The Warrant Issue:

When OSHA Knocks, Should an Employer Demand a Warrant?

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SHOULD AN EMPLOYER DEMAND A WARRANT?

Introduction

When OSHA arrives at a facility to conduct an inspection, an employer has a very important issue to resolve: should it demand a warrant or voluntarily consent to the inspection? On the one hand, in the absence of a warrant, the employer has the constitutional right to deny OSHA access to its facility. On the other hand, by waiving its right to a warrant the employer may be able to negotiate reasonable conditions and restrictions for managing the inspection.

The resolution of this issue involves weighing many competing factors, such as the basis for the inspection, the anticipated scope and duration of the inspection, the attitude of the compliance officer, any recent OSHA enforcement initiatives, the impact of the inspection on any immediate needs or the facility, the available resources within the facility to respond to the inspection, the level of regulatory compliance within the facility, and the current state or labor relations at the facility. The assessment of these factors will vary greatly from inspection to inspection, and as a result, the resolution of the issue must be decided on a case-by-case basis.

This article summarizes: (a) the law concerning Fourth Amendment requirements for warrants, (b) some of the many lawful ways to challenge warrants, (c) an example of challenging a warrant and the benefits to the employer from that challenge, (d) the employer’s right to negotiate reasonable terms and conditions for the inspection, and (e) the benefits and risks of resolving the issue.

Fourth Amendment Requirements for Warrants

The right to demand a warrant has deep roots in American history. In colonial times, the agents of the King of England could readily obtain general warrants and writs of assistance
which empowered them with the discretion to search any person, home or business they choose. They did not need evidence to support such warrants or writs, let alone good cause or even reasonable suspicion. They simply had the unfettered power to search.¹

The Framers of the United States Constitution wanted to limit this power to search and to guarantee the people the freedom from unreasonable governmental searches.² Toward this end, they drafted the Fourth Amendment to the Constitution. In relevant part, the Fourth Amendment states:

The right of the people to be secure in their . . . houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath . . . and particularly describing the place to be searched and the persons or things to be seized.³

The first part of the Fourth Amendment discusses the type of privacy interests (“houses, papers and effects”) that the Fourth Amendment protects. In Marshall v. Barlow’s, Inc., the Supreme Court, construing this privacy clause in an OSHA enforcement action, held that the “businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.”⁴ The Supreme Court prohibited OSHA from conducting a warrantless search of the Barlow’s facility.

In general, work places such as offices, factories, plants, and refineries come within the privacy protection of the Fourth Amendment, guaranteeing the employer the right to demand a

² Id.
³ U.S. Const. Amend. IV (emphasis added).
⁴ 436 U.S. at 311-312 (citing See v. Seattle, 387 U.S. 541, 543 (1967)).
warrant. A few work places, such as construction sites open to public view, do not enjoy such protection.⁵

The Warrant Clause in the Fourth Amendment sets forth the probable cause and oath requirements which OSHA, like any other governmental entity, must satisfy to obtain lawfully a valid warrant. The warrant must set forth sufficient facts under oath so that a court may determine that probable cause for a violation of the law exists. The probable cause determination must be based exclusively on the facts in the warrant and be made by a court which is both neutral and detached.⁶ In other words, OSHA does not make the probable cause determination.

There are two ways by which OSHA may establish probable cause for an inspection warrant. In Marshall v. Barlow’s, Inc., the Supreme Court discussed both of them, stating that probable cause for an inspection warrant may be based upon either specific evidence of a violation or upon a general administrative plan for enforcement based on neutral criteria.⁷

In Reich v. Kelly-Springfield Tire Company, an OSHA warrant case, the Seventh Circuit discussed the specific evidence test for probable cause. It noted that “probable cause demands more than [OSHA] merely receiving a complaint and drafting a warrant based solely on that complaint. At a minimum, the statute requires that [OSHA] must establish ‘reasonable grounds to believe that [a] violation . . . exists’ . . . and perform a sufficient investigation to confirm the validity of the complaint . . . .”⁸ In short, the specific evidence test requires OSHA to do some

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⁵ Lakeland Enterprises of Rhinelander, Inc. v. Chao, 402 F.3d 739, 744 (7th Cir. 2005); Tri State Steel Constr., Inc. v. Secretary of Labor, 15 BNA OSHC 1903 (1992).


investigation of the complaint, to search for and gather corroborating evidence, and then set forth the relevant facts in the warrant, so that a detached and neutral court may make the probable cause determination.

