

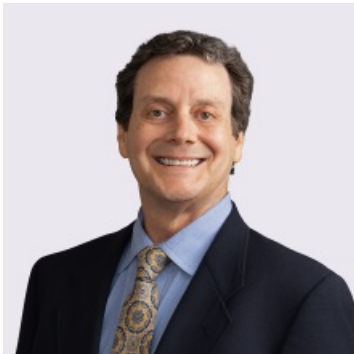
Podcast

The Do's and Don'ts of an OSHA Visit at a Construction Site

By Dion Y. Kohler,

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Meet the Authors



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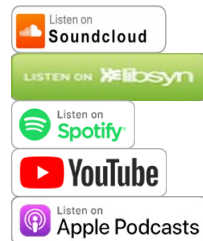
Workplace Safety and Health

Details

January 5, 2023

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Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We Get Work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

Avoiding workplace hazards in the construction industry may be next to impossible, but it's critical to ensure the health and safety of employees, as well as maintaining compliance with potentially dangerous OSHA regulations. On this episode of We Get Work, we discuss real life examples of what to do and what not to do when OSHA comes knocking at your door to assess your work site safety hazards and accident prevention efforts. Our hosts today are Dion Kohler, a principal in the Atlanta office and co-leader of the firm's construction group. Courtney Malveaux, a principal in the Richmond office and co-leader of the Workplace Safety and Health Group, and Sean Paisan, of council in the Orange County office of Jackson Lewis, and leader of the firm's Cal OSHA subgroup and co-leader of the firm's construction group.

Dion's practice is broad in scope and includes traditional labor matters involving labor organizations as well as the defense of employment litigation and administrative charges. Dion is also recognized for his experience and counsel in matters relating to occupational safety and health, affirmative action, employment contracts, and wage an hour matters, including prevailing wage laws. Courtney, no stranger to regulatory

action, enforced federal and state OSHA laws as Virginia's labor commissioner before joining Jackson Lewis. Sean assists employers with all workplace safety matters, from compliance to investigations and inspections to the appeals of citations in California, Arizona, Washington, and Hawaii, and is knowledgeable on the myriad of Cal OSHA regulations imposed on businesses, especially in the construction, manufacturing, and healthcare industries, and the consequences for violations of those regulations. Dion, Courtney, and Sean, the question on everyone's mind today is what strategies should construction employers use when the OSHA inspector shows up at their work site and how does that impact my business?

Dion Kohler:

Well, thank you everyone for joining us. Today, we're going to answer some of the most common questions we get from our construction clients about OSHA inspections and provide you with some tips and advice regarding minimizing your liability and how to respond. Let's start off by talking about when OSHA shows up. Should we allow the inspection to continue? Should we require a warrant or should we do something else? Courtney, why don't you help us with that?

Courtney Malveaux:

Sure, thanks, Dion. And I'll tell you one thing I always counsel people is act with intent. Don't just react to whatever's thrown your way. Having a game plan and knowing how you're going to handle the inspection before it starts is really important. So an example, what you're talking about, so should we consent to a search or should we require a warrant? Now you can require a warrant. You most certainly can. Do you want to? And I will tell you, most of the time my answer is no because they're going to get a warrant anyway. And I've been inside the agency, I've done these inspections on behalf of the agency, soup to nuts. I kind of know their mindset.

And they'll tell you, if you turn them around, make them go get a warrant, go through that process, then come back. It changes the tenor of the inspection. And so they may start to draw some inferences against you. They may start digging in a little bit more. They may try to push to topics that they want to inspect you for, and kind of push the limits on that. And so I like an inspection that is one that is professional, the tone, everyone's calm, and we step with intent. We're being cooperative, but not necessarily giving away the farm. So you can require it. I just don't think it's always a good idea. Sean, do you have any thoughts on that?

