

SURVIVING AN OSHA INSPECTION

*Philip J. Seibert, Jr., CVT
SafetyVet
www.safetyvet.com*

Terminology is important: There is a difference between an inspection and an investigation. An investigation happens every time they receive a complaint or a referral. Think of an investigation as merely the opening of a case. On the other hand, an inspection is an on-site visit – kinda like a physical exam. Not all investigations or cases include an on-site visit. In fact, most of them don't.

Frequency of Inspections & Investigations

One of the most frequent questions we get from folks is “how frequently do inspections happen?” – Well, that answer has two parts. First, let's answer the question “**How frequently do INVESTIGATIONS happen?**”

The good news is they don't happen to us any more frequently than any other business – with a caveat. The bad news is they don't happen any less frequently to us than any other business. We have the same inspection rate as most other small businesses that are not part of what they call a “high-hazard industry” or an “emphasis” program.

Now the caveat to that statement deals with “local emphasis” programs. There are a couple of parts of the country that have more active than normal OSHA offices. For example, in Washington state north of Seattle. That regional OSHA office is very active in inspecting many businesses on a regular basis – including veterinary hospitals. Hawaii, another great example. Their state-level program actually inspects most every veterinary hospital every couple of years. In the rest of the country, investigations don't usually happen on a “programmed” basis.

In number terms, about four-tenths of one percent of veterinary hospitals in the country are investigated in any given two-year period because OSHA doesn't have a “veterinary emphasis” program. Now we all know that “sensationalism sells.” We've all seen articles in journals that have suggested that investigations of veterinary hospitals are on the rise. Well, the numbers suggest that investigations of veterinary hospitals for the last several years are on par with most other businesses in the country.

Now the second part to the answer of, “how frequently do inspections happen?” requires us to change the question a little...The question now is “**what PROMPTS most OSHA investigations of veterinary hospitals...**”

And the answer to that question is 1) complaints, 2) referrals, 3) incidents and 4) emphasis. Let's take each of those in turn.

1. A complaint by an employee or a former employee is the number one “trigger” of OSHA investigations. When OSHA receives a complaint from an employee or former employee, they are REQUIRED to INVESTIGATE. OSHA will accept complaints from non-employees, but ANY COMPLAINT must be related to workplace safety. OSHA does not deal with patient care or

visitor issues; their only authority is EMPLOYEE SAFETY. So, if a client gets mad at you because of the way you treated Fluffy, they can call OSHA all day long and “report” the problem. But unless the complaint centers around employee safety problems, OSHA doesn’t get involved because they have no authority or no jurisdiction over animal care.

Employees have the right to file complaints if they feel aggrieved. But OSHA is actually very good at recognizing when the complaint is an obvious attempt at a vendetta. They still must open an investigation. And the business will still have to answer the alleged complaint, but it’s been our experience that OSHA is very good at realizing when a complaint is just “I want to make trouble for my ex-boss because they fired me” and they DO factor that into their approach to the process.

2. The second most common reason for an OSHA investigation is a referral from another agency. Twenty years ago, other agency referrals to OSHA were pretty rare in the veterinary world, but they are becoming more common. Still not as common as employee complaints, but a little more common than in the past. Here’s how that works...Let’s say, for example, you have the state radiology department come by for their annual or biennial inspection of your hospital’s radiograph machine. During that visit, the radiation department inspector, notices that there is a very strong odor of anesthetic gas. The radiology inspector may send a referral to OSHA for investigation.
3. The third most likely cause of an OSHA investigation is an accident that results in the death of an employee or one that required medical treatment of the employee and OSHA found the case “interesting.” For example, if an employee were to be hospitalized for over exposure to a chemical that rendered them unconscious.

And of course, if an employee dies on the job, it’s a guarantee that OSHA will investigate and probably do an on-site inspection. This doesn’t happen often, but it does happen.

4. The fourth most likely cause of an OSHA investigation is pursuant to a current “emphasis” program. The two biggest current “emphasis” programs right now are workplace violence and hazardous drugs. If you have an injury or a complaint that fits in one of those categories, it’s almost guaranteed that you’re going to have an investigation that probably will include an inspection.