In lieu of the specific evidence test, OSHA may establish probable cause through a general administration plan for enforcement based on neutral criteria (“Administrative Plan”). In the warrant, OSHA must explain its Administrative Plan and its specific neutral criteria in sufficient detail so that the court can evaluate the Administrative Plan and determine that it can be administered in a fair and neutral way.9 Thereafter, in the warrant, OSHA must demonstrate that the facility to be inspected property fits within the terms of the Administrative Plan.10 If both of these elements -- an Administrative Plan and its fair application to the instant facility -- are properly set forth in the warrant under oath, then probable cause has been established.

Challenges to the Warrant

There are many lawful and proper grounds for challenging a warrant. These include, for example, the lack of probable cause, the use of false and misleading statements in the warrant, the “staleness” of the facts in the warrant, and any attempts to exceed the scope of the warrant. In all of the challenges, the warrant is evaluated exactly as it was written. In other words, OSHA has no right to amend, supplement, or redraft a poorly prepared warrant.

Although there are many possible challenges to warrants, this article will only discuss two of them. First, the employer should carefully review the warrant to determine whether it sets forth sufficient facts to establish probable cause. Stating it another way, are there sufficient facts

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10 See, e.g., id; Industrial Steel Products Co., Inc. v. Occupational Safety and Health Administration, 845 F.2d 1330 (5th Cir. 1988); Donovan v. Welleson Alloys, Inc., 7695 F.2d 1 (10th Cir. 1982).
to show a specific violation of the OSH Act or one of its regulations? Moreover, if OSHA is relying on an Administrative Plan to establish probable cause, the employer should carefully analyze the warrant to determine whether it fully and properly explains the Administrative Plan and its criteria, that the criteria are, in fact, neutral and that the warrant actually explains why the instant facility comes within the Administrative Plan. If any of these important facts are missing, a challenge to the warrant should be considered.

Second, the employer may properly challenge a warrant if it contains either false statements or makes a false and misleading omission of facts. In *Franks v. Delaware*, a police officer knowingly put false information into the warrant, and the Supreme Court held that the defendant had the right to an immediate hearing to challenge it.\(^{11}\)

In *Brock v. Brooks Woolen Co.*, the Court of Appeals for the First Circuit applied the holding in *Franks v. Delaware* to an OSHA warrant.\(^{12}\) In *Brock*, an OSHA compliance officer persuaded a court to issue a warrant based on false facts and misleading omissions. In the warrant, the compliance officer stated that a machine lacked proper guarding, that the employer had been previously cited for this same OSHA violation, and that the employees were knowingly exposed to a hazard. In a subsequent challenge to the warrant, the employer proved that the machine had been taken out of service, that employees had been warned about it, that OSHA had withdrawn the earlier citations and that at the time OSHA prepared the warrant, OSHA knew all of these facts. The court concluded that OSHA had made a “series of misleading omissions and actual false statements” in order to put the employer “in the harshest possible light.” Given this, the court held that there was no probable cause and vacated the warrant.

\(^{11}\) 438 U.S. 154 (1978).

\(^{12}\) 782 F.2d 1066 (1st Cir. 1986).
Successful Challenge To a Warrant

A manufacturer experienced a catastrophe resulting in the death of several employees and the hospitalization of several others. At the opening conference, the employer asked the State to follow federal OSHA’s compliance directive (CPL 2.94), a protocol for the investigation of catastrophic incidents. Even though State plans must adopt and follow federal compliance directive (or develop their own equivalent directives), the State refused to do so, and without any notice to the employer, went into court and obtained a warrant and a temporary injunction.

In the warrant, the compliance officer tried to establish probable cause in two ways: specific evidence of a violation and an inspection based on an Administrative Plan. First, in the warrant, the compliance officer stated that the employer had been destroying evidence and documents. The employer challenged the warrant and introduced evidence showing that the warrant contained a series of false and misleading statements, including the allegations about destroying evidence and documents. Second, the facts in the warrant concerning the Administrative Plan were completely inadequate. The warrant failed to explain the Administrative Plan in detail and failed to state that the employer’s facility satisfied the terms of the Administrative Plan. As noted earlier, the State has no right to amend or supplement the warrant and by law, must prove the validity of the probable cause determination based exclusively on the facts in the warrant.

After the employer presented its evidence, the State, seeing the futility of its own case, asked the employer to settle. The settlement was a significant victory for the employer. The State agreed to strict procedures favorable to the employer for the remainder of the inspection. The State agreed to withdraw the warrant and the temporary injunction with prejudice, thereby withdrawing all of the false allegations; to provide advance notice to the employer of the employees, both management and hourly, that the State wanted to interview; to permit the
attorneys for the employer to attend interviews of both management and hourly employees; to adhere to rigid procedures for the resolution of future disputes; to refrain from any ex parte application for future warrants and subpoenas; and to require the consultants, whom the State had retained, to adhere to a confidentiality agreement under which the employer has the right to sue the consultants for any improper disclosure of confidential information. This particular challenge to the warrant resulted in major benefits to the employer for managing the remainder of the inspection.