Sean Paisan:

Yeah, thanks Courtney. So in terms of consenting, I just had a few comments. When OSHA shows up, they conduct the opening conference, and they... Or they should lay out the scope of what they intend to inspect. And at that point, the employer has the option to consent to that. Or if you force OSHA to go get a warrant, they're going to usually go get a wall-to-wall warrant; whereas if you're consenting, it's usually limited in scope to a specific item that they're there to inspect. Another thing about consent is that just because you're consenting to the inspection of that item doesn't mean that you can't revoke the consent or discuss the scope of your consent later on should the inspector go beyond what was originally discussed during the opening conference.

Dion Kohler:

All right, let's move on to the next question that I have, and that is, how does OSHA decide who they're going to inspect on any given day? Sean, why don't you help us with that?

Sean Paisan:

Sounds good, Dion. So there are a number of ways that OSHA inspections usually get started. Most commonly is if there is a serious accident or serious injury and you're reporting that into OSHA, more likely than not, they're going to show up and conduct an inspection. Other ways that inspections can get started are programmed inspections for specific industries, construction may be included in one of those, especially if there's an emphasis program in place for certain hazards. And then also if an inspector just happens to be driving by the site and see something occurring, they could stop at the site and start an inspection there.

Courtney Malveaux:

I will tell you, and a little even more specific to construction, this is how it kind of goes down with OSHA. And I've been on these, I know. And so literally they will stake out sometimes... Construction sites are out in the open. And sometimes there's some visual barriers here or there, but they'll find high ground or they'll find a place. And it could be like a lion in the Serengeti just waiting in the tall grass and with the camera, the video, everything, and they'll just wait. I've been out there for a couple hours. And what happens in a couple hours at a site? Okay, you get up in the morning, you do the job hazard analysis, you make sure you do your toolbox talks, you make sure everybody's on point. Great. Sure enough, I've seen it. An hour in, hour and a half in, people are hot, people get bored, they kind of go on autopilot with their brain and the mistakes start to happen. And they start stepping on the top rung.

I've seen it. They step on the top rung of that ladder when they know better. They don't necessarily put on their PPE as necessary, or any of a number of things. It's just how the human being seems to be built. And OSHA, especially with construction sites, not the same with manufacturing warehouses or some others where they don't have that kind of visual. And they'll sit and watch and wait for your guys to step out on ledges without fall protection. And it does happen. And by the time they cross the street or cross the field and come onto your site, they have the goods. That's how construction unfortunately works for OSHA. And so OSHA is very attuned to construction because that's about where half of injuries and illnesses tend to happen and more substantial ones occur.

So because they're out in the open and because that is an industry that is higher hazard than many, they will actually kind of stake out and lay in wait and then come across the street and they already have the evidence they need. And so that's what you have to be ready for. So is it fair? No, not at all. But also, a lot of construction sites, the inspector can see them on route while driving and will stop. Again, I've been in an enforcement mode and I see excavation done incorrectly, and whether that's on the clock or not or whether I'm supposed to be inspecting that area, if I happen to see an excavation or fall protection or something else happening and I don't address it, that's on me.

So there's a lot of exposure just because you could be seen. And inspectors, when they get up and they go to work, some of them don't even make it into the office or where they say they're going to go. They may run into so many infractions at construction sites, they may never get around to that programmed inspection they're supposed to get to. That's real and that happens. So again, is it fair? None of this is fair, but it is what it is. And so an inspector just can't drive by a site, see a hazard, and do nothing. And so you know, may never have a programmed inspection like Sean mentioned. It may all be just what is seen in plain view by virtually every member of the public.

Dion Kohler:

Okay. I want to shift gears here and flip it over to Sean. Sean, would you help us with telling us the different types of OSHA inspections, how they're different? And what are the limits of an OSHA inspection?

