



What do you do when the government shows up?

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- This Presentation Will Cover:

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- Current trends in government enforcement.
- Distinctions between liability of the corporation and the individual employee for regulatory violations revealed during government inspections.
- Strategies for corporations to limit their liability for the unauthorized actions of employees while on the job.
- Strategies for businesses to use to effectively handle government inspections and protect their interests in the event that violations of government regulations are discovered.

LLW provides solutions to the problems facing Florida's individuals, businesses and governments, especially issues associated with the myriad of current local, state, and federal laws and regulations.

The firm's vision is personalized high quality legal services, focusing on specialized and often technical areas of environmental and land use law, employment law, government relations, public finance and real estate law. Specific talents, knowledge and contacts are necessary for each field. The firm has recruited well-known and respected attorneys with expertise and accomplishments in these and related areas of law.

LLW lawyers are committed to responding to clients' needs promptly and economically. We believe in building long- term relationships based upon close cooperation and solid results.

Services are provided throughout Florida from four offices strategically located in Bradenton, Jacksonville and West Palm Beach.

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Stephen Walker's practice focuses primarily on water, environmental and administrative law and has over thirty years of experience in environmental and water-related issues in Florida.



Dan Richardson has over thirty-six years of experience in private practice and government with particular emphasis on environmental compliance, enforcement defense and transactional issues.



Andrew Baumann's practice focuses on environmental and land use law and litigation. Mr. Baumann represents private sector clients, governmental entities, and special districts in civil litigation before state and federal trial courts, courts of appeal and the Division of Administrative Hearings.

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AGENCY ENFORCEMENT ON THE RISE

- Since 2003 the amount of fines for environmental enforcement cases collected by EPA has increased from just over \$3 billion to \$11.7 billion.
- EPA has asked for a 6% increase in its 2010 budget and intends to hire 30 new compliance officers.
- Between 2001 and 2008 OSHA workplace inspections have increased by an average of more than 10% per year.
- In Fiscal Year 2010, OSHA is asking for funds to hire 130 new OSHA inspections.
- The incoming administration has appointed key officials suggesting an aggressive regulatory enforcement policy in the coming years.

AGENCY ENFORCEMENT ON THE RISE

- It is expected that the number and magnitude of enforcement cases will rise significantly in 2010 as more companies continue to cut corners on regulatory compliance to reduce overhead and expenses during tough economic times.
- It is expected that environmental non-compliance findings will also correspond with OSHA safety violations, and the government expects that the two will frequently be prosecuted together, dramatically increasing fines.
- Regulators have suggested a shift from civil to criminal enforcement proceedings, which may increase fines and tend to produce larger settlements.
- Many state and local agencies experience budgetary hard times view stepped up enforcement as a potential source of revenue generation.

CORPORATE VS INDIVIDUAL LIABILITY

A corporation may be held criminally liable for illegal acts of its employees if the acts are:

- a) Related to and committed within the course of employment
- b) Committed in furtherance of the business of the corporation; and
- c) Authorized or acquiesced in by the corporation.

The question typically turns on whether the employee is acting under corporations authority and within the limits of his authority and whether the corporation actually benefitted from the activity.

Corporate policies should be clarified to:

- a) Clearly define the scope and authority of employees; and
- b) Clear identify the authorized procedures for employee conduct which ensure regulatory control.

Clarified policies will make it more difficult for the corporation to be found to have acquiesced to violations which have been committed by employees if it can clearly be shown that the acts of the employee violated clear corporate policies and were unauthorized.

CONDUCTING THE OPENING INSPECTION CONFERENCE

- Refer the compliance officer arriving on the premises to the designated company representative.
- No employees, other than the designated individual should communicate with the compliance officer prior to the opening conference.

CONDUCTING THE OPENING INSPECTION CONFERENCE (Cont'd)

- The designated individual should review the compliance officer's credentials as well as obtain his or her business card with an address and phone number to ensure that the compliance officer is on an official inspection.
- Determine from the compliance officer the purpose, scope, and the circumstances of the visit to the facility. If the inspection is based on a complaint, obtain a copy of the complaint.

