

11 THINGS THAT DAIRY FARMS SHOULD KNOW DURING AN OSHA INSPECTION

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- 1. If an OSHA Compliance Safety and Health Officer (CSHO) arrives unannounced to begin an inspection, but the employer's chosen representative for OSHA inspections is not available, can the employer request that the CSHO return later or wait to start the inspection until the company representative can arrive?**

Yes, the employer can request that the CSHO either return later, or wait until the company representative can arrive. OSHA has written into its own field operations manual instruction to the CSHO regarding this topic. That document says "The inspection shall not be delayed unreasonably to await the arrival of the employer representative. This delay should normally not exceed one hour." However, in spite of this one hour rule, an employer always has the right to demand a warrant before an inspection takes place. (The only exception to this rule is if emergency circumstances exist, such as imminent danger to an employee.) Therefore, the warrant requirement can be used as a mechanism for negotiating a longer period than one hour to get the company representative at the inspection. In one recent inspection, the CSHO explained that if he were allowed to look in the dairy barn, workshop, and view the manure lagoon quickly, he could record the inspection as already being opened, and could schedule subsequent inspection activity days or weeks later, but if he was denied any access that day he would be required to go get a warrant. In that particular case, the CSHO was allowed a quick look at these three areas, and the inspection was then completed many weeks later. No violations were found and the inspection was closed.

- 2. Does OSHA have jurisdiction over small family farms?**

Small farming operations are exempt from enforcement of all rules, regulations, standards or orders under the Occupational Safety and Health Act if: (1) Employs ten (10) or fewer employees currently and at all times during the last twelve (12) months (with family members of farm employers not counted when determining the number of employees.); and (2) Has not has an active temporary labor camp during the preceding twelve (12) months. OSHA takes the view that some on-farm housing provided for workers constitutes a temporary labor camp. Therefore, onsite housing may make the small farm operation covered by OSHA, even if it employs less than ten (10) employees.

- 3. What areas will OSHA focus upon during the inspection?**

Currently OSHA is still developing its emphasis program, but if the program is the same as in Wisconsin, OSHA will focus on what has been referred to as the "dairy dozen": 1) manure storage facilities and collection structures; 2) dairy, bull and cow behavior/worker positioning; 3) electrical systems; 4) skidsteer loader operation; 5) tractor operation; 6) guarding of power take offs; 7) guarding of other power transmission and functional components; 8) hazardous energy control while performing servicing and

maintenance on equipment; 9) hazard communication; 10) confined spaces; 11) horizontal bunker silos; 12) noise.

4. How are farms being selected for inspection?

It is not clear at this time the precise methods OSHA will use to identify a particular farm for inspection. However, it is likely that farms will be selected from lists of consolidated animal feeding operations maintained by the State of New York. From those lists, farms will be randomly selected. However, farms may also be inspected based upon employee complaints or referrals from other government agencies – both federal and state. It is important to determine the basis for the inspection at the outset, in order to determine the reasonable scope of the inspection.

5. If a CSHO explains at the opening conference that the inspection is in response to an employee complaint about a machine guarding hazard in the maintenance shop, should the employer's representative provide the CSHO with a general tour of the entire workplace?

No. In the absence of a related special emphasis program for dairy farms, a warrant providing for a full workplace inspection or a hazard that is in plain view during an inspection, OSHA cannot expand the scope of the complaint-based inspection beyond the location and hazard identified in the complaint without the employers consent. The employer should insist that the inspection be limited to the location of the complaint. The route of the inspection should limit the CSHO to the least sensitive areas of the facility as possible, so that the inspection is not expanded to more sensitive areas based upon observations that are in plain view of the inspector.

6. Are employees required to speak with the CSHO?

The employer representative can advise an employee that it is his/her choice whether to speak to the CSHO. However, the employee should also understand that he/she can be subpoenaed to provide an interview to OSHA. So a short private interview at the workplace may be preferable to that. It is also important to note that it is unlawful to interfere with an employee's right to participate in an OSHA inspection or speak with the OSHA inspector. There is always a danger in advising an employee that he does not need to speak to the CSHO, because the employee may misunderstand this as a suggestion that the employer would prefer him not to do so. Sometimes these conversations can be twisted against the employer leading to OSHA believing that the employer is interfering with the inspection process.

NOTE FROM NEDPA: the NY OSHA Work Group has expressed our concern with the Syracuse Regional OSHA Office about the "fear" that may be present by employees in regard to employee interviews, especially our immigrant employees. OSHA has assured us that they understand the sensitivity and will not be asking employees about immigration status. They are there to ask about worker safety. They will likely bring a translator. If you work with your own translator, you do have the right to allow that

translator to be present during the employee interview as long as they are NOT a supervisor to the employee.