Sean Paisan:

Yeah, so as I may have mentioned earlier, there are different triggers for OSHA inspections. One could be a serious injury occurring, it could be programmed, or as Courtney was discussing earlier, it could just be the inspector driving by and seeing something. So those are what we usually call in-person inspections. There are also letter inspections where Cal OSHA may receive, or if not Cal OSHA, but any OSHA may receive a complaint. And out here in California, they'll send a letter to the employer with the complaint items. At that point, the employer would respond in writing to that letter complaint. And we recommend making sure that that response is pretty comprehensive without, giving away the farm, of course, because a letter inspection is much more preferable to actually having an inspector come on site and sort of digging around and finding things to site for. So that is the type of inspection that we want to make sure that our clients are responding to in a comprehensive manner while not making any key admissions that may come back to earth them later.

Dion Kohler:

My follow up question is can you limit the scope of an OSHA investigation? And how should you handle that if the inspector just starts wandering around and wants to look at things that weren't part of your original discussion? Or how much freedom should you give the inspector when they're conducting the investigation?

Sean Paisan:

Great question, Dion. So that all stems from the opening conference, and you want to make sure that you're paying attention during that opening conference because the inspector is obligated to set forth the scope of his or her inspection during that opening conference. And whatever you consent to is, it's knowing consent. So at that point, the inspector tells you what he or she's going to inspect, and you are either going to consent to that or not. If during the walk around, the inspector wants to see things that were weren't in the scope of the inspection or the scope of your consent, you could certainly bring that up with the inspector in a polite way of course, and invite some discussion about that. And the inspector could choose to have another opening conference where they call into the scope the additional items. Of course, there's got to be some probable cause for them to do so.

But if the inspectors during that walk around see something in plain view, that's fair game. So it's very important that if you want to limit your inspection, that you're not sort of leading the inspector into areas that would be fair game for them to conduct the inspection on. So for a construction site, for example, let's say you've got some trenching occurring on the no north side of the property, but the inspector wants to inspect something on the south side of the property. Well, take the inspector directly to the south side of the property so that they're not seeing something that wasn't in the scope of the inspection to begin with.

Courtney Malveaux:

And to add on to what Sean said, I have to highlight, while usually my practice is oftentimes to have a consent to an inspection, there are times when you do require a warrant. Now if you do require a warrant... And sometimes, it should be necessary, then you can actually develop in writing the limits to the scope of that inspection. And when Sean says probable cause, it's what that inspector has probable cause to believe is a hazard at that work site based on what they observe or what might have been reported to OSHA before they came on site. And so if they have a report of, for example, failure to provide personal fall arrest systems to employees, well they should go to those employees who seem to be exposed to potential fall hazards and then inspect their equipment and even ask about how it's provided and whether they're trained on it, et cetera.

But that doesn't mean they go running off, as Sean said, to another part of the site where fall protection's not required and start jumping into something else, unless it happens to be in plain view. And again, think about, well think about, for example, if a police officer was investigating your home or somewhere, then whatever's in plain view is fair game. But except for that, if you get the warrant, you are actually requiring the agency to get wording into the warrant and into an affidavit attached to it, defining exactly what they're supposed to be looking for. No more, no less. And that's it.

Dion Kohler:

My next question deals with the interview of employees and managers. Should those be, how should those be handled and should they be handled differently by the employer?

Courtney Malveaux:

Absolutely. And I can't tell you how many times I've been given a case where we have made admissions that provide evidence unnecessarily to the agency. Now of course, we don't obstruct inspections. We're very, we are truthful in answers at all times. Certainly. We also don't necessarily need to lay out every sin possible at that time. We are responsive, we're professional, and just like a witness on the state of trial, when you speak, you answer the question and you stop talking. Now, the difference between a manager and a non-manager is this, when a manager speaks, the manager's speaking on behalf of the company. And when a manager makes it admission, that's not just that one individual making admission, it's the company. And that is extremely difficult to undo if a manager reveals all sorts of hazards or violations that are occurring. So if an employee does, well, the employee might be, may misunderstand

the hazards around him or her or may not necessarily know the engineering controls that have been put in place that they're not aware of. And so that's more easily corrected.