Sure, there are other reasons for an inspection, but these 4 account for 99% of OSHA investigations.

Identity of the complainant

Contrary to what most folks believe, the business does NOT have the right to know the identity of the complainant. I know this really goes against the grain to be accused of something and not even know who is making the complaint, but it’s part of the whistleblower protection rules. There’s nothing the business can do to make OSHA tell them the identity of the complainant.

Don’t make any efforts to find out who made the complaint. I know that some folks want to find out who made the complaint to “talk to the employee because I want to find out the problem, and I want to make it right.” But it’s not a good idea to make such inquiries. For example, if you make any effort to find out who that employee is, any discipline to that employee in the future will be jaundiced. The very

first words out of their mouth are going to be, “They’re doing this in retaliation for me filing a complaint.” Whether they deserve the discipline or not, that’s just the way it’s going to work.

Our advice is when you get a complaint investigation, you can think about who made the complaint all day long, BUT DON’T THINK IT OUT LOUD! Don’t even say it to other managers or a trusted employee. Let it go. Let it remain anonymous and address the substance of the complaint, but do not engage in trying to figure out the identity of the complainant. It will come back to bite you and it doesn’t change your actions in addressing the complaint.

Process of an Investigation

Here’s how the complaint and investigation process usually works and how you should respond.

Most folks are led to believe that OSHA just shows up at the door. Although that can and has happened, it usually doesn’t. Usually, OSHA will call the business owner or manager, identify themselves and say, “We’ve received a complaint. I’m going to fax you over the complaint paperwork. You have five days to let us know your response to these complaints. When we receive your response, we’ll decide where to go from there.”

When this happens, don’t freak out! The reality is that most of these types of investigations are resolved in favor of the employer. If the employer proves they were doing it right in the first place or if they admit there was a minor problem, but it’s been fixed, OSHA usually closes the case without further action. So don’t freak out...follow this 4-step process.

Step 1 – Carefully READ every piece of paper they send you. Although only one sheet in all of paperwork they FAX over will actually detail the complaint, read and follow the directions on every page because there are specific actions that must be taken.

Step 2 - Make sure to post the Notice of Investigation on the employee bulletin board as soon as it’s received. That notice is required to inform employees that the business is being investigated by OSHA for a complaint and that they have the right to speak to the inspector or report any information they feel is relevant without fear of retaliation. Failure to post that page on the employee bulletin board may result in a separate citation. It’s a shame to have them dismiss the original complaint but then you get a citation for screwing up the paperwork!

Step 3 – UNDERSTAND AND RESPECT DEADLINES. Be deliberate in the response, but don’t miss the deadline to respond. Read the complaint. Talk with folks to gather information. Take pictures. Consult with an attorney or call a consultant to get some advice, but don’t miss the deadline to respond!

Step 4 – Although it’s not a requirement, it really is a good idea to consult with an attorney or a safety consultant when drafting your response. Your answer will determine whether the case is closed quickly or whether OSHA decides to go to the next step in the investigation.

Access by the Inspector

What gives an inspector the right to come into your workplace? Well, the Occupational Safety and Health Act of 1970 gives the inspector the authority to inspect any workplace covered under that

law. Unless they suspect there is an “imminent danger situation,” they are required to conduct the inspection in a way that is minimally disruptive to the business. Normally, they must conduct the inspection during the business’s normal operating hours. They must tell the employer, why they are inspecting and if they’re looking for something specific. If they are inspecting as part of a general hazard “emphasis” program, they have to inform the employer of that topic.

If they are looking into a specific complaint, generally, they must stick to that complaint. They’re not allowed to go on a fishing expedition, but anything that they notice during their time in the practice is fair game. Just like a police officer doing a traffic stop - anything that’s in plain sight is fair game. LFor example: Say OSHA receives a complaint that you don’t have any SDSs in the facility for the chemicals you use and the fumes from one of those chemicals are causing employees to become ill. They decide to do an on-site inspection as part of the investigation. While you are walking them back to the office to sit down for the opening conference, the inspector notices that you’ve boxes piled in front of an exit door. They’re going to write that citation. They’re not going to ignore that. That observation will probably open the door to the inspector saying, “I need to look at all the exit doors in the facility.”

