

CLIENT ALERT

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When The EPA Knocks At Your Door

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Surprise inspections by either the federal Environmental Protection Agency (EPA) or state environmental agencies may not be as frequent as in past years. However, it is important for your facility to be prepared in the event that government inspectors show up unexpectedly at your door. If they do, the following are some useful rules that could be of benefit to you.

First, ask for and photocopy all the inspectors' credentials. If possible, notify your attorney. If any of the inspectors appear to be from criminal investigation units, call your legal counsel immediately and request that you be given an opportunity to consult with counsel prior to answering any questions. Although, under some limited circumstances, you may be able to insist on a search warrant if the government doesn't have one, such a request will likely generate antagonism and this may not be in the overall best interests of your company. You should confer with counsel before insisting on a warrant because that is a rare and atypical response to a proposed government inspection. Generally, companies allow the inspections to go forward without a warrant. In most cases, the government does not need a warrant and, if it does, the

government ultimately will obtain the warrant necessary to perform the inspection.

Second, ask what the inspection is for and what prompted the inspection. Seek to focus the inspection on just the areas and documents in which the government has expressed an interest. Take good notes on everything that the inspectors say and everything that you say throughout the entire inspection. Instruct the inspectors in any necessary safety procedures and request them to sign any standard waiver of liability forms that you may require all visitors to sign. The government's refusal to sign a liability waiver is not an excuse to refuse access to the premises. Be cordial at all times.

Third, identify one company representative to communicate with the inspectors on behalf of the company. Usually this is the highest ranking manager on the premises. The manager should have one other employee accompany him or her during the inspection to take duplicate notes and to witness and document any communications between the manager and the inspectors. Everyone else should go about their regular jobs. For safety and other reasons, keep the inspectors in one

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group and stay with them at all times. To avoid miscommunications, the manager accompanying the inspectors should try to field all questions rather than allowing the inspectors to ask questions of employees who may not have the knowledge or sophistication to answer accurately the questions that are posed. If the manager is not sure about what the appropriate answer is to a particular question, he or she should indicate that additional investigation will be needed in order to answer the question. There is nothing wrong with not having all the facts at your fingertips. Giving off the cuff but possibly erroneous answers is a mistake. It is reasonable to request additional time to answer the government's questions, even if the answers will be provided after the inspection is concluded. The government may not like it, but it is better to be accurate and complete in your communications with the government rather than provide wrong or misleading information.

Fourth, as is the case during depositions, do not volunteer information. Answer just the specific questions that are posed. Surprise inspections are frequently triggered by allegations from disgruntled employees or malicious competitors. It is important not to make the situation worse through thoughtless commentary that may raise unnecessary issues.

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Fifth, if photographs are taken, request duplicate copies or take your own photographs of the same scenes. Also, ask for splits of any samples that are taken so that you may analyze them yourself and thus be in a position to confirm or challenge the accuracy of any government analytical results. Request copies of any government analytical results.

Sixth, at the end of the inspection, conduct a closing interview and request the inspectors to identify any violations that they perceive. Do not admit to any violations. Keep a duplicate of any copies of records that the inspectors may take with them. Do not provide attorney/client privileged documents. Mark as "Business Confidential" any documents that contain confidential business information for which you subsequently may wish to claim confidentiality protection under applicable privacy laws.

The above guidelines will help get you through an inspection. The best preparation for a government inspection, of course, is to have compliance procedures and practices already in place that insure that your facility is in full compliance at all times and that all required records are in good order. That will make it easier on both you and the government in the event the EPA indeed knocks at your door one day.

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