiate the “reasonable time” issue.

4. Opening conference with Employer Representatives and CSHO

View CSHO's credentials. Deny entry if no credentials. This is the only instance in which you deny entry.

Employer Representative record information regarding the CSHO's credentials in the notebook.

Determine whether Employee Representative will accompany the CSHO.

Ask CSHO to identify type of inspection (programmed / unprogrammed)

Ask CSHO to identify what areas, types of conduct, locations, machinery, employees he wishes to inspect and why. Document responses in notebook.

If programmed inspection with no warrant then you are in a good position to obtain CSHO's agreement to limit the inspection to those areas, types of conduct, locations, machinery, employees that CSHO described. If unprogrammed inspection then CSHO is going to want to see everything. If unprogrammed have the CSHO explain how your company was selected for inspection.

Identify any areas of the worksite that may contain a trade secret

Listen and be courteous during the opening conference but: (i) Do not volunteer any information and make no admissions; (ii) Do not volunteer information about past or present safety or health problems even if they have been corrected; (iii) Do not volunteer information about problems with contractors or subcontractors.

The CSHO will ask to review health and safety records. If you can, arrange for that review to take place at the conclusion of the walk-through phase of the inspection. Do not allow CSHO to take original records; furnish copies to the CSHO.

5. Provide CSHO with safety equipment as you would do with any visitor to the worksite.
6. Employer's Representative(s) accompany the CSHO, along with Employee's Representative (if applicable).
7. Allow the CSHO to only visit those areas of the site which were allowed for inspection by agreement or are authorized by warrant. If CSHO tries to go into other areas you never physically obstruct. Instead, you object by saying the Employer has not consented to inspection of that area or, if CSHO has a warrant, you object by saying that the area is outside authority granted in the warrant.

8. If the CSHO makes photographs, tape recordings, videotape, or test equipment, the Employer's Representative replicates these things exactly. For example, when the CSHO makes a photograph the Employer's Representative stands in the CSHO's footprints and makes an identical photograph. The CSHO will take multiple pictures from multiple angles, and then will choose the single worst appearing photo to make a case against you. You want to use the single best appearing photo to rebut. However, do not photograph/tape record/videotape/test anything that the CSHO is not recording.
9. Make notes in the notebook of all of the CSHO's activities during the inspection.
10. Make notes in the notebook of all statements made by the CSHO.
11. Make notes in the notebook of all statements of any Employee and, if applicable, the Employee Representative.
12. Closing Conference: (i) Make notes in the notebook of all of the CSHO's comments; (ii) Do not agree with the CSHO as to the existence of any violation; (iii) Never admit the necessity of any corrective measures . . . rather tell the CSHO that you will consider his/her requests and suggestions and that you will inform him/her of any corrective measures taken.

Things to do **after** the CSHO has left the worksite

1. Have a conference with your attorney to assess and manage risk.
2. Immediately correct any indisputable violations.
3. Immediately correct possible violations, if practicable
4. Preserve all of the documentation gathered during the inspection.

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