Or, a more likely scenario would be the inspector noticing a pizza or box of doughnuts on the counter in the lab or folks walking around with drinks in the treatment room. They’re not going to overlook that.

Now, the second most common question we receive is “Does the owner of the business have the right to be present during an inspection?” The answer is yes except during employee interviews. The follow-up question is always, “Can the inspector can be turned away if the owner is not present?” The “official” answer is yes, but the “practical” answer is no.

Although the owner has the right to be present, if the business is open for operation, then the regulation assumes that there is someone in charge of the business at that time. It may be a shift leader. It may be the practice manager. In the absence of the owner, the regulation assumes this leader is operating on behalf of the owner because they are conducting the operations of the business. We’re not talking about the boss being at lunch here. We’re talking about the boss being “away” that day.

Although one could tell their employees to refuse entry to any inspector no matter what, it’s not a good idea. They will be able to get an administrative warrant within a couple of hours, and, if need be, they can have the police escort them into the place. That makes the situation very adversarial and that’s really not a good position to start. Remember, this is a regulatory issue and not a criminal one, so don’t blow it out of proportion.

A better approach would be for the receptionist to say “I’m sorry but I do not have the authority to act on behalf of the owner during an inspection. Give me your card, have a seat and I will let the owner or manager know you are here. They’re not in the building right now, but I will track them down for you.”

“I do not have the authority to do that. Let me find the person who does.” will buy you a few hours (not days). That’ll at least give you the opportunity to gather your thoughts before you begin!

In reality, a delay of a few hours, or really even a few days isn’t going to change the outcome of the investigation. If your practice is doing things right, it’ll show. If you’re not, it’ll show. The inspector will absolutely be able to tell whether a policy or procedure or label or eyewash or whatever has been there for a while of whether it was put up overnight!

When the owner or manager meets with the inspector, be nice! Offer them a cup of coffee – in a safe office and not the treatment room! Say, “Listen, we want to do the right thing here, and we want to cooperate with you fully. As you can probably see we’re swamped with appointments this afternoon. An inspection at this point in time (this is a key word) would be very disruptive to the practice. Can we schedule this for first thing tomorrow morning or tomorrow afternoon? That will give my receptionist time to call appointments for tomorrow and postpone them so that you can have the access that you need. Right now, I can let you in, but we’ve got so much patient care stuff going on that it’s unlikely that employees can take time away from patients to meet with you to give you the time you need.” They don’t have to agree to that, but it’s a good way to ask for a postponement.

As part of the opening conference, the inspector will present their credentials. They will have a business card and an official Department of Labor ID and a badge, just like a police officer. They should present them right away but if they don’t politely ask them to see those credentials. A real inspector does not mind you verifying their credentials. You should make sure that you’re dealing with a legitimate inspector because there are scams!

Employee Engagement

Be prepared...the inspector will absolutely want to ask questions of some employees. They will go about that in two ways. First, they may just ask an employee to do something as they are walking around to judge their awareness of the workplace. For example, they may ask an employee to point out the nearest fire extinguisher. The second way they engage employees is with private interviews. The regulation REQUIRES the inspector to conduct interviews with likely relevant employees in private – without the boss or their representative present. The employee can clam up and not say much but the employee doesn’t have the right to refuse the interview because the employee can’t be held liable for violations by OSHA – therefore there is no self-incrimination possibility.

When those interviews happen, this is a fact: no matter how loyal the employee, they probably not going to lie for you. Generally, the inspector is not going to ask employees to testify against you. They’re not even going to tell the employee what the complaint is, so the employee won’t be able to come up with an answer they think you’d want them to give. Overwhelmingly, they’re going to tell the truth. The employer does not have the right to be present during those private interviews with employees and the employer does not have the right to know what was said. That is not released to the employer as part of the investigation. I know it sounds awful, but that’s the way it is...confidentiality of the “whistleblower” is protected.

