

Safety Insight

Responding to an OSHA Inspection (Part III) Employee Interview Rights

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I. Introduction

Osha Initial Policy

Whether an employee has a right to request that a representative of the employer be present during an interview by an OSHA inspector has been subject to some debate in recent years. In the early 1990s, OSHA's Field Operations Manual ("FOM") stated that the OSHA inspector was required to ask employees during the workplace inspection whether they wished the interview to be conducted in private. If the employee expressed a preference that the interview be held in private, the FOM required the inspector to make a reasonable effort to accommodate that request. Thus, under the FOM, the presumption was that interviews would be "public" (i.e. would have an employer representative present) unless the employee requested otherwise.

Osha Revises Policy

OSHA revised the FOM in 1994 by issuing its Field Inspection Reference Manual ("FIRM"). The FIRM, which is currently used by OSHA inspectors, apparently clearly reversed the FOM

position on employee interviews. The FIRM states that "[e]mployers shall be informed that the interview is to be in private. Whenever an employee expresses a preference that an employee representative be present for the interview, the [inspector] shall make a reasonable effort to honor that request." Thus, under OSHA's current inspection manual, according to OSHA, employee interviews are presumed to be private unless the employee requests that an employer representative be present.

Recently, employers have seen OSHA take the position that employee interviews are only to be conducted in private, regardless of the employee's request for an employer's representative to be present. However, case law supports the notion that because OSHA is an agency that is supposed to protect the interest of employees, an employee interview by an OSHA inspector really is governed by the employee's wishes. In fact, the interview is wholly voluntary by the employee who can decline for any reason. If the agency wants to interview the employee who has declined a voluntary interview, OSHA must obtain and serve a subpoena on the employee. When the employee is served with a subpoena, the employee



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has an absolute right to have legal representation. The case law supports the employee's right to make the decision. In *Trinity Industries v. Dole*, 760 F. Supp. 1194 (N.D. Tex. 1991), OSHA took the position that the OSHA inspector, not the employee, had the sole discretion to refuse or allow a representative of the employer to be present during employee interviews. The court found authority in the portion of the



Occupational Safety and Health Act, 29 U.S.C. § 657(a)(2) (the “Act”), the goal of which is to promote accuracy in the fact-finding process, including employee interviews. The court recognized that prejudice in the interview process may come, not only from the employer’s side, but can also come from OSHA if employees are intimidated by the prospect of speaking to a government official. The court found that Trinity’s employees were not intimidated by the presence of their employer’s representative, and that the employee should be free to decide whether the interview should be conducted in private or in the presence of the employer’s representative.

Allowing OSHA inspectors to interview employees also raises the question of the employees’ right to legal counsel. Where employees request legal representation, but do not have the resources to hire their own attorneys, legal counsel for the employer has sometimes represented employees individually, provided that the employee is notified and freely consents to the dual representation. OSHA has sometimes taken the position that this “dual representation” is prohibited, and an employee desiring legal representation must fend for himself.

OSHA’s position is apparently based upon a 1990 case from the Northern District of Texas which appears contrary to more recent case law discussed later in this article. *Dole v. Bailey*, 1990 WL 299392 (N.D. Tex. 1990). There, the OSHA inspector requested interviews with several employees. The employer had informed the employees that a representative of the employer would be present during their interview (this case occurred when the FOM was in place), and the employees refused to be interviewed. The OSHA inspector served an administrative subpoena on

the employees. The subpoenaed employees all met with the employer’s legal counsel, who advised them that they should appear for the interview, and that the employer’s counsel would represent them individually. The OSHA investigator refused to allow the employer’s counsel to represent the employees during their interviews, and OSHA sued the employer in federal court to enforce the subpoena. The court, finding the employer’s suggestion that there was no conflict of interest in the dual legal representation “beyond reason,” barred the employer’s attorney from representing the employees.

The current trend is supportive of permitting the employer representative or the employer’s attorney to represent the employee, so long as the representation is consensual. More recently, the U.S. Court of Appeals for the Fourth Circuit refused to bar the employer’s legal counsel from representing employees individually. *Reich v. Muth*, 34 F.3d 240 (4th Cir. 1994). Similar to *Bailey*, the employees

in *Muth* were subpoenaed for interviews and were represented, individually, by the employer’s legal counsel. OSHA objected to the presence of the attorney, taking the position that while the employees had the right to legal representation, OSHA had the right to question the employees outside of the employer’s presence. The court rejected OSHA’s contention that the employer’s legal counsel was nothing more than a “shill” for the employer or a “strongarm enforcer of discipline against employees otherwise chomping at the bit to ‘tattle’ on their bad employer,” calling the argument “totally unfair.” The court allowed the dual representation, finding that the Act does not allow OSHA to strike an employee’s chosen counsel from attending an interview simply because the attorney also represents the employer.

II. Recommendations

Thus, although OSHA appears to be getting increasingly aggressive about





denying an employee's request that a manager or other representative of the employer be present during the interview, the courts appear to favor allowing the employee to make that decision, so long as it is a voluntary one that is not coerced by the employer. When faced with an OSHA inspection, the employer should always take the opportunity to inform employees of their rights, including:

- OSHA may want to speak with them about a particular incident or complaint, or about safety issues in general;
- The employee has the right to be interviewed or may decline;
- If the employee so desires, he or she can request that a manager be present during the interview, but that the interview may also be done privately;
- If the employee desires legal counsel, he or she should so advise the inspector;
- If the employer agrees to make its legal counsel available and the employee agrees to representation by this attorney, the

employee has the right to have such counsel represent the employee at the interview;

- Under any circumstance, the employee must answer the inspector's questions truthfully, and must not speculate as to what the answer may be if the employee does not personally know the answer;
- The employee has the right to end the interview at any time;
- The employer will not retaliate, in any way, against any employee for participating in an OSHA interview or for telling an OSHA inspector the truth.

III. Conclusion

While it is anticipated that there will be continued tension between employees, employers and OSHA over the issue of employee representation in employee interviews, the employer should continue to inform employees of their rights in order to allow employees to be fully aware of their rights in order to be able to exercise them in a voluntary, consensual manner.

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