CONDUCTING THE OPENING INSPECTION CONFERENCE (Cont'd)

- Notify the company's counsel. If possible, this should be done prior to the opening conference in order to receive any instructions or to raise some defense or objection.
- If an OSHA inspection, notify the designated employees' representative (if applicable) of OSHA's presence.

CONDUCTING THE OPENING INSPECTION CONFERENCE (Cont'd)

- Have an opening conference with the compliance officer to establish:
 - the focus areas of the inspection;
 - the scope and route of the walk-around inspection;
 - the designated trade-secret areas or processes;

CONDUCTING THE OPENING INSPECTION CONFERENCE (Cont'd)

- the procedure for conducting employee interviews and producing documents;
- the schedule of interviews;
- The documents to be reviewed;
- the procedure for requesting copies of any employee complaints; and

CONDUCTING THE OPENING INSPECTION CONFERENCE (Cont'd)

- the facility's rules and procedures the compliance officer will be expected to follow.
- Conduct all necessary safety and health advising/training of the compliance officer(s) prior to access to restricted areas. Ensure that the compliance officer(s) wears all necessary personal protective equipment and follow all company safety and health policies.

Walk-Around Inspection

- A designated company representative should stay with each compliance officer at all times during the inspection except during hourly employee interviews.
- The designated company representative should take detailed notes, including date(s) of inspection, areas inspected, items discussed and employees interviewed.

Walk-Around Inspection (Cont'd)

- If the compliance officer deviates from area(s) covered by complaint then the designated company representative should inquire as for the reason for the deviation.
- When appropriate, photographs should be taken of areas inspected by the compliance officer as well as all items photographed by the compliance officer. Video also should be utilized, if used by the compliance officer.

Walk-Around Inspection (Cont'd)

- The designated company representative should immediately have corrected any alleged violations identified by the compliance officer to the extent possible, but should not acknowledge that a citation is appropriate.
- No management or supervisory employee should give information or make statements to the compliance officer without approval from the designated company representative or the company's counsel.

Walk-Around Inspection (Cont'd)

- All work rules and safety procedures should be enforced and applicable to the compliance officer and walk-around team during the inspection.
- The compliance officer should be asked to put all requests for company information and/or documents in writing.
- The company's counsel should review all requests for documents and information as well as all information and documents provided.

Walk-Around Inspection (Cont'd)

- Document all samples or monitoring test taken by the compliance officer and request copies of all sampling and monitoring results as well as all photographs and videos taken. The company should request the compliance officer to schedule sampling and monitoring at a time when the company can conduct its own sampling and monitoring. Time of sampling may be critical.
- Request copies of all sample and monitoring reports from the compliance officer.

Closing Conference

- Primarily listen to the compliance officer's proposal, and do not argue or debate the initial proposed findings.
- Remind the compliance officer of the scope of the inspection as stated in the opening conference.
- If directed by counsel, provide additional information and documentation relevant and supportive of the company's position as well as any information which shows abatement of any alleged violation.

Closing Conference (Cont'd)

- Obtain from the compliance officer an acknowledgment of receipt of the documents provided.
- Take detailed notes on the alleged hazards identified and the problem areas indicated by the compliance officer along with the applicable standards and suggested abatement procedures.

Closing Conference (Cont'd)

- Provide the compliance officer with the name, title, full address, and phone and fax numbers of the person to whom all correspondence should be directed.

After the Inspection

- Try to obtain all sample and monitoring reports.
- Review all areas noted by the compliance officer and make appropriate abatement.
- Provide the company's counsel with copies of all of the documents provided to the compliance officer and all of the notes, photographs, videos, etc., taken during the inspection.

After the Inspection (Cont'd)

- The company's counsel should make a written request to the inspecting agency to ensure that all trade secrets and proprietary information disclosed during the inspection are kept confidential.
- If facility is issued citations, the following should be done:
 - Post the citation as required (with penalty amounts deleted).

After the Inspection (Cont'd)

- Immediately notify the company's counsel about the citation and send a copy of the citation to them.
- With the advice of counsel, schedule an information conference with the agency.
- Post Notice to Employees of informal hearing if an OSHA inspection.

After the Inspection (Cont'd)

- Where an agreement cannot be obtained quickly, work with your counsel to determine if a Notice of Contest or other document should be filed.



Thank You!

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