So here’s some of the questions an inspector is likely to ask during “open” employee interviews:

One of their favorites is to just pick up a bottle of a chemical, hand it to the employee, and say, “Show me the Safety Data Sheet for this product” and then follow the employee over to where they get it.

Another one of their favorite questions is talking to the employee and saying, “Tell me, what are your responsibilities in the event of an emergency evacuation because of a fire.”

Where is the nearest fire extinguisher to here? Have you ever been taught how to use a fire extinguisher?

Where is your eyewash station?

Another angle to interviews: a practice in Wisconsin underwent an on-site inspection as part of an investigation initiated by an ex-employee. One of the complaints was that the veterinarian did not MAKE the staff wear protective gloves when they were taking radiographs. Now although we were never told and we never attempted to find out, we know the complainant was a long-time technician who recently went through a long and bitter divorce. Over a year or so, her performance declined, and her attitude soured, so the practice finally let her go. To say she was mad at everybody is an understatement. While she was employed, she was the biggest violator of the requirement to wear gloves when taking radiographs rule and she made that complaint to OSHA because she KNEW there was a problem!

During the inspection, the veterinarian said, "We've got the gloves back there. I tell them to use them. If I'm not standing in the room with them, how do I know that they're not following my directions? When I catch them, I discipline them."

And that's where it went wrong. The inspector asked for any disciplinary records for employee safety violations in the last two years. And of course, they couldn't produce them. During the inspection, the investigator asked the rest of the employees in private interviews, "Tell me what protective equipment you wear when you're taking radiographs and you have to restrain the animal." The employees will always say, "Well, we wear an apron." Sometimes they'll say, "We wear a thyroid collar," but if they don't regularly wear gloves, then they're not going to say they do. And when specifically asked "do you ALWAYS wear gloves when restraining for radiographs?" they won't lie. They'll probably say "most of the time" but by that time, it's over.

So no matter how well a manager preps the employees on answers, when they get into that interview, they are going to tell it like it is!

Citations & Penalties

OSHA does not deal in hundreds. They deal in thousands. Under the Occupational Safety and Health Act of 1970 which established the office of OSHA and gave them the authority to do all this kind of stuff, they put in a base fine back in 1970 and said we are going to index it for inflation. Every year OSHA publishes what they consider to be their base fine which is indexed for inflation. In 2021 the standard or the base fine is \$13,653 per infraction. I said that right, you heard it right, \$14,502 per infraction but it can go up from there. If you want to read it by the way, that website is www.osha.gov/penalties.

If it is a willful violation, (that is one in which the business owner, the business knew the hazard exists, knew the requirement but failed to act) the fine is seven times the base fine. If it is a repeat violation, let's say they caught you doing this before, the fine is even higher

And here's a little "Whoa! Wait a minute moment" when we discuss a repeat violation - the repeat violation can be tacked on if ANY location of a business was cited for that violation in the past! Dollar General Stores in the United States have a lot of stores and OSHA has been fining Dollar General Stores left and right for blocking emergency exits with merchandise on truck delivery day. Most of those stores don't have big storerooms in the back. They bring the merchandise off the truck and put it in the aisle ways and put it up. If they put a pallet of material in front of the back emergency exit door and it blocks the exit door, and the inspector catches it, it is a citation. What they found is it is a real common

practice in those types of stores around the country. Since they have cited Dollar General Stores for that violation in the past in any store, it is considered a repeat violation in any store because the company has been fined for that before. A repeat violation will also result in an increased fine. Although we are not seeing this yet in corporate owned veterinary practices, we will. It'll take time but eventually OSHA will figure out that the veterinary profession isn't all "mom and pop" clinics anymore and their attitude towards fines will change.

Then the big one is if they fine you and they cite you for a violation and you don't correct the problem. They call that a failure to abate that and then the fine is 10 times the original amount. Those are big numbers and that's why it's common to see fines of several hundred thousand dollars in some cases.