But a manager really has to be extremely careful about what they say. And also they have a right not to be interviewed. So we may think strategically, okay, before we allow a manager to go, should we go forward with that interview? And also, in all likelihood, that manager may want to have counsel and other managers present for the interview, which is allowable or otherwise they can decline. Employees are more sacrosanct. There is a sacrosanct right for employees to be interviewed privately by an OSHA inspector. And so we respect that. We respect their right to be interviewed and we respect their right not to be interviewed. But an important tip is this, oftentimes the inspector will write down their version of what the hearing employee say, and all this is happening behind closed doors, and you are on the opposite side of the door.

And the inspector will write down these notes and then slide it across the table to the employee, hand the employee a pen and say, "Here, sign this." Employees don't have to sign anything. And they oftentimes think that they do. And OSHA gets a lot of written admissions from employees that, from people who, and I've had nightmare scenarios where the employee couldn't read it because they don't speak, English may not be their native language or because they didn't have their reading glasses. And so there are times when employees are asked with some assertion to sign a statement and the statement may not reflect accurately what the employee said. So the employees do have some rights, but making sure that we observe their right to either be interviewed or not in private with the inspector is tantamount.

Dion Kohler:

Sean, I have a follow-up for you. Does the employee have the right to a copy of any statement they may give? And do we have the right as the employer to advise the employee of their rights and to give them advice regarding that?

Sean Paisan:

Great question, Dion. And it's important to keep in mind and also remind the employees, because at least in my experience, the inspectors out here in California do a pretty poor job of advising the employees of their rights. And as Courtney mentioned earlier, the employee holds the right to either consent to the interview, decline the interview, or perhaps consent to the interview with some sort of qualifications present, such as having maybe an attorney or someone from management present. So a lot of times, the inspectors treat the employees just basically as a given that they have to give these interviews or they have to sit for these interviews. The employees without that advice won't know that they have the ability to decline those interviews. Now, of course, we always want to tell the employees that we're cooperating with an OSHA investigation. They'd like to interview you, we'd like for you to cooperate, but that's up to you whether or not you want to be interviewed or not.

And so, yeah, it's absolutely appropriate, at least in my opinion, to let the employees know what they can or cannot do in this situation. And also to let the employee know that we're not going to hold it against you one way or the other. If you want to speak with OSHA, that's up to you. If you don't, that's also up to you. Either way, we're good

with it. For managers, the company holds the right to consent. The managers themselves often get tricked into consenting. But really when managers are asked to be interviewed, they should be kicking that up the chain of command to perhaps the company's legal department or outside counsel to determine whether or not it's appropriate for that manager to be interviewed, whether or not that manager has the authority to consent to that interview.

Because again, it's the company that holds the right to consent to that interview or not. And this goes back to what Courtney mentioned at the very outset of this program is to have a plan in place before OSHA even comes on the property so that they can advise these managers, hey, listen, if OSHA ever comes on site, you guys don't have the authority to consent. You need to do this, this, and this before even consenting to the inspection to begin with. So I think having a plan in place, this all comes back to that, and just being prepared, is really the right way to go.

Dion Kohler:

Thank you. My next question is, based on your experience, and I know you both have years of experience in advising construction employers regarding OSHA inspections, what are the biggest mistakes you see employers make? And this plan you talked about, is that something like in the form of a checklist and training that employers should do for their project managers and superintendents so they are prepared and follow a process when an inspection occurs?

Courtney Malveaux:

I'll say an act of admission is the greatest. In addition to admissions made by managers, my second highest is failure to build a dummy file. So when OSHA inspects, they're gathering evidence, evidence they will use against you. And it will not provide you with its file unless, until you contest and you're in litigation. So you will go months without getting the information OSHA has. So when the inspector takes a picture, I like a two-person tandem following that inspector. I like one person focusing on the inspector, asking lots of open-ended questions, asking what they see. And by the way, OSHA inspectors want to tell you what they're seeing, they want to tell you, so let them.

