I Hear You Knocking . . . But You Can’t Come In!

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The time to plan and implement procedures for handling a worksite inspection is definitely not when the Occupational Safety and Health inspector, known as a compliance safety and health officer ("CSHO"), is knocking on the door. Frequently, employers permit CSHOs to expand their inspection to areas in the workplace that are not specifically related to the injury or illness under investigation. Since the inspectors can cite any violations they see in "plain view" regardless of the purpose of the inspection, permitting them unfettered access to the entire worksite can lead to additional citations and penalties. Limiting negative outcomes after being targeted for an inspection is possible only when an employer's management team has been properly trained and understands that OSHA's authority to inspect its premises is not unlimited.

In *United States v. Mar-Jac Poultry, Inc.,* the U.S. Court of Appeals for the Eleventh Circuit held that OSHA could not expand the scope of a narrow injury-based inspection to a facility-wide general inspection based on the employer's OSHA 300 injury and illness logs.

Facts

Mar-Jac operates a poultry plant in Georgia. In 2016, an employee was hospitalized after being burned by an electrical arc flash. The employer reported the incident as required under OSHA regulations. OSHA's initial inspection uncovered the potential for other electrical hazards in the poultry plant. OSHA sought to expand the scope of the inspection to cover the entire facility and search for additional hazards in the plant that had no relation to the electrical accident whatsoever, including ergonomics, biological hazards, and slips/falls. The employer consented to an inspection of the specific worksite and tools involved in the electrical accident, but refused to allow inspection of any additional areas or hazards. OSHA applied for and was granted a warrant to inspect the entire facility. Mar-Jac filed an emergency motion to quash the warrant.

Procedurally, in a warrant application, OSHA must establish probable cause by providing reasonable suspicion that a violation exists. OSHA argued that Mar-Jac's OSHA 300 injuries and illnesses logs created reasonable suspicion of hazards which suggested the existence of violations. The Eleventh Circuit rejected this argument, holding that a recorded injury or

illness does not by itself demonstrate that it resulted from an OSHA violation. The Court distinguished hazards from violations, and explained that the existence of a hazard does not necessarily establish the existence of a violation. OSHA must show a violation to demonstrate reasonable suspicion in a warrant application.

Impact of Mar-Jac

Mar-Jac reinforces that there are limits on OSHA's inspection authority. OSHA cannot expand its inspection of a facility based solely on the existence of an injury or hazard. Rather, OSHA must proffer additional evidence to support its reasonable suspicion of a violation. Although Mar-Jac is an Eleventh Circuit decision and not binding precedent in other jurisdictions, it does offer a valuable lesson for employers to reasonably limit their consent for inspection to the specific area or tools involved in the reported injury or illness.

Employer Takeaway

Employers are entitled to Fourth Amendment protection against unreasonable searches and seizures of their workplaces, including inspections by OSHA. Accordingly, a CSHO must obtain either the employer's consent or an inspection warrant prior to any inspection of the employer's premises. Frequently, the CSHO will arrive at the worksite unannounced, and unarmed with a warrant. Employers do not want employees to make an all too common mistake of throwing the company doors wide-open when they absolutely have no obligation to do so. The initial contact is the first opportunity the employer has to negotiate with the CSHO to limit the scope of the inspection and control how the inspection process will be carried out. This is where the employer's advanced planning really will pay off.

Section 8(a) of the OSH Act provides: "OSHA may inspect at reasonable times any workplace during regular working hours and at other reasonable times within such reasonable limits and in a reasonable manner." During the initial consultation, the employer should try to come to terms with the CSHO regarding the reasonableness of the scope and limitations of the inspection, i.e., define the equipment, and/or area of the worksite that is to be inspected by the CSHO. Once that is established, the employer should confine the CSHO's access and travel routes to only the areas within the scope of the inspection. The CSHO's physical access to the premises should be with a management escort only, including the company compliance officer during any walk around and sample collection activities.

The CSHO has the right to interview employees as part of any inspection, however, the employer is entitled, and should insist, to be present for the interviews of any management employees. Because management employees' statements may be attributed to and used against the employer, the employer has the right to be present when those statements are made. The CSHO may interview hourly employees privately; however, employers should advise their non-management employees of their right to request counsel, or that a union representative be present for the interview, and that they may not be required to sign any statement or the CSHO's notes of the interview.

[1] 2018 WL 4896339 (11th Cir. Oct. 9, 2018)