7. Can OSHA interview employees privately without the farm's representative being present?

Yes, OSHA has the legal right to privately interview non-management employees. The employer has the right to be present during interviews of management employees. In addition, the employer has the right to be present at all times during the physical inspection. Therefore, OSHA's right of private employee interviews does not involve OSHA asking employees to demonstrate work activities without the company representative present. If private employee interviews take an employee away from the work area for an extended period or begin to involve demonstrations, the employer should politely inform the inspector that longer interviews should be conducted off the clock and/or in a location away from the work area and work activity.

8. How should a farm prepare for an OSHA inspection?

Since most dairy farms are just beginning to learn about OSHA requirements, it may be helpful to engage an outside consultant who is familiar with dairy farm safety to review the operations and safety procedures. The government is looking for documentation of safety procedures, and some of the regulations applicable to dairy farms require written policies. For example, a CSHO will always ask for the farm's hazard communication plan. If a farm does not have a written hazard communication program, it will be cited for this, as well as for not training employees. Moreover, the hazard communication standard requires that the farm make material safety data sheets available to employees for all of the chemicals in the workplace. A farm that does not have a policy, training, or material safety data sheets will likely receive three separate citations, but will also be seen by OSHA as a farm requiring more intense inspection activity. When employees are questioned regarding training, they may forget the training they received or may not understand what OSHA is asking. Documentation signed by employees acknowledging receipt of training can be helpful in proving that the training has occurred. Therefore, it is helpful for employers to prepare documentation in advance of an OSHA inspection so it is readily available. Consider what documentation is available to show compliance with the dairy dozen listed in question 3 above.

9. What will happen if the CSHO discovers violations?

CSHOs are required to recommend citations where violations are discovered. OSHA citations are classified as either non-serious, serious, willful, repeat or failure to abate. Non-serious penalties range from \$0 to \$7,000; serious from \$1 to \$7,000; willful and repeat from \$5,000 to \$70,000; and failure to abate up to \$7,000 per day. Citations will be adjusted based upon the size, history, and good faith of the employer. The most common citation is a serious citation. A serious citation involves a violation in which there is a likelihood of death or serious bodily injury. Serious bodily injury involves fractures, concussions, stitches, loss of consciousness and/or impairment. The average

serious citation for most dairy farms will range from \$2,000 to \$3,000. However, depending upon the severity of the hazard, that penalty can rise to \$7,000. Employers who have complied with none of the dairy dozen can expect as many as twenty (20) citations for various aspects of each area. So, the penalties could easily exceed \$10,000. Therefore, it is worth the effort to prepare for an OSHA inspection in advance.

10. What will happen at the completion of an OSHA inspection?

Generally, an OSHA inspection is completed by the holding of a closing conference in which the CSHO will describe the potential violations observed. Sometimes that is done at the inspection, but more often it involves a follow-up phone call from the CSHO weeks or even months later. OSHA has six (6) months to issue a citation following the inspection. However, some inspections span over more than one day. The six (6) month limitation period applies from the date the violation occurred. Once a citation is received, the employer has fifteen (15) “working days” to contest or settle the citation. The employer can schedule an informal conference with OSHA, which is essentially a meeting to discuss settlement of the citation. That informal conference must be scheduled within the fifteen (15) working day period. Failure to contest or settle the citations within the fifteen (15) working day period will result in the citations becoming final and the full penalty being due. Employers should go in to an informal conference prepared not only to discuss the amount of penalty they are willing to accept, but also with proof that the alleged violations have been corrected, or with a proposal for a time line for correction. If the employer believes that correction is not feasible, the citation should probably be contested in order to negotiate a formal settlement regarding the corrective measures that will be taken. Failure to address abatement in any settlement can leave an employer open to future citation for failure to abate or repeat citations.

11. If a farm performs safety audits is OSHA entitled to copies of those audits?

If an audit is documented, OSHA may be entitled to copies. However, NEDPA lawyers have successfully gone to court to prevent OSHA from obtaining such audits in the past. In addition, since New York dairy farms have been identified as potential targets of OSHA’s dairy emphasis inspections, the content of audits may be protected from disclosure if directed by legal counsel for purposes of the lawyers giving of advice regarding legal compliance. If a farm’s attorney engages an outside consultant to audit the farm, and then uses that audit report to provide advice, the content may be protected. However, even without lawyer involvement, OSHA may be prohibited from obtaining an audit to use as a roadmap. If all matters identified on the audit have been corrected, providing a copy of the audit and proof of the employer’s compliance efforts may help the farm avoid penalties. Caution should be exercised, however, in turning over such documents and competent legal counsel should be consulted.