Consent

An employer has the right to consent to the inspection of his facility under any terms or conditions that the employer chooses. More specifically, in the absence of a warrant, the employer has the legal right to determine the scope, duration, length and timing of a consensual inspection.

For example, at an opening conference based on an employee complaint, the employer may state that he will consent only to an inspection of the area of his facility directly related to the complaint. The employer may condition his consent upon the agreement to a set of ground rules governing the inspection. The ground rules would, for example, govern the procedures for the walkthrough, the availability and timing of employees for interview, the production of documents, the taking of photographs and samples, and the procedure for the review and protection of trade secrets. OSHA may resist such suggestions, insisting instead upon a broader scope for the inspection or a different set of ground rules.

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As a matter of law, the employer has the right to impose any terms or conditions he chooses upon a search to which it consents. As a practical matter, he may opt to negotiate with OSHA over these terms and reach a reasonable compromise. If the employer is unable or OSHA is unwilling to reach a compromise on the terms and conditions of the inspection, the employer must decide whether to exercise his constitutional right for a warrant or to waive it.

Benefits and Risks

In resolving the warrant issue, an employer has several benefits and risks to consider. There are three primary benefits to demanding a warrant. First, it preserves and protects the employer’s constitutional right of privacy from unreasonable governmental intrusion. Second, depending on the reason for the inspection, OSHA may simply go away. For example, in 1994, 135 employers denied OSHA’s request to inspect, and, in response, OSHA sought warrants for 33 of these employers. In other words, in 102 of these refusals (75%), OSHA did not seek a warrant. Third, the time that it takes OSHA to obtain a warrant varies greatly, ranging from a few days to months. This passage of time may be critical to an employer to resolve regulatory compliance issues or to address immediate business needs.

The demand for a warrant involves two primary risks. First, some compliance officers resent the demand and may in subtle ways retaliate by issuing more citations and larger penalties. In a report by OSHA Data, Matthew M. Carmel, MS, CIH, CSP, compared the number of citations and the magnitude of penalties for a group of employers who “cooperated with OSHA” with those who did not. Mr. Carmel concluded that “cooperative employers” averaged 2.6 violations per inspection with an average total proposed penalty of approximately $1,800 and that uncooperative employers averaged 4.6 violations per inspection with an average total proposed penalty of approximately $3,200. In short, demanding a warrant involves the risk of
more citations with greater penalties. Second, the warrant empowers OSHA and defines the exact areas where OSHA has the legal right to inspect. As a result, the employer has lost significant control over the management of the inspection.

There are benefits to consenting to a warrantless inspection. First, it creates the appearance that the employer is cooperative, which usually results in fewer citations. And second, it creates the opportunity for the employer to manage the inspection. At the opening conference, the employer can outline specific ground rules for the management of the inspection. These ground rules will enable the facility to put itself in the best possible light and to minimize the disruption to its business.

There are two primary risks to consenting to a warrantless inspection. First, the scope of inspections tends to expand. As OSHA learns more about the facility and interviews more employees, it will learn about other possible violations. OSHA will want to inquire into them. Second, as a practical matter, a consensual inspection significantly reduces the potential protection afforded by any future warrant. By consenting to the inspection, OSHA will learn of various violations and have adequate information to properly prepare a warrant. In short, the consensual inspection provides OSHA with the knowledge to obtain proper warrants.

Conclusion

When OSHA arrives at a facility to conduct an inspection, an employer has an important issue to resolve: should it exercise its constitutional right to a warrant or voluntarily consent to an inspection. The resolution of this issue involves weighing many competing factors such as the basis for the inspection, its anticipated scope and duration, any immediate business needs and the level of regulatory compliance with the facility. Each option -- demanding a warrant and consenting to the inspection -- has significant benefits and risks.
Generally, the demand for a warrant provides an immediate postponement, and possible avoidance, of the inspection with the risks of some additional citations. As a rule, consenting to an inspection provides more opportunity to manage the inspection, thereby minimizing the number of citations and the interruption to the facility. Consensual inspections, though, frequently expand and have the potential for additional compliance issues.

There is no simple solution to the warrant issue. Each OSHA request to inspect should be resolved on a case-by-case basis, focusing on what is in the particular employer’s best interest.