And the second person is getting all the evidence. When a picture is taken, they take the exact same picture, same angle. When the inspector takes a video, same video, same everything. You don't want to obstruct them of course, but you have every right to accompany them and get all the information they're getting at the time. When they do interviews, make note of who they're interviewing without interfering. And I do so in the context of being helpful to the inspector, but while I'm being unhelpful, I'm also gathering information that's going to be helpful to our case.

Sean Paisan:

Now one thing I've seen that's jumps out to me, to answer your question, Dion, is reenacting accidents. Let's say there's an accident on a site and the OSHA inspector is out there to investigate and basically sometimes the inspector will ask the employer to put the employees in place and sort of reenact what they think occurred so that the OSHA inspector can take pictures of it. I think that's a really dangerous thing to take

part in and I usually recommend against that. And so that'd be one of the biggest issues that employers should watch out for. It doesn't happen a lot, but be very careful if that comment or request ever comes your way.

Dion Kohler:

Thank you. Sean. From our last question, if you're an employer and you get a relatively small fine with a citation, why shouldn't the employer just settle it, pay the money, and move on? What are the kinds of factors and considerations an employer needs to take into account before they make that decision?

Sean Paisan:

Yeah, so out here in California, I was working on a case a while back that involved a roofing contractor or a roofing supply contractor, and they're responsible for delivering roofing materials to construction sites, residential construction sites. And you may have seen this if you're in the construction industry, but it's essentially a flatbed truck that has a conveyor system that delivers the roofing materials directly to the top of the home that's under construction. Well, they got cited for not, someone fell off the back of the truck, of course, and they got cited for not having guardrails on their truck. And it was only a couple hundred dollars, they were thinking about paying it. But as we looked more into it was clear that the abatement was going to be in the six figures, if not more. And so even though you're dealing with a few hundred dollars citation, the abatement itself, the cost to fix whatever is being alleged could be much more, magnitudes more.

And in our case, after they contacted me, we did some research and we learned that what the citation was based on wasn't even a violation to begin with. And so we were able to make the citation go away just by taking a little bit of a more detailed look at the citation itself and the regulation that was alleged to have been violated. So it may be tempting to just go ahead and pay the fine, but take a look at the cost of abatement. Certainly one thing that you want to consider. Courtney, are there any other issues in that regard that that would jump out to you?

Dion Kohler:

Specifically, Courtney, would you address the risk of repeat or willful violations based on an earlier settlement?

Courtney Malveaux:

Oh, absolutely. Especially you look at what is being cited. Is it being cited correctly? And is it something that's likely to repeat? So for example, if you get cited for failure to provide training and you did train that employee, but the employee didn't get, it's one of those citations that is easily repeatable. So you might actually in negotiations, yes, negotiations with the agency during the informal conference or even afterward in litigation to have the standard cited or the facts that are depicted in the citation to fit what is more specific to that situation, but also less likely to land you in a repeat. And I can't tell you how many people think, oh, well, let's just do other than serious, we can't get a repeat on that. Answer is wrong. You can. It's not common, but it does happen. And so what you agreed to in a final order can come back and hit you with a repeat with a penalty that could be 20, that could be 10 times higher. So that's something you

really have to watch for.

Sean Paisan:

Hey, Courtney, your comment about the final order just reminding me. Another good reason to appeal even a few hundred dollars citation may be to get a non admissions clause in that final order, so that the citation and the fact that you settled can't be used in any ancillary proceedings. Let's say it's a multi-employer site. Of course most construction sites are. And one of not your employees, but perhaps another subs employee was injured as a result of something that you were cited for. Well, getting that non admissions clause may prevent that employee, that other employee from coming back and trying to sue you civilly. It won't prevent them from suing you civilly, but your civil attorney will have a much better shot at excluding that evidence through a motion in limine if you have that non admissions clause in. So another good reason to appeal and to perhaps just settle out to get that non admissions clause even if the citation has merit.

Dion Kohler:

Thank you, Sean and Courtney. That's all very helpful and excellent advice. Of course, if you have any follow up questions or would like any further information, feel free to reach out to Courtney or Sean.

Alitia Faccone:

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