Now for some good news: There are ways for that fine to go lower. For example, the small business entity mitigating factor. Right off the bat, they will take that \$14,502 base fine, and cut it in half if the company has less than 250 employees. Then if it is a minor problem that was fixed during the inspection, they will probably cut it in half again. You can see that "per infraction" price go down to three or four thousand dollars pretty quickly. However, we don't usually see fines going below \$1500 until after the appeal process is over. The lowest initial fine that we usually see even for something like a poster violation is about \$1500.

However, a business can and probably should appeal any fine or citation that is issued except for ones that have no monetary fine attached. Let's say you get a citation for not having the right poster on the wall and then you get the poster and you put it up on the wall. You send them a picture of the poster. They issue a citation but no fine. Let that one go.

On the other hand, if there is a monetary fine attached to a citation, it's usually fruitful to appeal it and ask for an informal conference with the area director. An appeal could mean "Look this does not apply to us and you are wrong in applying it." But an appeal can also mean "Hey, let's negotiate. It's the first time we have had this problem and we have corrected the problem. So, let's talk about a discount." In many, many, many cases that happens.

Shared Responsibility

A growing scenario in the veterinary profession is where multiple businesses share the same facility. Many times, we see it as an after-hours critical care practice using a general practice's facility during "off hours." Or maybe it's a specialist renting an exam room in a general practice or a "visiting specialist" who comes into either the daytime practice for consultations or procedures. All these scenarios are what's known as a multiemployer workplace.

When you have a multiemployer workplace every task or every hazard must be addressed by all the employers that are involved in the process. For example, envision a facility that is used by a surgery specialty practice during the day and an emergency critical care practice at night. Say the specialist owns the facility and the emergency practice rents the space. In that facility there is probably a radiology machine. Chances are the radiology machine is probably owned by the specialist practice because it's their facility. The surgery specialist would be responsible for all aspects of the safe operation of the machine for their staff but have very little responsibility for the actual procedure when it is performed by the emergency hospital staff.

In that scenario the surgery staff and the surgery practice would be known as the controlling employer and the emergency clinic would be known as the creating and exposing employer when the emergency practice staff uses the machine.

Then there is the issue of “who pays for repairs?” For example, if there is an inoperable emergency light in the facility and the “renter” business is inspected. If the “renter” business is not allowed to make changes or repairs to the facility without permission of the owner business, OSHA COULD cite the owner business as well as the renter business. That is what’s known as the “correcting employer.”

It’s easy to get confused with all those terms, but please understand that in every single scenario where two businesses share the same facilities or equipment, both of those businesses must be on board with the plans. One business will have no immunity from the rules by saying “that equipment doesn’t belong to us” if their staff uses it. Nor will it give the “owner” business cover for not doing their part.

In the event of a fine in a multi-employer workplace, OSHA will allocate a percentage of the fine to each employer based on those categories.

Summary

Our likelihood of being inspected by OSHA is no greater than and no less than any other business in the country.

By far, the most common reason for an inspection is a complaint by an employee or a former employee. Remember the complaint must deal with employee safety: OSHA does not have any authority or jurisdiction over animal care, patient care, customer service, environmental issues.

When OSHA notifies the business of an investigation, it is important the manager or owner read every single thing that received from OSHA and answer that complaint in a timely manner. Don’t put it off, use all the time allotted have but don’t miss deadlines.

If the inspector shows up at the doorstep, there are some techniques that can minimize the impact, but you can’t tell them no. True, the owner has the right to be present or to dictate a representative to act on their behalf, but you are not going to get away with saying “I’m sorry, I can’t find the boss. They are going to say, “Whoever is in charge today is who is going to be their representative.” Since the owner left this person to run the business in their absence today, gives them the authority to act on their behalf in this situation.

Also remember that the inspector is going to engage employees and the owner does not have the right to be present when the inspector talks to those employees, so you really don’t know what they are going to say. They are not going to lie in those interviews.

Don’t just comply for fear of fines, please. Do things because you know it is the right thing to do, but don’t lose sight of the fact that non-compliance has a cost. A lot of folks get hung up on the cost of an eye wash or the cost of an employee spending time with compliance, but in almost every single case the cost of compliance is going to be significantly less than the cost of the fine for a violation.